

PUBLIC CONTRACTS APPEALS BOARD

Case No. 234

Advert No: CT/A/003/2010 – CT/2037/2009

Works Tender for Construction Works in conjunction with the Pembroke Landscape Project, Pembroke

This call for tenders was published in the Government Gazette on 15 January 2010. The closing date for this call for offers was 25 February 2010.

The estimated value of this tender was Euro 2,333,429.

Five (5) tenderers submitted their offers.

Polidano Bros Ltd filed an objection on 24 June 2010 following the decision taken by the Contracts Department that the company's (appellant's) bid was not administratively compliant since, in the financial statements submitted, the auditor's report indicated that they were *"not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as requested in Clause 4.1.1 of the ITT."*

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, 13 October 2010 to discuss this objection.

Present for the hearing were:

Polidano Bros Ltd

Dr. Henri Mizzi	Legal Representative
Dr Steve Decesare	Legal Representative
Mr Claudio Grech	

PaveCon JV

Dr Kenneth Grima	Legal Representative
Mr Anton Schembri	Representative

Bonnici Brothers Ltd

Dr John Gauci	Legal Representative
Arch David Bonnici	Representative
Arch Malcolm Gingell	Representative
Mr Manuel Bonnici	Representative

Malta Tourism Authority (MTA)

Dr Frank Testa	Legal Representative
Arch Kevin Bencini	Representative
Arch Christian Buhagiar	Representative

Adjudicating Board

Mr Josef Formosa Gauci
Mr Kevin Fsadni

Chairperson
Member

Department of Contracts

Mr Francis Attard

Director General (Contracts)

The representatives of TCM JV and RAB 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 appellant Company was invited to explain the motives of the objection.

Dr Henri Mizzi, legal representative of Polidano Bros Ltd, the appellant company, explained that by letter dated 18 June 2010 his client was informed by the Department of Contracts that its tender was not administratively compliant and the reason for the disqualification was that the auditors' report in respect of the statements for the year that ended on 31st December 2007 indicated that the said auditors "*were not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as requested in Clause 4.1.2 of the ITT (Instructions to Tenderers).*"

Dr Mizzi referred to Clause 4.1.2 which provided as follows:

"4.1.2. Evidence of financial and economic standing in accordance with Article 50 of LN177/2005 showing access to credit facilities of at least €250,000 and confirmed by a financial statement verified by a certified accountant. Audited accounts for the years (2006, 2007, 2008 (in the case of 2008 signed extracts of accounts/balance sheets are acceptable where the official audited accounts are not yet finalized) must be submitted using Form 4.4, Financial statement, in Volume 1, Section 4 of the tender documents."

Dr Mizzi remarked that his client submitted the audited accounts for 2006, the accounts for 2007 audited by Deloitte but accompanied by a disclaimer report, and the accounts of 2008 together with a report by an accountant of PricewaterhouseCoopers.

Dr Mizzi submitted the following, especially with regard to the 2007 accounts, which appeared to be the main hurdle:

i) in its deliberations the PCAB has adopted the practice of evaluating the 'substance' rather than sticking to purely formalistic procedures and, in this regard, even the Courts had shifted their position over the past few decades, namely from a rather formalistic approach to an approach that sought to achieve what the legislator had in mind when enacting the law. This same approach was being taken by the European Court of Justice claimed Dr Mizzi. The 'purposes approach' was doing away with certain formalities that had no bearing on the 'substance' of the case, so much so that, in recent years, the Courts have annulled few cases on the basis of formalities;

ii) it appeared that the adjudicating board felt uncomfortable having the 2007 accounts accompanied by an auditor's disclaimer report. However, the appellant company's lawyer, stated that the adjudicating board should have delved into the 'substance' of the matter by acknowledging that the tenderer had submitted the 2008 accounts certified by an accountant as requested, which accounts were more recent and, as a consequence, more relevant than the accounts for 2007;

iii) even if one were to concede that the 2007 audited accounts were not effectively submitted, that shortcoming should not have led to disqualification

in the spirit of the law since the adjudicating board could still arrive at the financial and economic standing of his client from the documentation made available in the tender submission;

iv) the adjudicating board was not entrusted with establishing whether the accounts were in perfect order or not but it was charged with establishing the financial and economic standing of the tenderer to see if the latter was capable to undertake the contract;

