PARLAMENT TA' MALTA

IT-TNAX-IL LEĠIŻLATURA

P.L. 3181

Dokument imqiegħed fuq il-Mejda tal-Kamra tad-Deputati fis-Seduta Numru 183 tat-22 ta' Lulju 2014 mill-Ministru għall-Iżvilupp Sostenibbli, Ambjent u Tibdil fil-Klima, f'isem il-Ministru għall-Finanzi.

_____

Raymond Scicluna
Skrivan tal-Kamra



The 2013 Report on the workings of the Public Contracts Review Board

This report is submitted in terms of Regulation 85 of Part XIV of the Public Procurement Regulations of 2010.

Foreword

The Public Contracts Review Board is hereby presenting the annual performance report for the year ending 31st December 2013.

With the effect from 1st June 2013, a new Board of the Public Contracts Review Board was appointed and this was composed of:

CHAIRMAN
Dr. Anthony J. Cassar, Ph.D, FCMA, FIA, CPA

MEMBERS
Dr. Charles Cassar Ph.D, ECP (Substitute Chairman)
Mr Richard A. Matrenza DPE (Oxon), FRES

SUBSTITUTE MEMBER
Mr Lawrence Ancilleri, BA, MA

SECRETARY
Mr Carmel Esposito

The new Board held its first Public Hearing on 2nd July 2013. The Board convened thirty two (32) Public hearings during the period; July – December, during which eighty seven (87) objections where heard.

The new Board felt the dire need to change the priority system of the Public Hearings of appeals. During the course of the changes effected, it was established that 'Priority and Fast Track' will be addressed towards EU funded projects, Health and Educational related appeals.

This Board also felt the need to increase the number of public hearings per week to cope with the inflow of the new appeals, whilst at the same, minimising the backlog significantly.

I am pleased to report that this objective has been achieved. It is also worth mentioning that the process of the hearing and adjudication of appeals has been substantially shortened. Such duration has been reduced to an average of six (6) weeks as compared to the previous average duration of two and half (2 ½) months.

For the first time, this Board presented an 'Accountability Report' to the Honourable Minister for Finance to elaborate further the performance during 2013 in terms of financial and statistical terms. The Board also decided that such a report will be presented annually to the Honourable Minister for Finance.

A brief statistical data may perhaps illustrate the Board's performance for the year ending 31st December 2013.

Year	Regulation	Objections			Sittings	Sentences	Upheld	Rejected	c/f to next year **or** pending
	LN 296 of 2010	Received	b/f from prev year	**Total**					
2013	21	99	1	**100**	100	90	20	70	10
	83	4	0	**4**	4	4	3	1	1
	84	30	1	**31**	31	27	10	17	3
	85	2	0	**2**	2	2	0	2	0
	Total	**135**	**2**	**137**	**137**	**123**	**33**	**90**	**14**

I would like to thank all the Board Members and Staff at Public Contracts Review Board for their cooperation and continuous support.

Dr Anthony J Cassar

Chairman 20th April 2014

Table of Contents 4

Introduction..... 7

Case No 509 - KMS/TEN/035/2012 - Tender for the Provision, Delivery, Installation and Dismantling of Professional Regatta Race Rigging at the Grand Harbour for Five National Regattas 9
Case No 510 - VLC CCC/2/12 - Tender for the Cleaning of the Commercial Centre in Valletta 13
Case No 511 - VLC SSCRA/3/12 - Tender for Street Sweeping and Cleaning of the Residential Areas in Valletta 21
Case No 512 - CT/3026/2012 - Tender for the Procurement of Helicopter/s for Border Control - Armed Forces of Malta 30
Case No 513 - WSM/346/2012 - Tender for the Procurement of a Second Hand Mobile Screener ... 39
Case No 514 - WSM/346/2012 - Tender for the Procurement of a Second Hand Mobile Screener .. 44
Case No 515 - CPSU/CPU/2061/12 - Tender for the Supply of High Protein Powder..... 47
Case No 516 - CT/2074/2012 - Tender for the Construction and Finishing of a Raised Water Polo Pitch at B'Bugia 55
Case No 517 - WSM/80/2012 - Period Contract for the Transportation of Material by using Hired Hook Loaders from Sant Antnin Waste Treatment 60
Case No 518 - MRRA/W/188/2011/6 - Tender for the Supply and Laying of Natural Paving Material at Gnien Karen Grech and Community Centre at San Gwann 65
Case No 519 - DH/619/2011 - Tender for Provision of Care Workers for Sir Paul Boffa Hospital .. 70
Case No 520 – 06/12 - Tender for Supply & Installation of Playing Field Equipment, Soft Flooring and Fencing in Gnien il-Kunsill Lokali, Gnien Profs. Anton Tabone & Gnien Mons. Guzeppi Minuti 75
Case No 521 - SLC/T/606/2012 - Tender for Road Cleaning Services 80
Case No 522 - CT/3054/2012 - Negotiated Procedure – Works Tender for the Construction, Servicing, Finishing and Commissioning of the Childcare Centre and an Administrative Office at Xewkija Industrial Estate 86
Case No 523 - CT/3039/2012 - Tender for the Restoration of the Historic Fabric of Fort St Angelo, Birgu 91
Case No 524 - GGH/91/2012 - Tender for the Manufacture, Supply, Delivery and Installation of Timber Doors at the Gozo General Hospital 98
Case No 525 - CPSU/CPU/2264/2012 - Tender for the Supply of Supplements for Bacteriological Media Preparation 102
Case No 526 - GHPST/108/11 - Tender for the supply of External Collection Kit 108
Case No 527 - GHPST/536/11 - Tender for the Supply of Sterile Powder Free Surgical Gloves, Size 7.5 113
Case No 528 - ZBGLC/05/11 - Tender for Cleaning of Non-Urban Areas in Haz-Zebbug 117
Case No 529 - ZBGLC/04/11 - Tender for Cleaning of Urban Areas in Haz-Zebbug 126
Case No 530 - CT/2200/2011 - Tender for the Provision of Insurance Services to all MCAST sites in Malta and Gozo 130
Case No 531 - LCA/01/2013 - Tender for the provision of research and consultancy for the selective collection of the organic waste in tourist areas and valorisation in farm composting plants (SCOW) 137
Case No 532 - ESF/EMP/168/12 - Tender for the Provision of Training Services in ICT related subjects 141

Case No 533 - LGA/REG02/2012 - Framework Contract for the Provision of System & Financial Auditing 145
Case No 534 - LGA/REG04/2012 - Framework Contract for the Provision of Compliance Auditing 149
Case No 535 - LGA/REG04/2012 - Framework Contract for the Provision of Compliance Auditing 153
Case No 536 - LGA/REG04/2012 - Framework Contract for the Provision of Compliance Auditing 157
Case No 537 - LGA/REG03/2012 - Framework Contract for the Provision of System Auditing 160
Case No 538 - LGA/REG03/2012 - Framework Contract for the Provision of System Auditing 164
Case No 539 - VLC/CMHW/1/12 - Tender for the Collection of Mixed Household Waste in Valletta 168
Case No 540 - SVLC/T/07/2012 - Tender for Street/Pavement Sweeping, Weeding and Cleaning of Soft Areas, Gardens and Playing Fields - Santa Venera 176
Case No 541 - BLC/025/2012 - Tender for the Construction of Fleur-de-Lys Arch 182
Case No 542 - KLBO/02/2012 - Tender for the Up-keep and Maintenance of soft areas within 'Access Roads', 'Access Only and Pedestrian Streets' and 'Parks and Gardens' using environmentally friendly materials and practices 188
Case No 543 - SLC/06/2012 - Tender for the Supply of Outdoor Gym Equipment 195
Case No 544 - SPBLC/009/2013 - Tender for the Building and Maintenance of Footpaths 199
Case No 545 - SPBLC/08/2013 - Tender for the Upkeep and Maintenance of Soft Areas 209
Case No 546 - GHPST/651/2012 - Tender for the Supply of Bandages Wadding 7.5 cm 214
Case No 547 - DH 4023/10 - Tender for the Supply, Installation and Commissioning of an Ultrasound Machine for ENT 217
Case No 548 - CT/2017/2012 - Pre-Contractual Complaint - Tender for the supply of Topiramate 100mg tablets 220
Case No 549 - MCH 136/2012 - Tender for Security Services at Mount Carmel Hospital 224
Case No 550 - CT/3004/2012 - Negotiated Procedure: Tender for the Design, Fabrication, Construction and Erection of a Protective Shelter over the Tarxien Megalithic Temples 228
Case No 551 - CT/3004/2012 - Negotiated Procedure: Tender for the Design, Fabrication, Construction and Erection of a Protective Shelter over the Tarxien Megalithic Temples 235
Case No 552 - HM/22/02/2012 - Service Tender for 3D Documentation of Fort St Angelo, Birgu 244
Case No 553 - MTA/828/2012 - Service Tender for the Provision of Mathematical Modelling for a Beach Replenishment Project.....251
Case No 554 - MIP/TQF/GEN/D32/12 - Tender for the Provision of Security Services at the Airmalta Head Office, Luqa 257
Case No 555 - T 1/2013 - Tender for the Leasing of Thirty-Seven A4 Energy Efficient Black & White Multifunction Printing Devices including Full Service Maintenance Agreement over a period of three years within the Ministry of Justice, Dialogue and the Family 261
Case No 556 - MXR/005/2012 - Tender for the Supply and Fixing of Pedestrian Guardrails and Construction of Pavements at Triq il-Kantra, ix-Xlendi and Supply and Fixing of Street Furniture for ix-Xlendi Bay 268
Case No 557 - DH/1093/2012 - Tender for Electrical Works at Rabat Health Centre 277
Case No 558 – CT 2190/2013 - Tender for the supply, delivery and distribution of diapers to

scheme B beneficiaries 281
Case No 559 - ETC/IT/Q/01/13 - Tender for the Supply of Energy Efficient Personal Computers 285
Case No 560 - MG 186/2010 Vol I - Tender for the Supply, Delivery, Installation, Commissioning, Operation (maintenance) and Decommissioning of a Wind Monitoring System in Gozo. 298
Case No 561 - MTFLC/T/01/12 - Tender for the Collection of Mixed Household Waste 292
Case No 562 - CT 3101/2012 - Works Tender for the Design, Building and Installation of a TensileMembrane Structure for the Zewwieqa Waterfront, Gozo 295
Case No 563 - CT 3080/2011 - Tender for the Design, Preparation, Management, Implementation and Evaluation of Training Programmes in Information Management 298
Case No 564 - CT 3113/2012 - Service Tender for the Provision of Specialised Training and Certification for Data Protection Officers with the Malta Public Service 301
Case No 565 - CT 2136/2012 - Tender for the Supply, Delivery, Installation, Testing, Commissioning and Certification of Grid connected Photovoltaic System at the Biosciences Building, Chemistry Building and Students' House-University of Malta 304
Case No 566 - RX 1/10 - Tender for the Provision of Local Warden Services - Regjun Xlokk 308
Case No 567 - MRRA/W/544/2012 - Tender for the Commissioning of Study to Establish Cost-Optimal Energy Performance Levels in New and Existing Residential Buildings 313
Case No 568 - MRRA/W/544/2012/1 - Tender for the Commissioning of Study to Establish Cost-Optimal Energy Performance Levels in New and Existing Offices 317
Case No 569 - CT 2023/2012 - Framework Contract for the supply of a combat uniform made with fabric compliant with environmental criteria 322
Case No 570 - QMS/U/6/2010 - Tender for the Supply of Winter Trousers to the Police Department 325
Case No 571 - DH 2458/2012 - Tender for the Supply, Installation and Commissioning of Fire Detection and Alarm System for Wards RW1 and RW4 at the Rehabilitaion Hospital Karin Grech 329
Case No 572 - MRRA/M/71/2012 - Service Tender of Chairperson Monitoring Board (Malta Embellishment Landscaping Programme) 322
Case No 573 - 06/12 - Tender for Supply & Installation of Playing Field Equipment, Soft Flooring and Fencing in Gnien il-Kunsill Lokali, Gnien Profs. Anton Tabone & Gnien Mons. Guzeppi Minuti 335
Case No 574 - CPSU/CPU/2375/12 - Tender for Sterile Disposable CS Drapes for 3 years Supply 340
Case No 575 - T/08/12 - Service Tender for the Provision of Short Courses for MCAST Staff 344
Case No 576 - RP 67/04/13 - Tender for the Maintenance of Roads - Patching, Zurrieq 347
Case No 577 - CPSU/2641/2012 - Tender for Dressing Pads 20 x 30 cm.....349
Case No 578 - CT 3115/2012 - Supply, Delivery and Installation of College (Lecture Room, Laboratory, Office, Staffroom, Auditorium) Furniture and Equimpment 352
Case No 579 - CT 3115/2012 - Supply, Delivery and Installation of College (Lecture Room, Laboratory, Office, Staffroom, Auditorium) Furniture and Equimpment 356
Case No 580 - CT 3115/2012 - Supply, Delivery and Installation of College (lecture Room, Laboratory, Office Staffroom, Auditorium) Furniture and Equimpment 360

Case No 581 - DCS/T4/2013 - Tender for the Supply and Installation of Electrical Services at Gozo College Xaghra Primary School 364
Case No 582 - MXLC 02/2013 - Tender for the embellishment and uprgrading of playing area at il-Maghluq, Marsaxlokk 367
Case No 583 - MXLC 01/2013 - Tender for the Collection of Mixed Household Waste in an enviromentally friendly manner 373
Case No 584 - MXLC 01/2013 - Tender for the Collection of Mixed Household Waste in an enviromentally friendly manner 377
Case No 585 - WSC/T/80/2012 - Tender for the Provision of Cesspit Emptying Services.....380
Case No 586 - SLC/T/608/2012 - Tender for the Collection of Mixed Household Waste 386
Case No 587 - TD/T/3088/2012 - Supply of New Transformer Installation Oil 387
Case No 588 - CPSU/CPU/14/2012 - Tender for the Hire of Transportation Services to the Central Procurement and Supplies Unit 392
Case No 589 - DH 1641/2013 - Provision of Transportation Services for CPSU - MFH 395
Case No 590 - DH 3282/12 - Supply of a Capsule Endoscopy System and Patency Capsule – Lot 1 400
Case No 591 - SLC/T/606/2013 - Tender Road Cleaning Services for Sliema Local Council 404
Case No 592 - WSM 372/12 - Period Contact for the Loading and Export of Asbestos Waste from Civic Amenity Sites found in Malta and Gozo 407
Case No 593 - WSM 079/13 - Period Contract for Security Services and Security Duties to be performed at the Sant' Antnin Waste Treatment Plant in Marsascala 411
Case No 594 - MLC/001/2013 - Tender for the Services of a 'Perit' 414
Case No 595 - CT 4042/2010 - Tender for the excavation of an undergrond tunnel from St Andrews to Maghtab 419
Case No 596 - KCM/M 313/03 - Supply of Paving Materials at Gnien il-Familja, Ta' Kercem 424
Case No 597 - CPSU 2753/2012 - Hydrocellular Foam Sacral Shaped Dressings 428
Case No 598 - CT 3120/2012 - Services Tender for the Design, Preparation, Implementation, Delivery and Evaluation of Training Courses related to the Film Servicing Industry 431
Case No 599 - CPSU/CPU 2742/12 - Tender for the Supply of Mercury Free Thermometers 438
Case No 600 - CT 2096/2011 - Framework Agreement for the Supply of National and European Union Flags 441
Case No 601 - CT 2170/2012 - Tender for the Finishing Works of Ten Appartments at No. 56 Argotti Street, Floriana 444
Case No 603 - WSD/4/2013/18 - Cottonera Dock No 1 Project - Tender for the Supply and Delivery of Various Types of Ready Mix Concrete 451
Case No 604 - CT 2023/2011 - Supply of Surgical Adhesive Drapes Used at Mater Dei Hospital 454
Case No 605 - DOI 99/07 - Service Contract for a Cameraperson to Cover Government Initaitives in Gozo 457
Case No 606 - UM 1721 - Tender for the Supply, Delivery and Installation of Lecture Rooms Furniture and Office Furniture Produced with Environmental Friendly Materials and Processes for the Corporate Research And Innovation Building, University of Malta 460
Case No 607 - UM 1716 - Tender for the Supply, delivery and Installaion of Office furniture produced with environmental friendly Materials and Processes, for the Institute of Digital games Offices at the University of Malta 464
Case No 608 - CPSU/CPU/2763/2012 - Self Adhesive Fabric Sheets SZ. 20 x 10cm 467

Case No 609 - CPSU/CPU/2288/2012 - Tender for the Supply of Technetium Generators 471
Case No 610 - TSE 1/2012 - Tender for Service of a Structural Engineer 473
Case No 611 - WSC/323/2011 - Supply of Microsoft Office Licences 477
Case No 612 - FTS/10/13 - Tender for Timber Doors for the Primary School C, Ghaxaq 481
Case No 613 - FTS/45/13 - Tender for the Supply and Installation of Extra Low Voltage Systems at that Child Care Centre at Gzira 485
Case No 614 - QLC/CBR/19/97 - Tender for the Collection of Bulky Refuse 488
Case No 615 - CT 3058/2013 - Supply of Ultra Filtration and Reverse Osmosis Modular Units for Water Reclamation 492
Case No 616 - TM 001/2013 - Consultancy Service for a Traffic Impact Statementon the Kappara Junction Project 499
Case No 617 - FTS 45/13 - Tender for the Supply and Installation of Extra Low Voltage Systems at that Child Care Centre at Gzira 503
Case No 618 - WSD 4/2013/33 - Cottonera Dock No 1 Project - Tender for Cleaning, Reinstatement and Restoration Works to Historical Dock Head 507
Case No 619 - PARK 20/2013/1 - Design, Supply, Installation, Testing and Commissioning and Certification of a Grid-Connection Photovoltaic System at the Oenology & Viticulture Research Centre, Buskett 510
Case No 620 –WSC/T/106/2012 - Repair Clamps for Metric Ductile Iron and Imperial Cast Iron Pipes.....514
Case No 621 - WSC 840/2012 - Supply of Turbidity Instruments 517
Case No 622 - WSM/68/2013 - Period Contract for the Supply and Delivery of Heating Gas Oil 520
Case No 624 - P/4584/11 - Supply and Installation of CCTV Surveillance Equipment at the Malta Police Department 524
Case No 625 - MRRA/A/1/2013/1 - Purchase of Water Purification System for the Plant Tissue Culture Lab 528
Case No 627 - WSM/048/2013 - Period Contract for the Procurement of LPG for the Qortin Gas Treatment Facility in Gozo 532
Case No 630 - CT 3051/2013 - Tender for Concrete Works and Finishes at St Pauls Link and Knights' Promenade - Dock One - Copsicua.....535
Case No 631 - TD/T/3124/2013 - Trenching Works Between Rabat Mosta and Rabat Villa Messina Substation.....540
Case No 635 - CT 2037/2013 - Tender for the Provision of Environmentally Friendly Cleaning Services to all Buildings on the Campuses of the University of Malta and the Juniour College and other University Designated Sites. 544
Case No 636 - CT 3060/2013 - Tender for the Provision of Security Services at the agency for the Welfare of Asylum Seekers (AWAS) Units and other Centres.....548
Case No 638 - PU/010/2013 - Expression of Interest / Request for Proposals (RFP) for the Provision of Legal Services 551
Case No 639 - TWO 4/2013 - Tender for Catch-Up Repairs, Replacement of Dangerous Structures, Alterations and Maintenance Works at Block 5A, Triq is-Sur, L-Isla in an Environmentally Friendly Manner.....556
Case No 640 - TWO 5/2013 - Tender for the catch-up repairs, relplacement of dangerous Structures, Alterations and Maintenance works at Block 5B, Triq is-Sur Isla.....560

PUBLIC CONTRACTS REVIEW BOARD

Case No. 509

KMS/TEN/035/2012

Tender for the Provision, Delivery, Installation and Dismantling of Professional Regatta Race Rigging at the Grand Harbour for Five National Regattas

This call for tenders was published in the Government Gazette on the 12th October 2012. The closing date for this call with an estimated budget of € 42,372.88 was the 26th October 2012.

Two (2) tenderers submitted their offers.

Mr Kevin Agius filed an objection on the 16th November 2012 against the decision of the Kunsill Malta ghall-Isport to recommend the award of the tender to Mr Franco Scicluna.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 16th January 2013 to discuss this objection.

Present for the hearing were:

Mr Kevin Agius

Dr Antonio Depasquale	Legal Representative
Mr Kevin Agius	Appellant

Mr Franco Scicluna

Mr Franco Scicluna	Recommended Tenderer

Kunsill Malti ghall-Isport

Dr Peter Fenech	Legal Representative

Evaluation Board

Mr Joseph Ludwig Cassar	Secretary

After the Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Antonio Depasquale, legal representative of Mr Kevin Agius, the appellant, made the following submissions:

i. by email dated 9th November 2012 the appellant was informed that his offer was not successful since it was not the cheapest compliant tender;

ii. albeit the appellant had requested details about the technical evaluation of the recommended tender yet this request was not entertained;

and

iii. the appellant was contending that it was not commercially viable for the bidder to carry out this contract for the amount quoted and, as a consequence, it was questionable whether the preferred bidder could provide the level of service requested in this tender.

Dr Peter Fenech, alegal representative of the Kunsill Malti ghall-Isport, the contracting authority, on his part submitted that as per letter of objection dated 15th November 2012 two points were raised, namely:-

Technical competence of recommended bidder

a. the appellant doubted the technical capacity of the preferred bidder to satisfy the technical specifications set out in the tender document;

b. that assertion was not, *per se*, sufficient for the appellant to lodge an objection because the evaluation of the technical aspects of the tender was the responsibility of the contracting authority, which, in this case had carried out the said evaluation and was satisfied that the recommended bidder did meet the requirements of the tender, including the experience required to carry out this service;

c. it was not allowed to provide the appellant with technical information of his competitor's (recommended) bid;

and

d. the contracting authority considered the recommended price of €39,895 reasonable when compared to the estimated value of €42,372 and, for that matter, it was up to the bidder to set his margin of profit.

Conflict of Interest on the part of the Recommended Bidder

a. it was not correct to claim that the recommended tenderer was an employee of the Kunsill Malti ghall-Isport;

b. whilst Mr Franco Scicluna was not an employee of the contracting authority for the duration of this tendering process, yet, in the past Mr Scicluna was engaged on a part-time basis by the Kunsill Malti ghall-Isport, along with hundreds of other coaches, with regard to the implementation of the programme 'Kids on the Move' which involved a number of sports disciplines;

and

c. the appellant has failed to demonstrate that the evaluation process carried out by the contracting authority was defective or deficient in some way and, as a result, the reason for objection brought forward by the appellant did not constitute sufficient grounds for an appeal.

Dr Depasquale remarked that whereas the appellant was satisfied with the explanation given that Mr Scicluna was not in the employment of the contracting authority, he still maintained that the recommended price was not realistic and that the recommended tenderer lacked the necessary experience.

The Chairman Public Contracts Review Board noted that, according to the evaluation report, the appellant did not submit the 'Financial Bid', which shortcoming should have led to his disqualification from the outset and which shortcoming should have been communicated to the appellant.

Dr Fenech acknowledged the mistake on the part of the contracting authority in not notifying the appellant that he had failed to submit the 'financial bid'.

The Public Contracts Review Board examined the original tender submission of the appellant and it resulted that, whereas he had indicated the price in the *tender form*, the appellant had failed to submit the 'Financial Bid' as per Volume 4 which was a mandatory requirement as per clause 16.1 *'Content of Tender' (f) (ii)*.

