

PUBLIC CONTRACTS REVIEW BOARD

Case 1021 – CT 2131/2016 – Tender for the Supply of Fludeoxyglucose F18 Injections

The Publication Date of the Call for Tenders was 4 October 2016 whilst the Closing Date for Call of Tenders was 15 November 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 900,000.

One (1) Bidder have submitted an offer for this Tender.

On 26 January 2017, JV Healthcare Ltd filed an Objection against the decision of the Central Procurement and Supplies Unit against a deposit of € 6,750.

On 9 February 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – JV Healthcare Ltd

Mr Damian Stellini	Representative
Dr Carl Grech	Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

Mr Tonio Farrugia	Chairperson, Evaluation Board
Ms Federica Spiteri Maempel	Member, Evaluation Board
Mr Mark Zammit	Member, Evaluation Board
Ms Danica Agius Decelis	Representative

Department of Contracts

Dr Franco Agius	Legal Representative
Dr Christopher Mizzi	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Carl Grech, the Legal Representative for JV Healthcare Ltd stated that they were appealing against the Letter of Rejection issued by the Central Procurement and Supplies Unit dated 17 January 2017 which *inter alia* stated that their offer,

"...was not Administratively Compliant as you did not submit the Original Bid Bond as requested in Article 8 of Section 1 – Instructions to Tenderers"

The Appellants were maintaining that their original submission was compliant because following the online submission of their offer through the E-Procurement Tender, they have presented a scanned copy of the original bid bond. This showed without any doubt that JV Healthcare Ltd were compliant with the Tender Requirements since they were in possession of the Bid Bond.

Dr Grech continued by saying that his client's submission was compliant because Article 5 (1) of Chapter 426 of the Laws of Malta, namely the Electronic Commerce Act, states that,

"If under any law in Malta a person is required or permitted to give information in writing, that requirement shall be deemed to have been satisfied if the person gives the information by means of an electronic communication."

JV Healthcare Ltd was stating that this law makes a provision to any other Maltese law; therefore it falls under the principle of "*lex specialis*" which comes out from "*lex generalis*". This means that when one sees this law in connection with Public Procurement, it was giving a particular derogation under any law in Malta; it should also apply in this case. Therefore if the law was recognizing their submission to be a correct one and is telling you that "*the requirement shall be deemed to have been satisfied*", therefore there should have been no doubt that the submission was originally done correctly.

Dr Carl Grech, the Legal Representative for the Appellants referred then to Article 5 (2) of the Electronic Commerce Act which said,

"For the purposes of this article, giving information includes, but is not limited to, the following

- (a) Making an application;*
- (b) Making or lodging a claim;*
- (c) Giving, sending or serving a notification;*
- (d) Lodging a Return;*
- (e) Making a Request;*
- (f) Making a Declaration;*
- (g) Lodging or issuing a certificate;*
- (h) Lodging an Objection; and*
- (i) Making a Statement"*

The Appellants continued by saying that the Reasoned Letter of Reply issued by the Department of Contracts and the Central Procurement and Supplies Unit on 30 January 2017 stated that once the submission of a Tender was not included in that list, therefore their submission was deemed to be non-compliant.

JV Healthcare Ltd insisted that the list above was not an exhaustive list but was an indicative list wherein, “*information includes, but is not limited to*”, and therefore their original submission was deemed to be compliant.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the Tender Document requested the Original Documents to be submitted. This was confirmed by the Appellants.

Dr Franco Agius, representing the Department of Contracts asked whether the Appellants have any evidence to show regarding the matter for which Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether there were any witnesses from the Appellant’s side. The latter replied in the negative.

Dr Carl Grech, on behalf of the Appellants, gave then a background of what happened in this and in other similar Tenders. This was not the first time that a Call for Tenders was issued for this product but was issued periodically. JV Healthcare Ltd submitted bids for this Tender regularly and usually it was the only bidder which submitted offers and consequently been awarded the Tender.

This Tender was for a very particular product, a nuclear marker which was used for patients in the Oncology Department during their PET scans and it was a rather complicated product for handling and it was also a product which is imported only by JV Healthcare Ltd.

In this particular offer it was only JV Healthcare Ltd who submitted an offer continued Dr Grech who was emphasising this because according to him, there was no danger that the Tender would be awarded to a second Bidder if his client’s offer was not Administratively Compliant since there were no other competitors who submitted offers for this Tender.

