

PUBLIC CONTRACTS APPEALS BOARD

Case No. 186 and Case No. 187

Advert No. CT 352/2009 – CT 2240 / 2009.

Tender for Restoration Works to Birgu Land front Fortifications – BRG 06

The closing date for this call for tenders, which was published on 01.09.2009, for a contracted estimated value of € 645,000 (excluding VAT) was 22.10.2009.

Five (5) different tenderers submitted their offers.

On 28.10.2009 both Messrs **Joint Venture Confirma** and Messrs **C.A.V.V.ALLIERI Joint Venture** filed two separate objections after they were informed that their respective offers were considered to be administratively non-compliant in view of the fact that, following the opening of the respective offers, it was found that the Tender Guarantee (Bid Bond) were not issued for the correct value as requested by Clarification 4.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members convened a public hearing on 15.02.2010 to discuss this objection.

Present for the hearing were:

Joint Venture Confirma

Dr John L. Gauci
Mr Paul Muscat

Legal Representative

C.A.V.V.ALLIERI Joint Venture

Dr Franco Galea
Dr Michael Sciriha
Mr Neville Calleja
Mr Ivan Farrugia
Mr Nyal Xuereb
Mr Brian Miller

Legal Representative

Legal Representative

Polidano Brothers Ltd

Dr Jesmond Manicaro

Legal Representative

Schembri Barbros Ltd

Dr Kenneth Grima
Mr Anton Schembri

Legal Representative

Ministry for Resources and Rural Affairs (MRRA)

Mr Raymond Farrugia
Dr Albert Caruana

Director General Works

Legal Representative

Department of Contracts

Mr Francis Attard
Dr Franco Agius

Director General (Contracts)

Legal Representative

At the beginning of this public hearing, the Chairman, Public Contracts Appeals Board (PCAB) explained that, since these two objections concerned the same call for tenders, it was decided to hold a joint hearing. However, the parties concerned were also informed that, in spite of this, the two cases would be dealt with and decided upon separately.

The Chairman, PCAB then invited the representative of Joint Venture Confirma and C.A.V.V.ALLIERI Joint Venture to explain the motive of their objections. This was followed by the response of the representatives of the Department of Contracts, Polidano Brothers Ltd and Schembri Barbros Ltd.

Mr John L Gauci, legal representative of Joint Venture Confirma, explained that both appeals were similar and that both offers were excluded for the same reason.

He said that in the Department of Contracts' letter of exclusion dated 22 October 2009 it was stated that:

"...when opening your offer it was found that the Tender Guarantee (Bid-Bond) was not issued for the correct value as requested by Clarification 4"

He explained that in Clarification Number 4 a third party asked the following question:

"Question 3: Can you confirm that bid bonds issued by U.K bank (RBS) for the amount of 6450 euros would be accepted by the regulatory body."

and the reply given was:

"Answer 3: Bid bonds issued by Bank or financial Institution regularly licensed in the UK will be acceptable"

Bidders are hereby being notified that the bid-bond for this tender is 6500 euro and is to remain valid on the 22nd March 2010"

Dr Gauci contended that, although the difference was of €50 only, his clients had submitted their Bid Bond with the amount specified in the Tender Document itself, that is, €6,450, which was confirmed in various parts of the tender document. He explained that the cover of the tender document itself indicated the following notification:

'Please note that the mandatory bid-bond of 6,450 euro is to remain valid up to 22nd March 2010'

Furthermore, clause 14.3.1 (page 13 of the tender document) indicated also the amount of €6,450. Apart from this, Dr Gauci claimed that the PCAB had, repeatedly, argued that a tenderer could not amend or depart from the amount indicated on the Tender Guarantee Form which in this case was at page 35 of 346 of the Tender

Document. He maintained that the amount of €6,450, which was in bold and highlighted, could not be altered and that was what his clients had done.

Joint Venture Confirma's lawyer also said that, under normal circumstances, the value of Bid Bond was 1% of the value of tender, and, in this case, the figure of €6,450 tallied with budget available for this tender, that is, €645,000 (excluding VAT).

Dr Gauci sustained that the only instance where the figure of €6,500 was indicated was under Clause 18.1 (page 17 of 346 of the tender document) which, evidently, was a mistake because this did not tally with the 1% of the tender value.