v) the accounts rigorously prepared according to 'International Accounting Standards' were mostly relevant to investors, to consider whether it was worth putting their money in the company, and if a company was worth €20m or €40m would be quite relevant from an investor's point of view;

vi) the shortcoming, such as the non-submission of the 2007 accounts when, on the other hand, the 2008 accounts, which included the 2007 figures by way of comparison, were submitted, was not 'substantive' because the information was still made available anyway;

vii) the accounts for 2008 demonstrated that his client had considerable financial and economic resources and that the adjustments effected in the comparative figures for 2007 that featured in the 2008 audited accounts did not change the picture in any significant manner but, if anything, that showed that the net asset value of the company in the audited accounts for 2007 had been undervalued by some €6m;

viii) although there was an auditor's disclaimer report with regard to the 2007 accounts, yet this did not mean that the accounts were not audited but it meant that the audit process was carried out but without reaching a conclusion. An auditor could either (a) certify that the accounts gave a 'true and fair view' of the financial situation or (b) issue a 'qualified report' in view of particular circumstances, such as a pending court case the outcome of which could have a considerable effect on the financial situation of the company or (c) issue a 'disclaimer report' because, for example, the directors prevented the auditor from doing his work properly in which case one could argue that the audit had not been effectively carried out. The reasons given for the 'disclaimer opinion' expressed by the auditors did not nullify the audit exercise because the audit process took place.

ix) Reg, 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 result, the contracting authority should consider other documentation that could show the economic standing of the tenderer if the tenderer could not furnish the documents requested. In such a case, the contracting authority was

obliged to consider such alternative documentation. The fact that different contracting authorities demanded different evidence of financial and economic standing, in itself, demonstrated that there were various means to prove the financial and economic standing of a firm;

x) the 'Instructions to Tenderers' were quite clear that a tender which contained substantial deviations or reservations might be disqualified and Clause 28.2 exhaustively listed what might be considered a 'substantial deviation'. Even if the accounts for 2007 provided by his client were not adequately substantiated - something which his client did not admit - that could have been addressed by referring to the 2008 accounts which were submitted as requested and which were more recent than the accounts for 2007. Therefore, proceeded Dr Mizzi, there was no 'substantial' deviation in that regard and as such there was no justification for the disqualification of his client.

Dr Frank Testa, legal representative of the Malta Tourism Authority (MTA), made the following submissions:

a) he agreed that in recent years our courts did concentrate more on what was 'substantial' rather than on formalities, yet it did not do away completely with formalities. The requirement of the audited accounts for the three previous years was not a formality but it was an important element in the evaluation exercise. In fact, the contracting authority wanted a history of the financial situation of the tenderer and not the financial position during one year as the appellant seemed to imply. One should note that the 2006 accounts had been referred to as 'Report and Financial Statements', the 2007 accounts were referred to as 'Report and non-Statutory Financial Statements' and the 2008 accounts, although submitted within the requirements requested, still were not audited; and

b) in Case No. 189 the PCAB had stated that:

“(a) an accountant, *per se*, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification ...”

Mr Josef Formosa Gauci, Chairman of the adjudicating board, and who declared that he had a background in accounts, under oath, gave the following evidence:

i) at administrative compliance stage the adjudicating board noted that (i) the 2006 were normal audited financial statements, (ii) the 2007 accounts were not referred to as 'financial statements' but as 'non-statutory financial statements' both on the first page and in the auditor's report and that the auditors could not express an opinion as to whether the accounts provided a true and fair picture of the firm and (iii) the directors' report usually included the reappointment of the auditors but, in this case, there was no such reference.

ii) there were various ways how the auditors could qualify the report, i.e. a qualified report which would mean that the accounts gave a true and fair

picture except for a particular area (e.g. going concern) or, as in the case of the 2007 accounts of the appellant company, issue a disclaimer that the auditor could not determine if the accounts gave a true and fair picture of the company's financial situation. The audit process had been carried out in the case of 2007 with the result that the auditor could not express an opinion which defeated the very purpose of undertaking the audit exercise, i.e. to obtain an independent certification that the accounts gave a true and fair account. Albeit the 2008 the accounts did not have to be audited, yet one could not rely on the figures as they were because those financial statements were not audited and one could not tell if there was a qualified audit report. It was true that the 2008 accounts were certified by accountants from PricewaterhouseCoopers that the figures were extracted from the accounting books of the company but, nevertheless, they were not audited financial statements.