Mr Kevin Agius remarked that if he had been notified that the reason for non-award was the non-submission of the 'financial bid' he would not have lodged his appeal in the first place.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 16th November 2012 and also through its representatives verbal submissions presented during the hearing held on the 16th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 9th November 2012 the appellant was informed that his offer was not successful since it was not the cheapest compliant tender, (b) albeit the appellant had requested details about the technical evaluation of the recommended tender yet this request was not entertained, (c) the appellant was contending that it was not commercially viable for the bidder to carry out this contract for the amount quoted and, as a consequence, it was questionable whether the preferred bidder could provide the level of service requested in this tender, (d) whereas the appellant was satisfied with the explanation given that Mr Scicluna was not in the employment of the contracting authority, he still maintained that the recommended price was not realistic and that the recommended tenderer lacked the necessary experience, (e) acknowledged the mistake on the part of the contracting authority in not notifying the appellant that he had failed to submit the 'financial bid' and (f) if he had been notified that the reason for non-award was the non-submission of the 'financial bid' he would not have lodged his appeal in the first place;

- having considered the contracting authority's reference to the fact that (a) with regard to *Technical competence of recommended bidder*, *(1)* the appellant doubted the technical capacity of the preferred bidder to satisfy the technical specifications set out in the tender document, *(2)* that assertion was not, *per se*, sufficient for the appellant to lodge an objection because the evaluation of the technical aspects of the tender was the responsibility of the contracting authority, which, in this case had carried out the said evaluation and was satisfied that the recommended bidder did meet the requirements of the tender, including the experience required to carry out this service, *(3)* it was not allowed to provide the appellant with technical information of his competitor's

(recommended) bid, *(4)* the contracting authority considered the recommended price of €39,895 reasonable when compared to the estimated value of €42,372 and, for that matter, it was up to the bidder to set his margin of profit and (b) with regard to *Conflict of Interest on the part of the Recommended Bidder, (1)* it was not correct to claim that the recommended tenderer was an employee of the Kunsill Malti ghall-Isport, *(2)* whilst Mr Franco Scicluna was not an employee of the contracting authority for the duration of this tendering process, yet, in the past, Mr Scicluna was engaged on a part-time basis by the Kunsill Malti ghall-Isport, along with hundreds of other coaches, with regard to the implementation of the programme 'Kids on the Move' which involved a number of sports disciplines and *(3)* the appellant has failed to demonstrate that the evaluation process carried out by the contracting authority was defective or deficient in some way and, as a result, the reason for objection brought forward by the appellant did not constitute sufficient grounds for an appeal,

reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that despite the appellant's claim wherein he questioned whether the preferred bidder could provide the level of service requested in this tender the said appellant failed to demonstrate such lack of capability.

2. The Public Contracts Review Board concurs with the position taken by the evaluation board in so far as the resistance to forward to the appellant technical information relating to the recommended bidder's submission. This Board has always maintained that, apart from certain commercial sensitivity, in this instance it was more a question as to whether the appellant was basing an argument on a hunch or on concrete evidence. Whilst the former line of reasoning is not permissible at all, the latter issue concerns the fact that one seems to be more embarking on a fact finding mission which, *per se*, does equally not provide enough reason for anyone to file an objection.

3. The Public Contracts Review Board noted that, according to the evaluation report, the appellant did not submit the 'Financial Bid', which shortcoming should have led to his disqualification from the outset and which shortcoming should have been communicated to the appellant. As a matter of fact this Board, following a thorough examination of the appellant's tender submission, establishes that the said appellant has erroneously failed to submit the 'Financial Bid' as per Volume 4 which was a mandatory requirement in line with clause 16.1 *'Content of Tender' (f) (ii)*.

In view of the above this Board finds against the appellant company but, in taking cognisance of the fact that the contracting authority had not notified the appellant that he had failed to submit the 'financial bid', thus recommends that the deposit paid by the same company for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

29 January 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 510

VLC **CCC/2/12**

Tender for the Cleaning of the Commercial Centre in Valletta

This call for tenders was published in the Government Gazette on the 2nd October 2012. The closing date for this call with an estimated budget of €270,000 was the 2nd November 2012.

Six (6) tenderers submitted their offers.

Mr Anthony Zammit filed an objection on the 12th December 2012 against the decision of the Valletta Local Council to recommend the award of tender to Waste Collection Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 9th January 2013 to discuss this objection.

Present for the hearing were:

Mr Anthony Zammit

Dr George Cutajar	Legal Representative
Mr Anthony Zammit	Appellant
Mr Joe Attard	Representative

Waste Collection Limited

Dr George Hyzler	Legal Representative
Mr Mario Muscat	Representative
Mr Adrian Muscat	Representative

Valletta Local Council

Dr Joe Bonnici	Legal Representative
Mr Chris Pullicino	Adviser

Evaluation Board

Dr Alexiei Dingli	Chairman and Mayor of Valletta Local Council
Ms Gabriella Agius	Executive Secretary

After the Chairman's brief introduction, the appellant's representative was invited to explain the motives of the objection.

Dr George Cutajar, legal representative of Mr Anthony Zammit, the appellant, made the following submissions:

i. by letter dated 28th November 2012 the appellant was informed that the tender was being recommended for award to the lowest compliant bid;

ii. the notice of award indicated Waste Collection Ltd as the recommended tenderer;

iii. on the 30th November 2012 the appellant was informed that his bid was compliant;

iv. the appellant quoted the price of €74,704, including VAT, for the 4 year contract period which was by far less expensive than the offer of €259,515 made by the recommended tenderer;

v. it resulted that, by the closing date for the submission of tenders, the recommended bidder did not have the necessary permits from the Malta Environment and Planning Authority (MEPA) covering its vehicle/s and this matter of fact should have led to the outright disqualification of the recommended bid since this was a mandatory requirement as per Volume 1 Section 4 'Literature' 1.2;

vi. in fact, the recommended tenderer had registered its vehicle no. JBR 119 with MEPA as per Legal Notice 106 of 2007 on the 8th November 2012 when the closing date of the tender was the 2nd November 2012;

vii. the tender was drawn up in such a way that it did not allow for bidders to submit a tender and then, if awarded the contract, they would purchase and/or import the required vehicles/equipment but the tenderers had to possess the necessary equipment properly registered at least prior to the closing date of the tender;

viii. according to the evaluation grid sections 1.2, 1.3 and 1.4, which concerned the vehicles that had to be used on the execution of this contract, carried 64 out of 100 points and, as a result, the appellant could not help questioning how the recommended tenderer could have been allocated any marks in this regard when it did not possess any MEPA registered vehicles by the closing date for the receipt of tenders;

ix. on the other hand, the appellant, who had submitted all the required documentation, including that in respect of the MEPA registered vehicles, was awarded only 50 points;

x. the details of the MEPA registration of the vehicles as requested in this tender were available and verifiable on the MEPA website;

xi. Volume 1 Section 4 part 2 'Experience as Contractor' requested evidence of relevant experience over the years 2007 to 2012 whereas part 3 'Key Person' requested a minimum of 3 years experience and, moreover, these same requirements were also found in clause 6.1.2 of the tender document;

xii. the appellant has been executing cleaning contracts on behalf of the Valletta and Marsascala Local Councils for about seven years and his performance was quite satisfactory so much so that he had never been issued with any default notice;

xiii. on the other hand, the recommended bidder possessed no experience with regard to cleaning services;

xiv. at no stage was the appellant asked to provide any clarifications;

and

xv. the appellant lamented that he had not been informed by the contracting authority of shortcomings, if any, in his tender submission nor was he informed of the points awarded to his bid and, when requested, it provided inadequate information.

Mr Chris Pullicino, an accountant and adviser to the Valletta Local Council, under oath, gave the following evidence:-

a. his role in this tender procedure was to prepare the tender document according to the template provided by the Contracts Department and, on receipt of the offers, he drew up a fact sheet comparing the bids received with the tender specifications;

b. the evaluation of the offers was made according to the evaluation grid published in the tender document and then he submitted the resultant fact sheet to the Local Council for its consideration and to make its decisions;

c. Volume 4, 'Financial Bid' of the tender document requested the 'daily rate' (inclusive of VAT) and whereas the recommended tenderer offered the average daily rate of €177.80, the appellant offered the average daily rate of €18,676 which rendered it excessively high;

d. although the contracting authority did note the wide difference in the prices quoted, still it was not permissible for rectifications to be made to the prices quoted - clause 16.1 (f) did not allow for any rectification with regard to the financial offer/bill of quantities;

and

e. the tender requirements indicated that the tenderers had to be in possession of the required vehicles and relevant MEPA registrations prior to the closing date of the tender so much so that proof had to be submitted in terms of log books and registration documents as per Volume 1 Section 4 'Literature'.

Dr Cutajar remarked that the excessive and illogical difference between the two daily rates, i.e. €177.80 vs €18,676, should have prompted the contracting authority to seek a clarification from the appellant to which he would have simply explained that he quoted the annual rate rather than the daily rate.

The Chairman Public Contracts Review Board observed that the contracting authority should not issue a set of tender conditions and specifications and then, during the evaluation process, ignore mandatory requirements and carry on with the evaluation and award. He added that it could have been the case that other potential tenderers declined to participate being aware that they could not satisfy in full the tender requirements. Needless to say that, with this in mind, these same potential tenderers might have participated had they known that the contracting authority was going to be very flexible or even not insist upon certain mandatory requirements.

Mr Pullicino continued giving evidence as follows:

i. what he did was to present the Valletta Local Council with the fact sheet comparing the tender submissions with the tender specifications. He claimed that he did not make any recommendations and it was the same local council that decided to carry on with the evaluation of the recommended tender notwithstanding the shortcomings, such as the non availability of the MEPA vehicle registration at closing date of tenders;

ii. it turned out that all participating tenders were not compliant for one reason or other either because some were in the process of acquiring the vehicles and relative permits or because of lack of relevant experience. Albeit the contracting authority could have refused all tenders, yet the Local Council was faced with a problem regarding the cleaning of the commercial centre in Valletta and after considering all the circumstances it decided to proceed with the evaluation of all the tenders – *evaluation report dated 21st November 2012 referred*;

iii. the recommended tenderer had, in fact, provided details of the company's vehicles because such details, such as the year of manufacture and the engine model (Euro Standard) had a bearing on the allocation of points as per evaluation grid;

iv. on the other hand the appellant failed to submit the work plans;

v. as per evaluation grid, points were allocated with regard to vehicle ownership, date of manufacture and engine model but no points were allocated for having the MEPA permit although this permit was requested as per section 1.2 of Volume 1 Section 4;

and

vi. with regard to 'experience', whilst it was noted that the recommended tenderer possessed experience in the provision of transport services but not in waste collection or street cleaning yet the Local Council decided to award the contract to the recommended tenderer.

Dr George Hyzler, legal representative of the recommended tenderer, submitted that:-

a. the vehicles to be dedicated to the contract were in Malta and the recommended tenderer had submitted the relevant log books;

b. at no point did the recommended tender attempt to mislead the contracting authority with regard to the MEPA registration of the vehicles so much so that in its tender submission the company had declared that the MEPA registration certificate was not available at that stage but that the company had applied for the MEPA permit and that the latter would be available within days - *declaration dated 29th October 2012;*

c. in fact, the MEPA permit was issued on the 8th November 2012, namely 6 days after the closing date of the tender but certainly before the start of the evaluation of the tenders;

d. one had to appreciate that, with regard to experience, the main elements in the provision of such cleaning services concerned traffic management and the use of heavy duty vehicles and, in that regard, his client had extensive experience in the provision of transport services by coaches and, recently, in the transport of persons with special needs;

and

e. this appeal had to be dealt with according to the points raised by the appellant in his letter of objection and no other elements should be introduced, namely, the likelihood that other tenderers could have participated if they had known that the contracting authority was going to be flexible in the interpretation of certain tender requirement.

Dr Alexiei Dingli, Mayor of Valletta and chairman of the evaluation board, explained that the major issues that arose from these contracts was the management of personnel and equipment on street sweeping and cleaning works such that it would not cause traffic jams. He added that the central government had abruptly stopped providing street cleaning services and, as a consequence, the local council had to step in to provide this service as a matter of urgency.

The Chairman Public Contracts Review Board remarked that the said Board was not against a certain degree of flexibility being applied to the tendering procedure but it was imperative that such flexibility had to be reflected in the published tender conditions and specifications for the benefit of all potential bidders because it was not acceptable for one to introduce and to apply a high degree of flexibility during the evaluation process.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 12th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 9th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 28th November 2012 the appellant was informed that the tender was being recommended for award to the lowest compliant bid, (b) the notice of award indicated Waste Collection Ltd as the recommended tenderer, (c) on the 30th November 2012 the appellant was informed that his bid was compliant, (d) the appellant quoted the price of €74,704, including VAT, for the 4 year contract period which was, by far, less expensive than the offer of €259,515 made by the recommended tenderer, (e) it resulted that, by the closing date for the submission of tenders, the recommended bidder did not have the necessary permits from the Malta Environment and Planning Authority (MEPA) covering its vehicle/s and this matter of fact should have led to the outright disqualification of the recommended bid since this was a mandatory requirement as per Volume 1 Section 4 'Literature' 1.2, (f) the recommended tenderer had registered its vehicle no. JBR 119 with MEPA as per Legal Notice 106 of 2007 on the 8th November 2012 when the closing date of the tender was the 2nd November 2012, (g) the tender was drawn up in such a way that it did not allow for bidders to submit a tender and then, if awarded the contract, they would purchase and/or import the required vehicles/equipment but the tenderers had to possess the necessary equipment properly registered at least prior to the closing date of the tender, (h) according to the evaluation grid sections 1.2, 1.3 and 1.4, which concerned the vehicles that had to be used on the execution of this contract, carried 64 out of 100 points and, as a result, the appellant could not help questioning how the recommended tenderer could have been allocated any marks in this regard when it did not possess any MEPA registered vehicles by the closing date for the receipt of tenders, (i) on the other hand, the appellant, who had submitted all the required documentation, including that in respect of the MEPA registered vehicles, was awarded only 50 points, (j) the details of the MEPA registration of the vehicles as requested in this tender were available and verifiable on the MEPA website, (k) Volume 1 Section 4 part 2 'Experience as Contractor' requested evidence of relevant experience over the years 2007 to 2012 whereas part 3 'Key Person' requested a minimum of 3 years

experience and, moreover, these same requirements were also found in clause 6.1.2 of the tender document, (l) the appellant has been executing cleaning contracts on behalf of the Valletta and Marsascala Local Councils for about seven years and his performance was quite satisfactory so much so that he had never been issued with any default notice, (m) on the other hand, the recommended bidder possessed no experience with regard to cleaning services, (n) at no stage was the appellant asked to provide any clarifications, (o) the appellant lamented that he had not been informed by the contracting authority of shortcomings, if any, in his tender submission nor was he informed of the points awarded to his bid and, when requested, it provided inadequate information and (p) the excessive and illogical difference between the two daily rates, i.e. €177.80 vs €18,676, should have prompted the contracting authority to seek a clarification from the appellant to which he would have simply explained that he quoted the annual rate rather than the daily rate;

- having considered Dr Dingli's reference to the fact that (a) the major issues that arose from these contracts was the management of personnel and equipment on street sweeping and cleaning works such that it would not cause traffic jams and (b) the central government had abruptly stopped providing street cleaning services and, as a consequence, the local council had to step in to provide this service as a matter of urgency;

- having considered Mr Chris Pullicino's testimony, including his reference to the fact that (a) his role in this tender procedure was to prepare the tender document according to the template provided by the Contracts Department and, on receipt of the offers, he drew up a fact sheet comparing the bids received with the tender specifications, (b) the evaluation of the offers was made according to the evaluation grid published in the tender document and then he submitted the resultant fact sheet to the Local Council for its consideration and to make its decisions, (c) Volume 4, 'Financial Bid' of the tender document requested the 'daily rate' (inclusive of VAT) and whereas the recommended tenderer offered the average daily rate of €177.80, the appellant offered the average daily rate of €18,676 which rendered it excessively high, (d) although the contracting authority did note the wide difference in the prices quoted, still it was not permissible for rectifications to be made to the prices quoted - clause *16.1 (f)* did not allow for any rectification with regard to the financial offer/bill of quantities, (e) the tender requirements indicated that the tenderers had to be in possession of the required vehicles and relevant MEPA registrations prior to the closing date of the tender so much so that proof had to be submitted in terms of log books and registration documents as per Volume 1 Section 4 'Literature', (f) what he did was to present the Valletta Local Council with the fact sheet comparing the tender submissions with the tender specifications, (g) he did not make any recommendations and it was the same local council that decided to carry on with the evaluation of the recommended tender notwithstanding the shortcomings, such as the non availability of the MEPA vehicle registration at closing date of tenders, (h) it turned out that all participating tenders were not compliant for one reason or other either because some were in the process of acquiring the vehicles and relative permits or because of lack of relevant experience and, albeit the contracting authority could have refused all tenders, yet the Local Council was faced with a problem regarding the cleaning of the commercial centre in Valletta and after considering all the circumstances it decided to proceed with the evaluation of all the tenders – *evaluation report dated 21st November 2012 referred*, (i) the recommended tenderer had, in fact, provided details of the company's vehicles because such details, such as the year of manufacture and the engine model (Euro Standard) had a bearing on the allocation of points in accordance with the evaluation grid, (j) on the other hand, the appellant failed to submit the work plans, (k) in line with the evaluation grid, points were allocated with regard to vehicle ownership, date of manufacture and engine model but no points were allocated for having the MEPA permit although this permit was requested as per section 1.2 of Volume 1 Section 4 and (l) with regard to 'experience', whilst it was noted that the recommended tenderer possessed experience in the provision of transport services but not in waste collection or street cleaning yet the Local Council decided to award the contract to the recommended tenderer;

- having considered the recommended tenderer's representative's reference to the fact that (a) the vehicles to be dedicated to the contract were in Malta and the recommended tenderer had submitted the relevant log books, (b) at no point did the recommended tenderer attempt to mislead the contracting authority with regard to the MEPA registration of the vehicles so much so that in its tender submission the company had declared that the MEPA registration certificate was not available at that stage (c) but that the company had applied for the MEPA permit and that the latter would be available within days - *declaration dated 29th October 2012*, (d) in fact, the MEPA permit was issued on the 8th November 2012, namely 6 days after the closing date of the tender but certainly before the start of the evaluation of the tenders, (e) one had to appreciate that, with regard to experience, the main elements in the provision of such cleaning services concerned traffic management and the use of heavy duty vehicles and, in that regard, the recommended tenderer had extensive experience in the provision of transport services by coaches and, recently, in the transport of persons with special needs and (f) this appeal had to be dealt with according to the points raised by the appellant in his letter of objection and no other elements should be introduced, namely, the likelihood that other tenderers could have participated if they had known that the contracting authority was going to be flexible in the interpretation of certain tender requirement,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the contracting authority should not issue a set of tender conditions and specifications and then, during the evaluation process, ignore mandatory requirements and carry on with the evaluation and award. This Board is not against a certain degree of flexibility being applied to the tendering procedure but it is imperative that such flexibility has to be reflected in the published tender conditions and specifications for the benefit of all potential bidders because it is not acceptable for one to introduce and to apply a high degree of flexibility during the evaluation process.

2. This Board cannot overlook the fact that, whilst the tender document states in no equivocal term that tenderers had to be in possession of the required vehicles and relevant MEPA registrations prior to the closing date of the tender, subsequent to this, the evaluation board decided, out of its own free will, to carry on with the evaluation of the recommended tenderer notwithstanding the fact that the latter did not provide the MEPA vehicle registration at closing date of tender.

3. Indeed, this Board has no problem with establishing that the recommended tenderer did not, in any way, attempt to mislead the contracting authority with regard to the MEPA registration of the vehicles so much so that, in its tender submission, the company had declared that the MEPA registration certificate was not available at that stage and that the company had applied for the MEPA permit and that the latter would be available within days - *declaration dated 29th October 2012*. Nevertheless, at this point, the fact remains that the MEPA permit was issued on the 8th November 2012, namely six days after the closing date of the tender which was the cut-off point applicable to all tenderers.

4. With regard to the appellant, this Board cannot but concur with the decision taken by the contracting authority wherein, whilst in Volume 4, 'Financial Bid' of the tender document the 'daily rate' (inclusive of VAT) was requested, the latter decided that the fact that the appellant, erroneously, offered the average daily rate of €18,676 which rendered the appellant company's offer excessively high. Furthermore, the Public Contracts Review Board establishes that the contracting authority was correct when, albeit noting the wide difference in the prices quoted, still decided that it was not permissible for rectifications to be made to the prices quoted in view of the fact that clause *16.1 (f)* did not allow for any rectification with regard to the financial offer/bill of quantities.

In view of the above this Board recommends that this tender be cancelled and that another call be issued.

Furthermore, in view of the fact that, all in all, the appeal filed by the appellant was not frivolous, this Board recommends that the deposit paid by the appellant for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

29 January 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 511

VLC SSCRA/3/12
Tender for the Cleaning of the Commercial Centre in Valletta

This call for tenders was published in the Government Gazette on the 2nd October 2012. The closing date for this call with an estimated budget of €509,760 was the 2nd November 2012.

Three (3) tenderers submitted their offers.

Mr Anthony Zammit filed an objection on 12th December 2012 against the decision of the Valletta Local Council to recommend the award of tender to Waste Collection Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 9th January 2013 to discuss this objection.

Present for the hearing were:

Mr Anthony Zammit

Dr Geoge Cutajar	Legal Representative
Mr Anthony Zammit	Appellant
Mr Joe Attard	Representative

Waste Collection Limited

Dr George Hyzler	Legal Representative
Mr Mario Muscat	Representative
Mr Adrian Muscat	Representative

Valletta Local Council

Dr Joe Bonnici	Legal Representative
Mr Chris Pullicino	Adviser

Evaluation Board

Dr Alexiei Dingli	Chairman and Mayor of Valletta Local Council
Ms Gabriella Agius	Executive Secretary

After the Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr George Cutajar, legal representative of Mr Anthony Zammit, the appellant, made the following submissions:

i. by letter dated 28th November 2012 the appellant was informed that the tender was being recommended for award to the lowest compliant bid;

ii. the notice of award indicated Waste Collection Ltd as the recommended tenderer;

iii. at no stage was the appellant informed that his bid was not technically compliant;

iv. the appellant quoted the price of €375,220, including VAT, for the 4 year contract period which was by far less expensive than the offer of €670,505 made by the recommended tenderer;

v. it resulted that, by the closing date for the submission of tenders, the recommended bidder did not have the necessary permits from the Malta Environment and Planning Authority (MEPA) covering the company's vehicle/s and this matter of fact should have led to the outright disqualification of the recommended bid since this was a mandatory requirement in line with Volume 1 Section 4 'Literature' 1.2;

vi. in fact, the recommended tenderer had registered vehicle no. JBR 119 with the Malta Environment and Planning Authority (MEPA) as per Legal Notice 106 of 2007 on the 8th November 2012 when the closing date of the tender was the 2nd November 2012;

vii. the tender was drawn up in such a way that it did not allow for bidders to submit a tender and then, if awarded the contract, they would purchase and/or import the required vehicles/equipment but the tenderers had to possess the necessary equipment properly registered at least prior to the closing date of the tender;

viii. according to the Evaluation Board, evaluation grid sections 1.2, 1.3 and 1.4, which concerned the vehicles that had to be used on the execution of this contract, carried 64 out of 100 points and, as a consequence, the appellant could not help questioning how the recommended tenderer could have been allocated the minimum 55 points required once he did not possess any Malta Environment and Planning Authority (MEPA) registered vehicles by the closing date for the receipt of tenders;

ix. on the other hand the appellant had submitted all the required documentation, including that in respect of the Malta Environment and Planning Authority (MEPA) registered vehicles;

x. the details of the Malta Environment and Planning Authority (MEPA) registration of the vehicles as requested in this tender were available and verifiable on the Malta Environment and Planning Authority (MEPA) website;

xi. Volume 1 Section 4 part 2 'Experience as Contractor' requested evidence of relevant experience over the years 2007 to 2012 whereas part 3 'Key Person' requested a minimum of 3 years experience and, moreover, these same requirements were also found in clause 6.1.2 of the tender document;

xii. the appellant company has been executing cleaning contracts on behalf of the Valletta and Marsascala Local Councils for about seven years and his performance was quite satisfactory so much so that he had never been issued with any default notices;

xiii. on the other hand the recommended bidder possessed no experience with regard to cleaning services;

and

xiv. the appellant lamented that he had not been informed by the contracting authority of shortcomings, if any, in his tender submission nor was he informed of the points awarded to his bid and, when requested, the contracting authority provided inadequate information.

Dr George Hyzler, legal representative of the recommended tenderer, submitted that:-

a. the Malta Environment and Planning Authority (MEPA) registration of the vehicles/equipment was not an issue in this tender even though *(1)* such registration was requested in Volume 1 Section 4 'Literature' 1.2 and *(2)* it was not unheard of that tender documents could contain requirements that were, effectively, inapplicable but were there because the standard template would not have been modified according to those particular services/supplies;

b. to his recollection mechanical sweepers/scrubbers did not require the Malta Environment and Planning Authority (MEPA) registration;

c. the appellant did not possess any experience with regard to street sweeping and cleaning in residential areas because his experience concerned the collection of waste which was a different activity altogether;

and

d. with regard to the experience of the 'Key Person', the recommended tenderer had been providing transport services by coaches for decades and for the past five years or so had also been providing transport services for persons with special needs and both activities involved traffic and personnel management which were the key elements of the tender under reference.

