

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1178 – CT 3068/2017 –Tender for the Upgrade of Triq il-Labour and p/o Vjal Sir Paul Boffa, Vjal Sta Lucija and Triq Giuseppe Garibaldi (Phase 3 of the Construction of a Multi-Level Interchange at Nodes EA20a and EA21 on Route 1 (Marsa)**

The publication date of the call for tenders was the 20<sup>th</sup> October 2017 whilst the closing date of the call for tenders was the 6<sup>th</sup> February 2018. The estimated value of the tender (exclusive of VAT) was € 49,477,983.

There were eight (8) bidders and nine (9) bids for this tender.

Trinita Joint Venture filed an appeal on 21<sup>st</sup> May 2018 against the Contracting Authority's decision to exclude their bid as it was not the cheapest priced offer satisfying the administrative and technical criteria. A deposit of € 50,000 was paid.

On 13<sup>th</sup> June 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Trinita Joint Venture**

Dr Massimo Vella	Legal Representative
Dr Shazoo Ghaznavi	Legal Representative
Dr Charlon Gouder	Legal Representative
Dr Tonio Cachia	Legal Representative
Perit Malcolm Gingell	Representative
Mr Emanuel Bonnici	Representative
Mr Frank Schembri	Representative
Mr Vincent Borg	Representative
Mr Anton Schembri	Representative
Perit Sandro Magro	Representative
Mr Carmelo Penza	Representative
Ms Annalise Pace	Representative

#### **Recommended Bidder – Ayhanlar Yol Asfaltlama**

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Dr Tansel Tugal	Legal Representative
Mr Ifran Kahraman	Representative

## **Contracting Authority – Transport Malta**

Dr Alessandro Lia

Mr Ray Stafrace

Ms Roberta Ciangura

Perit Sarah Pace

Mr Keith Tanti

Perit Robert Zerafa

Ms Ethel Demicoli

Legal Representative

Chairperson Evaluation Committee

Secretary Evaluation Committee

Member Evaluation Board

Member Evaluation Board

Member Evaluation Committee

Representative

## **Department of Contracts**

Dr Franco Agius

Dr Chris Mizzi

Assistant Director

Procurement Manager

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, invited Appellants to make their submission.

Dr Massimo Vella, Legal Representative for Trinita JV requested the Chairman's permission to enter a preliminary plea. He requested access to documents in the tender file which were not of a confidential nature. Trinita JV consider that there are flaws in the preferred bidder's points made in their reasoned Letter of Reply, as for instance in the non-submission of samples. There were objections to key personnel where they confirmed that they had requested to change a particular person. This is something usually asked for by the Contracting Authority. Further, there was the point regarding the lack of concrete batching and asphaltting plant (herein after referred to as plant) in Malta – if it was the intention to use mobile plant that would be an infringement of the tender conditions.

Dr Franco Agius, Legal Representative and Assistant Director of the Department of Contracts stated that this point has already been dealt with in the Department's reply. Legislation obliges the Director of Contracts not to give out confidential information. There was also the Data Protection Act to consider as a further barrier not to disclose information. Bidders' information is confidential as it is data sensitive, and although the Public Contracts Review Board is allowed access to all information this is not open an open door.

In reply, Dr Vella quoted Regulation 40 § 2 para (c) which stipulates which information is not confidential and the Board should be guided by it. The Data Protection Act did not apply to companies such as the bidders. Appellants had a clear and legitimate interest in asking for certain information which should be provided following the rules of transparency laid out in the Public Procurement Regulations.

The Chairman asked Appellants to clarify if the only information they were seeking was regarding the plant and machinery and the key experts.

