

PUBLIC CONTRACTS REVIEW BOARD

Case 1463 – CT 3008/2020 – Tender for all Works required for the Restoration, Rehabilitation and Upgrading of the Grandmasters’ Palace, Valletta in an Environmentally Friendly Manner

The tender was published on the 24th February 2020 and the closing date of the tender was the 21st April 2020. The estimated value of the tender (exclusive of VAT) was € 3,955,542.99.

On the 3rd July 2020 De Valier Co Ltd filed an appeal against Heritage Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid was administratively and technically non-compliant and that the tender was recommended to be cancelled. A deposit of € 19,778 was paid.

There were three (3) bidders.

On 23rd July 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – De Valier Co Ltd

Dr Marco Woods	Legal Representative
Mr Mario Cassar	Representative

Contracting Authority – Heritage Malta

Dr Alessandro Lia	Legal Representative
Arch David Zahra	Chairperson Evaluation Committee
Mr Mark Anthony Spiteri	Secretary Evaluation Committee
Arch Veronica Micallef	Member Evaluation Committee
Arch Katya Maniscalco	Member Evaluation Committee
Arch Anthony Galea	Member Evaluation Committee

Department of Contracts

Mr Mark Mizzi	Representative
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Interested Party – Kultura

Dr Jonathan Mintoff	Legal Representative
Mr Arturo Arezzo	Representative
Mr Marco Anfuso	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Marco Woods Legal Representative of De Valier Co Ltd outlined the three reasons for Appellants' appeal, namely being administratively and technically non-compliant as well as the cancellation of the tender. The letter of appeal detailed in full the contentions for Appellants' complaints.

The Contracting Authority claims that the requested clarifications on three issues was not replied to, despite the fact that Appellants had replied 'No' in all three instances and uploaded their reply on the European Single Procurement Document (ESPD). This is confirmed by the fact that the online platform would not have accepted the upload if any replies had been left blank. Copies of ESPDs of the 20th May, 21st and 22nd July 2020 were tabled (Doc 1) indicating that all questions had been answered correctly by Appellants.

Ms Marilyn Attard (37587G) called as a witness by Appellants testified on oath that she is a Project Officer at De Valier Co Ltd and explained the process she had followed in preparing and submitting the tender and also how she had submitted electronically the replies to clarification on the three queries raised by the Authority. In reply to a question she confirmed that she had inputted the changes electronically and uploaded in 'pdf' format the scanned and signed copy as confirmation.

Mr Jason Grech (185071M) called as a witness by the PCRb testified on oath that he is an Assistant Director on E-Mail tendering at the Department of Contracts. He explained in details how the ESPD process works and that it was possible to proceed in submitting an offer even if items were omitted. Certain replies on the form were preselected in the positive form and it was up to the bidder to change those if they did not meet with their requirements. The documents presented dated 21st and 22nd July (Doc 1 above) were previews for the use of the economic operator before submitting an offer and are not a true view of what is submitted – any prints taken of those previews lack certain information when the final version is submitted.

In reply to questions witness stated that a print out is a preview before saving and is not the final document and the same applies for print screen shots. Requests for clarifications can be inputted manually without the need to go into the system, and once the replies are saved and exported then they can be printed as a final version. It is the evaluation committee that decides what action to take if a clarification is not replied to in time – the system does not decide.

Ms Marilyn Attard recalled to give further testimony stated that the procedure she had followed was that on receipt of the clarification request she had altered the ESPD on line and changed the 'No' to 'Yes' on all three issues. She then saved it, printed it, signed it and sent it to the evaluation committee.

Mr Jason Grech re-iterated that the correct procedure is to amend the profile, save it and request exporting of file.

Architect David Zahra (383679M) called as a witness by the PCRb testified on oath that he was the Chairperson of the evaluation committee. He stated that the original replies on three items in the offer

were clearly not correct and rectification was requested. The reply on the print out in the 'Yes' or 'No' section were blank, so in fact the committee had received less information than originally. On line the reply was also blank. Witness confirmed that the rejection letter indicated that there were 'No' replies by the Appellant and no rectification on the subsequent online profile.

Recalled to give further testimony Ms Marilyn Attard after explaining again the procedure she had followed in dealing with the clarifications said that she had not used the export button after saving the document and printing it.

Mr Mario Cassar (57359G) called as a witness by Appellants testified on oath that he is the Managing Director of De Valier Co Ltd. He stated that he was present when the original offer was submitted and when the clarifications were sent and that the offer had been rectified following their normal procedure by amending the ESPD through the online profile and submitting on line. The evaluation committee had advised him that they had not found the amendments and there were blank answers on the three points in question.