The Chairman Public Contracts Review Board remarked that it appeared that points 7 to 10 raised by the appellant in his letter of objection dated 10th December 2012 did not require the Malta Environment and Planning Authority (MEPA) registration.

Mr Anthony Zammit, the appellant, remarked that:-

i. for the past three years he had undertaken street sweeping and cleaning after the annual feasts celebrated in Valletta and even in other localities and about 3 tons of material was collected after each events (*Dr Alexiei Dingli, Mayor of Valletta, acknowledged this statement*);

ii. albeit sections 1.3 and 1.4 of Volume 4 'Financial Bid' were not filled in but were crossed out because he was going to provide those services free of charge, yet he pointed out that the other rates were duly filled in and, at the end, even quoted the average daily rate over the four year period of €257 (€93,805 per annum);

iii. the debris resulting from street sweeping had to be disposed of by the same contractor and not disposed of, for example, in skips which belonged to another contractor – *in this regard the Chairman Public Contracts Review Board read out Section 07 of clause 7 of Volume 3 Section 2 'Terms of Reference' (page 47) which stated that the contractor was responsible for the disposal of waste collected*;

and

iv. likewise, the domestic waste collection contract catered for domestic waste and not for material resulting from street sweeping and, as a result, any waste transport vehicle had to be registered with the Malta Environment and Planning Authority (MEPA).

Mr Chris Pullicino, an accountant and adviser to the Valletta Local Council, under oath, gave the following evidence:-

a. his role in this tendering procedure was to prepare the tender document according to the template provided by the Contracts Department and on receipt of the offers he drew up a fact sheet comparing the bids received with the tender specifications;

b. the evaluation of the offers was made according to the evaluation grid published in the tender document and then he submitted the resultant fact sheet to the Local Council for its consideration for the latter to make its decisions;

c. the equipment required for this contract were a pedestrian sweeper, a mechanical floor scrubber and high pressure washing equipment in line with Volume 1 Section 4 'Literature' 1.1;

d. the appellant did not submit all the rates requested in the financial bid/bill of quantities, namely items 1.3 and 1.4 were crossed out although they represented a good part of the services requested and, as a result the bid was not considered to be administratively compliant;

e. the appellant was not awarded any points once he did not quote any rates in respect of items 1.3 and 1.4 in the *Financial Bid* and it was only at the hearing that it was being stated that the appellant was going to render these services free of charge;

and

f. with regard to 'experience', it was noted that the recommended tenderer possessed experience in the provision of transport services but not in street sweeping and cleaning and it was the decision of the Local Council to award the contract to the recommended tenderer.

Dr Cutajar intervened and remarked that:-

i. once the tender document requested the Malta Environment and Planning Authority (MEPA) registration then it had to be provided and one could not just pick or choose which conditions were applicable and which were not applicable;

ii. L.N. 106 of 2007 provided that any vehicle involved in waste collection and/or transportation had to be registered by the Malta Environment and Planning Authority (MEPA);

and

iii. it was clear that the tender was issued for the sweeping and cleaning of streets and the collection and disposal of the resulting material and that entailed the use of waste transport vehicles which required the Malta Environment and Planning Authority (MEPA) permit.

Mr Mario Muscat, also on behalf of the recommended tenderer, argued that the material resulting from street sweeping and cleaning operations, whether by mechanical means or manually, would be deposited in skips which, in turn, would be emptied by another contractor in waste collection vehicles.

Dr Alexiei Dingli, Mayor of Valletta and chairman of the evaluation board, explained that the major issues that arose from these contracts were the management of personnel and equipment on street sweeping and cleaning works such that it would not cause traffic jams. He added that the central government had abruptly stopped providing street sweeping and cleaning services and, as a consequence, the local council had to step in to provide this service as a matter of urgency.

Dr Cutajar concluded that tender requirements, especially mandatory ones, had to be respected and that as far as public procurement was concerned it was not tolerated for one to discard published tender conditions. He added that the urgency referred to by the Local Council was not a good enough excuse for one to do away with clear tender requirements.

The Chairman Public Contracts Review Board remarked that the Board was not against a certain degree of flexibility being applied to the tendering procedure but it was essential that such flexibility had to be reflected in the published tender conditions and specifications for the benefit of all potential bidders because it was not acceptable to introduce and to apply a high degree of flexibility during the evaluation process. He added that the contracting authority should not issue a set of tender conditions and specifications and then, during the evaluation process, ignore mandatory requirements and carry on with the evaluation and award.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 12th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 9th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 28th November 2012 the appellant was informed that the tender was being recommended for award to the lowest compliant bid, (b) the notice of award indicated Waste Collection Ltd as the recommended tenderer, (c) at no stage was the appellant informed that his bid was not technically compliant, (d) the appellant quoted the price of €375,220, including VAT, for the 4 year contract period which was, by far, less expensive than the offer of €670,505 made by the recommended tenderer, (e) it resulted that, by the closing date for the submission of tenders, the recommended bidder did not have the necessary permits from the Malta Environment and Planning Authority (MEPA) covering the company's vehicle/s and this matter of fact should have led to the outright disqualification of the recommended bid since this was a mandatory requirement in line with Volume 1 Section 4 'Literature' 1.2, (f) in fact, the recommended tenderer had registered vehicle no. JBR 119 with the Malta Environment and Planning Authority (MEPA) as per Legal Notice 106 of 2007 on the 8th November 2012 when the closing date of the tender was the 2nd November 2012, (g) the tender was drawn up in such a way that it did not allow for bidders to submit a tender and then, if awarded the contract, they would purchase and/or import the required vehicles/equipment but the tenderers had to possess the necessary equipment properly registered at least prior to the closing date of the tender, (h) according to the Evaluation Board, evaluation grid sections 1.2, 1.3 and 1.4, which concerned the vehicles that had to be used on the execution of this contract, carried 64 out

of 100 points and, as a consequence, the appellant could not help questioning how the recommended tenderer could have been allocated the minimum 55 points required once he did not possess any Malta Environment and Planning Authority (MEPA) registered vehicles by the closing date for the receipt of tenders, (i) on the other hand, the appellant had submitted all the required documentation, including that in respect of the Malta Environment and Planning Authority (MEPA) registered vehicles, (j) the details of the Malta Environment and Planning Authority (MEPA) registration of the vehicles as requested in this tender were available and verifiable on the Malta Environment and Planning Authority (MEPA) website, (k) Volume 1 Section 4 part 2 'Experience as Contractor' requested evidence of relevant experience over the years 2007 to 2012 whereas part 3 'Key Person' requested a minimum of 3 years experience and, moreover, these same requirements were also found in clause 6.1.2 of the tender document, (l) the appellant has been executing cleaning contracts on behalf of the Valletta and Marsascala Local Councils for about seven years and his performance was quite satisfactory so much so that he had never been issued with any default notices, (m) on the other hand the recommended bidder possessed no experience with regard to cleaning services, (n) the appellant lamented that he had not been informed by the contracting authority of shortcomings, if any, in his tender submission nor was he informed of the points awarded to his bid and, when requested, the contracting authority provided inadequate information, (o) for the past three years he had undertaken street sweeping and cleaning after the annual feasts celebrated in Valletta and even in other localities and about 3 tons of material was collected after each event (*Dr Alexiei Dingli, Mayor of Valletta, acknowledged this statement*), (p) albeit sections 1.3 and 1.4 of Volume 4 'Financial Bid' were not filled in but were crossed out because he was going to provide those services free of charge, yet he pointed out that the other rates were duly filled in and, at the end, even quoted the average daily rate over the four year period of €257 (€93,805 per annum), (q) the debris resulting from street sweeping had to be disposed of by the same contractor and not disposed of, for example, in skips which belonged to another contractor – *in this regard the Chairman Public Contracts Review Board read out Section 07 of clause 7 of Volume 3 Section 2 'Terms of Reference' (page 47) which stated that the contractor was responsible for the disposal of waste collected*, (r) likewise, the domestic waste collection contract catered for domestic waste and not for material resulting from street sweeping and, as a result, any waste transport vehicle had to be registered with the Malta Environment and Planning Authority (MEPA), (s) once the tender document requested the Malta Environment and Planning Authority (MEPA) registration then it had to be provided and one could not just pick or choose which conditions were applicable and which were not applicable, (t) L.N. 106 of 2007 provided that any vehicle involved in waste collection and/or transportation had to be registered by the Malta Environment and Planning Authority (MEPA), (u) it was clear that the tender was issued for the sweeping and cleaning of streets and the collection and disposal of the resulting material and that entailed the use of waste transport vehicles which required the Malta Environment and Planning Authority (MEPA) permit, (v) concluded that tender requirements, especially mandatory ones, had to be respected and that, as far as public procurement was concerned, it was not tolerated for one to discard published tender conditions and (w) the urgency referred to by the Local Council was not a good enough excuse for one to do away with clear tender requirements;

- having considered the contracting authority's representative's reference to the fact that (a) his role in this tendering procedure was to prepare the tender document according to the template provided by the Contracts Department and on receipt of the offers he drew up a fact sheet comparing the bids received with the tender specifications, (b) the evaluation of the offers was made according to the evaluation grid published in the tender document and then he submitted the resultant fact sheet to the Local Council for its consideration for the latter to make its decisions, (c) the equipment required for this contract were a pedestrian sweeper, a mechanical floor scrubber and high pressure washing equipment in line with Volume 1 Section 4 'Literature' 1.1, (d) the appellant did not submit all the rates requested in the financial bid/bill of quantities, namely items 1.3 and 1.4 were crossed out although they represented a good part of the services requested and, as a result, the bid was not considered to be administratively compliant, (e) the appellant was not awarded any points once he did not quote any rates in respect of items 1.3 and

1.4 in the *Financial Bid* and it was only at the hearing that it was being stated that the appellant was going to render these services free of charge, (f) with regard to 'experience', it was noted that the recommended tenderer possessed experience in the provision of transport services but not in street sweeping and cleaning and it was the decision of the Local Council to award the contract to the recommended tenderer, (g) explained that the major issues that arose from these contracts were the management of personnel and equipment on street sweeping and cleaning works such that it would not cause traffic jams and (h) the central government had abruptly stopped providing street sweeping and cleaning services and, as a consequence, the local council had to step in to provide this service as a matter of urgency.

- having considered the recommended tenderer's representative's reference to the fact that (a) the Malta Environment and Planning Authority (MEPA) registration of the vehicles/equipment was not an issue in this tender even though *(1)* such registration was requested in Volume 1 Section 4 'Literature' 1.2 and *(2)* it was not unheard of that tender documents could contain requirements that were, effectively, inapplicable but were there because the standard template would not have been modified according to those particular services/supplies, (b) to his recollection, mechanical sweepers/scrubbers did not require the Malta Environment and Planning Authority (MEPA) registration, (c) the appellant did not possess any experience with regard to street sweeping and cleaning in residential areas because his experience concerned the collection of waste which was a different activity altogether, (d) with regard to the experience of the 'Key Person', the recommended tenderer had been providing transport services by coaches for decades and for the past five years or so had also been providing transport services for persons with special needs and both activities involved traffic and personnel management which were the key elements of the tender under reference and (e) the material resulting from street sweeping and cleaning operations, whether by mechanical means or manually, would be deposited in skips which, in turn, would be emptied by another contractor in waste collection vehicles.

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that points 7 to 10 raised by the appellant in his letter of objection dated 10th December 2012 did not require the Malta Environment and Planning Authority (MEPA) registration.

2. The Public Contracts Review Board opines that the contracting authority should not issue a set of tender conditions and specifications and then, during the evaluation process, ignore mandatory requirements and carry on with the evaluation and award. This Board is not against a certain degree of flexibility being applied to the tendering procedure but it is imperative that such flexibility has to be reflected in the published tender conditions and specifications for the benefit of all potential bidders because it is not acceptable for one to introduce and to apply a high degree of flexibility during the evaluation process.

3. This Board notes that at the outset the evaluation committee admitted that "all the tenderers failed to fully satisfy the evaluation criteria and the requirements raised by Literature (Volume 1, Section 4). Etc etc". Taking full cognisance of this comment in the evaluation report would suffice for this Board to establish that this tender had to be cancelled.

4. This Board has taken note of the fact that, in its evaluation process, the evaluation board has, arbitrarily, overlooked the fact that, in their respective submissions,

    a. the appellant ...

        - did not submit his technical capacity and experience;

- did not indicate the address of his Valletta office – Albeit it was not required that pertinent office had to be up and running before the tender is awarded in line with clause 8(a) page 47, yet, according to page 31 the address had to be identified;

- erroneously filled in his offer since he did not split the daily rate according to items in the *Financial Offer* grid but repeated it in all the items and this whilst, on page 20 and page 63 the average daily rate was quoted at €257 amounting to a yearly cost of €93,805.

b. the recommended tenderer ...

- did submit his technical capacity and experience but it transpires that this is not in waste collection but in transport for the disabled;

- has indicated key experts whose expertise was not relevant as these were an accountant and a driver;

- erroneously filled in its offer since if one were to add all the items the average daily rate would work out to some €882 and this when. on page 20. the offer was worked out at €13,927 per month and on page 63 at a daily rate of €229! This Board opines that the grid on page 62 and the lists from page 51 to page 53 are, at best, misleading and contribute in no small way to confusion.

This Board has no difficulty in realising that both the appellant and the recommended tenderer did not seem to understand the requirements listed in the tender documents to the extent that they did not fill them out properly. Furthermore, the Public Contracts Review Board opines that the grid and lists on pages 62 and from page 51 to 53 added to the confusion providing this Board with ample justification as to why this tender needs to be reissued with clearer and unambiguous guidelines.

The Public Contracts Review Board recommends that the contracting authority should ensure that (a) a more coherent tender be published with clearer and unambiguous tender specifications and (b) it abides with the Procurement Regulations when assessing the offers.

Furthermore, in view of the fact that, all in all, the appeal filed by the appellant was not frivolous, this Board recommends that the deposit paid by the appellant for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

29 January 2013

Errata Corrige regarding:

Case No. 511

VLC SSCRA/3/12
Tender for Street Sweeping and Cleaning of the Residential Areas in Valletta.

The PCRB would like to notify that the title of the tender in respect of the case in caption should read as indicated above and not as inadvertently stated in our decision dated 29 January 2013, that is, **'Tender for the Cleaning of the Commercial Centre in Valletta'.**

Any inconvenience that might have been caused is regretted.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

31 January 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 512

CT/3026/2012
Tender for the Procurement of Helicopter/s for Border Control – Armed Forces of Malta

This call for tenders was published in the Government Gazette on the 4th September 2012. The closing date for this call with an estimated budget of € 18,000,000 was the 30th October 2012.

Two (2) tenderers submitted their offers.

Eurocopter SAS filed an objection on the 28th December 2012 against the decision of the Contracts Department to disqualify its offer as administratively non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 16th January 2013 to discuss this objection.

Present for the hearing were:

Eurocopter SAS

Dr Kenneth Grima	Legal Representative
Dr Antonio Ghio	Legal Representative
Mr Lionel de-Maupeou	Representative
Ms Marie-Anne Batoche	Representative
Mr Baudoin Marraud des Grottes	Representative

AugustaWestland Spa.

Dr Joseph Camilleri	Legal Representative
Mr Attilio Vassallo Cesareo	Representative
Mr Mark Vassallo Cesareo	Representative

Armed Forces of Malta

Dr Susann Agius	Legal Representative
Dr Mario Spiteri Bianchi	Legal Representative
Col. David Mifsud	Project Leader

Evaluation Board

Col. Harold Stivala	Chairman
Lt. Col. Ian Ruggier	Member
Maj. Robert Bonnici	Member
Capt. Stephen Spiteri Staines	Member
Capt. Douglas Falzon	Member
Lt. Angelic Galea	Member
Mr James Grixti	Secretary

Contracts Department

Ms Marisa Gauci Representative

At the request of the appellant company and interested parties, the Public Contracts Review Board agreed to conduct the hearing in English.

Preliminary Plea

Dr Joseph Camilleri, legal representative of Agusta Westland SpA, an interested party in this tendering procedure, registered his complaint in the sense that the contracting authority had turned down his client's request to be provided with a copy of the letter of objection submitted by the appellant company both for the sake of transparency and so that it would enable him to prepare his case, even though he was aware that Art. 83 of the Public Procurement Regulations were silent in this regard.

After the Chairman's brief introduction, the appellant company's legal representative was invited to explain the motives of its objection.

Dr Kenneth Grima, legal advisor of Eurocopter SAS, the appellant company, made the following submissions:

i. this tender called for the procurement of one helicopter with the option for the contracting authority to procure a further two helicopters and, as a result, the estimated value of the tender ranged from €18m to €54m;

ii. by letter dated 21st December 2012 the appellant company was informed that its offer was not administratively compliant because it included a CD containing the financial offer;

iii. only two bidders participated in this tendering procedure and the elimination of one of them from the very initial stage of the process would leave only one bidder;

iv. it was also noted that whereas the appellant company had been disqualified on administrative grounds, namely at the initial stage of the process, which issue was being contested through this objection, instead of halting the tendering process it appeared that the process continued such that the other tender had proceeded to the opening of financial offer stage;

and

v. it was not correct for the contracting authority to evaluate a tender technically when the process should have been stopped once an objection had been lodged at the preceding administrative stage so much so that the Public Procurement Regulations stated at Reg. 83 (5) that "*The review is to be effected by the Public Contracts Review Board before the next stage of the adjudication process is commenced.*".

The Chairman Public Contracts Review Board acknowledged that the letter sent by the Public Contracts Review Board to the appellant company was incorrect in stating that the tender has been recommended for award. He added that the Public Contracts Review Board's letter should have reflected the contents of the Contracts Department's letter sent to the appellant company on the 21st December 2012, which stated that *"the General Contracts Department has accepted the*

recommendation for your tender to proceed to the opening of the financial package" – and so there was no recommendation for award.

Dr Grima continued as follows:-

i. at tender opening stage, which was held in public, nothing amiss was noted;

ii. the Public Contracts Review Board, the European Court of Justice and our Courts have repeatedly upheld that whenever a tender document contained ambiguous provisions then that fault should not be attributed to the bidder;

iii. in the case under reference the appellant company had been extra careful to satisfy the tender conditions;

iv. this tender procedure entailed the submission of packages 1, 2 and 3 plus the printed copy and the soft copy, namely 5 packages in all and were to be delivered in one bundle;

v. clause 15.1 of the tender document stated that:

   a. *All tenders must be submitted in one original, clearly marked "original", and one identical copy (including all documentation in the original) signed in the same way as the original and clearly marked "copy",*

   b. *Both documents are to be separately sealed and placed in another sealed envelope/package so that the bid can be identified as one tender submission. Following the tender opening session, the copy shall be kept, unopened, at the Department of Contracts, for verification purposes only should the need arise. The soft copy must be included with the original tender offer.*

vi. whilst the tender document referred to 'the soft copy' which could well have meant one CD containing all 3 packages, namely including the financial package, yet the appellant company was extra careful and included two CDs, a CD containing packages 1 and 2, which was sealed in an envelope, and another CD containing the financial offer, which was sealed in a separate envelope, and both on the CDs and on the respective envelopes it was clearly indicated what they contained – in so doing it was ensured that if the contracting authority wanted to look into the technical submission of the soft copy it could do so without having access to the financial offer which was purposely stored in a separate CD sealed in a separate envelope;

vii. the appellant company had to follow the instructions given in the tender document in the sense that the bundle containing the tender submission which was delivered to the Contracts Department had to include the original printed tender, the copy of the tender in printed form and the soft copy of the tender – in the appellant company's case consisting of 2 CDs;

and

viii. clause 16.1 (f) 'Documentation to be inserted ONLY in package 3' made no mention of 'the soft copy' and clause 16.1 stated, among other things, that "*Any indication of the financial offer in packages 1 and 2 will automatically disqualify the tender*". Nevertheless, the appellant company was careful not to insert the financial offer in packages 1 or 2 and, as a consequence, the said appellant company should not have been disqualified.

The Chairman Public Contracts Review Board remarked that one of the purposes of having a 3-package system was so that, at administrative and technical evaluation stage, the contracting authority

would have no access to the financial bid and that the purpose of having a soft copy was to serve as a back-up, a point of reference, in case a page or something in the printed submission went missing. He went on to ask whether the term 'documentation' referred only to printed information or if it also included information in soft form.

Mr Lionel de Maupeou, also representing the appellant company, remarked that 'documentation' related to printed information which was backed up by a soft copy.

The Chairman Public Contracts Review Board expressed the view that if 'documentation' meant information both in printed form and in soft form, then, it could be that, according to clause 16.1 (f), the 'financial offer', both printed and in soft form, should have been inserted in package 3.

Dr Antonio Ghigo, legal representative of the appellant company, submitted that:-

a. there was agreement that the purpose of the soft copy was to back up the written/printed tender submission;

b. whilst clause 15 (1), among other things, stated that "*The soft copy must be included with the original tender offer",* yet this, and even clause 16, did not state that a soft copy of package 1 had to be inserted in original package 1, a soft copy of package 2 had to be inserted in original package 2 and a soft copy of package 3 had to be inserted in original package 3 so much so that clause 15 referred to 'the offer' and not to 'packages';

and

c. clause 15 (1) referred to 'the original tender offer', which envelope or bundle was made up of packages 1, 2 and 3, and the soft copy was to be included with the original offer and not in the three packages.

Dr Grima and Dr Ghigo insisted that the appellant company had to abide by the provisions of the tender document and at no stage did the tender document direct that the soft copy had to be inserted in packages 1, 2 and 3. They added that since, according to clause 16.1, the financial offer had to be presented separately from packages 1and 2, the appellant company was diligent and provided packages 1 and 2 on one CD sealed in an envelope and package 3 (the financial offer) on a separate CD sealed in another envelope and that there was no definition clause with regard to 'documentation'.

Dr Susann Agius, legal advisor representing the contracting authority, submitted that:-

i. the tender document mentioned a 3-package/envelope tender and it did not mention any bundles or parcels;

ii. the appellant company admitted that its tender submission contained 3 packages plus one envelope with 2 CDs with one of them being the financial bid;

iii. clause 15 (1) contained two requirements, namely that the original and the copy had to be sealed in separate envelopes and then that the soft copy had to be included with the original version and not with the copy;

iv. clause 16 then required that packages 1 and 2 had to be sealed separately from package 3 such that any indication of the financial offer in packages 1 and 2 led to disqualification;

v. the appellant company sought no clarification in this regard and, moreover, a clarification meeting was held on the 18th September 2012 (the minutes were dated 9th October 2012), which was attended by a representative of the appellant company and where the 3-package system was explained;

vi. section 3.8.1.3 of the internal 'Standard Operating Procedures/Guidelines for Tender Evaluation Committees' provided, among other things, that "*The Evaluation Committee shall also ensure that any reference to price is not included in the CD submitted with the tender documents (if and when a CD is required)*";

vii. the text of the tender document was quite clear and there was no need for diverging interpretations;

and

viii. in this case, the appellant company provided a fourth envelope where it included the financial bid with the other two packages and that led to the company's disqualification.

Dr Mario Spiteri Bianchi, legal representative of the contracting authority, referred to various Public Contracts Appeals Board cases, for example, case numbers 201 and 205 of 2010 and 144 and 145 of 2009 respectively, and to case number 243/89 of the European Court of Justice (ECJ) concerning the 3-package system. He added that this tender was financed through EU funds and delaying the award might jeopardise the utilisation of these funds.

Dr Ghigo referred to other Public Contracts Appeals Board cases, including case numbers 98 and 99 of 2006, case number 117 of 2008, case number 158 of 2009 and case number 180 of 2010 together with ECJ cases mainly concerning ambiguous and/or unclear provisions in tender documents and transparency in the tendering procedure.

The Chairman Public Contracts Review Board remarked that it could be the case that the circumstances of the cases mentioned by both the appellant company and the contracting authority were not identical to those of the case under reference and he added that the fact that EU funds were involved should not imply that important aspects of the tendering procedure could be overlooked.