The Appellant’s Legal Representative was saying this for the particular fact that as things happened to occur for this Tender, his clients have submitted a bid for the latter, and then they were subsequently informed by the Department of Contracts that they had yet to submit the original Bid Bond.

Once the Appellants were notified of this, two working days following the expiry of the deadline, as confirmed following a query by the Chairman of the Public Contracts Review Board, they submitted the original Bid Bond for this Tender within the hour of the receipt of the notification.

Dr Carl Grech continued by saying that the offer submitted by his clients was a *bona fide* offer and this omission of the late submission of the Bid Bond was not absolutely creating any doubts neither in the eyes of third parties nor of other competitors since there weren’t any while there was also no danger that the Bid Bond was non-existent or not available to the Appellant since originally they have submitted it online.

JV Healthcare Ltd argued also that it disagreed with the argument raised by the Contracting Authority that this would lead to a dangerous precedent to be created since there were no other competitors for this Tender. This was the case that if the Objection filed by the Appellant was going to be rejected, it was the general public who was to suffer since it was them who would eventually need this drug and it was neither a third party nor another competitor nor the Government. Besides, since there were no competitors for this Tender, there was no way that the latter would have been attacked.

Dr Grech continued by saying that the aim of Public Procurement was to create a Level Playing Field and a possibility for all Bidders to participate in an equal way and that no

competitor would gain an advantage on another. This was the reason why Bid Bonds were requested in Tenders. It was a guarantee that economically Bidders were ready to bind themselves to the contract and its requirement while on the other hand assuring that the Bidder is making a serious offer.

In this case, if there were no competitors, no one can say that JV Healthcare Ltd was being given an advantage over other Bidders, hence the requisites and the spirit of the Public Procurement Regulations were being respected whatsoever according to the Appellants.

Another issue was the applicability of the principle that justice must not only be done but it must also see to be done according to JV Healthcare Ltd's Legal Representative. In this case there was going to be no injustice since there were no competitors, therefore there should neither be the perception of such. If this Tender was not going to be awarded because of administrative non-compliance, an injustice was going to be created with the patient who needed this medicine because effectively apart from the question of the Bid Bond which was being lately submitted and which was immediately rectified once noticed.

Dr Carl Grech, the Legal Representative for JV Healthcare Ltd warned that if his client's offer was going to be refused because of this fact, there will be a re-issuing of the call for Tenders, re-evaluation of the latter and in the meantime there was the risk that this product was not going to be available.

Besides, the Public Contracts Review Board adopted correctly the principle of rationality according to the Appellants where a certain practicability must be applied therefore one must respect to the letter the Public Procurement Regulations and therefore if one had to see in this case that when the administrative non-compliance was highlighted and rectified immediately, a fact which its validity was not doubted by the Contracting Authority, Dr Grech wondered whether this Appeal was to be rejected because of the late submission of the Bid Bond or not.

Dr Anthony Cassar, the Chairman of the Public Contracts' Review Board remarked that this Board had to obey the Public Procurement Regulations and respects the Tender Document requirements since the latter was a contract. The Public Contracts Review Board had no right to alter the Tender Document.

Dr Franco Agius, the Legal Representative for the Department of Contracts submitted that Dr Grech was not correct when stating that the first time that the Appellants were informed of the closing date for the Bid Bond submission was by a telephone call. Article 2 of the Tender Document clearly stated that the deadline for submission of the Bid Bond was 23 November 2016 at 12:30.

Dr Agius also referred to Article 8 of the Tender Document which stated that if the original Bid Bond was not submitted in time the bid would be automatically disqualified. At this point, Dr Agius submitted two copies of the mentioned Articles of the Tender Document to the Public Contracts Review Board.

This means that by the time that the call for Tenders was published, every economic operator who was interested was immediately informed that the deadline for submission of the Original Bid Bond was 23 November 2016 at 12:30, hence according to Dr Agius, Dr Grech was not correct when saying this whilst adding that whoever alleges something must give proof about it and the Appellants did not submit any proof regarding the matter.