Dr Woods then moved on to the second reason for Appellants' rejection, namely the technical non-compliance. This is covered by article 15.1 in the tender requiring completion of works on the *Piano Nobile* by month four of the contract. In both the Construction Management Plan (CMP) and the Gantt chart Appellants confirmed that the works would be completed by month four (points 11 to 19 in the Gantt chart).

Architect Luran Dimech (8591G) called as a witness by Appellants testified on oath that he was responsible for preparing the CMP and Gantt chart which followed precisely the specifications of the BOQ and after discussions with the key expert and the contractors. Item 19 in the Gantt chart covers completion by month four of all the works affecting the *Piano Nobile*. In reply to a question witness stated that by the time Item 19 was reached all first fix works affecting the fabric would be complete.

The Board directed that the testimony given at this stage by Engineer Ruben Curmi (27172G) should be excluded due to him being in the same room while a previous witness was giving his testimony.

Mr Mario Cassar was recalled to give further testimony. He stated that at the site visit emphasis was made that this work was of a specialist nature and had to be undertaken with great care. He confirmed that the CMP and the Gantt chart reflected that the work on the *Piano Nobile* would be completed by month four. Witness explained that he had a background in civil works and was familiar with what was required on this contract. The mechanical and electrical work listed as item 52 in the Gantt chart did not affect what the Authority requested in regard to month four. The Gantt chart was not meant to provide minute details of the work process but covered all the requirements of the BOQ. Witness insisted that Item 19 in the Gantt chart includes work up to month four and this is made clear in item 16.4.19 of the chart.

Architect David Zahra was recalled to give further testimony. He stated that due to the complicated scope of the work the Authority had requested, in section 15.1 of the special conditions of the tender that the performance programme is split up into four phases. All the work in phase one up to first fix had to be completed by month four. The Appellants' Gantt chart does not give any indication that the first fix would be finished by month four – there were references to trenching work but there was no reference

to other milestones such as electrics and other works. The Authority had no assurance that the work would be completed as specified; indeed the first mention of first fix of the mechanical and electrical works in the Gantt chart is in item 52 in month five. Item 19 in the chart refers only to floors but there is much more work involved to floors and ceilings and it is only in month five that the chart indicates that the whole of the first fix would be complete. In reply to questions witness stated that there is no reference in the Gantt chart to completion of all works in the *Piano Nobile* by month four. The tender required first fix completion of the infrastructure by month four but this was not referred to in the chart.

Questioned by the Chairman witness stated that the highest offer was the only compliant one received but budget restrictions stopped the Authority from accepting it as this was an EU funded project.

In concluding his submissions Dr Woods said that Appellants offer was shown to be compliant and the tender should be awarded to them and cancellation of the tender was not necessary. Witnesses had confirmed that the ESPD was correctly submitted by Appellants and it was inexplicable how the Authority could claim that they had not received it. Appellants maintain that they are fully compliant on this point. It was testified that both the Gantt chart and the CMP confirm that all works on the *Piano Nobile* would be completed by month four. Since the offer was compliant, within budget and the cheapest it should be awarded accordingly to Appellants.

Dr Jonathan Mintoff Legal Representative of Kultura said that according to the ruling in EJC Case 599/10 if the technical offer was not clear the Authority was not obliged to rectify it. In line with Article 123 of the Public Procurement Regulations the cancellation of the tender should be dealt with through a negotiated procedure.

Dr Alessandro Lia Legal Representative for Heritage Malta said that according to a technical witness it had been established that the printout that was exhibited of the ESPD did not mean that the correct submission had been made and it must be accepted that the clarification had not been replied to. Although Appellants were claiming that items 11 to 19 of the Gantt chart include completion of all the work by month four it is clear that this does not include work to the walls and ceilings. Reference to item 52 shows that some of the above work would be carried out in month five. The contested use of the term 'up to first fix' is clear language and is taken to mean up to and including first fix.

The chairman thanked the parties for their submission and declared the hearing closed.