Dr Antoine Cremona, Legal Representative of Ayhanlar Yol Asfaltlama, said that the PCRFB had dealt with similar cases in the past. Appellant was using this procedure to go on a fishing exercise in the hope of building a case. This is not how public procurement works, and there are many cases in European and local courts that dealt with this point. Regulation 40 § 2 was used out of context and it is not correct to state that information of what is confidential is limited, and it does not regulate who can or cannot have a right to confidential information. He cited case law (such as A.Mifsud vs Sliema LC) as guidance to the Contracting Authority, and pointed out that even under the Freedom of Information Act there was a balance between transparency and competing information and a request for information had to be specific and then there was a process and a review to go through. Appellants did not have a case; they are fishing in the hope of building a case.

Dr Massimo Vella said that the information he was seeking was necessary to make a proper case.

Dr Alessandro Lia, Legal representative of Transport Malta, said that this was not a case of missing information. The Board has all the necessary information already and will hear grievances and come to the necessary conclusions.

Dr Franco Agius referred to the ECJ judgement in the case Varec SA vs Etat belge (C 450/06) where it was established that there is not an automatic right to information. It was up to the PCRB to use its discretion bearing in mind the damage that could arise in divulging certain information.

This point was re-iterated by Dr Cremona, following which the Chairman proposed a recess to enable the Board to consider this preliminary plea.

On resumption the Chairman said that after considering the points made, the Board decided that it will not give any information that is sensitive. Applicant was requesting information which might well come out in the proceedings. He assured the parties that the information was available.

Dr Vella stated that following the Chairman's assurance that the information was available he accepted the ruling. He then went on to deal with the two issues in contention – the lack of samples and the non-availability of the batching and asphalt plants. On issues that will not be particularly raised during the hearing he will rely on the written submissions. Page 10 of the technical specifications required a list of equipment which must be available at the time of the bid. Three items, namely the asphalt plant, the concrete batching plant and the onsite yard formed the core of the issues. According to the reply sent by the Contracting Authority it emerges that bidder was relying on mobile plants for batching and asphalt, whilst Trinita JV had all the necessary plant available in Malta. The ESPD also had the same requirement, and it was fundamental that the equipment had to be located in Malta. Mobile plant required permit to be installed on site and required an Environmental Impact Assessment (EIA). The tenderer has to comply with Planning Permit 2309/14 (P/P) which does not allow for the manufacturing of asphalt or concrete – therefore the P/P would need to be amended to allow onsite manufacturing – if this amendment was granted it would be in breach of the tender.

According to Dr Vella the technical specification in the tender required the submission of samples. Note 3 of the tender states no rectification is allowed and therefore samples had to be submitted with the offer. There is a conflict in the Contracting Authority's (Authority) argument, as one bidder, during the tendering process asked if it was possible to submit drawings and structure calculations in lieu of samples, and the Authority argued that a clarification did away with the provision to submit samples. Regulation 38 of the Public Procurement Regulations did not give the power to change tender as there was not an inconsistency. He quoted Case 879 which dealt with an appeal by Pharma-cos where the ePPs required samples to be submitted but was disqualified for failure to submit same. He then tabled a copy of a receipt issued by Transport Malta acknowledging receipt of samples by Trinita JV to fulfil the tender requirements and this requirement had never changed. Post-facto the Authority was arguing that the tender had been amended. He said there were three Appeal Court judgements backing the principle that the

tender criteria must be adhered to. In this case it was clear that samples had to be submitted with the offer and the Authority had confirmed that samples were not provided.

Perit Malcolm Gingell (418776M) testified on oath that he co-ordinated Trinita JV's tender offer. He was familiar with the P/P and confirmed that there was no reference in the permit allowing manufacturing of cement and asphalt: neither was there an EIA permit which referred only to generation of vehicle movements. He said he was well aware of what was available locally and he knew that there were no facilities available to meet the requirements of the tender.

The next witness was Perit Robert Zerafa (503976M) who tabled an affidavit. Under oath he confirmed that a clarification meeting was held and he had produced a list of submissions, which he tabled, required in the tender. All items listed had to be submitted with the tender and there was no requirement to submit samples, as this original requirement had been removed after a site meeting and Clarification Note 3. The original request for samples covered the pedestrian bridges which formed a minor part of the tender. He confirmed that nowhere did the tender indicate where samples had to be submitted.