He pointed out that the reason given by the Department of Contracts for the exclusion of his client was that the Bid Bond submitted was not issued for the correct value as requested by Clarification 4. At this point Dr Gauci sustained that a clarification could not be used to change the terms and conditions of the tender. Apart from this, it was maintained that the question was not related to the value of the Bid-Bond but whether a Bid-Bond issued by a UK bank (RBS) would be admissible. However, he contended that the most important thing was that his client had submitted the Bid Bond with the amount of €6,450 as established in the Tender Guarantee Form. As a subsidiary argument they insisted that the difference of a mere €50 should never warrant the exclusion of a bidder especially in the light of the fact that there was a mistake by the drafter/s of the tender document.

He concluded his introductory verbal submission by insisting that, on the basis of the above reasons, the tenderer, Joint Venture Confirma, should be reinstated in the tender procedure.

Dr Franco Galea, legal representative of C.A.V.V.ALLIERI Joint Venture, concurred that both appeals were identical. He pointed out that the reason for exclusion given by the Director of Contracts was not *Clause 18 Tender Guarantee (Bid Bond)* but had chosen 'Clarification Number 4' to inform them that they were administratively non-compliant. He contended that if the Director of Contracts wanted to amend the tender he could have submitted an addendum and not a clarification. He claimed that they did not have enough time to query the validity of this clarification because *Clarification 4* was received after the date allowed for the submission of questions.

Dr Galea maintained that the 1% of the value of tender used for the calculation of the value of the Bid Bond was not only a praxis since on the Contracts Department's electronic site there was a template with guidelines to help tenderers in the preparation of their bids and the footnote under Clause 18 Tender Guarantee (Bid Bond) specified that:

'During the vetting stage of tender documents and as a general rule it is to be ensured that tender guarantees (bid bonds) are to be requested from prospective economic operators for those tenders whose estimated cost/allocated budget is over the threshold of €133,000. The value of the Bid Bond is to be set at 1% of the estimated cost. The minimum amount should not be less than €1,300 and the maximum set at €60,000. However, this maximum may be exceeded in exceptional circumstances.'

At this point Dr Galea presented the PCAB with a copy of the relevant printout.

He insisted that the directive issued by the Department of Contracts to those who were preparing the tenders was that the value of the bid bond was to be set at 1% which, in this case, was 1% of €645,000, that is, €6,450. Dr Galea said that this amount was equivalent to that deposited by their clients.

The same lawyer maintained that the principle should be to have as many bidders as possible in order to obtain the most favourable offer. He emphasised that it was better for the country to have more tenders in the adjudication process and evaluate all offers rather than excluding two tenderers for a mere €50.

In reply to a specific question by the PCAB, the appellants' legal representatives confirmed that these clarifications were not sought by their clients.

At this point, Mr Francis Attard, Director General (Contracts), intervened and started by stating that the scope of a tender was not to attract as many offers as possible but the main purpose of every call for tenders was to ensure that the tendering process was carried out in a fair and transparent manner and that there was no discrimination amongst economic operators.

He confirmed that when the tender was published it had two amounts for the bid bond but this was rectified by means of Clarification Number 4 whereby they established the amount of €6,500. In reply to a specific question by the PCAB, the Director General (Contracts) said that the reason that they chose the amount of €6,500 and not €6,450 was to retain the figure indicated in the specific clause that referred to the tender guarantee. He also said that the amount for the guarantee was not the law but it was the prerogative of the Department of Contracts, so much so, that certain tenders requested a bank guarantee whilst others did not.

Mr Attard explained that they had communicated this clarification to everybody, uploaded it on the Department's website and sent it also to all those who had already purchased the tenders, including the two appellants. He also said that they had documents that showed that the appellants had received this clarification and, as a result, they should have known that the value of bid bond was €6,500.

Dr Franco Agius, legal representative of the Department of Contracts, intervened by stating that there was no need for another clarification because the Department of Contracts was clear in the clarification issued. He contended that the clarification issued by the Department of Contracts formed an integral part of the tender document, so much so that the document itself, where reference was made to clarifications, requested tenderers to sign them and submit same with their offer. Dr Agius also pointed out that the dates on the Bank guarantees (including the appellant Company's) and Clarification 4 showed that the former were issued after the latter and this was an indication that the appellants did not take heed of the contents of this clarification when they submitted their offer.

