



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

Dr Theresa Zammit Lupi opened by stating she applied for a Tender and she received a Letter from the Contracting Authority saying that there was a Letter of Reference which was missing. She said that this was beyond her control since in a Clarification Meeting which was held, it was decided that the Reference Letters had to be directly sent to the Department of Contracts instead of these being directly sent through the Electronic Public Procurement System.

During this Clarification Meeting, the Appellant has asked whether it was a problem if the Letters of the Reference were to be sent directly to the Department of Contracts and the latter answered that this was not a problem.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether this means that it was not a problem if the Letters were to be sent directly to the Department of Contracts for which Dr Theresa Zammit Lupi replied in the affirmative.

Dr Franco Agius, the Legal Representative for the Department of Contracts added that there was no contestation regarding the matter.

Dr Theresa Zammit Lupi added that she has checked with her referees whether the Letters were sent and both of them confirmed this. The Appellant added that this was a bureaucratic hinge for which she was being unfairly penalised.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that one had to stick with the Tender Document. If the latter requested two Letters of Reference, therefore two Letters of Reference had to be sent and received. On the other hand it was not the Appellant's fault if these Letters did not arrive.

Dr Franco Agius, the Legal Representative for the Department of Contracts said that he has brought a witness who can confirm what the latter received with regards to the Appellant's Bid.

At this point, Mr Joseph Caruana, an employee within the Registry Section of the Department of Contracts holding ID Card 266568 M, was summoned by the Department of Contracts to testify under oath before the Public Contracts Review Board.

Dr Theresa Zammit Lupi asked whether an amendment can be done at this stage but Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this was not possible.

Dr Theresa Zammit Lupi then asked why she was going to be penalised for a fault of the British Mail for which Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that here the discussion regarded the cancellation of a Tender which occurred since the Notary to the Government has received only one Letter of Reference from the Appellant.

Mr Carmel Esposito, a member of the Public Contracts Review Board, asked whether it could have been the case that the references came in directly for which Dr Franco Agius, the Legal

Representative for the Department of Contracts said that this was the first time that Reference Letters were requested. Usually, Bidders quote their referees and then it was the job of the Contracting Authority to seek references from the quoted people.

Dr Theresa Zammit Lupi said that she did not understand then why at one point the Notary of the Government contacted her for the European Single Procurement Document Form.

Dr Franco Agius, the Legal Representative for the Department of Contracts said that this was a different thing.

Dr Theresa Zammit Lupi countered that if the Contracting Authority has contacted her for the European Single Document Form, therefore she should have been contacted also for the missing Letter of Reference.

Dr Franco Agius then proceeded to explain that a Tender Requirement can fall either under Note 1 which concerned the Bid Bond, or Note 2 which concerned missing or wrong information such as in this case, the European Single Document Form or else Note 3 wherein no Clarifications or Rectifications were allowed. The Technical Offer usually falls under Note 3. In this case, as also established by the Tender Document, the Letter of Reference falls under Note 3 and therefore neither Clarifications nor Rectifications were allowed.

Dr Theresa Zammit Lupi said that she had uploaded in the Electronic Public Procurement System in Note 2 a covering note which referred to the two referees by their name and asked whether the Contracting Authority could have contacted them,

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that since this was part of the Technical Offer, the Contracting Authority was bound by the Public Procurement Regulations not to request such documentation. The Bidder is responsible to ensure that all documentation was sent to the Contracting Authority as requested by the Tender Document. Dr Franco Agius, the Legal Representative for the Department of Contracts agreed with the latter statement.

Dr Theresa Zammit Lupi asked whether she can present the missing document for which Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied in the negative adding that at this point the missing document is invalid. The fact that at Opening Stage, the Notary to the Government did not have this Letter of Reference led to the Evaluation Board to deem that as missing documentation.

Dr Theresa Zammit Lupi asked whether this can be amended for which Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied in the negative since the Contracting Authority was bound by the Public Procurement Regulations.

Dr Theresa Zammit Lupi then asked what will happen next for which Dr Franco Agius, the Legal Representative for the Department of Contracts added that if the Notary to the Government still requested the service, a fresh Tender was to be re-issued.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that here the discussion was about a Tender Cancellation. If a new similar Tender was to be reissued, one has to be careful that all documentation was to be submitted in time.

Dr Franco Agius, the Legal Representative for the Department of Contracts submitted that neither the latter nor the Notary to the Government had an Objection to refund the deposit back to Dr Zammit Lupi.

Mr Carmel Esposito, a member of the Public Contracts Review Board asked whether she could have submitted the missing documents by hand for which Dr Franco Agius, the Legal Representative for the Department of Contracts replied in the Affirmative whilst adding that these could have also been sent by registered mail.

At this stage, the Public Hearing was adjourned to Friday 21 July 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.

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**This Board,**

**Having noted this Objection filed by Dr Theresa Zammit Lupi (herein after referred to as the Appellant) on 27 June 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 3043/2016 listed as Case No 1068 in the records of the Public Contracts Review Board, issued by the Notary of the Government (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Theresa Zammit Lupi**

**Appearing for the Contracting Authority: Dr Franco Agius**

**Whereby, the Appellant contends that:**

a) Her offer was discarded due to the alleged non submission of one of the “*Letter of References*”. In this regard, Dr Theresa Zammit Lupi maintains that since these Letters of Reference were to be sent by the referees direct to the Contracting Authority, it was beyond her control that one of the Letters of References was not received by the latter, although she was assured by the particular referee that such communication was in fact made.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 13 July 2017 and its verbal submissions during the Public Hearing held on 17 July 2017, in that:

a) The Notary to the Government maintains that the “*Letters of Reference*” requested in the Tender Document formed part of the Technical Specifications so that reference should be made to Note 3 in Clause 7 wherein no clarification or rectification were allowed.

This same Board also noted the Testimony of the witness namely, Mr Joseph Caruana duly summoned by the Department of Contracts.

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

- 1. This Board, after having examined the relative documentation and heard the verbal submissions made by both parties concerned, opines that this Appeal refers to the non receipt of mandatory specifications as dictated in the Tender Document.**

**In this particular case, the Tender Document requested two “Reference Letters” and the Notary to the Government received only one. At the same instance, this Board justifiably notes that these “Letters of Reference” formed part of the Technical requisites of the Tender, so that, as per Note 3, no Clarification or Rectification was allowed.**

**In this regard, this Board, as had on numerous occasions, would like to respectfully emphasize that the Evaluation board can only assess an offer on the submitted documentation and in this case, Dr Theresa Zammit Lupi’s offer was missing one of the references dictated in the Tender Dossier. This was also confirmed, (under oath), by the witness duly summoned by the Department of Contracts. At the same instance, it is the onus and obligation of the Bidder to submit the information so requested in the Tender.**

**This Board opines that the Evaluation Board had no other option but to reject the Appellant's offer and hence cancel the Tender, since this was the only offer submitted.**

**In view of the above, this Board finds against Dr Theresa Zammit Lupi. However, since the Tender has been cancelled, this Board recommends that the deposit paid by the latter is to be fully refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*21 July 2017*