In reply to questions by Dr Cremona, witness stated that he was aware that there were eight bidders and nine bids on this tender and only Trinita JV had submitted samples which were in regard to the internal finishes of the lifts. Witness confirmed that samples had not been requested neither had they been tested once received.

Next to take the witness stand under oath was Mr Ray Stafrace (245157M) who stated that he was the Chairperson of the Evaluation Committee (Committee). The tender did not mention that the plant had to be fixed or available in Malta at the time of the bid; therefore the tender was acceptable. The Evaluation Committee had met the Chief Executive Officer of the Planning Authority (PA) who advised them that plant and equipment on site would be covered by the existing development permit. This advice was not given in writing. The Evaluation Committee had met the Director of Contracts who had advised them not to hinder international competition, more so as this was an E.U. funded project. In reply to a question the witness stated that under Article 70 (2) para 7 of the Laws of Malta no permission is required in respect of plant and equipment if development is covered by a planning permission. He confirmed that he was not familiar with P/P 2309/14 nor had he consulted the Environment and Resources Authority (ERA) with regard to obtaining an EIA. All contractors had been treated the same and the Evaluation Board was not required to verify the availability of plant.

Dr Vella stated that the P/P covers only the execution of the works but does not permit fabrication of asphalt and concrete on site. It therefore stands to reason that the P/P has to be modified to fulfil the tender – this makes the tender non-compliant. He contended that he cannot accept the answer of Mr Stafrace regarding the ruling by the CEO of the PA as this was hearsay (*detto del ditto*). Section 4, part 1(a) stated that the contractor has to comply with all provisions of the P/P which only covers the execution of works but not the manufacturing onsite.

Dr Cremona mentioned that what was stated by Mr Stafrace was not hearsay but passing on of advice given by the PA. He said that this was a fresh point raised the first time in this appeal, and Appellants had not provided any proof to back this argument.

Perit Zerafa, still under oath, was recalled to give further evidence. He stated that he was present at the meeting with the CEO of the PA and confirmed that they had been told that it was not necessary to have a further permit for plant on site. He had not gone into the details of the permit once the Committee had been assured that there was no need for further permits. He was not aware as to whether the permit specifically allowed manufacturing.

Dr Vella said that it was clear that the Committee was not familiar with the P/P and members had held only a generic discussion with the CEO of the PA. It was essential for the permit to specifically allow manufacturing, which was not the case in this instance, as it only covered development. Three witnesses had confirmed that there was not a specific permit allowing the use of plant on site, this apart from the fact the environmental requirements obliged compliance. In relation to the samples, the list of submissions produced by Perit Zerafa did not amend the tender. It was merely an excuse to try to save the tender decision by the Committee and there were no legal basis to amend it.

Dr Franco Agius mentioned that the tender was published on the 20<sup>th</sup> October 2017, Clarification Note 3 was issued on the 4th January 2018 and was published before the closing date of the tender (6<sup>th</sup> February 2018). There was no requirement to send samples, nor indeed was there an address where to send them. Trinita JV were the only bidders to send samples and therefore the lack of samples by other bidders was no basis for disqualification even if the Board were to find as Appellant claimed, some ambiguity in the tender.

This point was re-iterated by Dr Alessandro Lia who said that the Board had to consider and evaluate the merits of the clarification note issued prior to the closing date and why it was that only Trinita JV had submitted samples. The PCRb had to determine if the correct decision had been taken and if the tender requirements had been met.

Dr Cremona said that the points raised regarding the lack of samples by other bidders was out of context as the tender closed the day before the receipt of samples by Transport Malta. All case law quoted by Applicants was completely irrelevant as the whole point of the clarification was to resolve any irregularities. Appellants had made several assumptions which were not based on any facts. There was also a procedural point – if Appellants made an allegation it had to be proven. The Evaluation Committee had made their assessment and the Applicants had to prove that the assessment was not right.