The Department of Contracts' Legal Representative continued by stating that the Appellants were insisting that this procedure should be regulated by the Electronic Commerce Act which in this context was *lex speciali*. One had to note that the latter Act regulates electronic

transactions but e-procurement regulations had a number of sections and therefore the latter, which was the subject of discussion, was the process of how offers are submitted in an electronic way.

Even if one decides to discard this argument, which the Contracting Authority was keeping firm about, one had to see how Article 5.1 (a) of the Electronic Commerce Act states that,

“at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be usable for subsequent reference”

Dr Franco Agius for the Department of Contracts continued by saying that it was evidently clear that no bank was going to give money against a bank guarantee in the form of a scanned copy. The bank guarantee does not fall under this act anyway because the same Article 5.1 talks about information which is not the case with this Appeal as it treated a specific document which in order for it to be utilised, the original must be submitted. No guarantee was going to be utilised unless it was going to be an original one. Therefore the Department of Contracts felt that this article was not applicable to this Tender.

With regards sub article 2 of the Electronic Commerce Act, the Reasoned Letter of Reply issued by the Department of Contracts and the Central Procurement and Supplies Unit dated 30 January 2016, the Appellant was not precise when saying that if it was not mentioned therefore it does not mean automatic exclusion but they said that the sub article was an indicative one.

Dr Agius continued by emphasising that the Bid Bond was a bank guarantee and it was something to be used regularly. The fact that it was not included despite the list not being an exhaustive one was indicating the intentions of the Legislator.

The Contracting Authority continued by saying that this point was already treated by decisions of both the Public Contracts Review Board and the Hon Court of Appeal. The latter was crystal clear in the way which decided similar matters wherein it stated that the copy of the Bid Bond was not equivalent to the original. The original requisition was never satisfied.

Recently in a sentence of the Hon Court of Appeal, BAC Ltd vs Director of Contracts issued on 19 December 2016, it was clearly decided that once the requisite was not satisfied, whatever happened subsequently with regards to this sentence was to be discarded. The disqualification applies automatically in the considerations of whether the original Bid Bond was submitted or not. Therefore, from the moment that the original Bid Bond was not submitted the offer automatically should have been disqualified.

Dr Franco Agius continued by saying that Dr Grech wrongly stated that if the Tender was not going to be awarded in this way the patients and the public was going to suffer. Dr Agius wanted to assure the Public Contracts Review Board that the Government had its own means how to make the Procurement and in case of emergencies there was now an *ad hoc* regulation act which regulated how medicines should be produced, the Emergency Regulations Act which was published on 28 October 2016.

The Contracting Authority continued by saying that the Appellant’s Legal Representative mentioned that there was going to be no breach of competition since he was the only Bidder in this Tender. This was not true according to Dr Agius. The original Bid Bond was a requisite and maybe other economic operators were not financially strong enough to issue one hence not submitting an offer because of this fact. This was not a hypothetical argument and there were many sentences by the European Courts of Justice, which confirmed this.

In order for the Department of Contracts to be comfortable with the fact that there were no other economic operators which could have submitted bids for this Tender, the offer had to be without a Bid Bond which was not in this case. Once this Tender was issued with a Bid Bond, this should be observed as a requisite otherwise it would not be fair on the public since one of the essential elements of the call was not going to be respected; hence the level playing field factor issued with a Call for Tenders was not being discarded.

Dr Franco Agius, the Legal Representative for the Department of Contracts said they have presented a copy of the Bid Bond with the rubberstamp marking when it was received by the Department together with the Reasoned Letter of Reply. This indicated that the Bid Bond was received on 25 November 2016. Dr Agius asked whether the Appellants contested this.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board confirmed that the rubberstamp indicated that the Bid Bond was received at the Department of Contracts on 25 November 2016.

Dr Franco Agius, the Legal Representative for the Department of Contracts said that he was asking this because the Appellants were saying that they have submitted the Bid Bonds two days after the expiry of the Call for Tenders.

Mr Damian Stellini on behalf of JV Healthcare Ltd said that it was submitted on 23 November 2016 but Dr Franco Agius explained that the submission of offers closed on 15 November 2016.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that the date was more than two days after the deadline.

Dr Carl Grech, the Legal Representative for JV Healthcare Ltd explained that the Bid Bond was submitted two days after the deadline for submission of the Bid Bond expired.