End of Minutes

Decision

This Board,

having noted this objection filed by De Valier co Ltd (hereinafter referred to as the Appellants) on 3rd July 2020, refers to the claims made by the same Appellants with

regard to the tender of reference CT 3008/2020 listed as case No. 1463 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Marco Woods

Appearing for the Contracting Authority: Dr Alessandro Lia

Appearing for the Department of Contracts: Mr Mark Mizzi

Appearing for interested party: Dr Jonathan Mintoff

Whereby, the Appellants contend that:

- a) Their first grievance refers to the Authority's alleged claim that, they did not submit the replies to the clarification request. In this regard, Appellants maintain that, they had replied to all the requested information by denoting a 'No' on the relative issues raised by the Authority and uploaded their reply on the ESPD document.**
- b) Their second contention relates to the alleged non-compliance with article 15.1 relating to completion of works on 'Piano Nobile'. In this respect, Appellants maintain that, they had denoted in their offer that, such requested works will be completed by the end of month 4 as per Gantt Chart duly submitted.**
- c) Since the Appellants insist that, their offer is compliant and within the Authority's financial estimate, a cancellation of the tender is therefor not justified.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 14th July 2020 and its verbal submissions during the virtual hearing held on 23rd July 2020, in that:

- a) The Authority maintains that, Appellants failed to reply to the clarification request on three issues and although Appellants are claiming that a reply was submitted via the EPPS, the Authority confirms that, it had not received such information.**
- b) With regard to Appellants’ second grievance, the Authority maintains that, it was highly important that, the first phase up to the first fix had to be completed by month four. In this regard, same Authority noted that in accordance with Appellants’ Gantt Chart not all the works up to the first fix was to be completed by month 4.**
- c) The Authority also insists that, since there were no compliant offers that fell within the estimated value of the tender, the Evaluation Committee had no other option but to recommend the tender for cancellation.**

This same Board also noted the testimony of the witnesses namely:

Ms Marilyn Attard duly summoned by De Valier Co Ltd

Mr Jason Grech duly summoned by the Public Contracts Review Board

Architect David Zahra duly summoned by the Public Contracts Review Board

Mr Mario Cassar duly summoned by De Valier Co Ltd

Architect Lauran Dimech duly summoned by De Valier Co Ltd.

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 various witnesses duly summoned opines that, the issues that merit consideration are three-fold namely;

- **Appellants' reply to the clarification request**
- **Completion of first phase up to first fix**
- **Cancellation of tender**

Each of the above issues will be treated as follows:

1. Reply to the Clarification Request

1.1. In this regard, Appellants are claiming that, they did reply to the clarification request dated 11th May 2020 whereby, the Authority is inviting the Appellants to review their reply to three issues related to exclusion criteria, as follows:

“2 As per Tender Section 1 Instructions to Tenderers, Article 5(B) Exclusion Criteria (C): Grounds relating to insolvency, conflicts of interest or professional misconduct

*Please refer to **Guilty of misinterpretation, withheld information, unable to provide required documents and obtained confidential information of this procedure***

included in the ESPD under the ‘Grounds relating to insolvency, conflicts of interest or professional misconduct.’

The question states as follows:

“Can the economic operator confirm the four exclusion grounds, that it has not been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, that it has not withheld such information, it has been able without delay, to submit the supporting documents required by a contracting authority or contracting entity, and it has not undertaken to unduly influence the decision making process of the contracting authority or contracting entity, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award?”

Your Answer for this question was NO.

Request: You are kindly requested to review, and confirm or otherwise your answer by replying to this request. Should you need to correct your answer you may rectify your position by amending your ESPD through your position by amending your ESPD through your online profile and submit a revised ESPD.

- 3. As per Tender Section 1 Instructions to Tenderers, Article 5 (B) Exclusion Criteria (D): Purely National Exclusion Grounds.’*

Please refer to Information concerning possible blacklisting related to Misrepresentation included in the ESPD under ‘Purely National Exclusion Grounds.’

The question states as follows:

“can the economic operator confirm that:

- a) It has not ben declared guilty by a Court or Tribunal of a serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria,*
- b) It has not withheld such information,*
- c) It has been able, without delay, to submit the supporting documents required by an organisation or contracting entity.”*

Your answer was No.

Request: You are kindly requested to review, and confirm or otherwise your answer by replying to this request. Should you need to correct your answer you may rectify your position by amending your ESPD through your online profile and submit a revised ESPD.

4. As per Tender Section 1 instructions to Tenderers, Article 5(B) Exclusion Criteria (D): ‘Purely National Exclusion Grounds.’

Please refer to Information concerning possible blacklisting related to undue influence on the decision making process included in the ESPD under ‘Purely National Exclusion Grounds.’