Dr Grima pointed out that:-

a. Dr Agius quoted from internal guidelines which were not available to tenderers and which were not part of the tender document nor part of the procurement regulations;

b. Reg. 83 (1) made no mention whatsoever of the soft copy

c. the appellant company had inserted the soft copy in a sealed envelope separate from packages 1, 2 and 3 as per tender instructions;

d. if at the clarification meeting issues emerged that merited a change to the tender document, then the Contracts Department would have circulated the clarification among all bidders and it would have formed an integral part of the tender document, yet, no such clarifications seemed to have been issued;

e. the Public Procurement Regulations and the amendments thereto effected in 2010 were meant to ensure transparency and to enhance competition as far as possible by giving tenderers the opportunity to clarify and/or rectify certain aspects of the tender submission so as not to resort to outright rejection of bids on trivial matters to the detriment of competition and better offers;

and

f. whilst the appellant company had been disqualified at administrative stage, which decision was being contested, yet, it seemed that the contracting authority had moved on with the technical evaluation of the other bidder prior to the appeal being decided upon.

Col. David Mifsud, project leader, acting on behalf of the Armed Forces of Malta, explained the procedure followed, namely that, whilst package 1, containing the bid bond, was opened at tender opening stage, with regard to package 2, containing the technical offer, the evaluation board would open it and first check the contents for administrative compliance followed by the technical evaluation of the administratively compliant offers.

Col. Harold Stivala, chairman of the evaluation board, remarked that package 1 contained the bid bond whereas package 2 contained the technical offer and the appellant company was disqualified administratively at package 2 stage and therefore it was not correct to imply that, after having disqualified the appellant company, the evaluation board went on to open and to consider the technical offer, because the technical offer was in package 2.which had already been opened. He added that the first task of the evaluation board was to check the documentation submitted and it was there that it came across the CD and the process stopped.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 28th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 16th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) this tender called for the procurement of one helicopter with the option for the contracting authority to procure a further two helicopters and, as a result, the estimated value of the tender ranged from €18m to €54m, (b) by letter dated 21st December 2012 the appellant company was informed that its offer was not administratively compliant because it included a CD containing the financial offer, (c) only two bidders participated in this tendering procedure and the elimination of one of them from the very initial stage of the process would leave only one bidder, (d) it was also noted that whereas the appellant company had been disqualified on administrative grounds, namely at the initial stage of the process, which issue was being contested through this objection, instead of halting the tendering process it appeared that the process continued such that the other tender had proceeded to the opening of financial offer stage, (e) it was not correct for the contracting authority to evaluate a tender technically when the process should have been stopped once an objection had been lodged at the preceding administrative stage so much so that the Public Procurement Regulations stated at Reg. 83 (5) that "*The review is to be effected by the Public Contracts Review Board before the next stage of the adjudication process is commenced.*", (f) at tender opening stage, which was held in public, nothing amiss was noted, (g) the Public Contracts Review Board, the European Court of Justice

and Maltese law Courts have repeatedly upheld that whenever a tender document contained ambiguous provisions then that fault should not be attributed to the bidder, (h) in the case under reference the appellant company had been extra careful to satisfy the tender conditions, (i) this tender procedure entailed the submission of packages 1, 2 and 3 plus the printed copy and the soft copy, namely 5 packages in all and were to be delivered in one bundle, (j) clause 15.1 of the tender document stated that "*All tenders must be submitted in one original, clearly marked "original", and one identical copy (including all documentation in the original) signed in the same way as the original and clearly marked "copy"* and that *"Both documents are to be separately sealed and placed in another sealed envelope/package so that the bid can be identified as one tender submission. Following the tender opening session, the copy shall be kept, unopened, at the Department of Contracts, for verification purposes only should the need arise. The soft copy must be included with the original tender offer,* (k) whilst the tender document referred to 'the soft copy' which could well have meant one CD containing all 3 packages, namely including the financial package, yet the appellant company was extra careful and included two CDs, a CD containing packages 1 and 2, which was sealed in an envelope, and another CD containing the financial offer, which was sealed in a separate envelope, and both on the CDs and on the respective envelopes it was clearly indicated what they contained – in so doing it was ensured that if the contracting authority wanted to look into the technical submission of the soft copy it could do so without having access to the financial offer which was purposely stored in a separate CD sealed in a separate envelope, (l) the appellant company had to follow the instructions given in the tender document in the sense that the bundle containing the tender submission which was delivered to the Contracts Department had to include the original printed tender, the copy of the tender in printed form and the soft copy of the tender – in the appellant company's case consisting of 2 CDs, (m) clause *16.1 (f)* 'Documentation to be inserted ONLY in package 3' made no mention of 'the soft copy' and clause 16.1 stated, among other things, that "*Any indication of the financial offer in packages 1 and 2 will automatically disqualify the tender*", (n) word 'documentation' related to printed information which was backed up by a soft copy, (o) there was agreement that the purpose of the soft copy was to back up the written/printed tender submission, (p) whilst clause 15 (1), among other things, stated that "*The soft copy must be included with the original tender offer",* yet this, and even clause 16, did not state that a soft copy of package 1 had to be inserted in original package 1, a soft copy of package 2 had to be inserted in original package 2 and a soft copy of package 3 had to be inserted in original package 3 so much so that clause 15 referred to 'the offer' and not to 'packages', (q) clause 15 (1) referred to 'the original tender offer', which envelope or bundle was made up of packages 1, 2 and 3, and the soft copy was to be included with the original offer and not in the three packages, (r) insisted that the appellant company had to abide by the provisions of the tender document and at no stage did the tender document direct that the soft copy had to be inserted in packages 1, 2 and 3, (s) albeit, according to clause 16.1, the financial offer had to be presented separately from packages 1and 2, the appellant company was diligent and provided packages 1 and 2 on one CD sealed in an envelope and package 3 (the financial offer) on a separate CD sealed in another envelope and that there was no definition clause with regard to 'documentation', (t) other Public Contracts Appeals Board cases, including case numbers 98 and 99 of 2006, case number 117 of 2008, case number 158 of 2009 and case number 180 of 2010 together with ECJ cases, which mainly concerned ambiguous and/or unclear provisions in tender documents and transparency in the tendering procedure, (u) Dr Agius quoted from internal guidelines which were not available to tenderers and which were not part of the tender document nor part of the procurement regulations, (v) *Reg. 83 (1)* made no mention whatsoever of the soft copy, (w) if at the clarification meeting issues emerged that merited a change to the tender document, then the Contracts Department would have circulated the clarification among all bidders and it would have formed an integral part of the tender document, yet, no such clarifications seemed to have been issued, (x) the Public Procurement Regulations and the amendments thereto effected in 2010 were meant to ensure transparency and to enhance competition as far as possible by giving tenderers the opportunity to clarify and/or rectify certain aspects of the tender submission so as not to resort to outright rejection of bids on trivial matters to the detriment of competition and better offers and (y) whilst the appellant company had been disqualified at administrative stage, which decision was being

contested, yet, it seemed that the contracting authority had moved on with the technical evaluation of the other bidder prior to the appeal being decided upon;

- having considered the contracting authority's reference to the fact that (a) the tender document mentioned a 3-package/envelope tender and it did not mention any bundles or parcels, (b) the appellant company admitted that its tender submission contained 3 packages plus one envelope with 2 CDs with one of them being the financial bid, (c) clause *15 (1)* contained two requirements, namely that the original and the copy had to be sealed in separate envelopes and then that the soft copy had to be included with the original version and not with the copy, (d) clause 16 then required that packages 1 and 2 had to be sealed separately from package 3 such that any indication of the financial offer in packages 1 and 2 led to disqualification, (e) the appellant company sought no clarification in this regard and, moreover, a clarification meeting was held on the 18th September 2012 (the minutes were dated 9th October 2012), which was attended by a representative of the appellant company and where the 3-package system was explained, (f) section 3.8.1.3 of the internal 'Standard Operating Procedures/Guidelines for Tender Evaluation Committees' provided, among other things, that "*The Evaluation Committee shall also ensure that any reference to price is not included in the CD submitted with the tender documents (if and when a CD is required)*", (g) the text of the tender document was quite clear and there was no need for diverging interpretations, (h) in this case, the appellant company provided a fourth envelope where it included the financial bid with the other two packages and that led to the company's disqualification, (i) this tender was financed through EU funds and delaying the award might jeopardise the utilisation of these funds, (j) the procedure followed was clear, namely that, whilst package 1, containing the bid bond, was opened at tender opening stage, with regard to package 2, containing the technical offer, the evaluation board would open it and first check the contents for administrative compliance followed by the technical evaluation of the administratively compliant offers, (k) package 1 contained the bid bond whereas package 2 contained the technical offer and the appellant company was disqualified administratively at package 2 stage and, as a result, it was not correct to imply that, after having disqualified the appellant company, the evaluation board went on to open and to consider the technical offer, because the technical offer was in package 2.which had already been opened and (l) the first task of the evaluation board was to check the documentation submitted and it was there that it came across the CD and the process stopped,

reached the following conclusions, namely:

1. The Public Contracts Review Board maintains that the fact that EU funds were involved should not imply that important aspects of the tendering procedure could be overlooked.

2. This Board acknowledges the fact that the letter sent by the Public Contracts Review Board to the appellant company was incorrect in stating that the tender has been recommended for award. As a matter of fact this Board's letter should have reflected the contents of the Contracts Department's letter sent to the appellant company on the 21st December 2012, which, *inter alia*, stated that *"the General Contracts Department has accepted the recommendation for your tender to proceed to the opening of the financial package*" – and so there was no recommendation for award.

3. The Public Contracts Review Board opines that one of the purposes of having a 3-package system was so that, at administrative and technical evaluation stage, the contracting authority would have no access to the financial bid and that the purpose of having a soft copy was to serve as a back-up, a point of reference, in case a page or something in the printed submission went missing.

4. This Board feels that, contrary to the interpretation given to it by the appellant company's representative, the term 'documentation' referred to both printed as well as information

submitted in soft format. Once this Board has embraced this line of though it cannot but express the view that if 'documentation' meant information both in printed and in soft format, then, it reaches its own conclusion, namely that, according to clause 16.1 (f), the 'financial offer', both in printed and in soft form, should have been inserted in package 3 with the consequence that, in case of non observance of this tender condition this would have led to automatic disqualification. Needless to state that, in this case, the appellant company provided a fourth envelope where it included the financial bid with the other two packages and that led to the company's outright disqualification.

5. The Public Contracts Review Board has no doubt that the tender document mentioned a 3-package/envelope tender and it did not mention any bundles or parcels and it is also of the opinion that the text of the tender document was quite clear and there was no need for diverging interpretations.

6. This Board has taken full cognisance of the fact that the appellant company sought no clarification albeit a clarification meeting was held on the 18th September 2012 (the minutes were dated 9th October 2012), which was attended by a representative of the appellant company and where the 3-package system was explained.

7. The Public Contracts Review Board is satisfied that the evaluation board followed the right procedure wherein package 1, containing the bid bond, was first analysed and this was followed by an analysis of package 2 which contained the technical offer. Needless to say, the evaluation board was correct in disqualifying the appellant company at the stage wherein package 2 was analysed in view of a non observance of a mandatory condition.

In view of the above this Board finds against the appellant company and recommends that, in line with the procurement regulations, the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

29 January 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 513

WSM/346/2012
Tender for the Procurement of a Second Hand Mobile Screener

This call for tenders was published in the Government Gazette on the 12th October 2012. The closing date for this call with an estimated budget of € 120,000 was the 2nd November 2012.

Two (2) tenderers submitted their offers.

SR Environmental Solutions Ltd filed an objection on the 26th November 2012 against the decision of the WasteServ Malta Ltd to disqualify its offer as technically non-compliant and to recommend the cancellation of the tender.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 16th January 2013 to discuss this objection.

Present for the hearing were:

SR Environmental Solutions Limited

Ing. Ray Muscat	Director
Dr Ian Vella Galea	Legal Representative

Vassallo Builders Limited

Mr Pio Vassallo	Chief Executive Officer
Mr Jonathan Buttigieg	Commercial Director
Mr Eusebio Muscat	Representative

WasteServ Malta Limited

Evaluation Board

Mr Charles Zerafa	Member

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Ing. Ray Muscat, representing SR Environmental Solutions Ltd, the appellant company, made the following submissions:

i. by notice issued on the 19th November 2012 the appellant company was informed that the three options it presented were not technically compliant since (i) the specification form was not complete as per clause 1.2.12 and (ii) the flow of material of the equipment was out of range to that requested in the tender document;

ii. this tender called for second hand equipment and such equipment could be made available up to a specific period beyond which availability would not be guaranteed;

iii. this screener was a sort of large sifting or grading machine for different types of material;

iv. the tender specifications requested a screener with a processing capacity ranging from 10 to 20 tons per hour;

v. it was correct for one to state that the equipment offered by the appellant firm in option 1 could process 35 tons/hr whereas, in the case of options 2 and 3, the processing rate was 25 tons/hr;

vi. apparently, once the contracting authority noted the processing rates of 35 tons/hr and 25 tons/hr it adjudicated the offer as technically non-compliant;

vii. besides the fact that the throughput was dependent on the type of material to be processed along with a number of other variables, namely the belt feeding speed, in effect, the equipment offered by the appellant company had the maximum throughput of 25 tons/hr and 35 tons/hr, yet the operator of the equipment could adjust certain settings so that the throughput would be reduced to the desired rate but up to the maximum limits indicated;

viii. whilst admitting that an error had been made by the said appellant company in the tender submission where the throughput was indicated as 35 tons/hr and 25 tons/hr without inserting the words 'up to', yet, in the technical specifications of the equipment which were presented with tender submission it was clearly indicated that the throughput rate was 'up to' 25 tons/hr and 'up to' 35 tons/hr and, as a consequence, the proposed equipment could be operated at the throughput rate of 20 tons/hrs and lower according to tender specifications;

ix. the tender requested equipment with the year of manufacture being 2007 onwards and with not more that 5000 operating hours;

and

x. one of the options offered referred to a demo unit manufactured in 2011 with 300 operating hours whereas another option had the same year of manufacture but with 500 operating hours.

Mr Charles Zerafa, a member of the evaluation board and works manager, whilst acknowledging that the evaluation board had noted that the throughput of the proposed equipment was outside that requested, yet it did not check thoroughly the technical literature submitted by the appellant company and that explained the erroneous decision taken. He added that, in the light of the explanation given

by the appellant company, it was clear that the equipment, the said company proposed, was, in fact, technically compliant.

Dr Ian Vella Galea, legal representative of the appellant company, submitted that with regard to the other reason given for disqualification, namely that the *specification form* was not complete as per clause 1.2.12, the appellant company maintained that the specifications form was duly filled in and was inviting the contracting authority to indicate which section was left incomplete.

Mr Charles Zerafa remarked that the appellant company had failed to answer in a 'yes or no' manner the first question in the Specifications Form which read: *The contractor confirms to undertake the following tasks?*

The Chairman Public Contracts Review Board stated that that question did not make sense and, frankly, it did not deserve an answer.

The Chairman Public Contracts Review Board deplored the lightness with which certain technical evaluations were being carried out with the consequence that bidders had to resort to appeals with the consequent waste of time, effort and money.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 26th November 2012 and also through its representatives verbal submissions presented during the hearing held on the 16th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by notice issued on the 19th November 2012 the appellant company was informed that the three options it presented were not technically compliant since *(1)* the 'specification form' was not complete as per clause 1.2.12 and *(2)* the flow of material of the equipment was out of range to that requested in the tender document, (b) this tender called for second hand equipment and such equipment could be made available up to a specific period beyond which availability would not be guaranteed, (c) this screener was a sort of large sifting or grading machine for different types of material, (d) the tender specifications requested a screener with a processing capacity ranging from 10 to 20 tons per hour, (e) it was correct for one to state that the equipment offered by the appellant firm in option 1 could process 35 tons/hr whereas, in the case of options 2 and 3, the processing rate was 25 tons/hr, (f) apparently, once the contracting authority noted the processing rates of 35 tons/hr and 25 tons/hr it adjudicated the offer as technically non-compliant, (g) besides the fact that the throughput was dependent on the type of material to be processed along with a number of other variables, namely the belt feeding speed, in effect, the equipment offered by the appellant company had the maximum throughput of 25 tons/hr and 35 tons/hr, yet the operator of the equipment could adjust certain settings so that the throughput would be reduced to the desired rate but up to the maximum limits indicated, (h) whilst admitting that an error had been made by the said appellant company in the tender submission where the throughput was indicated as 35 tons/hr and 25 tons/hr without inserting the words 'up to', yet, in the technical specifications of the equipment which were presented with tender submission it was clearly indicated that the throughput rate was 'up to' 25 tons/hr and 'up to' 35 tons/hr and, as a consequence, the proposed equipment could be operated at the throughput

rate of 20 tons/hrs and lower according to tender specifications, (i) the tender requested equipment with the year of manufacture being 2007 onwards and with not more that 5000 operating hours, (j) one of the options offered referred to a demo unit manufactured in 2011 with 300 operating hours whereas another option had the same year of manufacture but with 500 operating hours and (k) with regard to the other reason given for disqualification, namely that the *specification form* was not complete as per clause 1.2.12, the appellant company maintained that the specifications form was duly filled in and was inviting the contracting authority to indicate which section was left incomplete;

- having considered the contracting authority's reference to the fact that (a) whilst the evaluation board had noted that the throughput of the proposed equipment was outside that requested, yet it did not check thoroughly the technical literature submitted by the appellant company and that explained the erroneous decision taken, (b) in the light of the explanation given by the appellant company, it was clear that the equipment, the said company proposed, was, in fact, technically compliant and (c) the appellant company had failed to answer in a 'yes or no' manner the first question in the Specifications Form which read "*The contractor confirms to undertake the following tasks?*"

reached the following conclusions, namely:

1. The Public Contracts Review Board stated that it does not agree with the evaluation board's assessment wherein this decided that the 'specification form' as submitted by the appellant company was not complete in line with clause 1.2.12 in view of the fact that the initial question did not make sense and, in the first place, it did not deserve an answer and, more importantly, no bidder could have ever been disqualified for not replying to an unanswerable question. In this regard, this Board cannot but deplore the lightness with which certain technical specifications are being drafted and certain evaluations are being carried out with the consequence that bidders have to resort to appeals with the consequential waste of time, effort and money.

2. This Board took full cognisance of the fact that the tender specifications requested a screener with a processing capacity ranging from 10 to 20 tons per hour. Nevertheless it is also a fact that the equipment offered by the appellant firm in option 1 could process 35 tons/hr whereas, in the case of options 2 and 3, the processing rate was 25 tons/hr. With this in view this Board agrees with the appellant company regarding the fact that one had to consider the fact that the throughput was dependent on the type of material to be processed along with a number of other variables, namely the belt feeding speed, and that albeit, in effect, the equipment offered by the appellant company had the maximum throughput of 25 tons/hr and 35 tons/hr, yet the operator of the equipment could adjust certain settings so that the throughput would be reduced to the desired rate but up to the maximum limits indicated.

3. Also, this Board took full consideration of the fact that in the technical specifications of the equipment which were presented with tender submission it was clearly indicated that the throughput rate was 'up to' 25 tons/hr and 'up to' 35 tons/hr and, as a consequence, the proposed equipment could be operated at the throughput rate of 20 tons/hrs and lower according to tender specifications. The Public Contracts Review Board cannot but demonstrate its disappointment at the way the evaluation board did not thoroughly check the technical literature submitted by the appellant company and which explained the erroneous decision taken by the said evaluation board.

4. In its deliberation this Board has considered the fact that, during the hearing, the evaluation board's representative exclaimed that, in the light of the explanation given by the appellant company, it was clear that the equipment the appellant company proposed was, in fact, technically compliant.

In view of the above this Board finds in favour of the appellant company and recommends that, apart from the appellant company's bid being reintegrated in the evaluation process, this Board recommends also that the deposit paid by the same company for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

29 January 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 514

WSM/346/2012
Tender for the Procurement of a Second Hand Mobile Screener

This call for tenders was published in the Government Gazette on the 12th October 2012. The closing date for this call with an estimated budget of € 120,000 was the 2nd November 2012.

Two (2) tenderers submitted their offers.

Vassallo Builders Ltd filed an objection on the 26th November 2012 against the decision of the WasteServ Malta Ltd to disqualify its offer as technically non-compliant and to recommend the cancellation of the tender.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 16th January 2013 to discuss this objection.

Present for the hearing were:

Vassallo Builders Ltd

Mr Pio Vassallo	Chief Executive Officer
Mr Jonathan Buttigieg	Commercial Director
Mr Eusebio Muscat	Representative

SR Environmental Solutions Ltd

Ing. Ray Muscat	Director
Dr Ian Vella Galea	Legal Representative

WasteServ Malta Ltd

Evaluation Board

Mr Charles Zerafa	Member

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Mr Jonathan Buttigieg, representing Vassallo Builders Ltd, the appellant company, made the following submissions:

i. by notice issued 19th November 2012 the appellant company was informed that the equipment offered was not technically compliant since the flow of material of the equipment was out of range to that requested in the tender document;

ii. despite the fact that, admittedly, the throughput of the proposed screener was 25 tons/hr, yet, in the tender submission, reference was made to the technical specifications of the equipment which formed part of the tender submission where it was indicated that the throughput was 'up to' 160 m³/hr or up to 25 tons/hrs;

iii. the *Specification Form* itself provided space where to 'Please indicate the corresponding page reference in the technical literature where applicable';

iv. the operator could adjust the settings of the proposed screener to process material at a lower rate than its maximum of 25 tons/hr, namely at 20 tons/hr or even lower which would satisfy the tender conditions;

v. the proposed equipment was a demo model manufactured in 2011 and only had 500 operating hours, whereas the contracting authority requested equipment with the year of manufacture being 2007 onward and with a maximum 5000 operating hours;

and

vi. it was clear that the proposed equipment was fully compliant with tender specifications.

Mr Charles Zerafa, a member of the evaluation board and works manager, whilst acknowledging that the evaluation board had noted that the throughput of the proposed equipment was outside that requested, yet it did not check thoroughly the technical literature submitted by the appellant company and that explained the erroneous decision taken. He added that, in the light of the explanation given by the appellant company, it was clear that the equipment, the said company proposed, was, in fact, technically compliant.

The Chairman Public Contracts Review Board deplored the lightness with which certain technical evaluations were being carried out with the consequence that appeals would eventually be filed resulting in waste of time, effort and money.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 26th November 2012 and also through its representatives verbal submissions presented during the hearing held on the 16th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by notice issued 19th November 2012 the appellant company was informed that the equipment offered was not technically compliant since the flow of material of the equipment was out of range to that requested in the tender document. (b) despite the fact that, admittedly, the throughput of the proposed screener was 25 tons/hr, yet, in the tender submission, reference was made to the technical specifications of the equipment which formed part of the tender submission where it was indicated that the throughput was 'up to' 160 m³/hr or up to 25 tons/hrs, (c) the *Specification Form* itself provided space where to 'Please indicate the

corresponding page reference in the technical literature where applicable', (d) the operator could adjust the settings of the proposed screener to process material at a lower rate than its maximum of 25 tons/hr, namely at 20 tons/hr or even lower which would satisfy the tender conditions and (e) the proposed equipment was a demo model manufactured in 2011 and only had 500 operating hours, whereas the contracting authority requested equipment with the year of manufacture being 2007 onward and with a maximum 5000 operating hours and it was clear that the proposed equipment was fully compliant with tender specifications;

- having considered the contracting authority's reference to the fact that (a) whilst the evaluation board had noted that the throughput of the proposed equipment was outside that requested, yet it did not check thoroughly the technical literature submitted by the appellant company and that explained the erroneous decision taken and (b) in the light of the explanation given by the appellant company, it was clear that the equipment, the said company proposed, was, in fact, technically compliant,

reached the following conclusions, namely:

1. This Board took full cognisance of the fact that the tender specifications requested a screener with a processing capacity ranging from 10 to 20 tons per hour. Nevertheless it is also a fact that the technical specifications of the equipment which formed part of the tender submission there was indicated that the throughput was 'up to' 160 m^3/hr or up to 25 tons/hrs implying that the operator could adjust the settings of the proposed screener to process material at a lower rate than its maximum of 25 tons/hr, namely at 20 tons/hr or even lower which would satisfy the tender conditions.

2. In its deliberation this Board has considered the fact that, during the hearing, the evaluation board's representative exclaimed that, in the light of the explanation given by the appellant company, it was clear that the equipment the appellant company proposed was, in fact, technically compliant.
3. The Public Contracts Review Board cannot but demonstrate its disappointment at the way the evaluation board did not thoroughly check the technical literature submitted by the appellant company and which explained the erroneous decision taken by the said evaluation board.