Dr Franco Agius for the Department of Contracts added that the Appellants' Letter of Objection stated that the closing date for the submission of the Tender was 15 November 2016 whilst it also stated that the original Bid Bond was submitted two days later.

Dr Carl Grech for JV Healthcare Ltd replied that the deadline was on 23 November 2016 while the original Bid Bond was submitted on 25 November 2016.

Dr Franco Agius for the Department of Contracts asked once again whether there was an agreement that the original Bid Bond was submitted on 25 November 2016 for which the Appellants replied in the affirmative.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked why the Bid Bond was submitted two days late for which Mr Damian Stellini for JV Healthcare Ltd replied that Bidders had a ten day period of grace to physically submit the originals since the Bid Bond would have been already opened and the latter was submitted electronically.

Dr Christopher Mizzi for the Department of Contracts remarked that there was a discrepancy in the Letter of Objection dated 26 January 2017 submitted by the Appellants since it mentioned that it was submitted two days after the submission of the Tender.

Dr Franco Agius for the Department of Contracts wanted to finally draw the attention of the Public Contracts' Review Board that this information was to be found in the Bid Bond file where the acknowledgment issued was also filed.

Dr Agius also noted that in the Letter of Objection dated 26 January 2017, the Appellants made a reference to the fact that the Bid Bond was presented by means of a CD for which Dr Carl Grech on behalf of the Appellants confirmed that this was submitted online.

Dr Grech then submitted that he wanted to make a distinction in the mind of the Public Contracts Review Board wherein in the offer submitted by his clients was not rejected because there was no Bid Bond but because the latter was not submitted on time which was something completely different from when there was no Bid Bond.

The arguments which the Contracting Authority was making were that Article 5.1(a) could not be applied because of the Bid Bond and there was no level playing field because other economic operators might have been discouraged because there was the Bid Bond.

The Appellants continued by saying that they have opened the Bid Bond with the bank on 14 November 2016 and was submitted online with the rest of the documents, therefore all the arguments which the Department of Contracts and Central Procurement and Supplies Unit were raising because of the fact that there were no Bid Bonds were not applicable for this case since there were no Bid Bonds.

The only thing which the Department did not have was the original Bid Bond but all the arguments raised in the Reasoned Letter of Reply were only right in the case that the Bid Bond was not submitted. If the Bid Bond existed but was submitted late, these arguments were not valid according to Dr Grech.

The Appellants argued that this Appeal was a matter of time and that their offer was discarded because the original Bid Bond was submitted late. Any arguments in the Reasoned Letter of Reply which regarded the need of a Bid Bond, for which JV Healthcare Ltd were in agreement, were null since the document was submitted after the deadline of submission.

Mr Damian Stellini for JV Healthcare Ltd said that when the Contracting Authority have asked them anyway to submit the original Bid Bond which they did immediately as proved by the rubberstamp.

Dr Franco Agius, the Legal Representative for the Department of Contracts countered that the point of all this was clear. In their opinion this point was also debated in sentences issued by the Hon Court of Appeal namely the decision 278/2014, Cherubino Ltd vs Department of Contracts decided on 31 October 2014 wherein the latter said,

“Din il-Qorti ġa kellha l-okkażjoni tesprimi ruħha fis-sens li darba li d-dokumenti marbuta mas-sejha esiġiet l-original tal-garanzija, kopja tal-istess mhux suffiċjenti – Projekte Global Ltd v Kunsill Lokali Marsaskala, deċiża fis-7 ta’ Ottubru 2014. Il-Klawżola 8.1 tad-dokument tas-sejha kienet ukoll tgħid li offerta bla garanzija originali tkun skwalifikata awtomatikament.”

Dr Agius then mentioned other similar cases decided by the same Hon Court of Appeal such as Projekete Global Ltd vs Kunsill Lokali Marsaskala decided on 7 October 2014, BAC Ltd vs Department of Contracts decided on 19 December 2016 which illustrates the same point, namely that if the original Bid Bond was requested, the original Bid Bond had to be submitted.

Once it was established that the contract with which you were bound with the public stated that the original Bid Bond was requested, that contract should not be changed. At the end of the day, the Tender Document was simply a contract and the Hon Court of Appeal has

repeatedly said that the latter binds all parts concerned and binds also the Government with the public whether one has submitted an offer for a Tender or not.