The question states as follows:

“Can the Economic Operator confirm that it has not undertaken to unduly influence the decision making process of the organisation or contracting entity, to obtain confidential information that may confer upon it undue advantages in the procurement

procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award?”

Your answer for this question was NO.

Request: you are kindly requested to review, and confirm or otherwise your answer by replying to this request. Should you need to correct your answer you may rectify your position by amending your ESPD through you online profile and submit a revised ESPD.”

- 1.2. Appellants presented copies of ESPD dated 20th May and 22nd July 2020, indicating that, all the questions raised by the Authority, through the clarification request, had been attended to and replied upon.**
- 1.3. It is evidently clear that, the amended ESPD claimed to have been submitted by Appellants, for some reason, did not arrive at the receiving end. In this respect, this Board examined closely the testimony of Mr Jason Grech, assistant director in charge of the e-Tendering System at the Department of Contracts, who explained, in detail, the technical procedure to be adopted whilst replying to a clarification request.**
- 1.4. It was technically established that, the copy of ESPD claimed to be sent, indicating the necessary replies to the clarification request, did not represent a copy which was also received by the Authority and an extract from the testimony of Mr Grech, will substantiate such an occurrence, as follows:**

“Avukat : *Minix nargumenta max-xhud. Ha nirreferih ghal dokumenti ohrajn li gew prezentati. Dawk id-dokumenti li gew prezentati 22nd July, hemm Dok 1 u Dok 2. Jghid ESPD before clarification u ESPD following clarification. Dawk rajthom?*

Xhud : Nerga nghidlek dawn iz-zewg ESPDs li baghtli s-Sur Zarb, dawk mhumiex il-propja correct use tal-ESPD. Dawk huma printouts ta' meta jkollok preview and save. Jigifieri inti l-bidder qed jaghmel preview u imbghad jissejva u wara ghandu buttuna to export PDF l-ESPD bid-dettalji b'kollox. Issa hu li ghamel, ghamel printout, jigifieri dik li qed turini hemm hekk hija printout ta preview and save. Dik mhux qeghda biex tipprintjaha. Dik qeghda biex taraha u tissejvaha. Jekk tipprintja dik ser ikollok informazzjoni nieqsa”

1.5. This Board also took into consideration the explanation given by the same witness regarding the proper procedure for the submission of offers through the e-PPS with special reference to replies to clarification requests and in this regard, an extract from Mr Grech’s testimony indicates that, Appellants, while submitting the reply to the clarification, did not follow the proper procedure for the submission of same through the online system, as follows:

“*Xhud : Mela inti trid tirranga mill-profil tieghek online, taghmel save, meta taghmel save tohorgok mill-screen u tiehdok fi screen iehor fejn ghandek buttuna biex tghidlek to export the PDF, dan l-ESPD shih kif imlejt u inti.*

Tissejvjah u you upload it mar-risposta tieghek tal-clarification. Issa hi qabel m'ghamlet save, ghamlet print, ghafset Control P ghax ahna ma rridux li jiprintjaw minn hemm u din meta inti printjajtha qed tara b'ghajnejk, qed tara li YES u NO ma jidhrux. Jigifieri din meta tiprintjaha qed tinduna li m'ghandekx l-informazzjoni li l-evaluation committee jrid

Avukat : *Jigifieri dik il-printout zgur li mhijiex post save*

Xhud : *Le ma jistax ikun ghax inti kif tissejvja, johorgok mill-screen. U jiehdok fil-punt fejn anzi tissejvja dak il-PDF biex tibghatu”*

1.6. At this stage of consideration, this Board took note of the testimony of Ms Marilyn Attard, the person who actually keyed in the replies to the clarification requests, who explained the procedure adopted by her in submitting the replies, as follows:

“Chairman : *Hu pacenzja u spjegali, meta inti rcevejt il-clarification request, ezatt x'ghamilt?*

Xhud : *Mela l-ewwel irrangajt l-ESPD. Issa biex irrangajt l-ESPD, irrid nidhol online u irrangajt ghax kelli 3 issues li kienu qed jghidu li ghamilthom NO u kelli naghmilhom YES. Allura klikkjajt fuqhom u ghamilthom YES. Imbghad issejvjajt*

Chairman : *Jigifieri inti li ghamilt huwa rrangajt l-ESPD*

Xhud : *Irrangajt li kelli ezatti. Issa jiena dik ma nistax inhallieha vojta. Hija impossibbli li thallieha vojta. Bilfors irid ikun hemm xi haga ttikkjata. Jew NO jew YES bilfors. U jiena kienet NO u ghamiltha YES. Imbghad*

issejvjajtha. X'hin issejvjajtha imbghad printjajtha, iffirmajnieha u tajniehom kopja. Imma inti dejjem trid tirrangaha online ghax huma qalulna biex nirrangawha online. Ghalhekk qeghda sistema online”

According to the credible technical testimony of Mr Jason Grech, the above procedure was not the correct method to apply in sending replies to clarification requests, via the e-PPS.