Dr Franco Agius said that the Contracting Authority was not contesting that samples had been submitted, accepted and acknowledged, but both on this point and on the submissions made on the question of the mobile plant the Evaluation Committee has reviewed the requirements of the tender documents and found them satisfactory. The Authority was not obliged to, but decided to verify briefly with the PA and they confirmed that the plant falls within the parameters of the

existing permit. Bidder had fully complied with the conditions and Section 4 to which Appellants had referred was in relation to a contractor not to a bidder.

In his final submission on these two points Dr Vella said that the testimony of Perit Gingell, that the use of plant on site was not permitted, had not been contested. The P/P does not allow such manufacturing and the onus was on the Board to check the P/P. It was a fundamental fact that the Evaluation Committee had made the wrong assumptions on this point.

Dr Shazoo Ghaznavi, Legal Representative of Trinita JV, requested the return of Mr Stafrace to the witness stand. He asked the witness who were the key experts nominated by the preferred bidder, whether they were qualified and if they had met the tender requirements at submission stage and was also asked to indicate if these key experts were subsequently changed.

Mr Stafrace said that the Evaluation Committee had examined the qualifications of the nominated experts and found that all were compliant except one person who did not have a warrant to practice in Malta. As permitted under Note 2 of the tender bidder was allowed to replace that person with the approval of the Director of Contracts. The Committee treated all key experts equally and had accepted their qualifications and experience at face value. The tender document did not require the Committee to check qualifications.

The Chairman of the Board asked the witness what happened when the Committee realised that a key expert was found not to qualify.

Mr Stafrace replied that nominee was replaced and the replacement met all the tender requirements.

Dr Ghaznavi formally requested that the replacement candidate be formally identified as once publicly known, it will be found that he was not qualified.

The Chairman said that the Board assumes responsibility to investigate and ensure that the person is qualified.

To further questioning Mr Stafrace said the replacement person had five years experience in major civil engineering work in which he had taken a leading role and he had experience as a structural engineer in one project. (At this stage witness referred to the C.V. of the individual in question and confirmed that he had the necessary qualifications).

Dr Ghaznavi asked that it be formally minuted that he requested the name of the key expert. He went on to state that applicant did not have a key expert at tendering closing stage. The Director of Contracts agreed with the Appellant that key expert did not meet the requirements, and thus the bidder asked for rectification to appoint an alternative. It is clear that they were faced with a situation where an important element at offer stage was not compliant with the tender. The Department of Contracts claim that the rectification was based on Note 2(a) which deals only with documentation and there are various European Commission documents which confirm that

the Committee is permitted to clarify minor points or submissions-nowhere does it allow changes to the key elements of the offer. Key experts form part of the technical offer which is regulated by Note 3 which states that no rectification shall be allowed in the technical offer. This includes key experts, so why did the Committee allow it?

Called again to testify on this point Mr Stafrace stated that the key expert was not part of the technical specifications as a few months previously the template regarding key experts had been changed by the Department of Contracts. He further stated that the whole bidder's document relating to the key expert had been changed.

Dr Ghaznavi noted that this was a substantial change and not a clarification of a minor detail.

After further minor submissions by all parties' legal representatives the Chairman thanked all the parties and declared the hearing closed.