iii) at administrative compliance stage the adjudicating board had serious doubts about whether the financial documentation submitted by the appellant was administratively compliant, namely the information submitted was insufficient or not available to assess financial stability.

iv) the audit of the annual accounts of a company would, naturally, refer to the audit of the statutory financial statements. In order to take the accounts into consideration one required a clean audit report but with regard to the 2007 accounts there was a 'disclaimer' report by the auditor.

v) although one did not have to be too formalistic, adjudicating boards had to ascertain that mandatory requirements were submitted otherwise that could give rise to appeals by competing tenderers. Out of the three years' accounts requested, the appellant company had only presented the audited accounts for one year, namely 2006, because the 2007 accounts carried a disclaimer report and the 2008 accounts were not audited and, as a consequence, the adjudicating board considered that the information submitted in this regard was insufficient and unreliable for financial evaluation purposes.

vi) the auditor's basis for disclaimer of opinion read as follows:

“The following information which we considered necessary for the purpose of our audit was not made available to us by the company by the date of this audit report:

- *Up to date audited financial statements of the company's subsidiaries, associates and jointly controlled entities, and management accounts of the company subsequent to the balance sheet date;*
- *Reconciliations and confirmation of all transactions and balances between the company and related parties;*
- *The company's parent consolidated financial statements;*
- *Appropriate cash flow forecasts and business plans*

for the company and material subsidiaries, associates and jointly controlled entities;

- *Full details of the company's interests in jointly controlled entities;*
- *Supporting documentation in connection with transactions and balances with shareholders and related parties; and.*
- *Supporting documentation regarding works undertaken but not yet billed by the company for the related party entities.”*

Disclaimer of opinion

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--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.

The Chairman PCAB observed that the reason for rejection was not the non-submission of the audited accounts but “*that the auditors were not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as requested in Clause 4.1.2 of the ITT*” and, therefore, the exclusion concerned the outcome of the audited accounts.

Mr Claudio Grech, representing the appellant company, under oath, gave the following evidence:

- a) in November 2009 the appellant company engaged PricewaterhouseCoopers to undertake a process to restructure and consolidate Polidano Group;
- b) Polidano Group was made up of 94 registered companies and it turned out that the rate of expansion of the group by far exceeded the administrative capacity of the organisation. The financial management of the group was decentralised such that each company managed its own financial affairs and that the inter-company relationships were not properly accounted for, i.e. no consolidation used to be carried to establish the final overall picture. Moreover, the works in progress, involving some 50 on-going projects, was not being accounted for in line with ‘International Accounting Standard – IAS 11’ which stipulated how this had to be done;
- c) this situation led to Deloitte, an auditing firm, to issue the disclaimer in respect of the 2007 financial statements;

- d) the work carried out from November 2009 onwards consisted of addressing the issues raised in the 2007 accounts and the adjustments made to 2007 were included in the 2008 financial statements which were audited by Deloitte - which had not withdrawn - with a marginal qualification. Whilst the 2007 disclaimed opinion dented the firm's standing, yet the 2008 audited accounts were concluded in July 2010 and filed at the Malta Financial Services Authority. Following this process, it resulted that the net asset value for 2007 of Polidano Bros Ltd, the tenderer, was €36m as compared to the €30m shown in the disclaimed accounts for 2007. It was reckoned that the audited accounts of 2009 would be filed at the MFSA in November 2010;
- e) Polidano Group employed about 700 employees in its core activities - construction and real estate - and that number would go up to about 1,200 employees taking into account subsidiaries engaged in hospitality and the like;
- f) it was appreciated that the adjudicating exercise was concluded on 11 May 2010 and, as a result, at that stage the board did not have the comfort of the 2008 audited financial statements which were concluded in July 2010;
- g) the 2008 accounts were drawn up by PricewaterhouseCoopers from the records held by the tenderer and certified by the same accounting firm, which, although not being the auditor, was more than the contracting authority had asked for in the tender document. The 2007 accounts were, in fact, audited as requested, even if with the disclaimer, and it later transpired that the net asset value of the company in the disclaimed 2007 accounts was underestimated by €6m; and
- h) the tenderer had always been up-to-date with regard to the filing of tax returns.