1.7. This Board, after having taken into consideration the testimony of both Mr Jason Grech and Ms Marilyn Attard, opines that, the copy of the ESPD allegedly submitted by Appellants after replying to the clarifications, was not actually transmitted on the online system to the Authority and in this regard, this Board, does not uphold Appellants' first contention.

2. Completion of Works up to First Fix

2.1. The main issue refers to the fact that, the tendered works are regarded by the Authority as being very complex and delicate to perform, so that, such works involve various contractors and the timing of the completion of each stage of work and such a programme is of the utmost importance for the proper execution of the tendered works.

2.2. This Board would respectfully refer to Article 15.1 of the special conditions wherein, it clearly indicating, the programme of works, as follows:

“Article 15: Performance Programme (Timetable)

15.1 The Contractor shall submit, for the approval of the Supervisor, a detailed Programme of Works together with a Works Method Statement and Construction Management Plan within five (5) days from last signature of the Contract and prior to the commencement of any works on site. The approval of the programme of works by the supervisor shall not relieve the Contractor of any of his/her obligations under the contract. The Programme of Works shall take into consideration the site imposed constraints outline above under Art. 9.

The Contractor is to plan his works accordingly to achieve the following intermediate milestones:

- 1. All the works in the corridor areas, which necessitate any intervention to the fabric, and shall impinge on the completion of the restoration intervention to the Piano Nobile artworks (*floors walls and ceilings) up to first fix, need to be completed by month 4.*
- 2. The works in the armoury (first floor) are to be completed by month 12*
- 3. The Ucceleria shall be completed by month 14.*
- 4. The main visitor lift, presently located in Prince Alfred Courtyard (to be renovated), existing or new, has to be operational throughout the months of November and December due to official functions of the OPR.”*

2.3. At the same instance, the Authority stipulated, as a mandatory technical requisite, a Gantt Chart to show the distribution of the tendered works over a period of 18 months. In this regard, this Board noted the testimony of Architect David Zahra, who explained, in a very clear manner, the requirements involved and the phase of works as shown in Appellants' Gantt Chart, as follows:

“Xhud : *Minhabba kemm hu kkumplikat dan il-progett, minhabba li hemm hafna kuntratturi jridu jiffittjaw flimkien u qed nahdmu fil-palazz tal-president, ahna tlabna li l-progett jinqasam f’qisu 4 fazzjiet principali u dawn kienu cari u tondi miktubin f’Artikolu 15.1 tal-ispecial conditions. Imbghad sabiex ahna nkunu certi li l-kuntrattur jimxi ma dawn il-milestones, ahna tlabnieh jipprezenta gun chart biex jurina kif ser jippjana x-xoghol u jilhaq dawn il-milestones. Ghalhekk din qeghda fit-technical submission u mhijiex rectifiable. Issa jidher car almenu ghalina li mic-chart prezentata m’hemm l-ebda indikazzjoni li l-first fix, il-parti tal-kuritur, ser tibda fl-ewwel 4 xhur tal-progett. Barra minn hekk inkwetat iktar issa wara li ntqal dak li smajt qabli ghaliex jidher li lanqas fhimna ezatt ix-xoghol li hemm fil-kuritur.*

Chairman : *U x’hemm nieqes perit allura?*

Xhud : *Ghaliex qed naghmlu referenza ghall-item partikolari fejn rridu nghaddu certu trinek that l-irham pero qed ninsew u ghamel alluzjoni zghira ghaliha jidhirli s-Sur Cassar ghax-xoghol li qed isir fuq il-hitan u barra minn hekk hemm xoghol li jridu jsiru fuq il-sabiex nghaddu d-dawl, l-E\$LV u anke sistemi ohrajn li ahna nsejjhulha bhala back bone infrastructure ghall-bqija tas-sit. Jigifieri bhala project leader daqxejn inkwetat. Pero biex ma niddevjawx, il-mechanicalfix iva hemm bzonnha u l-unika item*