4. This Board deplores the lightness with which certain technical specifications are being drafted and certain evaluations are being carried out with the consequence that bidders have to resort to appeals with the consequential waste of time, effort and money.

In view of the above this Board finds in favour of the appellant company and recommends that, apart from the appellant company's bid being reintegrated in the evaluation process, this Board recommends also that the deposit paid by the same company for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

29 January 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 515

CPSU/CPU/2061/12
Tender for the Supply of High Protein Powder

This call for tenders was published in the Government Gazette on the 3rd February 2012. The closing date for this call with an estimated budget of €31,350 was the 5th March 2012.

Four (4) tenderers submitted their offers.

A.T.G. Company Ltd filed an objection on the 25th October 2012 against the decision of the Ministry for Health, the Elderly and Community Care to disqualify its offer as non-compliant because the sample submitted upon request was not gluten free.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 16th January 2013 to discuss this objection.

Present for the hearing were:

A.T.C. Company Ltd

Mr Oliver Attard	Managing Director
Mr Andrew Corrieri	Chemist/food handler
Mr Hans Wolfe	Representative

Cherubino Ltd

Dr Francis Cherubino	Representative

Central Procurement and Supplies Unit – Ministry for Health, the Elderly and Community Care

Mr David Baldachino	Representative

Evaluation Board

Ms S Zerafa	Pharmacy Technician/Member
Dr M Caruana	Dietician/Member
Mr M Spiteri	Pharmacist/Member
Ms B. Briscoe	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Mr Oliver Attard, representing ATG Ltd, the appellant company, made the following submissions:

i. by email/letter dated 18th October 2012 the appellant company was informed that its offer was not successful since, according to the sample submitted on request, the item in question was not gluten free;

ii. the information displayed on the packet containing the product offered was in line with EU directives;

iii. the proposed product was gluten free and, in any case, if the contracting authority had any doubt in this regard it could have asked the firm for a clarification/confirmation as to whether the product was gluten free.

Mr David Baldacchino, representing the contracting authority, submitted that:-

a. the sample of the product submitted had printed on its package: *Produced in a factory that handles products containing milk, egg, soy and gluten*;

b. the product could well have been contaminated with gluten once it was not manufactured in a gluten free environment;

c. gluten free products usually carried a label clearly stating that the product was gluten free;

d. in this case it was evident that the manufacturer printed this warning so as not to shoulder any responsibility in case the product would be contaminated with gluten;

e. the tender specifications stated that the product had to be '*high protein powder for the dietary management of patients with proteinaemia as a protein supplement for those unable to meet their protein requirements from normal food and drink or for patients with increased protein requirements, e.g. burns, wound healing etc*';

and

f. the proposed product also carried a label which stated that '*this product is not intended to diagnose, treat, cure or prevent any disease or illness*.'

Mr Andrew Corrieri, a pharmacist, representing the appellant company, submitted that:-

i. the proposed product was not a medicinal product and that explained why it was labelled that it did not provide cure to disease and so forth - in fact this was a food product and, by legislation, it had to have that information;

ii. the European Food Labelling Directive provided no requirement to indicate that the product was gluten free in respect of 14 or so allergies;

iii. the tender requested high protein powder and it specified that it had to be gluten free and, as a consequence, the product offered was 'whey protein' which naturally was gluten free and over 90% pure and there was no chance that it contained gluten;

iv. gluten was a product from plants, like wheat and barley, and to be gluten free a product had to have less than 20 parts per million.

Dr Mario Caruana, a dietician and a member of the evaluation board, stated that:-

a. the product requested in the tender represented food for special medical purposes;

b. the fact that the product offered displayed the warning which read '*Produced in a factory that handles products containing milk, egg, soy and gluten'* meant that the product was manufactured in an environment that was exposed to gluten and, therefore, the manufacturer could not guarantee that the product was gluten free;

c. the contracting authority had to be sure that the product was gluten free so that it could safely give to celiac patients and other patients requiring this high protein powder;

d. for persons with celiac disease the maximum safe level of gluten in a finished product was as little as 20 parts per million, namely it only took a very small amount of gluten to contaminate the product;

e. there would have been no problem with the product offered by the appellant company had it not been for the label which clearly stated that the product was manufactured in an environment that contained gluten and could, as a result, be contaminated;

and

f. although after testing the product it could be found gluten free, still, as presented, that product could not be said to be gluten free as requested in the tender document;

At this point Mr Corrieri intervened and:

a. reiterated that 'whey protein' did not contain gluten;

b. stated that if a product contained wheat protein then it would be treated to have the gluten removed and it would still need to have both the statement that it was manufactured in a factory that handled gluten and also the label that it was gluten free;

and

c. expressed the view that if the contracting authority had any doubt as to whether the product offered was gluten free or not, then it should have asked for a clarification from the tenderer.

The Chairman Public Contracts Review Board remarked that in this case the label was quite clear and left no room for any diverging interpretations. He asked whether the same factory could produce products with gluten and gluten free.

Mr Attard stated that it was difficult for a factory to limit its production exclusively to gluten free products and what happened was that when shifting production from gluten products to gluten free products the factory had to follow an established procedure to clean up the place from gluten and still, in that case, although the product would be gluten free it had to bear the label stating that it was manufactured in a factory that handled gluten. Mr Attard remarked that every batch delivered would be accompanied by an appropriate certificate of analysis that it was gluten free.

The Chairman Public Contracts Review Board opined that the label represented a commercial disclaimer and that the end user was guided by the instructions that featured on the pack and not by the information that might be available on websites or in departmental files.

Dr Caruana remarked that legislation had been introduced precisely to protect patients who suffer from certain allergies, including celiac patients, because, in the past, no indications were displayed on products with regard to gluten content to the detriment of these patients. He added that the label on this product made it clear that the manufacturer could not guarantee that the product was gluten free and that rendered the product unsafe for use and hospital staff would decline to prescribe and hand out such a product to patients. Dr Caruana stated that the product offered was not indicated as food for special medical purposes.

Dr Francis Cherubino, representing the recommended tenderer, submitted that:-

a. that label was displayed on the product precisely because it could have been contaminated by gluten because other products, like the one offered by the recommended firm, which were manufactured in a sterilised environment, did not have to bear that label since it would be 100% free of gluten so much so that the container displayed the wording 'gluten free';

b. the product offered by the recommended firm was termed as food for medical purposes and gluten free;

c. it was questionable how the appellant company's product could have satisfied the tender requirement as per LN 209 of 2001 that it had to be certified a dietary food for specific medical purposes;

and

d. if the product was totally gluten free then, according to legislation, there was no need for any disclaimer as that appearing on and applicable to the appellant's product.

Mr Hans Wolfe, also representing the appellant company, submitted that:-

i. the certification mentioned by the recommended bidder applied to special medicinal foods;

ii. the tender requested a high protein powder and not a special medicinal food and the product offered did meet the tender requirements in that regard;

iii. the product offered was a general consumer product and that was why it displayed those statements by way of disclaimers;

iv. although the product offered was a general consumer product, in the tender document it was clearly stated that each and every batch delivered would be accompanied with a certificate of analysis which would clearly demonstrate that the supply was gluten free and that would satisfy the gluten free requirement at clause 1 of Volume 3;

and

v. albeit legislation was very strict on manufacturers to display information in the case of general consumer products, yet dedicated supplies such as in this one could be issued with a specific certificate attesting that the product was gluten free.

The Chairman Public Contracts Review Board observed that it could be that the contracting authority might be covered contractually with the required paperwork that the product was gluten free but the fact remained that pharmacists and nurses who would be distributing this product, as well as the users themselves, would only have the instructions on the package to go by and that label did not state that it contained gluten but, on the other hand, it did not provide the peace of mind that the product was gluten free.

Mr Corrieri contended that clause 1 of Volume 3 stated that this protein powder was meant to supplement protein requirements from normal food and drink and that did not render the item a medicinal product.

Dr Caruana maintained that this product was required for dietary management of patients and so it was legally termed as food for special medical purposes. Dr Caruana added that the product offered was marketed as a 'sports nutrition product' and not as food for special medical purposes and the evaluation board adjudicated on the sample provided which represented the product that would eventually be supplied and which had to be consumer friendly.

Mr Mark Spiteri, a member of the evaluation board, explained that, whilst non medicinal products represented products which were not pharmaceuticals/drugs, yet there were food preparations which were meant to treat medical conditions.

Mr Wolfe pointed out that the tender did not request a product for the treatment of medical conditions but what it requested was a high protein powder for dietary management of patients and the product offered satisfied that purpose. He maintained that the appellant company's product was equivalent to that of the recommended tenderer and up to tender specifications but at a better price and if the contracting authority wanted something different then it should have reflected those requirements in the tender specifications.

Dr Caruana concluded that the case hinged on the fact that the contracting authority requested a gluten free product whereas the product offered by the appellant company, evidently, did not provide the comfort that it was gluten free. He added that the fact was that a food for special medical purposes would have the indication that it was 'gluten free' whereas a general consumer product, like the one offered, would display a disclaimer.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 25th October 2012 and also through its representatives verbal submissions presented during the hearing held on the 16th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email/letter dated 18th October 2012 the appellant company was informed that its offer was not successful since, according to the sample submitted on request, the item in question was not gluten free, (b) the information displayed on the packet containing the product offered was in line with EU directives, (c) the proposed product was gluten

free and, in any case, if the contracting authority had any doubt in this regard it could have asked the firm for a clarification / confirmation as to whether the product was gluten free, (d) the proposed product was not a medicinal product and that explained why it was labelled that it did not provide cure to disease and so forth - in fact this was a food product and, by legislation, it had to have that information, (e) the European Food Labelling Directive provided no requirement to indicate that the product was gluten free in respect of 14 or so allergies, (f) the tender requested high protein powder and it specified that it had to be gluten free and, as a consequence, the product offered was 'whey protein' which naturally was gluten free and over 90% pure and there was no chance that it contained gluten, (g) gluten was a product from plants, like wheat and barley, and to be gluten free a product had to have less than 20 parts per million, (h) 'whey protein' did not contain gluten, (i) stated that if a product contained wheat protein then it would be treated to have the gluten removed and it would still need to have both the statement that it was manufactured in a factory that handled gluten and also the label that it was gluten free, (j) expressed the view that if the contracting authority had any doubt as to whether the product offered was gluten free or not, then it should have asked for a clarification from the tenderer, (k) it was difficult for a factory to limit its production exclusively to gluten free products and what happened was that when shifting production from gluten products to gluten free products the factory had to follow an established procedure to clean up the place from gluten and still, in that case, although the product would be gluten free it had to bear the label stating that it was manufactured in a factory that handled gluten, (l) remarked that every batch delivered would be accompanied by an appropriate certificate of analysis that it was gluten free, (m) the certification mentioned by the recommended bidder applied to special medicinal foods, (n) the tender requested a high protein powder and not a special medicinal food and the product offered did meet the tender requirements in that regard, (o) the product offered was a general consumer product and that was why it displayed those statements by way of disclaimers, (p) although the product offered was a general consumer product, in the tender document it was clearly stated that each and every batch delivered would be accompanied with a certificate of analysis which would clearly demonstrate that the supply was gluten free and that would satisfy the gluten free requirement at clause 1 of Volume 3, (q) albeit legislation was very strict on manufacturers to display information in the case of general consumer products, yet dedicated supplies such as in this one could be issued with a specific certificate attesting that the product was gluten free, (r) contended that clause 1 of Volume 3 stated that this protein powder was meant to supplement protein requirements from normal food and drink and that did not render the item a medicinal product, (s) the tender did not request a product for the treatment of medical conditions but what it requested was a high protein powder for dietary management of patients and the product offered satisfied that purpose and (t) the appellant company's product was equivalent to that of the recommended tenderer and up to tender specifications but at a better price and if the contracting authority wanted something different then it should have reflected those requirements in the tender specifications;

- having considered the contracting authority's reference to the fact that (a) the sample of the product submitted had printed on its package: *Produced in a factory that handles products containing milk, egg, soy and gluten*, (b) the product could well have been contaminated with gluten once it was not manufactured in a gluten free environment, (c) gluten free products usually carried a label clearly stating that the product was gluten free, (d) in this case it was evident that the manufacturer printed this warning so as not to shoulder any responsibility in case the product would be contaminated with gluten, (e) the tender specifications stated that the product had to be '*high protein powder for the dietary management of patients with proteinaemia as a protein supplement for those unable to meet their protein requirements from normal food and drink or for patients with increased protein requirements, e.g. burns, wound healing etc*', (f) the proposed product also carried a label which stated that '*this product is not intended to diagnose, treat, cure or prevent any disease or illness*.', (g) the product requested in the tender represented food for special medical purposes, (h) the fact that the product offered displayed the warning which read '*Produced in a factory that handles products containing milk, egg, soy and gluten'* meant that the product was manufactured in an environment that was exposed to gluten and, therefore, the

manufacturer could not guarantee that the product was gluten free, (i) the contracting authority had to be sure that the product was gluten free so that it could safely give to celiac patients and other patients requiring this high protein powder, (j) for persons with celiac disease the maximum safe level of gluten in a finished product was as little as 20 parts per million, namely it only took a very small amount of gluten to contaminate the product, (k) there would have been no problem with the product offered by the appellant company had it not been for the label which clearly stated that the product was manufactured in an environment that contained gluten and could, as a result, be contaminated, (l) although after testing the product it could be found gluten free, still, as presented, that product could not be said to be gluten free as requested in the tender document, (m) that legislation had been introduced precisely to protect patients who suffer from certain allergies, including celiac patients, because, in the past, no indications were displayed on products with regard to gluten content to the detriment of these patients, (n) the label on this product made it clear that the manufacturer could not guarantee that the product was gluten free and that rendered the product unsafe for use and hospital staff would decline to prescribe and hand out such a product to patients, (o) the product offered was not indicated as food for special medical purposes, (p) this product was required for dietary management of patients and so it was legally termed as food for special medical purposes, (q) the product offered was marketed as a 'sports nutrition product' and not as food for special medical purposes and the evaluation board adjudicated on the sample provided which represented the product that would eventually be supplied and which had to be consumer friendly, (r) whilst non medicinal products represented products which were not pharmaceuticals/drugs, yet there were food preparations which were meant to treat medical conditions, (s) the case hinged on the fact that the contracting authority requested a gluten free product whereas the product offered by the appellant company, evidently, did not provide the comfort that it was gluten free and (t) the fact was that a food for special medical purposes would have the indication that it was 'gluten free' whereas a general consumer product, like the one offered, would display a disclaimer;

- having also considered the recommended tenderer's representative's reference to the fact that (a) that label was displayed on the product precisely because it could have been contaminated by gluten because other products, like the one offered by the recommended firm, which were manufactured in a sterilised environment, did not have to bear that label since it would be 100% free of gluten so much so that the container displayed the wording 'gluten free', (b) the product offered by the recommended firm was termed as food for medical purposes and gluten free, (c) it was questionable how the appellant company's product could have satisfied the tender requirement as per LN 209 of 2001 that it had to be certified a dietary food for specific medical purposes and (d) if the product was totally gluten free then, according to legislation, there was no need for any disclaimer as that appearing on and applicable to the appellant's product,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the label, as provided by the manufacturer through the appellant company, represented a commercial disclaimer. In this case the disclaimer provided by the manufacturer is, seemingly, more intended towards warning the ultimate user / consumer so as the said manufacturer would not shoulder any responsibility in case the product would be contaminated with gluten. At least this is, *prima facie*, the perception of such claimer considering that, normally, gluten free products carry a label clearly stating that the product is gluten free.

2. This Board observes that it could be that the contracting authority might be covered contractually with the required paperwork that the product was gluten free but the fact remains that pharmacists and nurses who would be distributing this product, as well as the users themselves, would only have the instructions on the package to go by and that, although the label did not state that it contained gluten, yet, on the other hand, it did not provide the peace of mind that the product was gluten free, especially when the label provided on the

sample of the product submitted had the following printed on it, namely *'Produced in a factory that handles products containing milk, egg, soy and gluten.*'

3. The Public Contracts Review Board concurs with the contracting authority's claim namely that there would have been no problem with the product offered by the appellant company had it not been for the label which clearly stated that the product was manufactured in an environment that contained gluten and could, as a result, be contaminated. One has to bear in mind that legislation was introduced precisely to protect patients who suffer from certain allergies, including celiac patients, because, in the past, no indications were displayed on products with regard to gluten content to the detriment of these patients.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

29 January 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 516

CT/2074/2012
Tender for the Construction and Finishing of a Raised Water Polo Pitch at B'Bugia

This call for tenders was published in the Government Gazette on the 13th April 2012. The closing date for this call with an estimated budget of €1,554,268 was the 14th June 2012.

Three (3) tenderers submitted their offers.

Ballut Blocks Services Ltd filed an objection on the 29th November 2012 against the decision of the Contacts Department to disqualify its offer as administratively non-compliant and to recommend the award of tender to Messrs Aquatics Joint Venture.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 30th January 2013 to discuss this objection.

Present for the hearing were:

Ballut Blocks Services Ltd

Dr Massimo Vella	Legal Representative
Mr Paul Vella	Director

Messrs Aquatics Joint Venture

Dr Roderick Zammit Pace	Legal Representative
Ms Itiana Abela	Representative
Mr Benny Muscat	Representative
Mr Johann Farrugia	Representative

B'Bugia Aquatic Sports Club

Mr Joe Esposito	Representative
Mr George Farrugia	Representative

Ministry for Resources and Rural Affairs

Dr Victoria Scerri	Legal Representative

Evaluation Board

Architect Ray Farrugia	Chairman
Mr Patrick Girxti Soler	Member
Ms Janice Borg	Member
Mr John Farrugia	Member
Mr Joseph Casaletto	Secretary

Contracts Department

Mr Nicholas Aquilina	Representative

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection because, according to the Public Contracts Review Board, it had already decided on the merits of this case and that, subsequently, the same appellant company had exercised its right of appeal from that Public Contracts Review Board decision before the Court of Appeal.

Dr Massimo Vella, legal representative of Ballut Blocks Services Ltd, the appellant company, made the following submissions:

i. by letter dated the 20th November 2012 the appellant company was informed that its offer was not administratively compliant because it did not enter the financial amount in the 'Tender Form';

ii. albeit, originally, this tender was recommended for award to the appellant company, Ballut Blocks Services Ltd, yet, following the objection filed by Aquatics Joint Venture concerning a deficiency in the appellant company's tender form the Public Contracts Review Board, as composed at this hearing, had decided that the appellant company's bid had to be disqualified and that the bid of Aquatics Joint Venture had to be reintegrated in the tendering process;

iii. subsequently, on the 20th November 2012, the adjudicating board acted on the decision taken by the Public Contracts Review Board in that it awarded the tender to Aquatics Joint Venture while rejecting Ballut Blocks Services Ltd's bid as administratively non-compliant;

iv. the appellant company had to lodge this appeal to contest the award of the tender to Aquatics Joint Venture otherwise, unless that award decision was appealed it would become final and it would prejudice its appeal presently before the Courts;

v. in this appeal, the appellant company was requesting the Public Contracts Review Board to quash the decision dated 20th November 2012, whereby the contracting authority awarded the tender to Aquatics Joint Venture, and that the tender be awarded to Ballut Blocks Services Ltd;

vi. once this appeal was going to be dealt with by the Public Contracts Review Board composed of the same members who had decided upon case no. 473, the merits of which were identical to those of the present appeal, it was being submitted that the Public Contracts Review Board as composed ought to abstain from hearing this appeal so as to follow the Court practice whereby a magistrate or a judge could not preside over the appeal contesting his first decision, all the more so when this practice had been introduced following a ruling by the European Court of Human Rights in Strasbourg;

vii. the decision to disqualify the appellant company's offer was in breach of EC Directive 2004/18/EC in that it violated the principle of proportionality such that the shortcoming in his client's tender form, which, effectively, amounted to a formality, did not preclude the contracting authority from determining the price quoted by the appellant company and that rendered the measure taken to disqualify Ballut Blocks Services Ltd disproportionate;

and

viii. after all, the Tender Form submitted by Aquatics Joint Venture included an erroneous amount which, for all intents and purposes, rendered its tender submission defective.

The Chairman Public Contracts Review Board expressed the following views:-

a. there was only one Public Contracts Review Board constituted of a chairman and two members with a substitute member;

b. once this appeal was based on the same grounds as those of case no. 473, then the Public Contracts Review Board has already decided on the merits of the case and, as a consequence, the Public Contracts Review Board could not decide on this second appeal because that would amount to a review of its first decision;

c. it was up to the courts to deal with this case at this juncture;

and

d. there were other instances where the Public Contracts Review Board presided over two or even three appeals on the same case but in each case there would be fresh grounds for objection, namely once on administrative shortcomings, then on technical shortcomings and then on the award criteria.

Dr Vella reiterated that, in his view, it was necessary for the appellant company to lodge this appeal, namely to contest the award of the tender in favour of Aquatics Joint Venture, otherwise, in the absence of such an appeal, that award would become final and would prejudice its court case because the merit of the court case would be exhausted.

The Chairman Public Contracts Review Board reminded the appellant that Reg. 85 (5) of the Public Procurement Regulations provided, among other things, that '*Such recourse* – before the Court of Appeal - *shall not however delay the Director of Contracts or the Head of a contracting authority from implementing the Review Board's final decision*.'

Dr Roderick Zammit Pace, on behalf of the recommended tenderer, expressed the following views:-

i. agreed with the views expressed by the Chairman Public Contracts Review Board in the sense that this Board could not decide on the same merits decided upon in case no. 473 and the same appellant company's legal representative admitted this when he asked the Public Contracts Review Board, as composed, to abstain from hearing the present appeal;

ii. Ballut Blocks Services Ltd has lodged an appeal before the Court of Appeal on the same grounds as those of case no. 473 and, as a result, one had to question the need for the appellant company to lodge this appeal in the first place;

iii. at this stage, the Public Contracts Review Board's decision on case no. 473 was final and had to be acted upon as provided for in Reg. 85 (5) and, in the meantime, the appellant company had to wait for the outcome of the case it has pending before the Court;

and

iv. whilst, the purpose of this appeal was to stop the award of the tender until such time that the Court of Appeal would decide on the appellant company's case, yet, the regulations did not provide for this eventuality and neither did it permit the Public Contracts Review Board to decide a case twice on the same merits.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 29th November 2012 and also through its representatives verbal submissions presented during the hearing held on the 30th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated the 20th November 2012 the appellant company was informed that its offer was not administratively compliant because it did not enter the financial amount in the 'Tender Form', (b) albeit, originally, this tender was recommended for award to the appellant company, Ballut Blocks Services Ltd, yet, following the objection filed by Aquatics Joint Venture concerning a deficiency in the appellant company's tender form, the Public Contracts Review Board, as composed at this hearing, had decided that the appellant company's bid had to be disqualified and that the bid of Aquatics Joint Venture had to be reintegrated in the tendering process, (c) subsequently, on the 20th November 2012, the adjudicating board acted on the decision taken by the Public Contracts Review Board in that it awarded the tender to Aquatics Joint Venture while rejecting Ballut Blocks Services Ltd's bid as administratively non-compliant, (d) the appellant company had to lodge this appeal to contest the award of the tender to Aquatics Joint Venture otherwise, unless that award decision was appealed, it would become final and it would prejudice its appeal presently before the Courts, (e) in this appeal, the appellant company was requesting the Public Contracts Review Board to quash the decision dated 20th November 2012, whereby the contracting authority awarded the tender to Aquatics Joint Venture, and that the tender be awarded to Ballut Blocks Services Ltd, (f) once this appeal was going to be dealt with by the Public Contracts Review Board composed of the same members who had decided upon case no. 473, the merits of which were identical to those of the present appeal, it was being submitted that the Public Contracts Review Board as composed ought to abstain from hearing this appeal so as to follow the Court practice whereby a magistrate or a judge could not preside over the appeal contesting his first decision, all the more so when this practice had been introduced following a ruling by the European Court of Human Rights in Strasbourg, (g) the decision to disqualify the appellant company's offer was in breach of EC Directive 2004/18/EC in that it violated the principle of proportionality such that the shortcoming in his client's tender form, which, effectively, amounted to a formality, did not preclude the contracting authority from determining the price quoted by the appellant company and that rendered the measure taken to disqualify Ballut Blocks Services Ltd disproportionate, (h) after all, the 'tender form' submitted by Aquatics Joint Venture included an erroneous amount which, for all intents and purposes, rendered its tender submission defective and (i) it was necessary for the appellant company to lodge this appeal, namely to contest the award of the tender in favour of Aquatics Joint Venture, otherwise, in the absence of such an appeal, that award would become final and would prejudice its court case because the merit of the court case would be exhausted;

- having also considered the recommended tenderer's reference to the fact that, (a) this party agreed with the views expressed by the Public Contracts Review Board in the sense that this Board could not decide on the same merits decided upon in case no. 473 and the same appellant company's legal representative admitted this when he asked the Public Contracts Review Board, as composed, to abstain from hearing the present appeal, (b) Ballut Blocks Services Ltd has lodged an appeal before the Court of Appeal on the same grounds as those of case no. 473 and, as a result, one had to question the need for the appellant company to lodge this appeal in the first place, (c) at this stage, the Public Contracts Review Board's decision on case no. 473 was final and had to be acted upon as provided for in Reg. 85 (5) and, in the meantime, the appellant company had to wait for the outcome of the case it has pending before the Court and (d) whilst, the purpose of this appeal was to stop the award of the tender until such time that the Court of

Appeal would decide on the appellant company's case, yet, the regulations did not provide for this eventuality and neither did it permit the Public Contracts Review Board to decide a case twice on the same merits,

reached the following conclusions, namely:

1. The Public Contracts Review Board establishes that, once this appeal was based on the same grounds as those of case no. 473, then this meant that the Public Contracts Review Board has already decided on the merits of the case and, as a consequence, the Public Contracts Review Board could not decide on this second appeal because that would amount to a review of its first decision. This Board contends that the Public Contracts Review Board's decision on case no. 473 was final and had to be acted upon as provided for in Reg. 85 (5) of the Public Procurement Regulations which, among other things, states that '*Such recourse* – before the Court of Appeal - *shall not however delay the Director of Contracts or the Head of a contracting authority from implementing the Review Board's final decision*.'

