



The Chairman made a brief introduction and asked the Appellant's representative to make his submissions.

Dr David Wain on behalf of the appellants explained that his clients were not present and kindly asked for an adjournment. This was not granted and Dr Wain was provided with a copy of a letter of reply filed by the contracting authority and was granted a postponement of 15 minutes in order to be able to peruse it.

Dr David Wain for AX Construction Limited referred to what was submitted in the letter of objection and said that the first grievance was that the appellant had not been given a clear reason for the disqualification. The letter of rejection just said that appellant's intervention included the dismantling of further parts of the Casino in addition to those indicated for demolition but did not specify which part of appellant's proposal went against the requisites. He insisted that appellants could not thus formulate a proper objection. Dr Wain submitted that clarifications issued after the call for tenders should not be used to change the original tender conditions. In the present case, the walls that could not be dismantled had only been specified through a clarification and the tender document itself did not identify that certain walls could not be dismantled. A report forming part of the tender by Architect Musumeci had stated that the drawings were a "suggested course of action" and the non removal of certain parts only became mandatory by means of the clarification. He said that this was a design and build tender and in response to clarification note 4, admitted that the contractor was free to retain or change any of the design concept suggested. The Contracting Authority cannot impose new conditions through clarifications. The Appellants' method statement had explained that only 1 non-structural wall needed to be dismantled since the other walls would not need to be so dismantled. Their proposal would have consolidated the existing walls and at a cheaper price. He contended that after all this was the reason why 'design and build' tenders are issued, to enable bidders to make proposals; and the method statement proposed by appellant made more sense.

Dr Fiorella Fenech Vella for the Contracting Authority said that the reason for disqualification had been properly given. The tender document comprised 5 drawings which formed part of it and showing what could be dismantled or not. The clarification had asked whether parts of the walls GHA could be dismantled. The clarification reply made it clear that the maximum dismantling allowed was only that already indicated in the tender. The drawings indicated which parts could be dismantled and these were marked in yellow while the parts marked in black could not be dismantled, and part GHA was in black and therefore could not be dismantled. The reason for disqualification was given clearly enough.

Dr Christopher Mizzi on behalf of the Department of Contracts contended that the plans formed part of the tender document and said that appellants in their proposal had indicated the demolition of other parts in addition to those parts identified by the Contracting Authority for demolition.

Dr David Wain stated that the same drawings are headed "proposed" and insisted that the letter of rejection clearly refers to the clarification as the reason for disqualification. The Appellants' method statement had proposed the demolition as a suggestion. He insisted that clarifications should not be used to change tender conditions and that the reason for disqualification was the clarification.

Perit Norbert Gatt on behalf of the Contracting Authority explained that any clarification forms part of the tender documents. In this case the clarification did not contain new information but reinforced what was already explained in the drawings included in the documents. The clarification had clearly shown that certain walls could not be dismantled;

yet appellants had recommended demolishing one of these walls.

The Chairman remarked that the contracting authority can issue clarifications that would form an integral part of the tender documents.

Dr David Wain for the Appellants reiterated that clarifications cannot change the original conditions. He said that Architect Musumeci's report that formed part of the tender documents referred to the drawings as "suggested course of action" and therefore not final. The tender should have clearly stated that certain walls could not be dismantled.

Dr Fiorella Fenech Vella reiterated that the tender did just that – the parts in yellow could be dismantled, and "proposed" referred to these; the others parts not in yellow could not be dismantled.

Dr Alessandro Lia on behalf of the preferred bidder said that bidders cannot dictate the requirements of the contracting authority. He contended that tenderers sign a declaration wherein they declare to accept the tender documents in their entirety, including any clarification. The clarification in this case was of a technical nature and since this falls under note 3 no rectification was possible.

At this point the hearing was closed.

**This Board,**

**Having noted the Appellant's objection in terms of the undated "Reasoned Letter of Objection" received on the 21st May 2015 and also through their verbal submissions during the hearing held on 2nd July 2015, had objected to the decision taken by the pertinent Authority, in that:**

- a) The Appellant contends that he was not given specific reasons why his offer was discarded to the effect that his objections could not be properly formulated;**
- b) The Appellant maintains that the Clarifications issued by the Contracting Authority after the closing date of the tender altered the original Tender Conditions with particular reference to the dismantling of the walls;**
- c) The Appellant also insists that since the Tender consisted of a "Build and Design Tender", the proposed suggestions adopted in the Appellant's Bid should be considered.**

**Having considered the Contracting Authority's "Letter of Reply" and verbal submissions during the Hearing held on 2nd July 2015, in that:**

- a) The Contracting Authority maintains that it had given specific reasons why the Appellant's tender was discarded with special reference to the reply given by the Appellant in "Clarification Note No 3";**
- b) The Contracting Authority contends that the clarifications did not in any way, alter the original tender conditions, but rather confirmed the same;**
- c) The Appellant's Technical Bid did not abide by the "Plans" which formed part of the Tender Document.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's first grievance, this Board would respectfully refer to the "Letter of Rejection" sent by the Contracting Authority where it was clearly stated that the reason for discarding the Appellant's offer was due to the fact that "The proposed consolidation intervention includes the dismantling of further parts of the casino structure in addition to those indicated for the demolition in the Tender drawings. This was clearly explained as unacceptable in reply 1 of clarification note no. 3" This Board justifiably opines that the reason given by the Contracting Authority was fair, just and transparent, as the Appellant's offer did not abide by the dictated drawings which formed part of the Tender Document. This Board credibly notes the reasons for discarding the Appellant's offer were specific and clear. In this regard, this Board does not uphold the Appellant's first grievance;**
- 2. With regards to the Appellant's second grievance, this Board justifiably affirms that clarifications, do in fact, form part of the Tender Document and in this particular instance, it has been credibly proved that the clarifications did not, in any way, change the original works which had to be carried out. From the drawings of the Tender Document, it was clearly demonstrated which walls had to be dismantled and which had to be retained. The clarification did neither alter the dictated dismantling of the walls nor propose any innovations but rather answered the bidders' questions on what has been dictated in the Tender Document. In this regard, it was clearly mentioned that "The Maximum Allowance dismantling is that indicated in the Tender Drawnigs." This Board, justifiably does not uphold the Appellant's second grievance;**
- 3. With regards to the Appellant's third contention, this Board credibly notes that although this was a "Design and Build" tender, the Technical conditions laid out in the Tender Document were strictly limited to those specified in the drawings which formed part of the latter. The Appellant's submission disregarded the reply issued to Question 1 of Clarification Note 3. This Board, credibly opines that the Appellant's offer was not in conformity with the Technical Specifications as dictated in the drawings and in this regard, this Same Board does not uphold the Appellant's third contention.**

**In view of the above, this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*7 July 2015*