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**This Board,**

**Having noted this Objection filed by Trinita' Joint Venture, (hereinafter referred to as the Appellants) on 21 May 2018, refers to the contentions made by the same Appellants with regards to the award of the Tender of Reference CT 3068/2017 listed as Case No 1178 in the records of the Public Contracts Review Board, by Transport Malta, (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Massimo Vella**

**Dr Shazoo Ghaznavi**

**Appearing for the Contracting Authority: Dr Alessandro Lia**

**Whereby, the Appellants contend that,**

- a) They have entered a preliminary plea whereby they requested the availability of documentation pertaining to the Preferred Bidder, but which are not confidential. In this regard, the Appellants maintain that through such documentation, they can prove that the successful Bidder was not compliant, in particular with the submission of samples and the appointed Key Experts;**
  
- b) The Preferred Bidder was strictly relying on mobile plants for asphaltting and concrete batching. In this regard, the Appellants insist that, to be situated on site, such mobile plants require special permits together with an Environment Impact Assessment. Moreover, Planning Permit 2309/14 does not allow onsite manufacturing processes so that the present planning permit needs to be amended whilst, on the other hand, Trinita' Joint Venture have all the necessary plant and equipment available and in Malta;**

- c) The Tender Document requested samples of particular items stipulated in the technical specifications and the Preferred Bidder failed to submit such a mandatory requirement;**
  
- d) Transport Malta failed to verify the qualification and experience of the Key Experts so indicated in the Preferred Bidder's offer.**

**This Board also considered the Contracting Authority's "*Letter of Reply*" dated 24 May 2018 and 31 May 2018 and its verbal submissions during the Public Hearing held on 13 June 2018, in that:**

- a) The Authority insists that, prior to the Board deciding whether to disclose any information related to the Preferred Bidder's offer, the Public Contracts Review Board should consider whether such information requested is deemed to be classified as confidential or sensitive commercial information;**
  
- b) Transport Malta maintains that the Evaluation Committee had conducted the necessary assurances that the plant proposed by the preferred bidder, does not require any specific permit to operate provided it is situated on site on which the necessary planning permission has been issued for the tendered works;**

- c) **The Contracting Authority also contends that, although the original requisite in the Tender Document dictated the submission of samples on particular items, through clarifications and meetings, it was established and to the knowledge of all Bidders, that such samples are not included as submissions at Tendering Stage.**

**This same Board also noted the testimony of the witnesses namely,**

- 1. *Perit* Malcolm Gingell, duly summoned by Trinita' Joint Venture;**
- 2. *Perit* Robert Zerafa, duly summoned by the Department of Contracts and Transport Malta;**
- 3. Mr Ray Stafrace, duly summoned by the Department of Contracts and Transport Malta.**

**This Board has also noted the documents submitted by *Perit* Robert Zerafa, which consisted of an affidavit showing a list of submissions to be made by bidders at tendering stage.**

**This Board, after having examined the relevant documentation to this Appeal and heard submissions made by all the interested parties, including the testimony of the witnesses, opines that the two main issues to be considered first are:**

- a) The Plant and Machinery to be deployed by Ayhanlar Yol Asfaltlama;**
- b) The submission of samples;**
- c) The Key Experts offered by the Recommended Bidder.**

**With regards to the preliminary plea raised by Trinita' Joint Venture, after having established what information relating to the Preferred Bidder's offer was being requested, this Board opines that the information so requested does not consist of any particular information which would benefit the Appellants in their representations. At the same instance, this Board has also considered the fact that such information will be identified and discussed during this Public Hearing and in this regard, this Board does not uphold Trinita' Joint Venture's preliminary request.**

- 1. With regard to the Appellants' alleged claim that the Recommended Bidder does not have available the necessary plant and machinery in**

**Malta and with the necessary permits, this Board would respectfully refer to Section 7, (Selection and Award requirements), wherein there is clearly specified the type of plant and equipment which the bidder must have available to enable him to embark on the project. In this regard, the Appellants' concern refers to asphalt plant and concrete batching plant.**

**One must clearly establish from the very start, that the Tender Document does not stipulate that the plant and equipment so listed must be situated in Malta. At the same instance, there are no restrictions in the Tender Dossier, as to the type of asphalt or concrete batching plant, or whether such plant and equipment must be available at tendering stage. All the ESPD requested was,**

***“Please provide details of the relevant tools, plant or technical equipment available to you in relation to this procurement exercise.”***