With regard to the appellants' argument that the difference in the value of their bid bond was a mere €50, the Contracts Department's legal representative insisted that

this was an issue of principle where tenderers had to be regulated by the law and the tender document since, otherwise, they would arrive at a situation where anything would be acceptable.

As regards the issue raised in the Joint Venture Confirma's reasoned letter of objection wherein reference was made to the PCAB's Case No 87 to support its argument that the Department of Contracts had no right to modify the tender document by means of a clarification, Dr Agius underlined that the facts of that case were completely different from the case being discussed during the said hearing. He said that, in the former case, there was a situation where the Evaluation Committee requested various clarifications in order to give tenderers the opportunity to modify their offers in order to be in conformity with the technical specifications.

Dr Galea replied by stating that, in that case, the PCAB argued that a clarification could not be requested to amend a tender but to clarify a tender. He reiterated that the reason given by the Department of Contracts for their exclusion from the tender procedure was not Clause 18.1 but Clarification 4, which, he insisted that a clarification could not alter a tender. Dr Galea maintained that once the praxis was that the amount for the bid bond was calculated on the basis of 1% of the value of tender, then the correct value of the bid bond should have been €6,450. C.A.V.V.ALLIERI Joint Venture's lawyer said that he agreed with the Director of Contracts' statement that the tendering procedures had to be transparent but he did not think that the latter was correct when he said that the purpose of the tendering process was not to attract as many offers as possible to make the best selection. He acknowledged that they could not accept everything but the amount involved was a mere €50.

Subsequently, replying to various question by the PCAB, Dr Agius said that 1% of the estimated value of tender was a praxis used by the Department of Contracts to calculate the value of a bid bond, however, he said that this could fluctuate as it was not cast in stone. He explained that they chose the €6,500 and not the €6,450 because in the Tender Document the appropriate section that regulated the bid bond specified that amount. He said that considering the fact that in the tender document there were two figures for the bid bond, the Department of Contracts had exercised its right by issuing a clarification to clear this ambiguity and notified bidders with the actual amount. Dr Agius confirmed that none of the bidders queried the fact that the tender indicated two different amounts for the bid bond.

The PCAB argued that the manner in which the issue regarding the value of a bid bond was written was a statement and not a clarification. Furthermore, it was stated that since none of the tenderers had sought a clarification about this anomaly their attention should have been drawn about the correct amount under separate cover. It was noted that the amount of €6,500 was included in the clarification incidentally because the question asked by a third party was whether bid bonds issued by a U.K. bank would be accepted. The PCAB did not feel that this was a professional way of conducting matters.

Dr Kenneth Grima, legal representative of Schembri Barbros Ltd, said that, by their arguments, the appellants were implying that the amount for the bid bond was €6,450 and that this was changed to €6,500 after the publication of *Clarification 4*. He

maintained that, if this were the case, he would not have attended these proceedings because it would have been unfair on the appellants. Dr Grima said that the tender dossier was the tender law and that everybody had to abide by that law. He said that, while his clients had complied with the tender conditions, others paid less attention. Dr Grima claimed that mistakes in tenders had always led to their rejection. He sustained that the PCAB was always consistent in such instances and, as an example, he mentioned Case No 138 which dealt with an appeal in respect of the reconstruction of the M'Scala Bypass that was decided on 29 December 2008. It was explained that, in spite of the fact that the preferred bidder's offer was about €1 million higher than that submitted by his clients, namely SSJV Joint Venture, their appeal was rejected because one particular document out of hundreds of documents was not submitted. He argued that the parameters within which tenderers had to submit their offers could not be extended because otherwise they would not know where to stop and would also create precedents. Dr Grima argued that SSJV had paid the price for the mistake committed because their offer was disqualified.

He claimed that, in the tender under reference, two out of five tenderers understood that there was a mistake in the tender document because there were two different amounts (€6,450 and €6,500), however, they were careful and considered the most important and relevant clause in the tender document regarding the bid bond which specified the amount of €6,500.