2. The Public Contracts Review Board cannot but demonstrate its reservations as to the real scope which prompted the appellant company to decide to file this appeal considering the fact that the same appellant company has to wait for the outcome of the case it has pending before the Court of Appeal. As a result, following a thorough deliberation of submissions made by the appellant company, this Board concludes that the nature of this appeal was, intrinsically, frivolous.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

6 February 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 517

WSM/80/2012
Period Contract for the Transportation of Material by using Hired Hook Loaders from Sant Antnin Waste Treatment Plant to Maghtab Environment Complex, returning back to Sant Antnin Waste Treatment Plant

This call for tenders was published in the Government Gazette on the 4th September 2012. The closing date for this call with an estimated budget of €120,000 was the 25th September 2012.

Six (6) tenderers submitted their offers.

Ballut Blocks Services Ltd filed an objection on the 20th November 2012 against the decision of WasteServ Malta Ltd to recommend the award of the tender to Polidano Brothers Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 30th January 2013 to discuss this objection.

Present for the hearing were:

Ballut Blocks Services Ltd

Dr Massimo Vella	Legal Representative
Mr Paul Vella	Director

Polidano Brothers Ltd

Dr Franco Galea	Legal Representative
Mr Paul Polidano	Representative

WasteServ Malta Ltd

Mr Anton Borg	Representative

Evaluation Board

Mr Marco Borg	Member

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Massimo Vella, legal representative of Ballut Blocks Services Ltd, the appellant company, made the following submissions:

i. by award notice published on the 15th November, 2012, the appellant company was notified that its offer was not successful as it placed 3rd in the final ranking of bids;

ii. the notice of award issued on the 15th November 2012 indicated that the appellant company had quoted the total amount of €234.55 which amounted to a misinterpretation of the rates as featured in the schedule of rates which clearly indicated the total price of €51.63 against the recommended price of €53.10;

iii. one had to quote for two (2) items and, as a result, in the schedule of rates the appellant company quoted in the most clear terms as follows:-

(a) a rate for item 1 in respect of the transport of loaded container from Sant' Antnin Waste Treatment Plant to Maghtab and transport of empty container back to Sant' Antnin Waste Treatment Plant, where the appellant company offered the rate of €9.15 per tonne which then had to be multiplied by 5 tonnes to read €45.73, including VAT;

(b) a rate for item 2 in respect of the transport of loaded container from Maghtab to Sant' Antnin Waste Treatment Plant where the appellant company offered the rate of €5.90 per tonne (only) including VAT;

iv. in the case of the appellant company, the notice of award should have featured the rate per tonne for item 1, namely €9.15 multiplied by 5 (tonnes) i.e. €45.73 ***plus*** the rate of €5.90 per tonne for item 2 totalling €51.63 and not as, in fact, indicated in the notice of award, namely the rate of €45.73 per tonne for item 1 multiplied by 5 (tonnes) i.e. €228.65 ***plus*** the rate of €5.90 per tonne for item 2 totalling €234.55;

v. what, evidently, happened was that, in the notice of award, the contracting authority did not include the rate of €9.15 per tonne but included the rate of €45.73 per tonne in respect of item 1 when the latter was, in fact, the rate per 5 tonnes and, as a result Ballut Blocks Services Ltd's offer instead of reading €51.63, which rendered it the cheapest offer, it read €234.55;

vi. clauses 4.5.1 (b) provided, among other things, that '*Where there is a discrepancy between a unit rate/price and the total amount derived from the multiplication of the unit rates/price and the quantity, the unit rates/price as quote shall prevail* and clause 4.5.2 provided, among other things, that: *The amount stated in the Tender shall be adjusted by the evaluation committee in the event of error, and the tenderer shall be bound by that adjusted amount'*;

and

vii. therefore, in the appellant company's case, the rates quoted in its schedule of rates should prevail over those indicated in the notice of award, which were evidently misinterpreted.

Mr Anton Borg, representing the contracting authority, offered the following explanations:-

a. whilst, it was correct that, in the schedule of rates, the appellant company quoted the total price of €51.63 for items 1 and 2, yet in para. 3 of the the tender form the appellant company quoted the rate per tonne of €45.73 in respect of item 1 and the rate per tonne of €5.90 in respect of item 2;

b. the evaluation board noted this discrepancy in the rates quoted by the appellant company in its schedule of rates and in its 'tender form' and sought guidance from the Departmental Contracts Committee (DCC) and the latter advised, in writing, that, in such a case, the rates quoted in the 'tender form' should prevail;

and

c. that explained why the prices that, eventually, featured in the notice of award issued on 15th November 2012 were those indicated in the appellant company's 'tender form'.

Dr Vella insisted upon his argument that, in this case, the rates in the Schedule of Rates, which were crystal clear, should prevail as per clauses 4.5.1 and 4.5.2 and, if anything, it would have been in place had the contracting authority asked for a clarification.

Dr Franco Galea, legal representative of the recommended tenderer, submitted that:-

i. in this case the discrepancy between the rates in the 'Schedule of Rates' and in the 'tender form' did not arise from any arithmetical error but the discrepancy resulted because, in its tender submission, the appellant company, effectively, quoted two different rates in respect of item 1, namely €9.15 per tonne in the 'schedule of rates' and €45.73 per tonne in the 'tender form';

ii. therefore, the provisions of section 4.5 of the tender document did not apply in this case;

iii. it had always been held that the 'tender form' prevailed over any other signed declarations/documents found in any other part of the tender submission so much so that the tenderer was bound by what was declared in the 'tender form';

iv. tenderers could have offered more than one rate, namely different options, provided that a separate 'tender form' had to be filled in for each option;

v. clause 1.2.7 provided that failure to submit the 'tender form', complete in all respects, would disqualify the bid;

and

vi. no rectifications were allowed to the 'tender form'.

Dr Vella maintained that, according to section 4.5 of the tender document, it was evident that the schedule of rates should prevail as far as the rates were concerned. He added that the appellant company was currently providing this service and it had won the contract with an identical tender submission.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 20th November 2012 and also through its representatives verbal submissions presented during the hearing held on the 30th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by award notice published on the 15th November, 2012, the appellant company was notified that its offer was not successful as it placed 3rd in the final

ranking of bids, (b) the notice of award issued on the 15th November 2012 indicated that the appellant company had quoted the total amount of €234.55 which amounted to a misinterpretation of the rates as featured in the schedule of rates which clearly indicated the total price of €51.63 against the recommended price of €53.10, (c) one had to quote for two items and, as a result, in the schedule of rates the appellant company quoted in the most clear terms as follows *(1)* a rate for item 1 in respect of the transport of loaded container from Sant' Antnin Waste Treatment Plant to Maghtab and transport of empty container back to Sant' Antnin Waste Treatment Plant, where the appellant company offered the rate of €9.15 per tonne which then had to be multiplied by 5 tonnes to read €45.73, including VAT and *(2)* a rate for item 2 in respect of the transport of loaded container from Maghtab to Sant' Antnin Waste Treatment Plant where the appellant company offered the rate of €5.90 per tonne (only) including VAT, (d) in the case of the appellant company, the notice of award should have featured the rate per tonne for item 1, namely €9.15 multiplied by 5 (tonnes) i.e. €45.73 ***plus*** the rate of €5.90 per tonne for item 2 totalling €51.63 and not as, in fact, was indicated in the notice of award, namely the rate of €45.73 per tonne for item 1 multiplied by 5 (tonnes) i.e. €228.65 ***plus*** the rate of €5.90 per tonne for item 2 totalling €234.55, (e) what, evidently, happened was that, in the notice of award, the contracting authority did not include the rate of €9.15 per tonne but included the rate of €45.73 per tonne in respect of item 1 when the latter was, in fact, the rate per 5 tonnes and, as a result Ballut Blocks Services Ltd's offer instead of reading €51.63, which rendered it the cheapest offer, it read €234.55, (f) clauses 4.5.1 (b) provided, among other things, that '*Where there is a discrepancy between a unit rate/price and the total amount derived from the multiplication of the unit rates/price and the quantity, the unit rates/price as quote shall prevail* and clause 4.5.2 provided, among other things, that: *The amount stated in the Tender shall be adjusted by the evaluation committee in the event of error, and the tenderer shall be bound by that adjusted amount'*, (g) therefore, in the appellant company's case, the rates quoted in its schedule of rates should prevail over those indicated in the notice of award, which were evidently misinterpreted, (h) the rates in the Schedule of Rates, which were crystal clear, should prevail as per clauses 4.5.1 and 4.5.2 and, if anything, it would have been in place had the contracting authority asked for a clarification and (i) that the appellant company was currently providing this service and it had won the contract with an identical tender submission;

- having considered the contracting authority's representative's reference to the fact that (a) whilst, it was correct that, in the schedule of rates, the appellant company quoted the total price of €51.63 for items 1 and 2, yet in para. 3 of the the tender form the appellant company quoted the rate per tonne of €45.73 in respect of item 1 and the rate per tonne of €5.90 in respect of item 2, (b) the evaluation board noted this discrepancy in the rates quoted by the appellant company in its schedule of rates and in its 'tender form' and sought guidance from the Departmental Contracts Committee (DCC) and the latter advised, in writing, that, in such a case, the rates quoted in the 'tender form' should prevail and (c) that explained why the prices that, eventually, featured in the notice of award issued on 15th November 2012 were those indicated in the appellant company's 'tender form';

- having also considered the recommended tenderer's reference to the fact that, (a) in this case the discrepancy between the rates in the 'Schedule of Rates' and in the 'tender form' did not arise from any arithmetical error but the discrepancy resulted because, in its tender submission, the appellant company, effectively, quoted two different rates in respect of item 1, namely €9.15 per tonne in the 'schedule of rates' and €45.73 per tonne in the 'tender form', (b) therefore, the provisions of section 4.5 of the tender document did not apply in this case, (c) it had always been held that the 'tender form' prevailed over any other signed declarations / documents found in any other part of the tender submission so much so that the tenderer was bound by what was declared in the 'tender form', (d) tenderers could have offered more than one rate, namely different options, provided that a separate 'tender form' had to be filled in for each option, (e) clause 1.2.7 provided that failure to submit the 'tender form', complete in all respects, would disqualify the bid and (f) no rectifications were allowed to the 'tender form',

reached the following conclusions, namely:

1. The Public Contracts Review Board (a) observes that *(1)* clause 4.5.1 (b) provided, among other things, that '*Where there is a discrepancy between a unit rate/price and the total amount derived from the multiplication of the unit rates/price and the quantity, the unit rates/price as quote shall prevail* and *(2)* clause 4.5.2 provided, among other things, that '*The amount stated in the Tender shall be adjusted by the evaluation committee in the event of error, and the tenderer shall be bound by that adjusted amount'* (b) agrees with the recommended tenderer's argument wherein it was stated that, in this case, the discrepancy between the rates in the 'Schedule of Rates' and in the 'tender form' did not arise from any arithmetical error but the discrepancy resulted because, in its tender submission, the appellant company, effectively, quoted two different rates in respect of item 1, namely €9.15 per tonne in the 'schedule of rates' and €45.73 per tonne in the 'tender form' and, as a consequence, in this particular instance, the provisions of section 4.5 of the tender document did not apply.

2. The Public Contracts Review Board also concurs with the recommended tenderer's viewpoint in respect of the fact that it had always been held that the 'tender form' prevailed over any other signed declarations / documents found in any other part of the tender submission so much so that the tenderer was bound by what was declared in the 'tender form'.

3. This Board has also taken full cognisance of the fact that clause 1.2.7 provided that failure to submit the 'tender form', complete in all respects, would disqualify the bid and that no rectifications were allowed to the 'tender form'.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

6 February 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 518

MRRA/W/188/2011/6
Tender for the Supply and Laying of Natural Paving Material at Gnien Karen Grech and Community Centre at San Gwann

This call for tenders was published in the Government Gazette on the 14th September 2012. The closing date for this call with an estimated budget of **€117,033.90** was the 28th September 2012.

Five (5) tenderers submitted their offers.

Attard Brothers Ltd filed an objection on the 4th December 2012 against the decision of the Works and Services Department (Ministry for Resouces and Rural Affairs) to disqualify its offer as administratively non-compliant and to recommend the award of tender to SCH Joint Venture.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 30th January 2013 to discuss this objection.

Present for the hearing were:

Attard Brothers Ltd

Mr Michael Attard	Chairman and CEO
Mr Carl Attard	Managing Director
Mr Matthew Micallef	Representative

SCH Joint Venture

Not. Matthew Pulis	Legal Representative
Mr Hugh Vella	Representative
Mr Andrea Vella	Representative
Mr Anton Schembri	Representative

Works and Services Department - Ministry for Resources and Rural Affairs

Dr Victoria Scerri	Legal Representative

Evaluation Board

Architect Anton Camilleri	Chairman
Mr Emmanuel Buttigieg	Member
Mr Joseph Zerafa Boffa	Member
Mr Robert Fenech	Member

After the Chairman's brief introduction, the appellant company was invited to explain the motives of his company's objection.

Mr Carl Attard, representing Attard Brothers Ltd, the appellant company, made the following submissions:

i. by letter dated 27th November 2012 the appellant company was notified that its offer was adjudicated to be technically non-compliant because the comprehensive strength of the granite offered was less than that specified, namely it was 124 Mpa (megapascals) when the minimum was 125 Mpa;

ii. the decision was considered disproportionate when considering that the difference of 1 Mpa was almost negligible in terms of quality and strength of the material offered and all the more when the value of which comprised only 4.6% of the offer and when considering that the bid was €18,760 or 15% cheaper than that recommended for award;

and

iii. whilst, admittedly, the sample provided was certified as having 124 Mpa, yet, the contracting authority could have asked for a clarification in which case the appellant company would have confirmed that the material actually supplied would be up to or exceeding the 125 Mpa requested.

Architect Anton Camilleri, chairman of the evaluation board, explained that:-

a. clause 8.4.13 provided that the 'bush hammered granite steps grey in colour' had to have a comprehensive strength greater or equal to 125 Mpa;

b. according to the certificate presented with the sample submitted by the appellant company it was evident that the granite offered was not up to specifications with regard to comprehensive strength requirement and the evaluation board did not have any discretion to depart from the technical specifications;

c. the granite submitted by the recommended tenderer had a comprehensive strength of 164 Mpa (as per evaluation report);

d. there was no need for any clarification in this case because the certificate accompanying the sample was very clear in that it read 124 Mpa;

e. technically speaking, it would not make much difference if the granite was 1 Mpa less than specified and, on a personal basis, the contracting authority would have had no hesitation in accepting it;

and

f. it was advisable that bidders would first check that the certificate met the technical specifications because the evaluation board had its hands tied in such situations.

Mr Emmanuel Buttigieg, a member of the evaluation board, remarked that, whilst the comprehensive strength minimum of 125 Mpa was included in the tender document so as to set a standard, yet, in practice, a variation of 1 Mpa was insignificant to the quality of the product and, when such instances

occurred, the contracting authority would find itself in an awkward position having to refuse a financially advantageous tender due to an almost negligible technical variation.

The Chairman Public Contracts Review Board expressed the view that, although standards had to be set in the drawing up of the tender document, yet, if one were to just limit the tender evaluation process to ticking whether or not the technical specifications had been met, then one might as well input the data into a computer and that would be that, but, the fact that experts were selected to sit on evaluation boards it would perhaps be more reasonable to allow the technical experts a measure of leeway with regard to the overall technical evaluation of the bid. He added that, in this case, the evaluation board had its hands tied.

Dr Matthew Paris, legal representative of the recommended tenderer, remarked that:-

i. any anomalies with regard to the tender conditions/specifications had to be sorted out at pre-contractual remedy state and not at technical evaluation stage;

ii. once the bidder participated in the tendering procedure then that meant that one would have accepted the tender conditions and specifications;

and

iii. this tender had to be awarded to the cheapest tender which, however, had to satisfy the technical specifications and, evidently, the appellant company's offer was not technically complaint.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 4th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 30th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 27th November 2012 the appellant company was notified that its offer was adjudicated to be technically non-compliant because the comprehensive strength of the granite offered was less than that specified, namely it was 124 Mpa (megapascals) when the minimum was 125 Mpa, (b) the decision was considered disproportionate when considering that the difference of 1 Mpa was almost negligible in terms of quality and strength of the material offered and all the more when the value of which comprised only 4.6% of the offer and when considering that the bid was €18,760 or 15% cheaper than that recommended for award and (c) whilst, admittedly, the sample provided was certified as having 124 Mpa, yet, the contracting authority could have asked for a clarification in which case the appellant company would have confirmed that the material actually supplied would be up to or exceeding the 125 Mpa requested;

- having considered the contracting authority's representative's reference to the fact that (a) clause 8.4.13 provided that the 'bush hammered granite steps grey in colour' had to have a comprehensive strength greater or equal to 125 Mpa, (b) according to the certificate presented with the sample submitted by the appellant company it was evident that the granite offered was not up to specifications with regard to comprehensive strength requirement and the evaluation

board did not have any discretion to depart from the technical specifications, (c) the granite submitted by the recommended tenderer had a comprehensive strength of 164 Mpa (as per evaluation report), (d) there was no need for any clarification in this case because the certificate accompanying the sample was very clear in that it read 124 Mpa, (e) technically speaking, it would not make much difference if the granite was 1 Mpa less than specified and, on a personal basis, the contracting authority would have had no hesitation in accepting it, (f) it was advisable that bidders would first check that the certificate met the technical specifications because the evaluation board had its hands tied in such situations and (g) whilst the comprehensive strength minimum of 125 Mpa was included in the tender document so as to set a standard, yet, in practice, a variation of 1 Mpa was insignificant to the quality of the product and, when such instances occurred, the contracting authority would find itself in an awkward position having to refuse a financially advantageous tender due to an almost negligible technical variation;

- having also considered the recommended tenderer's reference to the fact that, (a) any anomalies with regard to the tender conditions/specifications had to be sorted out at pre-contractual remedy state and not at technical evaluation stage, (b) once the bidder participated in the tendering procedure then that meant that one would have accepted the tender conditions and specifications and (c) this tender had to be awarded to the cheapest tender which, however, had to satisfy the technical specifications and, evidently, the appellant company's offer was not technically complaint,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that, under normal circumstances, in this particular instance, the decision taken by the contracting authority could very well be considered disproportionate when considering that the difference of 1 Mpa was almost negligible in terms of quality and strength of the material offered and all the more when (a) the value of which comprised only 4.6% of the offer and (b) considering that the bid was €18,760 or 15% cheaper than that recommended for award.

2. This Board also acknowledges the fact that, during the hearing, the Chairman of the evaluation board himself remarked that, technically speaking, it would not make much difference if the granite was 1 Mpa less than specified.

3. The Public Contracts Review Board argues that, apart from the fact that the sample provided was certified as having 124 Mpa, the contracting authority was not allowed to seek any clarification in regard especially in view of the fact thta clause 8.4.13 provided that the 'bush hammered granite steps grey in colour' had to have a comprehensive strength greater or equal to 125 Mpa.

4. This Board recognises the fact that, whilst the comprehensive strength minimum of 125 Mpa was included in the tender document so as to set a standard, yet, in practice, a variation of 1 Mpa was insignificant to the quality of the product and, when such instances occurred, the contracting authority would find itself in an awkward position having to refuse a financially advantageous tender due to an almost negligible technical variation.

5. This Board, however, also acknowledges the fact that this tender had to be awarded to the cheapest tender which had to satisfy the technical specifications and, evidently, the appellant company's offer was not technically complaint.

6. The Public Contracts Review Board argues that any anomalies with regard to the tender conditions/specifications had to be sorted out at pre-contractual remedy state and not at technical evaluation stage. As a consequence, the fact that the appellant company chose to participate implied that it had accepted the tender's conditions and specifications.

7. The Public Contracts Review Board expresses the view that, although standards had to be set in the drawing up of the tender document, yet, if one were to just limit the tender evaluation process to ticking whether or not the technical specifications had been met, then one might as well input the data into a computer and that would be that, but, the fact that experts were selected to sit on evaluation boards it would perhaps be more reasonable to allow the technical experts a measure of leeway with regard to the overall technical evaluation of the bid. Nevertheless, unfortunately, in this case, the evaluation board members had their hands tied.

8. This Board recommends that bidders should first check that a certificate meets the technical specifications because the evaluation board has, in many a similar instance, no discretionary powers whatsoever.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

6 February 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 519

DH/619/2011
Tender for Provision of Care Workers for Sir Paul Boffa Hospital

This call for tenders was published in the Government Gazette on the 16th September 2012. The closing date for this call with an estimated budget of €111,618.64 was the 18th October 2012.

Two (2) tenderers submitted their offers.

Medistar Healthcare Services Ltd filed an objection on the 10th December 2012 against the decision of the Ministry for Health, Care of the Elderly and Community Care to disqualify its offer as administratively non-compliant and to recommend the award to Support Services Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 30th January 2013 to discuss this objection.

Present for the hearing were:

Medistar Healthcare Services Ltd

Mr Jeremy Muscat	Director
Mr Martin Aquilina	Operations Manager

Support Services Ltd

Dr Martin Fenech	Legal Representative
Mr Gaetano Bonnici	Representative
Mr Josef Borg	Representative

Ministry for Health, Care of the Elderly and Community Care

Dr Adrian Mallia	Legal Representative
Ing. Karl Farrugia	Represenatative

Evaluation Board

Mr Charles Schembri	Chairman
Ms Ninette Grech	Member
Ma Annabel Magro	Member
Ms Lorraine Muscat	Member
Ms Stefanie Abela	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Mr Jeremy Muscat, representing Medistar Healthcare Services Ltd, the appellant company, made the following submissions:

i. by email/letter dated 3rd December 2012 the appellant company was informed that its offer was adjudicated to be unacceptable for the following reasons:

(a) the experience listed does not comply with what has been requested through the published Selection Criteria clause 6.1.2 moreover the experience listed merely relates to the provision of care worker services and

(b) the list of staff proposed for the execution of the contract is not compliant in both number of staff and in the standard of education requested through clause 10 of the published technical specifications;

ii. one could not help noting that the tender was issued in October 2011 whereas the award/rejection of tenders was communicated in December 2012;

iii. when this tender was issued in 2011 the appellanty company was already carrying out these services at this same hospital and the appellant company could, therefore, not understand how its offer was being adjudicated unacceptable;

and

iv. with regard to experience of staff, when the appellant company had taken over the provision of this service at this hospital in May 2011, this firm had bound itself with the Employment and Training Corporation to retain the employees of the previous contractor, namely, Novitas Ltd, with the same employment conditions and it therefore followed that the staff did have the experience required in the tender document.