**This Board also noted that the Preferred Bidder declared that he will bring over the listed plant and equipment over to Malta and included therein are mobile asphalt plant and mobile concrete batching plant.**

**With regards to the latter mentioned mobile plants, Appellants are contesting that such equipment requires a planning permit for their deployment and the Preferred Bidder has not obtained such permit. From the submissions made, this Board was informed that since the project has the necessary planning permits, the equipment to be located on the site of the project does not require an additional permit. In this regard, reference is made to the testimony of the Chairman of the Evaluation Committee, as follows:**

*“Well, first of all, the Tender did not mention any requirement that the plant has to be fixed or available in Malta. So, the Committee concluded that any plant, whether mobile or fixed is acceptable as per requirements. The difference is that while fixed plants in Malta would probably have planning permits already in hand, a mobile plant would perhaps require a separate permit.*

*In this regard, the Committee delved deeply into the matter and discussed it profoundly and it decided to take the matter in hand to see how it can be resolved. In this respect, the Committee held a meeting with the CEO of the Planning Authority to explain to him the case of the mobile plant and what would be the requirements of the Planning Authority for the issue of the permit.*

*The CEO immediately referred us to an Article in the Development and Planning Act where it stated that the asphalt plant and the batching plant, being equipment on site, will be automatically covered by the Development permit itself and therefore for us was no issue at all, the question of the permit. It was settled once and for all.”*

**At this particular stage of the evaluation process, the Committee had to rely on the information given to it by the Chief Executive Officer of the Planning Authority, who advised that, there is no need for a permit for plant and equipment located on the site of the project which has all the necessary building permits.**

**This Board would like to emphasize that the whole purpose of a European Single Procurement Document is to avoid, from the very beginning of a tendering procedure, unnecessary documentation and certification which could be verified on successful offers only and to smoothen the contents of the submissions thus facilitating the procedure. In this particular case, and in accordance with the European Single Procurement Document submitted, the Preferred Bidder satisfied all the conditions as so dictated in the Tender Document and apart from being fully compliant, was the cheapest.**

**On the other hands, Trinita' Joint Venture did not present credible evidence that Ayhanlar Yol Asfaltlama requires another planning permit for the location and utilisation of the mobile plants being proposed. This Board was also not presented with proof that the Recommended Bidder could not carry out the tendered works with the plant and machinery so declared to be available, although not present in Malta. In this regard, this Board does not uphold Trinita Joint Venture's contention.**

- 2. With regards to the Appellants' claim that the Preferred Bidder did not submit the samples as duly requested, this Board would refer to page 372 of the Tender Dossier wherein, for three of the listed requirements under note 11.6, (cabin requirements), namely floor finish, cabin doors and interior cabin sides, samples had to be provided. In this respect, this Board establishes that originally, in the Tender Dossier, samples of the above mentioned requirements had to be submitted. However, this Board refers to clarification note Number 3 dated 4 January 2018, with particular reference to the answer to question 6, wherein it is stipulated that:**

***“Bidders are to clearly identify what is required at Tender Stage and what is required at contract stage. The requirements listed in the Tenderers’***

*technical offer are mandatory to be submitted at tender stage. Any other requirements listed in the specifications, such as those listed under appendix 1-10, section 5 (h) (xiv) are required at contract stage.”*

**One will appreciate that clarification notes form part of the Tender Dossier and at the same time, acknowledges that they also supercede any condition or requirement previously denoted in the original Tender Document. Through the above clarification note, Transport Malta is emphasizing the distinction between what is required at submission stage of the offer and what will be requested at contract stage. At the same instance, this Board notes that the Contracting Authority had specifically indicated that what is specified in the technical offer is mandatory and the issue of samples is not denoted in the technical offer of the Tender Dossier.**

**This Board is also aware that during a clarification meeting which was held on 9 November 2017, the Contracting Authority issued, in point form, what was to be submitted at Tender Stage, and samples do not feature as one of the items on this list. In this regard, this Board would refer to an extract of the testimony of *Perit Zerafa*, one of the adjudicators, as follows:**