Replying to a comment by the PCAB, Dr Grima said that if the clarification was not clear all the participating five tenderers would have submitted a bid bond for €6,450 but he did not think that it was ambiguous because two of the tenderers had complied with the tender requirement. He maintained that it was dangerous if one were to start accepting everything in the tendering evaluation process because it appeared that the appellants were giving the impression that, once the amount of €50 was trivial they should be allowed to amend the bid bond in order to proceed. Dr Grima said that previous decisions taken by the PCAB showed that it was very strict in its interpretation and he felt that it should remain rigorous. However, he thought that the PCAB was not empowered to effect changes - if any - because otherwise these had to be amended from above.

The Chairman, PCAB pointed out that they were always consistent and that they did not have any intentions to change anything. He said that the PCAB had to keep an open mind in its deliberation on the fact that they had a situation where three out of five tenderers were rejected for the same reason.

On the other hand, Dr Galea responded to Dr Grima's arguments by stating that the issues in Case No 138 were different from the case under reference because in that case the appellants were not excluded because of a mistake - if any - in one of the documents but because one of the documents was missing. He explained that in this case the appellants were arguing that the Bid Bond was submitted exactly as specified in Tender Guarantee Form attached to the tender dossier.

Dr Jesmond Manicaro, legal representative of Polidano Brothers Ltd, said that if they were to analyse the tender procedure it was acknowledged that there was a discrepancy between two figures. He said that it was established, in front of this Board and also in accordance with Department of Contracts' procedures, that, once

there was a clarification, that clarification would become a tender law. Dr Manicaro argued that, in actual fact, the Department of Contracts' legal representative stated that a tender would not be accepted if these clarifications were not signed and submitted with the tender and this meant that, in doing so, a tenderer would be accepting the conditions and specifications in each and every clarification. He insisted that a clarification would become part and parcel of the tender document.

The PCAB Chairman said that they agreed with what was being stated, however, they had to deliberate on whether the clarification under reference, as worded, necessitated another clarification from the tenderers because it might not have been clear and, as a result, it may have been interpreted rather vaguely.

Dr Manicaro responded by stating that if there was enough time to seek another clarification the whole argument would be meaningless.

Dr Gauci intervened by stating that there was nothing that showed that the Department of Contracts had issued this clarification after noticing the discrepancy in the tender document because the question asked dealt with a different issue, namely, whether bid bonds issued by a U.K. bank (RBS) for the amount of €6,450 would be acceptable by the regulatory body. He contended that the Director of Contracts should have issued a separate and specific clarification regarding the correct amount of the bid bond.

At this point, the PCAB Chairman remarked that the Board had to deliberate also on whether this clarification was technically correct because, under normal circumstances, a clarification was issued with an answer to a question from a third party. He said that they were taking note of the fact that the comment or statement was not part of the question that was asked by a third party. The Chairman, PCAB insisted that the issue of the value of bid bond was not a clarification but a statement because a clarification was made to clarify something that was not clear and also considering the fact that no one had sought any clarification about the actual value of the bid bond. He was of the opinion that, as a consequence, this should not have been part of a clarification exercise once no one had asked anything about this discrepancy. It was reiterated that it should have been issued separately as an 'addendum'.

He said that the PCAB had to deliberate also on whether the appellants could have been misled. However, the Chairman PCAB emphasised that, by what was being stated, they did not want to give the impression that they were deciding towards a particular direction because their intention was solely to raise issues for discussion with the interested parties in order to hear their reactions to facilitate their deliberation.

Dr Grima said that although they agreed that the clarification could have been worded better, he wanted to draw the attention of those present that, in the most important and relevant part of the tender document, that is, Clause 18, it was clear that the tender guarantee was set at €6,500. He failed to understand why the appellants did not choose the highest figure if they had doubt about the correct amount and considering the fact that the difference was only €50. Dr Grima alleged that this happened because the appellant did not read the tender properly and therefore, once they made a mistake, they had to bear the consequences.

At this point the PCAB pointed out that the fact that it was established that the clarification was sent on 8 October 2009 and the closing date of tender was 22 October 2009, it seemed quite evident that the tenderers had enough time to seek clarification on the value of the bid bond. Reacting to this comment, Dr Gauci explained that in their case it was technically impossible to issue another bid bond within one week because when a bid bond was issued by a foreign bank another bid bond had to be issued back to back from Malta. Here, his attention was drawn by the PCAB Chairman, that they could have informed the Department of Contracts explaining the reasons why it was impossible to comply with such requirement. Dr Manicaro said that the issue of time had to be evaluated in the sense that questions on the tender documents could only be accepted up to a specific date. However, the argument would have made sense if the reply to a clarification was submitted, say, one day before the closing date and, in such instance, tenderers would not have had enough time to seek another clarification.