Dr Adrian Mallia, legal representative of the contracting authority, submitted the following explanations:-

a. it had to be made clear from the outset that, whatever the outcome of the hearing, the fact was that the appellant company's offer, besides being non-compliant, was not the cheapest, whereas the recommended tender was compliant and the cheapest;

b. clause 2 of the terms of reference requested the services of 5 (five) care workers on a shift basis;

c. according to clause 10 of the terms of reference, all the care workers proposed had to have 'O' Level standard or Form 5 school leaving certificate together with anyone of the following, namely *(1)* one of the three specified MCAST diploamas or *(2)* an appropriate ETC course or a two-year care worker certificate by a recognised Health Care provider or *(3)* had followed a care assistant course of the Department of the Elderly;

d. it appeared that two of the care workers proposed by the appellant company, namely Mr Ephraim Bezzina and Mr Anthony Mercieca, did not possess the academic requirements set out in the tender document;

e. the reason behind the non-award of this tender in 2011, apparently, was the non-availabilty of funds and, although one was justified in critising the inordinate length of time it took to award this tender, it had to be stressed that the evaluation board had nothing to do with this aspect;

and

f. clause 6.1.2 requested "*evidence of relevant experience in providing services of a similar nature over the past three (3) years including the nature and monetary value, as well as contracts in hand and contractually committed*."

Mr Muscat remarked that:-

i. members of the staff proposed did have certain qualifications and experience but the appellant company did not submit them with its tender submission;

ii. the company was set up in May 2011 and, although the firm had not been set up and in operation for three years, at the time the tender was issued it did have a number of contracts in hand and those were indicated in its tender submission;

and

iii. if tender documents were to include the three years experience then it, effectively, meant that start-ups were being precluded from participating in such public tender procedures.

The Chairman Public Contracts Review Board remarked that:-

a. whatever the reason, it was deplorable that a tender issued in October 2011 was awarded in December 2012;

b. the evaluation board had to adjudicate on the documentation submitted by the closing date for the submission of tenders;

and

c. if a tenderer considered the tender conditions and/or specifications discriminatory in one's regard then the tenderer had the opportunity to seek a pre-contractual remedy but, prior to the closing date for the submission of tenders, and not at evaluation stage.

Dr Martin Fenech, legal representative of the recommended tenderer, submitted that:-

i. the appeal was both frivolous and vexatious because it was lodged for the purpose of delaying further the award of this tender because, in the meantime, the appellant company was still providing this service to the detriment of the recommeded tenderer;

ii. the appeal was a non-starter because the appellant company did not qualify as a bidder and, moreover, Medistar Healthcare Services Ltd could not, at this stage, claim experience which the said company did not possess at tendering stage and experience was an important element in the provision of health care services;

and

iii. the fact was that the recommended tenderer had submitted the cheapest compliant tender.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 7th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 30th January 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email/letter dated 3rd December 2012 the appellant company was informed that its offer was adjudicated to be unacceptable for the following reasons, namely *(1) the experience listed does not comply with what has been requested through the published Selection Criteria clause 6.1.2 moreover the experience listed merely relates to the provision of care worker services and (2) the list of staff proposed for the execution of the contract is not compliant in both number of staff and in the standard of education requested through clause 10 of the published technical specifications*, (b) one could not help noting that the tender was issued in October 2011 whereas the award/rejection of tenders was communicated in December 2012, (c) when this tender was issued in 2011 the appellanty company was already carrying out these services at this same hospital and the appellant company could, therefore, not understand how its offer was being adjudicated unacceptable, (d) with regard to experience of staff, when the appellant company had taken over the provision of this service at this hospital in May 2011, this firm had bound itself with the Employment and Training Corporation to retain the employees of the previous contractor, namely, Novitas Ltd, with the same employment conditions and it therefore followed that the staff did have the experience required in the tender document, (e) members of the staff proposed did have certain qualifications and experience but the appellant company did not submit them with its tender submission, (f) the company was set up in May 2011 and, although the firm had not been set up and in operation for three years, at the time the tender was issued it did have a number of contracts in hand and those were indicated in its tender submission and (g) if tender documents were to include the three years experience then it, effectively, meant that start-ups were being precluded from participating in such public tender procedures,

- having considered the contracting authority's representative's reference to the fact that (a) it had to be made clear from the outset that, whatever the outcome of the hearing, the fact was that the appellant company's offer, besides being non-compliant, was not the cheapest, whereas the recommended tender was compliant and the cheapest, (b) clause 2 of the terms of reference requested the services of 5 (five) care workers on a shift basis, (c) according to clause 10 of the terms of reference, all the care workers proposed had to have 'O' Level standard or Form 5 school leaving certificate together with anyone of the following, namely *(1)* one of the three specified MCAST diploamas or *(2)* an appropriate ETC course or a two-year care worker certificate by a recognised Health Care provider or *(3)* had followed a care assistant course of the Department of the Elderly, (d) it appeared that two of the care workers proposed by the appellant company, namely Mr Ephraim Bezzina and Mr Anthony Mercieca, did not possess the academic requirements set out in the tender document, (e) the reason behind the non-award of this tender in 2011, apparently, was the non-availabilty of funds and, although one was justified in critising the inordinate length of time it took to award this tender, it had to be stressed that the evaluation board had nothing to do with this aspect and (f) clause 6.1.2 requested "*evidence of relevant experience in providing services of a similar nature over the past three (3) years including the nature and monetary value, as well as contracts in hand and contractually committed*.";

- having also considered the recommended tenderer's reference to the fact that, (a) the appeal was both frivolous and vexatious because it was lodged for the purpose of delaying further the award of this tender because, in the meantime, the appellant company was still providing this service to the detriment of the recommeded tenderer, (b) the appeal was a non-starter because the appellant company did not qualify as a bidder and, moreover, Medistar Healthcare Services Ltd could not,

at this stage, claim experience which the said company did not possess at tendering stage and experience was an important element in the provision of health care services and (c) the fact was that the recommended tenderer had submitted the cheapest compliant tender,

reached the following conclusions, namely:

1. The Public Contracts Review Board observes that, whatever the reason, it was deplorable that a tender issued in October 2011 was awarded in December 2012.

2. The Public Contracts Review Board contends that, whilst clause 2 of the terms of reference requested the services of 5 (five) care workers on a shift basis, yet it was established that two of the care workers proposed by the appellant company, namely Mr Ephraim Bezzina and Mr Anthony Mercieca, did not possess the academic requirements set out in the tender document.

3. The Public Contracts Review Board has taken full cognisance of the fact that during the hearing the appellant company's representative remarked that, albeit members of the staff proposed did have certain qualifications and experience, yet the said appellant company did not submit them with its tender submission and, as it was very often stated in similar circumstances by this Board, the evaluation board had to adjudicate on the documentation submitted by the closing date for the submission of tenders.

4. This Board, whilst concurring with the appellant company's observation that if tender documents were to include the three years experience then it, effectively, meant that start-ups were being precluded from participating in such public tender procedures, yet, in this particular instance, it was also true that if a tenderer considered the tender conditions and/or specifications discriminatory in one's regard then the tenderer had the opportunity to seek a pre-contractual remedy but this had to take place prior to the closing date for the submission of tenders, and not at the evaluation stage.

5. This Board feels that this appeal was a non-starter because the appellant company did not qualify as a bidder and, moreover, Medistar Healthcare Services Ltd could not, at this stage, claim experience which the said company did not possess at tendering stage.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

6 February 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 520

Ref: 06/12

Tender for Supply & Installation of Playing Field Equipment, Soft Flooring and Fencing in Gnien il-Kunsill Lokali, Gnien Profs. Anton Tabone & Gnien Mons. Guzeppi Minuti

This call for tender was published in the Government Gazette of the 11th September 2012 with a closing date of the 12th October 2012. The estimated value of the tender is €60,000 excluding VAT.

The Birzebbugia Local Council recommended that the tender be cancelled.

FGL Commercial Services Sales Ltd filed an objection on the 18 January 2013 against the decision of the B'Bugia Local Council to recommend the cancellation of the tendering procedure.

The Public Contracts Review Board composed of Mr Joseph Croker as A/Chairman, with Messrs Carmelo Esposito and Paul Mifsud as members convened a public hearing on Monday the 18th February 2013 to discuss the appeal.

Present for the hearing were:

FGL Commercial Services Sales Ltd

Dr John Gauci	Legal Representative
Dr David Zahra	Legal Representative
Mr Gordon Dimech	Representative
Mr Tony Bonello	Representative

B'Bugia Local Council

Mr Victor Bugeja LP	Legal Representative
Mr Joseph Farrugia	Mayor
Mr Joseph Baldacchino	Councillor
Mr Carol Muscat	Councillor

Contracts Department

Mr Francis Attard	Director General

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr John Gauci, on behalf of FGL Commercial Services Sales Ltd, the appellant**,** made the following submissions:

i. by email dated 11th January 2013 his client was informed that the B'Bugia Local Council had reconsidered the offers and concluded not to accept any offer as provided for in Clause 11 of the 'Instrucitons to Tenderers';
ii. his client had already submitted an appeal against the disqualification of his offer and the proposed award of this tender to JGC Ltd and as per PCRB decision conveyed on 14th December 2012 (case no. 504) where his client's bid was re-integrated in the tendering submission;
iii. notwithstanding the provisions of Clause 11 of the 'Instructions to Tenderers' which, according to the PCRB, afforded a measure of discretion to the Local Council still it was held that it could not act arbitrarily;
iv. apparently, the contracting authority did not look favourably on the decision taken by the PCRB to reinstate his client's bid so much so that it was now cancelling the tender after having reconsidered all offers and, on being specifically asked to give the reason behind the cancellation, so as to enable his client to consider whether to object or not, the contracting authority stated that since the budget of the central government had not been approved it could not tell what funds were going to be made available for 2013;
v. it was on the 10th December 2012 that the budget of the central government failed to pass through Parliament; however, in its meeting held on the 12th December 2012, the B'Bugia Local Council, while making reference to the PCRB hearing held on the 7th December 2012 and that the Council was awaiting the outcome of that hearing prior to taking further action, it made no mention regarding the unavailability of funds;
vi. following the receipt of the decision of the PCRB on the 14th December 2012, the Council decided on the 11th January 2013 to refuse all offers and to re-issue at a later stage the tender, which according to the Council would be more specific;
vii. one had to point out that the budget of the local councils emanated from the Local Councils Act and as such it was independent of the budget of the central government;
viii. moreover, local councils were required to submit a 3-year work programme for approval by government and in fact the B'Bugia had presented this programme covering the three year period ending 2014;
ix. the reconsideration of all offers was not contemplated in the regulations;
x. it was evident that the Council had decided to ignore the decision of the PCRB, which did not indicate the cancellation of the tender but the reinstatement of his client's offer, whereas that decision had to be acted upon; and
xi. in the light of the above, the decision to cancel the tender ought to be annulled and the tender awarded to his client as the cheapest compliant tenderer.

Mr Victor Bugeja, legal procurator on behalf of the contracting authority, explained that:-

a. the decision of the PCRB was to reinstate the appellant's offer in the tendering procedure and not to award the tender to the appellant or to any other bidder, for that matter, and the contracting authority had in fact abided by that decision because it considered all the offers, including that of the appellant, prior to reaching its decision of the 11th January 2013;

b. it was correct that the local council had a 3-year work programme in place and that it was independent from the central government budget but, on the other hand, it was correct to state that the execution of works were dependent on the funds provided in the budget of the central government and it so happened that the 2013 budget had not been approved and therefore the Council was not in a postion to enter into contractual agreements on capital works;

c. the Council was sort of suspending this tender until such time that funds were in fact available for the specific purpose and one had to keep in mind that in handling public funds the Council had to act very cautiously and diligently;

d. the contracting authority could have excluded the appellant on other grounds, such as the non submission of certain documentation; and

e. although the PCRB was entitled to look into the cancellation of the tender, on the other hand, the PCRB could not oblige the contracting authority to award the tender at all costs, if anything, the contacting authority could perhaps reimburse the expenses incurred by the tenderer in submitting his bid by way of pre-contract remedy.

The A/Chairman PCRB remarked that, as far as he was aware, whereas the central government budget was on a cash basis, the budget of the local councils operated on an accrual basis, i.e. if a project fell behind schedule the relative funds would not be lost at year's end - and perhaps re-voted in the subsequent year - but the funds would remain available by being carried forward from one year to the next. He added that it appeared that up to the Council meeting held on the 12th December 2012 the non-availability of funds was not an issue even though the budget of the central government had already not been approved.

Mr Joseph Farrugia, mayor of B'Bugia Local Council, remarked that this project was earmarked for completion in 2012 and funds were available under the Urban Improvement Fund (UIF) managed by the Malta Environment and Planning Authority (MEPA), however, given that this project was not taken in hand the funds were utilsed on another urgent project.

Dr Gauci remarked that:-

i. in a three envelope tender procedure the contracting authority could disqualify a bid at each of the three different stages however this was a single envelope tender and therefore it was not the case that the contracting authority could raise other issues for rejecting the same offer soon after the PCRB would have decided on the reintegration of that bid; and

ii. this appeal was not a pre-contractual remedy because that was applicable only prior to the closing date for the submission of tenders but this appeal was contesting the cancellation of the tender and calling on the contracting to go ahead with the award to his client as the cheapest compliant.

The A/Chairman PCRB explained that it was not the role of the PCRB to award a tender to any particular bidder but if anything to recommend the reintegration of a bid into the tendering process. He asked what happened to the funds which, at least up to the 12th December 2012, were earmarked for this project.

Mr Joseph Baldacchino, councillor in charge of finance**,** under oath, gave the following evidence:-

a. the funds available to the Council covered works/services of a recurrent nature, e.g. waste collection and the upkeep of public gardens/areas;

b. capital projects, which would have already been approved in the 3-year programme, were financed out of the UIF managed by MEPA;

c. presently the Council was carrying out strictly those recurrent services and works required by law however after much effort funds were granted also for urgent works on a particular road; and

d. the Council also had about €700,000 earmarked exclusively for a project in connection with the Malta Freeport which funds could not be utilised otherwise.

Mr Joseph Farrugia, mayor, under oath, gave the following evidence:-

i. UIF funds were meant for the execution of capital works which would have been apporved on the submission of the appropriate plans and estimates, and this contract was going to be financed from that source, however, once these works were not taken in hand the same UIF funds were used on urgent roadworks at 'Tal-Papa'; and

ii. it was up to MEPA to issue development permits and to allocate funds which sometimes did not cover all the costs.

Mr Bugeja argued that apparently the Council first issued the tender documentation together with the costings and then, those same plans and costings were submitted for MEPA's approval of funds, among other things.

Mr Paul Mifsud, PCRB member, remarked that a contracting authority could not issue a tender unless it filled in the Tender Originators Form whereby the required funds were available and duly committed for that specific purpose.

Mr Francis Attard, Director General (Contracts), under oath, explained that:-

a. in his opinion, Clause 11 of the 'Instructions to Tenderers' provided considerable discretion to the contracting authority with regard to the rejection of tenders even in the case of compliant bids;

b. although the Department of Contracts was not involved in the adjudication of this tender, from what he had just heard it appeared that the contracting authority had abided by the decision made by the PCRB on the first appeal in the sense that the appellant had been reinstated in the tendering process, however, following the re-examination of all the bids, including that of the appellant, the contracting authority felt that it should cancel the tendering procedure claiming that in view of unforeseen developments funds were no longer available; and

c. tenderers had the right to lodge an appeal against the cancellation of a tender and the PCRB was entitled to look into whether that cancellation was justified or not.

The Board:

- Having noted that the appellants in terms of their letter of objection and also through their verbal submissions during the hearing of the 18th February 2013 had objected to the decision taken by the B'Bugia Local Council to cancel the tender;

- Having noted the appellant's representatives claims and observations in particular to the fact that the Local Council during its sitting of the 12th December 2012 did not mention the lack of funding as a result of the Central Government Budget not being approved by Parliament on the 10th December 2012 but only mentioned that it was awaiting the decision of the PCRB as regards Case 504 (an appeal lodged in connection with the same tender) to decide on the way forward; that the local councils funding was regulated by the Local Councils Act and was not directly dependent on the approval or otherwise of the

Central Government Budget; that local councils had to draw up a 3-year work programme, which programme covered the period ending 2014;

- Having noted the contracting authority's representatives claim that the PCRB's decision re Case 504 was to reinstate the appellant and not to award the tender to any particular provider, and this decision was observed in full by the council; that though the local council budget was independent of the Central Government's it so happened that funds have to be provided from the Central Government's budget and once this was not approved the local council could not be sure that funds would be made available; that once funds allocated for this particular budget from the UIF had not been utilised during 2012, the council used them to carry out emergency repairs on a road which was in a very bad state; that the PCRB had the right to hear an appeal but could not compel a contracting authority to award a tender, and that Clause 11 empowered a contracting authority not to award a tender;

- Having also noted the Director of Contracts explanation that Clause 11 gave contracting authorities wide discretion to cancel a call for tender at any stage; however this discretion was always open to appeal;

came to the following conclusions:

1. that once the project was included in the 3-year work plan ending 2014 proposed by the B'Bugia Local Council;

2. that once any project submitted for funding through the Urban Improvement Fund (UIF) would have to be supported by detailed estimates of costs, the portion of funds that would be expected from the UIF and details of how shortfall (if any) would be covered; that development permits and any other permit would have to be submitted in support of the project;

3. that once as a result it is manifest that any project submitted by a local council would not have been accepted unless it was covered by adequate funding in order to ensure that the project is carried out; and

4. that once local councils use an accruals accounting system meaning that there would not be any potential loss of funds and that any committed funds would be transferred to the following year;

5. the reason brought forward by the Birzebbugia Local Council for having cancelled the call for tender i.e lack of funds following the non-passage of the Central Government Budget through Parliament is not justifiable.

In view of the above, the Board finds in favour of the appellant and recommends that the tender adjudication process be continued. It also recommends that the deposit paid by the appellant for filing the objection be reimbursed in full.

Joseph Croker	Carmelo Esposito	Paul Mifsud
A/Chairman	Member	Member

27 February 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 521

SLC/T/606/2012

Tender for Road Cleaning Services

The call for tender was published in the Government Gazette of the 7th September 2012 with a closing date of the 9th October 2012. The estimated value of the tender covering a period of 3 years amounted to €430,500 excluding VAT. The price of the recommended tender was €169,272.18 per annum, while the appellant's price amounted to €95,000 per annum.

Mr Saviour Mifsud filed an objection on the 22nd November 2012 against the decision of the Sliema Local Council to recommend the award of the tender to SRF Cleaning Services.

The Public Contracts Review Board composed of Mr Joseph Croker as A/Chairman, and Messrs Carmelo Esposito and Paul Mifsud as members, convened a meeting on Monday 18th February 2013 to discuss the appeal.

Present:

Mr Saviour Mifsud

Dr Luciano Busuttil	Legal Representative
Mr Saviour Mifsud	Appellant
Mr Kevin Mifsud	Representative

SRF Cleaning Services

Dr John Gauci	Legal Representative
Mr Steve Rennie Farrugia	Representative

Sliema Local Council

Mr Anthony Chircop	Mayor
Dr Kris Busietta	Councillor
Mr Matthew Dimech	Executive Secretary

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Luciano Busuttil, on behalf of Mr Saviour Mifsud, the appellant, made the following submissions:

i. by letter dated 13th November 2012 his client was informed that the tender was being recommended for award to SRF Cleaning Services since it was the most advantageous offer;

ii. six tenderers participated in this tendering procedure with offers ranging from €50,900 to €177,548 p.a.;
iii. his client's offer was about €74,000 cheaper than the recommended offer;
iv. his client had demonstrated in his tender submission that he had more experience than the recommended bidder since he had been in this sector for over 15 years and that he had both the human resources and the equipment required to carry out this service;
v. his client was already rendering his services to the same local council and he has never been served with any default notice;
vi. according to the provisions of the tender document the contracting authority was obliged to interview the bidders as part of the adjudication process;
vii. it was not clear whether the award was arrived at by allocating points to each bidder in respect of a set of criteria; and
viii. in the circumstances and since no cogent reason had been provided in the letter dated 13th November 2012 why his offer had been discarded and on which grounds the recommended bid was found to be more advantageous, his client was requesting the cancellation of the award as recommended.

Mr Matthew Dimech, executive secretary of the Sliema Local Council, explained that:-

a. the contracting authority had carried out the mandatory interviews with the bidders and in fact the first to be interviewed was Mr Mifsud as recorded in the minutes of meeting held on the 29th October 2012;

b. the purpose of the interviews was to assess the capabilities of the tenderers and to give the opportunity to the tenderers to explain how they intended to execute the contract, i.e. to assess their understanding of what this tender entailed, especially in view of the wide variation in the offers received;

c. the tender document included more information than in the standard tender document such as the division of the area to be covered into different sectors and the frequency in which each sector had to be cleaned;

d. this was the first instance when the Sliema Local Council was issuing a tender for road cleaning since this service had previously been provided by the central government;

e. the appellant had explained that he had been carrying out street sweeping works at Tarxien for 12 years, besides being engaged on similar works at Kalkara and Santa Venera, and that he could provide the requested service by the deployment of 6 cleaners and a supervisor;

f. the contracting authority did not indicate in the tender document the number of cleaners that had to be provided but it provided all the details of the requirements and then it was left up to the bidders to demonstrate how they intended to meet those requirements;

g. the tender called only for manual street sweeping services and it excluded mechanical sweepers, which service could be contracted separately by quotation as per clause 18 of the 'Specific Conditions';

h. the recommended tenderer had been rendering street sweeping services at Msida for the 9 years and at Gzira for 5 years, which localities were considered to have more or less the same characteristics of Sliema in terms of traffic and parking;

i. the recommended tenderer had indicated that he would deploy 9 cleaners together with a supervisor;

j. the contracting authority did not opt for the cheapest bid, i.e. that of €50,900 p.a.;

k. the contracting authority had sought the advice of Mr Ramon Deguara, Manager at the Cleansing Department, who used to supervise these works and he opined that these services required a minimum of 8 cleaners and this advice was obtained in the course of the adjudication;

l. the three council meetings held to evaluate this tender together with the concluding meeting – which was attended by all coucillors except one - were held in public and the relative minutes were in the public domain;

m. the Council was unanimous in its award decision;

n. the appellant was the current contractor providing waste collection and it was correct that he had not been served with any default notice however the nature of the works was quite distinct from those requested in this tender;

o. the tender was not adjudicated on a MEAT basis otherwise the relative evaluation grid would have been provided in the tender document; and

p. the recommended tenderer had also offered a once a month service to remove grass from pavements which was included in the price.

Dr Busuttil remarked that:-

a. evidently this tender was adjudicated on the basis of manpower, i.e. it excluded machinery and equipment, and it therefore appeared that the additional 3 cleaners to be deployed by the recommended tenderer was going to cost the Council about €74,000 more, i.e. about €25,000 per employee which was very much on the high side;

b. the Council evidently based its decision mainly on the manpower required for this service and it turned out that the public officer previously in charge of these works was asked to submit his advice in this regard after tender opening stage, however, once this aspect was considered so crucial then the minimum manpower requirement should have been included in the tender document for the sake of transparency; and

c. in the tender document it was not indicated that this service had to be carried out by at least 8 employees.

Dr Kris Busietta, councillor, remarked that the unanimous decision of the Council to recommend the bid by SRF Cleaning Services was arrived at following a close examination of the bids and following the interviews conducted which revealed that the recommended bidder was more professional in the way he intended to deliver the service. He added that the Council reckoned that SRF Cleaning Services could satisfy best the tender requirements.

Dr John Gauci, obo the recommended tenderer, remarked that with regard to the deposit according to Reg. 84 the deposit represented 1% of 285,000 (appellant's bid 95,000 p.a. x 3 years), i.e. 2,850 and not the minimum of 1,200 set by the same regulation. He added the PCRB had always held that the deposit for lodging the appeal had to be according to the Public Procurement Regulations and even if

the contracting authority was to misguide the bidder in this regard, the bidder was expected to abide by regulations (CT 3057/2010 refers).