*“Yes, but I can quote my colleague, it was further clarified in two instances, whereby, as I mentioned before in the last slide, (the list), which was the most important slide and it was presented by myself as a very important slide because there is the list of submissions, in point form, so that one does not have a difference of interpretation of what is to be submitted and if we wanted the samples to be in that list, there would have been another point and samples written on the list.”*

**On the issue of samples, this Board also notes that out of nine offers submitted, only the Appellants submitted samples and in this regard, it is evidently clear that the latter failed to follow the instructions and directions given by Transport Malta in clarification note 3 and the established list of submissions given during the clarification meeting held on 9 November 2017. From the credible testimony of the witnesses, submissions and documentation available, this Board is convinced, that the samples were not required at tender stage and the Appellants’ claim in this regard does not, in any justifiable way, render the Preferred Bidder’s offer non compliant. In this respect, this Board does not uphold Trinita’ Joint Venture’s contention.**

- 3. With regards to the issue of Key Experts indicated in Ayhanlar Yol Asfaltlama’s offer this Board would, first and foremost, refer to the**

**testimony of the Chairman of the Evaluation Committee in this regard,  
as follows:**

*“The Evaluation Committee examined the qualifications and experience of the Experts submitted by the Preferred Bidder. They were compliant except in one case only, where the nominated person did not have a warrant to practice, issued by the Qualifying Board tal-Periti.”*

**Furthermore, this Board was made aware of the action taken by the Evaluation Committee in respect of this non-compliant key expert, in that:**

*“This recruitment falls under Note 2A where the bidder is allowed to clarify, rectify or produce any missing documentation. So the Committee, with the approval of the Director of Contracts, wrote to the Bidder requesting him to nominate an Expert that satisfied the requirements of the Tender Document.”*

**For clarity’s sake, this Board would refer to Note 2A which states that,**

*“Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation and/or submit any missing documents within five (5) working days from notification.”*

**It is amply clear that Note 2A allowed the Evaluation Committee to rectify this deficiency in one of the Key Experts nominated by the successful Bidder and in this regard, this Board opines that the Evaluation Committee acted in a just and transparent manner, so that this issue does not affect the valid compliance of the Preferred Bidder’s offer.**

- 4. With regards to the Appellants’ concern that the Preferred Bidder’s workforce will not be paid in accordance with local labour regulations, this Board would, first and foremost, point out that the Appellants did not present any tangible proof that the successful Bidder will pay his labour force rates which are below the dictated minimum in Malta for such similar work. Secondly, once the project is being executed in Malta, labour laws and conditions will adhere to the local legislation in this regard.**

**On the other hand, it will be Transport Malta’s obligation and responsibility to ensure that local regulations are strictly applied by the**

**Contractor. This Board opines that such an issue and concern should not be considered any further, as it does not, in any credible way, render the Preferred Bidder's offer as non-compliant.**

- 5. With regards to the eligibility of the successful Bidder, this Board would pertinently point out that the Preferred Bidder is a Turkish Company and Turkey enjoys an observer status within the World Trade Organisation. One has to refer to article 2.1 of the General Rules Governing Tenders, wherein it is stated that:**

*“Participation in tendering is open on equal terms to all natural and legal persons of Member States of the European Union, the Beneficiary Country and any other Country.”*

**The above mentioned article 2.1 is self explanatory, in that it is clearly stating that the tender is open for offers from any other country and Turkey falls within that parameter, therefore this contention should be immediately dismissed.**

**In view of the above, this Board:**

- a) Upholds Transport Malta' s decision in awarding the Tender to Ayhanlar Yol Asfaltlama;**
- b) Does not uphold Trinita' Joint Venture's contentions;**
- c) In the circumstances, this Board can only recommend that the deposit paid by the Appellants be forfeited.**

Dr Anthony J Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*3 July 2018*