In reply to a specific question by the PCAB as to why none of the bidders queried this discrepancy, Dr Gauci insisted that the *Tender Guarantee Form* could not be altered.

With regard to the importance given to the value of the bid bond in the tender dossier, Dr Galea explained that this was included in the front page to attract one's eyes and, under Clause 14.3.1, the amount was repeated twice because it specifically mentioned €6,450 and also referred to the amount of €6,450 in the *Tender Guarantee Form* which could not be changed because otherwise a tenderer could be excluded. He said that the impression given that Clause 18 appeared to have more weighting than Clause 14 was not correct because, in his opinion, the fact that it was repeated twice it was hammering in a point that the value of the bid bond was €6,450. Dr Galea insisted that their argument was not that the appellants had decided to submit a bid bond for €6,450 capriciously to save €50 but their argument was that the manner in which the tender was drafted was misleading. He maintained that they did not believe that it was the Department of Contracts that noticed such discrepancies because it was only after a request for clarification that tenderers were notified that the bid bond for this tender was €6,500. It was also stated that the reason for exclusion did not refer to the tender dossier but to the clarification and they would maintain that a clarification could not alter the terms and conditions of tender but to clarify that was being questioned. He argued that, to ensure that no one was misled, the Department of Contracts should have issued a separate *addendum* but not in a clarification. He insisted that they were so misled that the bid bond was €6,450. Dr Galea also said that although they acknowledged that the Director of Contracts had the discretion on the bid bond, yet the tender dossier was drafted by another person on the basis of the template wherein it was stated that the value of the bid bond was to be set at 1% of the estimated cost.

Dr Agius drew the attention of the PCAB that, considering the fact that there were two different figures the clarification was issued to ensure that tenderers would not be misled. As far as the wording was concerned, he pointed out that the clarification was not addressed to one person only because it was stated that '*Bidders are hereby being notified*' Dr Agius insisted that it was not addressed to that person who asked the question but it was addressed to the prospective bidders, including those who had already submitted their bid. Apart from this, when they submitted their bid they had

to sign the tender form which stated that they were accepting without any reservations the tender document in its entirety, including the clarification/s. He made reference to clause 20.4 of the tender document wherein it was clearly specified that *'The tender will be rejected if it contains any modification, addition or deletion to the tender documents not specified in a modification issued by the Central Government Authority..'* He claimed that the amount of the appellants' bid bonds was different from that indicated in clarification 4 which, he reiterated, was an integral part of the tender document.

Dr Galea made reference to the provisions of *Article 9 Explanations Concerning Tender Documents* whereby at clause 9.1 it was specified that:

'Tenderers may submit question in writing up to 16 calendar days before the deadline for submission of tenders. The Central Government Authority must reply to all tenderers' questions at least 6 calendar days before the deadline for receipt of tenders.'

He maintained that, once clarification 4 was sent on 8 October 2009, they had no chance or possibility to seek another clarification.

Mr Attard intervened by saying that the appellants had to explain to the Board whether they understood that clarification.

Dr Agius concluded by stating that there were instances where the Department of Contracts received clarifications even after the 16 calendar days, possibly even from the appellants, however, in this case no questions were received after the 16 days.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 28.10.2009 and also through their verbal submissions presented during the public hearing held on the 15.02.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of, *Messrs Joint Venture Confirma*, appellant Company No.1's (a) claim that the reason given by the Department of Contracts for the exclusion of his client was that the Bid Bond submitted was not issued for the correct value as requested by Clarification 4, (b) contention that, albeit the difference was of €50 only, they had submitted their Bid Bond with the amount specified in the Tender Document itself, that is, €6,450, which was confirmed in various parts of the tender document, (c) claim that clause 14.3.1 (page 13 of the tender document) indicated also the amount of €6,450, (d) contention that the PCAB had, repeatedly, argued that a tenderer could not amend or depart from the amount indicated on the Tender Guarantee Form which in this case was at page 35 of 346 of the Tender Document, (e) statement wherein it was argued that, under normal circumstances, the value of the Bid Bond was 1% of the value of tender, and, in this case, the figure of €6,450 tallied with budget available for this tender, i.e., €645,000 (excluding VAT), (f) claim that the only instance where the figure of €6,500 was indicated was under Clause 18.1 (page 17 of 346 of the tender document)