Dr Kenneth Grima, legal representative of PaveCon JV, an interested party, observed that the accounting firm PricewaterhouseCoopers spent from November 2009 to July 2010 to put the 2007 accounts in order and that, *per se*, demonstrated the type of accounts that the adjudicating board had been presented with by the appellant company at tendering stage.

Dr Mizzi claimed that the adjudicating board could have undertaken the evaluation of his client's bid from the documentation made available in the tender submission. He remarked that, for tender evaluation purposes, it was irrelevant whether the accounts for 2007 gave a true and fair view or not because the audited accounts were required for other purposes, for investing, whereas what should have mattered to the adjudicating board was whether the bidder was solvent and such other aspects. Dr Mizzi expected the adjudicating board to go beyond the formalistic approach of establishing whether there was an auditor's qualified report or disclaimer, in fact, he expected it to examine the financial information available to see if the tenderer had the financial standing required to execute the contract particularly by examining the 2008 accounts which were certified by the accounting firm, which, although short of

being audited, still carried weight. Dr Mizzi stressed that the 2008 accounts presented with the tender proved that the shortcomings pointed out in the auditor's disclaimer in respect of the 2007 accounts were not material ones.

Dr Testa disagreed with the appellant company's claim that all was well with the financial information submitted by the appellant company. He argued that it was clearly indicated by the two witnesses, namely, Mr Josef Formosa Gauci and Mr Claudio Grech, that there was a grey area in the financial management of Polidano Bros Ltd so much so that an accounting firm had to be engaged to rectify the situation and that the task took nine months work to accomplish. Dr Testa insisted that, at the time the adjudicating board was carrying out its evaluation exercise, it did not have reliable financial data for the three year period requested.

Dr Grima observed that the line of reasoning taken by the appellant company seemed to imply that the adjudicating board was obliged to make all efforts to mitigate or to justify the shortcomings in the appellant company's bid so as to render it compliant. He remarked that the PCAB had always ruled that mandatory requirements had to be submitted and that it was not up to the tenderer to decide what was required or what was substantial or not. Dr Grima pointed out that, whilst the other tenderers submitted all that was required in order, yet the appellant company did not submit the financial data in order so much so that it took nine months work to prepare the 2008 audited accounts along with the 2007 amended comparative figures. Dr Grima noted that the appellant company had been failing to produce proper accounts for the previous seven year period. Dr Grima concluded that it was irrelevant to present the 2008 audited accounts to the adjudicating board in July 2010 when the closing date of tender was February 2010 and when the adjudication was concluded in May 2010 and that demonstrated that the appellant company was not able to meet the requirements set out in this particular tender.

Dr John Gauci, representing Bonnici Brothers Ltd, an interested party (a) agreed with what Dr Grima had submitted and (b) made reference to Case No. 189 paragraph (3) of its conclusions (at page 12) with regard to the functions of the accountant and the auditor and that the accounts submitted with a tender had to be in the same format as submitted to MFSA, unless instructed otherwise.

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 24 June 2010 and also through their verbal submissions presented during the public hearing held on 13 October 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants' (a) remark that they submitted the audited accounts for 2006, the accounts for 2007 audited by Deloitte but accompanied by a disclaimer report, and the accounts of 2008 together with a report by an accountant of PricewaterhouseCoopers, (b) reference as to how the question of 'substance' over content is now being considered by competent authorities locally and in foreign institutions contending that the adjudicating board