fil-gun chart li rajna li tirreferi għall-first fix hija item 52 u din tibda fil-hames xahar. Barra minn hekk ta min isemmi wkoll li l-milestones l-ohrajn ukoll mhumiex cari fil-bqija tal-gun chart. Jigifieri fl-ebda mument jien m'ghandi assikurazzjoni li l-kuntrattur ser ilesti x-xoghol, fir-raba' xahar fil-kuritur, fit-tmax-il xahar fl-armerija, fl-erbatax-il xahar . . . u imbghad ilestilna l-progett fl-18th month. Jigifieri il-kuntrattur fil-gun chart tiegħu kull m'ghamel illistja it- . . . u qassam il-progett fuq 18-il xahar. Pero m'hemmx il-logika li ahna pretendejna bhala kumitat biex naraw biex inkunu kunfidenti li dan il-kuntrattur fehem kif ahna xtaqnieh jindirizza l-progett

Avukat : *Jigifieri item 52 x'inhu ezatt?*

Xhud : *Huwa mechanical and electrical first fix u dan jibda fit-18 ta' Dicembru meta ahna l-progett suppost beda kieku m'hemmx l-appell f'Lulju. Jigifieri ghaddew l-4 xhur*

Chairman : *Dak il-progett huwa fil-first fix zgur hux*

Xhud : *QEd naqra hielek Mr Chairman. Dak huwa l-unika moment fil-gun chart kollha fejn hemm alluzjoni għall-first fix. Ahna bhala kumitat kull ma kellna f'idejna hija din il-gun chart u din il-game chart l-unika moment fejn il-kelma first fix tissemma hija f'item 52"*

2.4. From the submission made and the testimony of Architect Zahra, this Board notes that, the purpose of requesting the Gantt Chart, was to disclose the phase of works as duly stipulated in the tender document, however, from the credible explanations by Architect Zahra, it is being established that, by the end of month 4, as duly shown in Appellants'

Gantt Chart, not all the works are included for the first fix, which has to be finalised by end of month 4 i.e. some of the work to the walls and ceilings which form part of the first fix, will be carried out in month five.

2.5. This Board, examined closely Appellants' Gantt Chart and from such documentation, established that, not all the works which form part of the first fix, will be finished by month 4. At the same instance, this Board was made aware that, since more than one contractor will be assigned for the works, a delay in a particular work phase will jeopardise the date of completion of the whole project.

3. Cancellation of Tender

3.1. With regard to Appellants' third grievance, this Board would respectfully point out that, there were no compliant offers within the estimated value of the tender and although the information about the offers are known to all, one should also take into consideration the delicate works which has to be performed by the successful bidder and the magnitude of the tender itself.

3.2. Under the circumstances, the Authority has no other option but to cancel the tender. At the same instance, this Board opines that, not enough time was dedicated by the Authority to explain the nature of works to prospective bidders, prior to the closing date of the offers and in this regard, this Board recommends that, more explanatory effort should be devoted by the Authority to ensure that, prospective bidders

are aware of the delicate works and their nature, prior to the closing date of the new tender.

3.3. With regard to the interested party's request in that, the tender should not be cancelled but to adopt a negotiated procedure, this Board would respectfully point out that, it is the Authority which has the remit to decide whether to opt for a negotiated procedure and not this Board.

In conclusion, this Board opines that,

- a) With regard to Appellants' first contention, this Board, after having heard the credible explanations given by the technical witness Mr Grech, establishes that, the information which was not received by the Authority was due to the incorrect application of the system, by the sender.**
- b) With regard to Appellants' second contention, this Board, after considering the submissions made during the hearing, with special reference to the testimony of Architect Zahra, is convinced that, Appellants' offer did not include all the works of the first fix which had to be completed by month 4.**
- c) This Board would also point out that, under the prevailing circumstances, the Authority has no other option but to cancel the tender.**
- d) It is not the remit of this Board to recommend a negotiated procedure to this tender but rather it is the Authority to decide the way forward.**

In view of the above, this Board,

- i. does not uphold Appellants' contention,**
- ii. upholds the Authority's decision in the cancellation of the tender,**

- iii. in view of the fact that, the tender is being cancelled, directs that an amount of €19,000 be refunded to Appellant,**
- iv. directs that the Authority, prior to the closing date of the new tender, allocates sufficient explanatory sessions to prospective bidders to ensure that all bidders are aware of what is actually being requested by the Authority.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

31st July 2020