which, evidently, was a mistake because this did not tally with the 1% of the tender value, (g) claim that the question raised in the so-called “Clarification 4” the question was not related to the value of the Bid-Bond but whether a Bid-Bond issued by a UK bank (RBS) would be admissible, (h) claim that the difference of a mere €50 should never warrant the exclusion of a bidder especially in the light of the fact that there was a mistake by the drafter/s of the tender document, (i) explanation that, in their case, it was technically impossible to issue another bid bond within one week because when a bid bond was issued by a foreign bank another bid bond had to be issued back to back from Malta, (k) argument that, to ensure that no one was misled, the Department of Contracts should have issued a separate *addendum* but not in a clarification and (l) statement to the effect that, although they acknowledged that the Director of Contracts had the discretion on the bid bond, yet the tender dossier was drafted by another person on the basis of the template wherein it was stated that the value of the bid bond was to be set at 1% of the estimated cost

- having also taken note of, *Messrs C.A.V.V. ALLIERI Joint Venture*, appellant Company No.2’s (a) claim that the reason for its exclusion as given by the Director of Contracts was not *Clause 18 Tender Guarantee (Bid Bond)* but, instead, ‘Clarification Number 4’ had been chosen as the reason for them being considered as administratively non-compliant, (b) contention that if the Director of Contracts wanted to amend the tender he could have submitted an addendum and not a clarification, (c) claim that they did not have enough time to query the validity of this clarification because *Clarification 4* was received after the date allowed for the submission of questions, (d) argument that the 1% of the value of tender used for the calculation of the value of the Bid Bond was not only a praxis it was even stated on the Contracts Department’s electronic site wherein there is a template with guidelines to help tenderers in the preparation of their bids with a footnote under *Clause 18 Tender Guarantee (Bid Bond)* specifying just that; (e) insistence that the directive issued by the Department of Contracts to those who were preparing the tenders was that the value of the bid bond was to be set at 1% which, in this case, was 1% of €645,000, that is, €6,450 which, was also claimed that it equivalent to that deposited by them, (f) statement whereby it was argued that the principle should be to have as many bidders as possible in order for one to obtain the most favourable offer, placing emphasis on the fact that it is better for the country to have more tenders in the adjudication process with all offers being evaluated rather than having a scenario wherein two tenderers are excluded for a mere €50, (g) insistence that their argument was not that the appellants had decided to submit a bid bond for €6,450 capriciously to save €50 but their argument was that the manner in which the tender was drafted was misleading and (h) reference to the provisions of *Article 9 Explanations Concerning Tender Documents*, especially, clause 9.1 which stipulated terms of reference in connection with the submission of and reply to clarifications prior to the deadline for receipt of tenders, maintaining that, once clarification 4 was sent on 8 October 2009, they had no chance or possibility to seek another clarification;