If the requisites that one had to submit a Bid Bond for an original document had to be submitted by 23 November 2016 without having the faculty to do so were changed, the principles of transparency and level playing field were breached.

Dr Agius could see no reason why a Bid Bond submitted two days late had to be accepted and that the Department of Contracts always tried to show with facts that whatever was published was to be respected even in uncomfortable situations.

Dr Carl Grech, the Legal Representative for JV Healthcare Ltd concluded by saying that the original Bid Bond was submitted for which Dr Anthony Cassar, the chairman of the Public Contracts Review Board added that it was submitted late.

At this stage, the Public Hearing was adjourned to Tuesday 21 February 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by JV Healthcare Ltd (herein after referred to as the Appellant) on 27 January 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2131/2016 listed as Case No 1021 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Carl Grech

Appearing for the Contracting Authority: Dr Franco Agius

Whereby, the Appellant contends that:

- a) Its offer was rejected due to the non-submission of the original Bid Bond. In this regard, JV Healthcare Ltd contend that the soft copy submitted should have sufficed enough proof that the guarantee in favour of the Central Procurement and Supplies Unit was actually in effect;**

- b) Every effort should have been made by the Contracting Authority to save the Tender especially when one takes into account the fact that the Appellant was the only Bidder and the non submission of the Bid Bond within the stipulated period was a minor omission;**

- c) One of the reasons why the Central Procurement and Supplies Unit rejected their offer was out of fear of creating a precedent in such a circumstance. In this regard, JV Healthcare Ltd contend that if its offer was not disqualified, Appellant would not have been given an advantage, since it was the only Bidder;**

- d) In accordance with the Electronic Commerce Act (Chapter 426 of the Laws of Malta), the Electronic Version of the Bid Bond suffices the requirements and deems to be equivalent to the Original Document;**
- e) Under the Public Procurement Regulations, there are remedies whereby missing documentation in a Tender Submission can be corrected. In this regard, the Contracting Authority failed to apply this remedial action to rectify this slight omission.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 30 January 2017 and its verbal submissions during the Public Hearing held on 9 February 2017, in that:

- a) The Tender Document clearly dictates that the Bid Bond should be submitted in its original form and failure to abide by this condition would mean that the respective Bid would be automatically disqualified.**

In this regard, the Central Procurement and Supplies Unit contend that it has abided by the conditions as laid out in the Tender Document whilst at the same instance, the Appellant had failed to comply with it.

b) The Evaluation process was carried out in accordance with the provisions of the Public Procurement Regulations, in that, as stated clearly and explicitly in the Tender Document,

“Failure to submit the original Bid Bond will automatically disqualify the offer”

In this regard, the Principle of Self Limitation should prevail;

c) The only reason for rejecting the JV Healthcare Ltd’s offer was due to the non submission of the original Bid Bond;

d) The fact that, had they accepted the soft copy of the Bid Bond whilst taking into account that the Appellant was the only Bidder, the Contracting Authority would have deviated from the provisions of the Tender Document;

e) The Electronic Commerce Act does not include bank guarantees, yet at the same instance, the submission of the Bid Bond is governed by the Tender Document;

- f) The Contracting Authority will not accept the fact that the Public Procurement Regulations allow for the missing documentation in a Tender can be corrected.**

This Board, after having treated the merits of this case, arrived at the following conclusions:

- 1. With regards to the Appellant's First Grievance, this Board would like to first and foremost emphasize the fact that the submission of the Original Bid Bond, as and when requested in a Tender Document is of great importance.**

It is one of the main conditions dictated in the Tender Document when such documentation is requested. At the same instance, whenever such a guarantee is dictated, it is stipulated that this important document is to be submitted in original form.

The sole reason why the original is to be submitted is that, it is only the original document which can be traded, hence the emphasis is placed in a Tender Document that only the original document is to be submitted. Failure to abide by these conditions will automatically result in the disqualification of the Bid.

In this particular case, JV Healthcare Ltd submitted a soft copy through the Electronic Public Procurement System and therefore no original document was received by the Contracting Authority.

In accordance with the principle of self limitation, the Central Procurement and Supplies Unit, quite properly and correctly disqualified the Appellant's offer.

In this Board's opinion, there was no need for the Contracting Authority to request the original document after the closing date of the dictated submission of the Bid Bond in the original form. In this regard, this Board does not uphold the Appellant's First Grievance.