should have delved into the ‘substance’ of the matter by acknowledging that the tenderer had submitted the 2008 accounts certified by an accountant as requested, which accounts were more recent and, as a consequence, more relevant than the accounts for 2007, (c) argument that even if one were to concede that the 2007 audited accounts were not effectively submitted, that shortcoming should not have led to disqualification in the spirit of the law since the adjudicating board could still arrive at their financial and economic standing from the documentation made available in the tender submission, (d) reference to the fact that the adjudicating board was not entrusted with establishing whether the accounts were in perfect order or not but it was charged with establishing the financial and economic standing of the tenderer to see if the latter was capable to undertake the contract, (e) remark relating to the fact that the 2008 accounts, which included the 2007 figures by way of comparison, were submitted and that, as a result, the information was still made available anyway, (f) reference to the fact that the accounts for 2008 demonstrated that they had considerable financial and economic resources and that the adjustments effected in the comparative figures for 2007 that featured in the 2008 audited accounts did not change the picture in any significant manner but, if anything, that showed that the net asset value of the company in the audited accounts for 2007 had been undervalued by some €6m, (g) (h) claim that, in line with Reg. 50 (5) of the Public Procurement Regulations 2005, • the contracting authority should consider other documentation that could show the economic standing of the tenderer if the tenderer could not furnish the documents requested, • the fact that different contracting authorities demanded different evidence of financial and economic standing, in itself, demonstrated that there were various means to prove the financial and economic standing of a firm, (i) claim that there was no ‘substantial’ deviation and, as such, there was no justification for the disqualification of their offer, (j) claim that the adjudicating board could have undertaken the evaluation of its bid from the documentation made available in the tender submission and (k) contention that, for tender evaluation purposes, it was irrelevant whether the accounts for 2007 gave a true and fair view or not because the audited accounts were required for other purposes, for investing, whereas what should have mattered to the adjudicating board was whether the bidder was solvent and such other aspects;

- having also taken note of the contracting authority’s various representatives’ (a) reference to the fact that albeit it is true that in recent years our courts did concentrate more on what was ‘substantial’ rather than on formalities, yet it did not do away completely with formalities, (b) claim that the requirement of the audited accounts for the three previous years was not a formality but it was an important element in the evaluation exercise, (c) explanation as to the various ways as to how the auditors could qualify a financial report, (d) argument that albeit the 2008 accounts were certified by accountants from PricewaterhouseCoopers that the figures were extracted from the accounting books of the company yet, nevertheless, they were not audited financial statements, (e) claim that in order for the evaluation board to take the accounts into consideration one required a clean audit report but with regard to the 2007 accounts there was a ‘disclaimer’ report by the auditor, (f) contention that out of the three years’ accounts requested, the appellant company had only

presented the audited accounts for one year, namely 2006, because the 2007 accounts carried a disclaimer report and the 2008 accounts were not audited and, as a consequence, the adjudicating board considered that the information submitted in this regard was insufficient and unreliable for financial evaluation purposes, (g) emphasis on the fact that it was clearly indicated by the two witnesses, namely, Mr Josef Formosa Gauci and Mr Claudio Grech, that there was a grey area in the financial management of Polidano Bros Ltd so much so that an accounting firm had to be engaged to rectify the situation and that the task took nine months work to accomplish and (h) emphasis on the fact that at the time the adjudicating board was carrying out its evaluation exercise, the latter did not have reliable financial data for the three year period requested;

- having also duly considered Mr Grech’s testimony, especially (a) the reason as to why, in the appellant company’s opinion, Deloitte, an auditing firm, issued the disclaimer in respect of the 2007 financial statements, (b) the point raised in connection with the fact that the work carried out from November 2009 onwards consisted of issues raised in the 2007 accounts and the adjustments made to 2007 were addressed and included in the 2008 financial statements which were audited by Deloitte, (c) the fact that whilst the 2007 disclaimed opinion dented the firm’s standing, yet the 2008 audited accounts – wherein, inter alia, the net asset value for 2007 of Polidano Bros Ltd, the tenderer, was €36m as compared to the €30m shown in the disclaimed accounts for 2007 - were concluded in July 2010 and filed at the Malta Financial Services Authority and (d) the fact that the same witness appreciated the fact that the adjudicating exercise was concluded on 11 May 2010 and, as a result, at that stage the board did not have the comfort of the 2008 audited financial statements which were concluded in July 2010;
- having taken cognizance of the fact that the reason for rejection was not the non-submission of the audited accounts but “*that the auditors were not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as requested in Clause 4.1.2 of the ITT*” and, therefore, the exclusion concerned the outcome of the audited accounts;
- having also noted Dr Grima’s observation as regards the fact that (a) the accounting firm PricewaterhouseCoopers spent from November 2009 to July 2010 to put the 2007 accounts in order and that, *per se*, demonstrated the type of accounts that the adjudicating board had been presented with by the appellant company at tendering stage, (b) the line of reasoning taken by the appellant company seemed to imply that the adjudicating board was obliged to make all efforts to mitigate or to justify the shortcomings in the appellant company’s bid so as to render it compliant, (c) the PCAB had always ruled that mandatory requirements had to be submitted and that it was not up to the tenderer to decide what was required or what was substantial or not, (d) whilst the other tenderers submitted all that was required in order, yet the appellant company did not submit the financial data and (e) it was irrelevant for the appellant company to present the 2008 audited accounts to the adjudicating board in July 2010 when the closing date of tender was February 2010 and when the adjudication was concluded in May 2010, a process that more than

amply demonstrated that the appellant company was not able to meet the requirements set out in this particular tender;

reached the following conclusions, namely:

1. The PCAB notes that the reason for rejection was not the non-submission of the audited accounts but “*that the auditors were not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as requested in Clause 4.1.2 of the ITT*” and, therefore, the exclusion concerned the outcome of the audited accounts. However, this Board opines that, with regards to the submission of accounts, (i) whilst the other tenderers submitted all that was required in order, yet the appellant company did not submit the financial data as requested and (ii) it was irrelevant for the appellant company to present the 2008 audited accounts to the adjudicating board in July 2010 when the closing date of tender was February 2010 and when the adjudication was concluded in May 2010, a process that more than amply demonstrated that the appellant company was not able to meet the requirements set out in this particular tender.
2. The PCAB feels that, with regards to the question of ‘substance’ over ‘content’ as raised by the appellant company during the hearing and the submission made by the appellant company with regards to the fact that the adjudicating board should have delved into the ‘substance’ of the matter by acknowledging that the tenderer had submitted the 2008 accounts certified by an accountant as requested, which, in the appellant company’s opinion such accounts were more recent and, as a consequence, more relevant than the accounts for 2007, this Board feels that, albeit the 2008 accounts were certified by accountants from PricewaterhouseCoopers with figures extracted from the accounting books of the company yet, nevertheless, they were not audited financial statements as requested in the tender document.

The PCAB has repeatedly pronounced itself that, despite one’s reservations as to the mandatory submission of a particular document or set of documents, whether considered substantial or not, 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.

3. 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.

4. The PCAB also opines that, with regards to the appellant company's claim that the adjudicating board could have undertaken the evaluation of its bid from the documentation made available in the tender submission, this Board (a) finds that the requirement of the audited accounts for the three previous years was not a formality but it was an important element in the evaluation exercise, (b) places emphasis on the fact that it was clearly indicated by the two witnesses, namely, Mr Josef Formosa Gauci and Mr Claudio Grech, that there was a grey area in the financial management of Polidano Bros Ltd so much so that an accounting firm had to be engaged to rectify the situation and that the task took nine months work to accomplish. This Board notes that the accounting firm PricewaterhouseCoopers spent from November 2009 to July 2010 to put the 2007 accounts in order and that, *per se*, demonstrated the type of accounts that the adjudicating board had been presented with by the appellant company at tendering stage.
5. The PCAB maintains that with regards to the fact that, according to the appellant company, the accounts for 2008 (a) demonstrated that they had considerable financial and economic resources and (b) that the adjustments effected in the comparative figures for 2007 that featured in the 2008 audited accounts did not change the picture in any significant manner but, if anything, that showed that the net asset value of the company in the audited accounts for 2007 had been undervalued by some €6m, this Board places emphasis on the fact that it was clearly indicated by the two witnesses, namely, Mr Josef Formosa Gauci and Mr Claudio Grech, that there was a grey area in the financial management of Polidano Bros Ltd, so much so, that an accounting firm had to be engaged to rectify the situation and that the task took nine months work to accomplish.

This Board observes that 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 February 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 February 2010 rather than in July 2010.

6. The PCAB generally agrees with the appellant company's claim that, albeit there was an auditor's disclaimer report with regard to the 2007 accounts, yet this did not mean that the accounts were not audited but it simply meant that the audit process was carried out but without reaching a conclusion. However, this Board also maintains that, in order for the evaluation board to take the accounts into consideration, one required a clean audit report but it was also a fact that with regard to the 2007 accounts there was a 'disclaimer' report by the auditor.

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 disagrees with this claim made by the appellant company.

7. With regards to the fact that the appellant company's representatives claimed that the contracting authority was obliged to request alternative documents to audited accounts and other mandatory documents not submitted, this Board feels that the line of reasoning taken by the appellant company, implying that the adjudicating board was obliged to make all efforts to mitigate or to justify the shortcomings in the appellant company's bid so as to render it compliant, was wrong.

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