- having heard and deliberated upon the Department of Contracts' representatives' claims wherein, *inter alia*, it was stated that (a) the Department of Contracts had communicated this clarification to everybody, uploaded it on the Department's website and sent it also to all those who had already purchased the tenders, including the two appellants, (b) they had documents that showed that the appellants had received this clarification and, as a result, they should have known that the value of bid bond was €6,500, (c) there was no need for another clarification because the Department of Contracts was clear in the clarification issued, (d) the clarification issued by the Department of Contracts formed an integral part of the tender document, so much so that the document itself, where reference was made to clarifications, requested tenderers to sign them and submit same with their offer, (e) the dates on the Bank guarantees (including the appellant Company's) and Clarification 4 showed that the former were issued after the latter and this was an indication that the appellants did not take heed of the contents of this clarification when they submitted their offer, (f) albeit the fact that difference in the value of their bid bond was a mere €50 was an issue of principle where tenderers had to be regulated by the law and the tender document since, otherwise, one would arrive at a situation where anything would be acceptable, (g) 1% of the estimated value of tender was a praxis used by the Department of Contracts to calculate the value of a bid bond, however, he said that this could fluctuate as it was not cast in stone, (h) they chose the €6,500 and not the €6,450 because the appropriate section that regulated the bid bond specified that amount, (i) considering the fact that in the tender document there were two figures for the bid bond, the Department of Contracts had exercised its right by issuing a clarification to clear this ambiguity and notified bidders with the actual amount, (j) at any stage, none of the bidders queried the fact that the tender indicated two different amounts for the bid bond and (k) the appellants had to explain to the Board whether they understood that clarification;
- having also heard Schembri Barbros Ltd's legal representative (a) state that the tender dossier, including the clarification, was the tender law and that everybody had to abide by that law arguing that, while his clients had complied with the tender conditions, others paid less attention, (b) claim that, in the tender under reference, two out of five tenderers understood that there was a mistake in the tender document because there were two different amounts (€6,450 and €6,500), however, they were careful and considered the most important and relevant clause in the tender document regarding the bid bond which specified the amount of €6,500, (c) claim that it seemed like the appellants were giving the impression that, once the amount of €50 was trivial they should be allowed to amend the bid bond in order to proceed and (d) state that, although they agreed that the clarification could have been worded better, yet the most important and relevant part of the tender document, that is, Clause 18, was clear enough stating that the tender guarantee was set at €6,500;
- having taken full cognizance of the fact that albeit it was a fact that two out of five tenderers were careful and considered the most important and relevant clause in the tender document regarding the bid bond which specified the

amount of €6,500, yet it was also a fact that three out of five tenderers were rejected for the same reason;

- having taken into consideration the issues raised by Dr Manicaro on behalf of an interested party, wherein, *inter alia*, he stated that (a) a tender would not be accepted if these clarifications were not signed and submitted with the tender and this meant that, in doing so, a tenderer would be accepting the conditions and specifications in each and every clarification, (b) a clarification becomes part and parcel of the tender document;
- having deliberated on whether the clarification under reference, as worded, necessitated another clarification from the tenderers because it might not have been clear and, as a result, it may have been interpreted rather vaguely;

reached the following conclusions, namely:

1. The PCAB argues that the content of the Tender Document and Clarification note was anomalous.
2. The PCAB opines that the Contracts Department could have easily included the new value of the bid bond under separate cover instead of leaving such information, seemingly, as a passing comment right at the bottom of a clarification reply which, ironically enough, had nothing to do with the same subject as it related to a question asked by a third party as to whether bid bonds issued by a U.K. bank would be accepted. The PCAB reiterates that the methodology adopted was far from what one would, under normal circumstances, consider professional.
3. The PCAB cannot base its analysis on the triviality of the amount, which in this case was a mere € 50 difference – this Board bases its argument on principles.
4. The PCAB argues that, albeit there exists no doubt that matters could have been attended to in a much better way, the PCAB also feels that whilst the responsibility for ensuring the correctness of the content of the documentation originated by a public entity should equally be entrusted to the contacting authority and the Contracts Department, yet, it is also a fact that the onerous task of checking correctness of a submission remains with the tenderer.
5. The PCAB also opines that clarifications made subsequent to original publication of tender document should be considered as forming part of the said tender document and the content of such clarifications remain valid and binding to all parties concerned.
6. The PCAB also feels that the fact that it was established and acknowledged that (a) the contended clarification was sent to all parties concerned on 8 October 2009 and (b) the closing date of tender was 22 October 2009 demonstrated that the time frame involved between the said dates provided enough evidence that all interested parties had ample time to react to apparent

anomalies in content of the tender document *vis-a-vis* content as stated in the clarification note.

7. The PCAB acknowledges that the fact that two participants abided by the content of the clarification note is proof enough that such note, albeit written in a way that left to be desired as it contained a ‘clarification’ and a ‘statement’ in the same clarification, was clear enough for all parties to follow. The PCAB argues that documents are meant to be meticulously read in their entirety and any one refraining from doing so in a capricious manner cannot be exculpated – and, this, despite the triviality of the amount in question which this Board has not considered as being a pivotal issue in its deliberation process.

As a consequence of (1) to (7) above this Board finds against both appellant Companies.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

14 March 2010