- 2. With regards to the Appellant's Second Grievance, this Board had already pointed out that the submission of the original Bid Bond was an important requirement in the Tender Document. This Board, at the same instance accepts the fact that every effort should be made by the Contracting Authority to save a Tender from being disqualified. At the same time, the Central Procurement and Supplies Unit should not go in breach of its own provisions dictated in the Tender Document. If the latter dictated the submission of the original Bid Bond and the latter was not submitted, the Contracting**

Authority is never expected to breach the principle of self limitation for the purposes of saving the only offer in a Tender Process.

JV Healthcare Ltd is also claiming that this was a minor omission. This Board has already established the fact that the submission of the original Bid Bond, as and when requested in a Tender Document, is of a great importance and is not to be regarded as a minor requirement.

The importance of this document in its original form is emphasized in Clause 8.1 of the Tender Document, wherein, in bold letters it states that,

“If the original Tender Guarantee (Bid Bond) is not submitted by the date and time indicated in Clause 2 above, the respective Bid will be automatically disqualified”

In this regard, this Board does not consider the non submission of the Original Bid Bond in time to be a minor omission, but rather a grave one and to this effect does not hold the Appellant’s Second Grievance.

- 3. With regards to JV Healthcare Ltd's Third Contention, this Board opines that the fact the Appellant was the only Bidder does not mean that the Central Procurement and Supplies Unit can be in breach of the conditions as laid out in the Tender Document.**

The Principle of Self Limitations applies in all circumstances whether there is one Bidder or more. At the same instance, the fact that the Contracting Authority would not be giving any advantage to the Appellant's offer, does not credibly holds.

The principles and provisions do not apply in accordance with the number of Bidders but must be strictly adhered to in each and every circumstance. The fact that JV Healthcare Ltd was the sole Bidder does not, in any credible way, mean that they were the only supplier of such products. In fact, this Board opines that there might be other financial reasons relating to the provision of the Bid Bond why other Bidders did not submit an offer. In this regard, this Board does not uphold the Appellant's Third Contention.

- 4. With regards to the Appellant's Fourth Grievance, this Board opines that the only binding document is the Tender Document. The latter document is drawn up in a legal form of a contract having specific**

conditions in accordance with the requirements of the Contracting Authority and the Public Procurement Regulations.

The Central Procurement and Supplies Unit has all the rights to lay down conditions in the Tender Document as long as these are legal and reasonable to attain. In this particular case, the Tender Document requested the original Bid Bond by a certain date and JV Healthcare failed to submit the same. At that point in time, the Central Procurement and Supplies Unit had all the rights at law to declare the offer null.

With regards to Chapter 426 of the Laws of Malta regarding the Electronic Commerce Act, this Board does not credibly relate such provision to override the specific condition dictated in the Tender relating to the submission of the Bid Bond in the original form.

The Bid Bond is imposed upon by the Contracting Authority, so that if the Bidder defaults in his obligations, the Central Procurement and Supplies Unit will penalise the same Bidder by forfeiting the amount of the guarantee and the Contracting Authority can only cash the guarantee if it produces the original document.

Electronically scanned copies of guarantees are not realisable instruments. In this regard, this Board does not uphold the Appellant's Fourth Grievance.

- 5. With regards to the Appellant's Fifth Contention, this Board justifiably opines that nowhere is it stated, in the Public Procurement Regulations that in the event of a missing document, this omission can be corrected.**

This Board, as had on many occasions, affirms the fact that missing documentation as requested in a Tender Document can never be corrected. It is an established fact that JV Healthcare Ltd failed to submit the original of a very important document.

The dictated document cannot be substituted by a copy as the latter has no effective realisable value, so that the original document was missing and under no circumstance this can be corrected.

This Board would also point out that the Appellant's claim that the failure to submit the original Bid Bond was a slight omission, has already been dealt within the preceding paragraphs wherein the importance of the original Bid Bond was firmly emphasized. In this regard, this Board does not uphold the Appellant's Fifth Contention.

In view of the above, this Board confirms the decision of the Central Procurement and Supplies Unit to cancel the Tender and finds against JV Healthcare Ltd. However, it also recommends that the deposit paid by the Appellant should be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

21 February 2017