Deposit To Lodge The Appeal

Mr Dimech remarked that one had to consider also if the appeal lodged by Mr Mifsud was valid or not in terms of Reg. 84 of the Public Procurement Regulations which, among others things, provided as follows:-

> *The notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender submitted by the tenderer, provided that in no case shall the deposit be less than one thousand and two hundred euro (€1,200) or more than fifty-eight thousand euro (€58,000).*

Dr Busuttil argued that in the absence of the estimated value of the contract, his client had paid the deposit of €1,200 which was the mininum allowed since 1% of his offer, i.e. €95,000 p.a. amounted to €950.

Mr Dimech stated that in his opinion the contract period covered three years and cited Annex 1 'Duration of Contract':

> *Subject to earlier termination in accordance with the provisions of the General Conditions, the contract period shall be valid for up to a period of three years subject to the satisfactory performance of contractor.*

Dr Busuttil argued that to his recollection the contract was issued for one year renewable for 3 years. He pointed out that clause 19 'Tender Guarantee Requirement' of the 'Instructions to Tenderers' stated that "*The bid bond shall be calculated according to the value of the offer submitted by the tenderer'* and then indicated ranges with regard to the 'estimated value of the contract' which seemed to represent the offer per annum. His client had presented a bid bond amounting to €4,660 applicable to a contract value of between €58,250 and €116,500, since his annual offer was of €95,000 p.a. Moreover, the Pro-forma Bill of Quantities requested the global annual sum.

Dr Gauci remarked that the bid bond was governed by tender provisions whereas the deposit to file an appeal was governed by regulations.

It is noted that in the case of the recommended bidder the bid bond had to be the maximum amount requested in the tender document, i.e. €5,824 since both his annual offer and his three year offer exceeded the maximum contract value of €116,500 for bid bond purposes.

This Board:

- having noted that the appellants in terms of their letter of objection and also through their verbal submissions during the hearing of the 18th February 2013 had objected to the decision taken by the Sliema Local Council to award the tender to SRF Cleaning Services 'since their offer was the most advantageous';

- having noted the appellant's representatives claims and observations in particular to the fact that the offer submitted by the appellant was cheaper than the recommended one by €74,000; that the appellant had an amount of years experience in carrying out similar services to other localities, namely Kalkara and Tarxien; that the call for tender did not stipulate the number of sweepers engaged in the cleaning of streets but left it to the tenderer to suggest an appropriate number and method;

- having noted the contracting authority's representative's explanations that this was the first instance that a similar tender was issued by the council since the service was previously provided by the central government; that the tender document contained more information than the tender usually published by local councils for similar services; that the council carried out the interviews of all bidders as stipulated in the tender document in order to identify the best possible candidate for award; that in the council's opinion the recommended bidder offered the best service since he also had experience in areas considered to be similar to Sliema i.e. Gzira and Msida; that the tender was not adjudicated on an MEAT basis as otherwise the criteria and weightings would have been included in the tender document; that the council based its decision on the advice given by Mr Ramon Deguara, Manager at the Cleansing Department which used to provide the service who estimated that one would need a minimum of 8 persons to carry out the work;

- having also noted the submissions made by both the contracting authority's representative and the recommended tenderer's to the effect that the appeal should not have been accepted since it was not accompanied by the appropriate amount of deposit which should have been worked out on the cost of a 3 year period and not on the annual cost; having also noted the appellant's representative's claim that the tender was for a period of 12 months which may be extended yearly for 3 years and thus the deposit should have been collected on the cost of the first year; having also noted that in the schedule drawn up during the tender opening session the cost was entered on an annual basis; having also noted that according to Annex 1 'Duration of Contract':

  Subject to earlier termination in accordance with the provisions of the General Conditions, the contract period shall be valid ***for up to*** *a period of three years subject to the satisfactory performance of contractor.*

came to the following conclusions:

1. that the local council made an attempt to include more information than is usually entered in a standard tender issued by local councils for such services and this is highly recommendable;

2. that once the tender was not to be adjudicated on a MEAT basis, but rather on the basis of the cheapest offer that satisfied the contracting authority's requirements, than the local council should have ensured a level playing field by clearly stating minimum requirements which would have to be satisfied for one to be considered for award of the tender; this basic requirement was missing from the tender document since the local council left it up to the tenderer to submit his proposals;

3. that the advice tendered by Mr Ramon Deguara Manager at the Cleansing Department might have been subjective in that he based his calculations on past experience using Government employees as against the use of employees from the private sector;

4. that the tender did not guarantee a three year engagement but specified that the contract period shall be valid for up to a period of three years and as a result the deposit was paid correctly based on the cost of one year.

In view of the above, the Board finds for the appellant and recommends that the tender be re-issued with clear parameters in order to ensure a level playing, which would facilitate an objective adjudication process. It is also recommended that the deposit paid by the appellant to lodge his appeal be refunded in full.

Joseph Croker	Carmelo Esposito	Paul Mifsud
A/Chairman	Member	Member

27 February 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No: 522

CT/3054/2012

Negotiated Procedure – Works Tender for the Construction, Servicing, Finishing and Commissioning of the Childcare Centre and an Administrative Office at Xewkija Industrial Estate

The call for tender was published on the 4th September 2012 with a closing date on the 2nd October 2012. The estimated value of the tender amounts to €737,500 excluding VAT, the recommended tenderer's price amounts to €726,188.96 while that the appellant's was €698,705.22.

An objeciton was filed by VMA Joint Venture on 21 December 2012 against the decision of the Contracts Department to disqualify its offer as administratively non-compliant and to recommend the award of the tender to Central Power Installations Ltd.

The Public Contracts Review Board composed of Mr Joseph Croker, A/Chairman, and Messrs Carmelo Esposito and Paul Mifsud as members convened a public hearing on Monday 18th February 2013 to discuss the appeal.

Present:

VMA Joint Venture

Dr Adrian Delia	Legal Representative
Dr Matthew Pulis	Legal Representative
Mr Raymond Vella	Representative
Mr Joseph Attard	Representative
Mr Joseph Mercieca	Representative

Central Power Installations Ltd

Dr Carmelo Galea	Legal Representative
Mr Victor Hili	Representative
Mr Dmitry Pechenkin	Representative
Ms Veronica Zammit	Representative

Malta Industral Parks

Col. David Mifsud	Chairman, Evaluation Board

Contracts Department

Mr Jonathan Barbara	Representative

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Adrian Delia, on behalf of VMA Joint Venture, the appellant, made the following submissions:

i. by letter dated 11th December 2012 his client was informed that his offer was found administratively non-compliant because page 1 of the bills of quantities (underfloor heating) was not found in both the original and copy of the tender submission;
ii. his client's offer was cheaper than the recommended offer and it was also compliant and that the only reason for disqualification was that mentioned at (i) above;
iii. the contracting authority was obliged to seek clarifications from bidders and more so in the case of a 'negotiated procedure', however, in this case no clarification was sought, even if, for fairness sake, the contracting authority did open up the copy of the tender submission to check if the missing page from the bill of quantities was there or not – in fact, the outcome was in the negative; and
iv. the bill of quantities consisted of a number of pages, each with a running balance and therefore, in spite of page 1 being missing, the total value of the bill of quantities/bid did not change, it was easily arrived at and it did not hinder the contracting authority from carrying out its evaluation.

Col. David Mifsud, chairman of the evaluation board, explained that:-

a. it was correct that the appellant had been disqualified because page 1 of the bill of quantities he presented was missing;

b. the evaluation process in a 'negotiated procedure' followed the same course as that of an open tender procedure and the contracting authority could not indulge in any negotiations with the bidders during tender evaluation stage;

c. clause 1.1 of the 'General Instructions' stated, among other things, that: *Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this tender document*;

d. clause 16.1 (f) (iii) read: *Breakdown of the overall price, in the form provided in Volume 4 (Bill of Quantities)* and in respect of this provision Note 3 applied which stated that: *No rectification shall be allowed. Only clarifications on the submitted information may be requested*;

e. contrary to what the appellant seemed to imply, in this case it was not a matter of clarification but a rectification because the appellant would have had to submit page 1 of the bill of quantities which he had not submitted in the first instance;

f. the contracting authority did take action to open up the copy of the tender submission in the presence of representatives of the appellant and of the Contracts Department but the missing page was not traced;

g. one had to keep in view also that page 1 of the bill of quantities contained various rates and one could not just assume or guess what those rates actually were and, those same rates assumed a degree of importance in the light of clause 31.1 (b) which provided that: *Where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will prevail* and in the light of clause 31.2 which stated that: *The amount stated in the tender will be adjusted by*

the Evaluation Committee in the event of error, and the tenderer will be bound by that adjusted amount – which meant that the rates could change the overall price; and

h. in such circumstances, the evaluation board had no option but to disqualify the bid.

Dr Carmelo Galea, on behalf of the recommended bidder, submitted that:-

i. a contracting authority could resort to a negotiated procedure when, following an open tender procedure none of the bidders would be administratively compliant and in so doing all bidders who participated in the open tender would be invited to re-submit an offer but from the closing date for tender submission onwards the negotiated procedure followed the same rules of the open tender procedure;

ii. the bill of quantities had a bearing on the overall price and was also useful when the contracting authority would come to issue payments because it would have to check the claim against the awarded rates, something which it would not be able to do in the absence of a complete bill of quantities;

iii. last para. of clause 1.1 of the 'General Instructions' stated that: *No rectifications shall be allowed in respect of the documentation as outlined in sub-clause 16.1 (d) (e) and (f) of these instructions to tenderers. Only clarifications on the submitted information in respect of the latter may be eventually requested.*

Dr Delia put forward the following arguments:-

a. if one were to be too rigid during adjudication then most of the tenders would end up being cancelled;

b. according to regulations: *"negotiated procedures" means those procedures whereby contracting authorities consult the economic operators of their choice and negotiate the terms of a contract with one or more of these*;

c. in the case of his client the total of page 1 amounted to €5,496 when the total value of the bid amounted to €698,705.22;

d. since the total of each page of the bill of quantities was carried forward to the next page then the total cost of the bill of quantities could be arrived at and the evaluation of the tender could be carried out;

e. one would have been correct to exclude a bidder if he failed to submit the bill of quantities but it was another thing if only a small part thereof was not submitted and that shortcoming did not prevent the contracting authority from arriving at the total value of the offer;

f. therefore, in a negotiated procedure, contrary to an open tender procedure, the contracting authority was allowed to negotiate and in this particular case the contracting authority had the leeway to negotiate with his client to correct this shortcoming which had no bearing on the total quoted price; and

g. this was a clear case of 'substance over form' which the PCRB had stressed upon in several other cases.

Col. Mifsud clarified that:-

i. the term '*contracting authorities consult the economic operators of their choice and negotiate'* meant that the contracting authority could consult/negotiate prior to the closing date of the tender but certainly not at adjudication stage;

ii. the matter under reference amounted to a rectification, i.e the submission of more information and not to a clarification on information already submitted;

iii. a contracting authority would opt for a negotiated procedure when it would realise that notwithstanding the shortcomings, the bidders had the capacity to carry out the contract.

Mr Jonathan Barbara, representing the Contracts Authority, under oath, stated that:

a. in the case of an open tender procedure where no bidder/s would be found compliant, the evaluation committee could recommend to the General Contracts Committee that instead of re-issuing the tender one would resort to a 'negotiated procedure' in which only those bidders who had participated in the open tender procedure would be allowed to tender and any one of those bidders could opt not to participate in the negotiated procedure; and

b. a negotiated procedure would kick off by the contracting authority meeting the bidders to explain to them in general terms the shortcomings of the submissions they made in the open tender procedure following which a fresh tender document with the same technical specifications would be handed out to them to fill in and submit their new offer by the established closing date and, from then on, a negotiated procedure would follow the same rules as an open tender procedure.

Dr Delia concluded that:-

i. the content of page 1 of the bill of quantities was not a mandatory requirement and, moreover, that shortcoming did not hinder the evaluation board in carrying out its evaluation of the offer;

ii. from the tenderers who had participated in the open tendering procedure only two submitted an offer in the negotiated procedure and as such these two participating tenderers qualified as the economic operators of the contracting authority's choice with whom the same contracting authority could consult/negotiate; and

iii. in one of its decisions the European Court of Justice stated that: *contracting authorities shall negotiate with tenderers the tender submitted by them in order to adapt them to the requirements which they had set out in the contract notice, the tender document and other documents, if any, and to seek out the best tender*.

Col. Mifsud concluded that (i) the adaptation stage mentioned by Dr Delia had in fact taken place during the information meeting which the contracting authority held with the bidders but that was prior to submitting their tender and (ii) in this case the incomplete document was equivalent to the non-submission of the document.

This Board:

- Having noted that the appellants in terms of their letter of objection and also through their verbal submissions during the hearing of the 18th February 2013 had objected to the decision taken by the Department of Contracts to disqualify them as administratively non-compliant;

- Having noted the appellant's representatives claims and observations in particular to the fact that the non-submission of one page of the Bill of Quantities did not necessarily invalidate a bid for the simple reason that there was a running balance carried forward from one page to another and one could easily arrive at the value on the missing page; that in a negotiated procedure the contracting authority was obliged to seek clarifications from the bidders; that though the submission of the Bill of Quantities was mandatory, the missing page was not;

- Having noted the contracting authority's submissions that the negotiated procedure followed an identical course as that of an open tender; that clause 1.1. of the General Instructions emphasised that *Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this tender document*;'that no rectification was permissible where the submission of the Bill of Quantities was concerned and that the insertion of a missing page from the Bill post submission of the tender document would have been tantamount to a rectification; that the missing page contained information which would have been essential when verifying invoices for payment;

- Having noted the explanation given by the representative of the Department of Contracts to the effect that in a negotiated procedure one had to follow the same procedure applicable to open calls for tenders and there that no leeway was envisaged;

came to the following conclusions:

1. that the fact that page one of the Bill of Quantities was missing from the submission was not in dispute so much so that it was also missing from the sealed envelope containing the copy of the appellant's tender document and which envelope was opened in the appellant's presence;

2. that the negotiated procedure did not imply that the rules normally applicable to an open tender may be suspended;

3. that the missing document was an integral component of the Bill of Quantities and had to be submitted with the tender document without any means of rectification should one fail to include it in the documentation.

In view of the above, the Board finds against the appellant and recommends that the deposit paid to file the objection be forfeited.

Joseph Croker	Carmelo Esposito	Paul Mifsud
A/Chairman	Member	Member

27 February 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No: 523

CT/3039/2012
Tender for the Restoration of the Historic Fabric of Fort St Angelo, Birgu

The call for tender was published in the Government Gazette of the 20th July 2012 with a closing dated on the 27th September 2012. The estimated value amounted to €6,500,000 excluding VAT. There was no recommended price/tenderer at this stage.

An objeciton was filed by MT R Contracting Ltd on 4 February 2013 against the decision of the Contracts Department to disqualify its offer as admininstratively non-compliant.

The Public Contracts Review Board, with Mr Joseph Croker as A/Chairman and Messrs Carmelo Esposito and Paul Mifsud as members, convened a public hearing on Monday 18th February 2013 to discuss the objection.

Present:

MT R Contracting Ltd

Dr Joseph Ellis	Legal Representative
Dr Stefano Filletti	Legal Representative
Ms Filomena Capriata	Director
Mr Joseph Zammit	Representative

Castille Joint Venture

Dr Matthew Pulis	Legal Representative
Mr Hugh Vella	Representative
Mr Anton Schembri	Representative

Restoration Group JV

Dr Franco Vassallo	Legal Representative
Mr Charles Ellul	Representative
Mr Jimmy Calleja	Representative

Heritage Malta

Dr Patrick Valentino	Legal Representative
Dr Ruth Baldacchino	Legal Representative

Evaluation Board

Perit Ruben Abela	Chairman
Ms Anastasia Anastasi	Secretary
Ms Veronica Bonello	Member
Mr Godwin Vella	Member
Ms Daphne Zammit Fenech	Member

Contracts Department

Mr Jonathan Barbara	Representative

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Preliminary Plea: Dr Stefano Filletti, in his name and on behalf of Dr Jospeh Ellis, submitted that they had made a request to the PCRB for the deferment of the hearing to another date or perhaps even to later on the same day due to other urgent work that they had to attend to at the Law Courts, which request had evidently not been acceded to. A/Chairman explained that it was not possible to adjourn the hearing to later during the day or to another day. It was agreed to proceed with the hearing.

Dr Stefano Filletti, on behalf of MT R Contracting Ltd, the appellant**,** made the following submissions:

i. by letter dated 25th January 2013 the Department of Contracts informed his client that his offer was adjudicated as administratively not compliant for the following reasons: *In Volume 1 Section 7 Form 6,* Personnel to be employed on this Contract - Conservation Architect, *the Tenderer provided the CV of Perit Edward Said as Conservation Architect. Request for Clarifications 02, Answer 3 issued on the 2nd August 2012, refers to Clause 9.1 of the General Conditions of Service Tenders which states that "The Contractor shall take all necessary measures to prevent or end any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interest could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any relevant connection or shared interest. Any conflict of interest which could arise during performance of the contract must be notified in writing to the Contracting Authority without delay". It results to the Evaluation Committee that Perit Edward Said has familiar ties with representatives of the Contracting Authority and thus in line with the clarification quoted above a conflict of interest could arise. This also presents a potential conflict of interest as per Article 37.0 o "Ethics Clauses" of Volume 1, Section 1 – Instructions to Tenderers;* and

ii. request was being made for a copy of the 'General Conditions of Service Tenders' since both the reason of exclusion and the Clarification Note No. 2 dated 2nd August 2012 made reference to them and as far as he was aware such conditions did not exist.

Dr Patrick Valentino, on behalf of the contracting authority, submitted that:

a. Clarification Note No. 2 dated 2nd August 2012 – closing date for submission of tenders 27th September 2012 - Question 3 asked as follows: *Are nominated Key Staff who have members of their family engaged with Heritage Malta accepted?* The answer to that question read as follows:

> *Please be directed by clause 9.1 of the General Conditions of Services Tenders: "The Contractor shall take all necessary measures to prevent or end any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interest could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any relevant connection or shared interest. Any conflict of interest which could arise during performance of the contract must be notified in writing to the Contracting Authority without delay;*

b. it was clearly indicated that the clarifications set out in letter dated 2nd August 2012 were construed to form an integral part of the Tender Document.

Dr Filletti remarked that:-

i. the crux of the matter was precisely that the 'General Conditions of Services Tenderers' did not exist and he contested Dr Valentino's declaration that a clarification could alter the legal requisites set out in the tender document itself, i.e. once the tender document included conditions from the 'General Conditions of Works Contracts' then one could not alter that by including conditions from the 'General Conditions for Services Tenders' through a clarification; and

ii. this was more so when the tender document already included a 'Conflict of Interest' clause which was entirely different from that included in the clarification and in the General Conditions of Services Contracts.

Dr Joseph Ellis, on behalf of the appellant, submitted that:-

a. the tender document made reference to the 'General Conditions of Works Contracts' (version 1.02 dated 1st December 2011) and not to the 'General Conditions of Services Tenders' as erroneously indicated by the contracting authority in its letter of rejection and in Clarification Note No. 2;

b. volume 1 section 5 (page 31) gave the following meaning to 'Conflict of Interest':

> *Any event influencing the capacity of a candidate, tenderer or supplier to give an objective and impartial professional opinion, or preventing him, at any moment, from giving priority to the interests of the Central Government Authority and the Contracting Authority. Any consideration relating to possible contracts in the future or conflict with other commitments, past or present, of a candidate, tenderer or supplier, or any conflict with his own interests. These restrictions also apply to sub-contractors and employees of the candidate, tenderer or supplier.*

c. clause 9 of the 'Tenderer's Declaration' (page 22) read as follows:-

> *We agree to abide by the ethics clauses of the instructions to tenderers and, in particular, have no potential conflict of interests or any relation with other candidates or other parties in the tender procedure at the time of the submission of this application. We have no interest of any nature whatsoever in any other tender in this procedure. We recognise that our tender may be excluded if we propose key experts who have been involved in preparing this project or engage such personnel as advisers in the preparation of our tender.*

d. according to these provisions in the tender document 'conflict of interest' could arise if the bidder was related to other tenderers or if the proposed key experts were involved in the preparations for this project and not as the contracting authority was interpreting matters that conflict of interest could arise if someone attached to the bidder was related to someone employed with the contracting authority as per clause 9.1 of the 'General Conditions of Service Tenders';

e. it was not on to discard the clauses regarding 'conflict of interest' specifically included in the tender document and apply other conditions;

f. these general conditions would apply at post award stage and not at adjudicating stage;

g. moreover, in the case that, say, a family member of the key expert of the bidder would be appointed, say, chairman of Heritage Malta during the execution of the contract, the 'General Conditions of Service Contracts' cited by the contracting authority provided a remedy at clause 9.2 which read as follows:-

> *The Contracting Authority reserves the right to verify that such measures are adequate and may require additional measures to be taken if necessary. The Contractor shall ensure that its staff, including its management, are not placed in a situation which could give rise to conflict of interests. Without prejudice to Article 7, the Contractor shall replace, immediately and without compensation from the Contracting Authority, any member of its staff exposed to such a situation.*

h. therefore, in such a case the contractor had to remove any member of his staff exposed to such a situation but the contract would by no means be cancelled;

i. it was therefore evident that the contracting authority's decision to exclude his client at this stage was incorrect and legally unjustified because it applied the wrong or inexistent conditions and because the relevant condions were those related to a works contract and not clause 9.1 of the conditions of service tenders and even if the latter were to be applied clause 9.2 provided the remedy whereby the staff member concerned had to be replaced; and

j. it was not justified to exclude his client from such a large contract on the pretext of conflict of interest brought forward by the contracting authority when there were other remedies to this kind of conflict of interest.

Dr Valentino maintained that:-

i. it was no use quoting bits and pieces of the tender provisions but what mattered was that one had to be careful to address adequately the issue of conflict of interest;

ii. the answer to Question 3 of Clarification Note No. 2 was quite clear in that if a staff member, in this case the key expert, of the bidder had family ties with member/s of staff engaged with Heritage Malta, in this case the chairman, that amounted to a conflict of interest;

iii. this clarification formed an integral part of the tender document and the appellant did not contest this condition and therefore by submitting his offer the appellant was accepting all the tender conditions including the clarifications which were issued and circulated prior to the closing date for tender submissions;

iv. it was no secret that Perit Edward Said was the son of the chairman of Heritage Malta;

v. how could one not raise the possibility of conflict of interest in the case of the key expert of the bidder being the son of the chairman of the contracting authority in a tender worth some €6.5m; and

vi. the appellant seemed to imply that it was allowed to have a conflict of interest between a son and his father in the case of a works tender whereas it was not allowed in the case of a services tender.

Dr Ellis argued that:-

a. once the contracting authority was concluding that this father and son relationship led to a conflict of interest then he wished to formally call the two persons concerned to the stand to ask them about this alleged conflict of interest;

b. it could be that in this case the son did not have good relations with his father; and

c. one could also picture a situation when during the execution of the contract the members of the board of Hertiage Malta could be replace and one of the new members would be related to a staff member of the contractor in which instance the contractor would have to remove the party exposed to such a situation.

Dr Franco Vassallo, on behalf of Restoration Group JV, a participating bidder, remarked that:-

i. his client wished to register that his request to be given a copy of the appellant's letter of objection had not been entertained, even though he was aware that the PCRB was not obliged to furnish him with one;

ii. the contracting authority was acting correctly to bring up the issue of conflict of interest arising from family ties between the key expert of the appellant and the chairman of Heritage Malta;

iii. if this issue had not been raised at this stage but came to light at a later stage it would have led to the annulment of the tendering process and this stand was taken by the PCRB in a similar case, i.e. Case No. 209 of 2010 (Doc A), where the tender was cancelled after having been compromised by the family ties of the key expert of the appellant, Ms Simone Vella Linicher, and a member of the contracting authority, the Grand Harbour Regeneration Corporation;

iv. clause 67.10 of the 'Ethics Clauses' applicable to all tenders stated that:

> *The Contractor shall refrain from any relationship likely to compromise his independence or that of his staff. If the Contractor ceases to be independent, the Contracting Authority with the prior written approval of the Central Government Authority, may, regardless of injury, terminate the contract without further notice and without the Contractor having any claim to compensation.*

v. when dealing with public procurement one had to avoid any conflict of interest; and

vi. the appellant could have queried the clarifications issued by the contracting authority prior to the closing date for the submission of tenders but once the appellant participated without quering those conditions then that meant that he had to accept them.

Dr Matthew Paris, on behalf of Castille Joint Venture registered his client's complaint that his repeated request to be provided with a copy of the letter of objection had not been met while pointed out that apart from this forum the other venue available to his client to contest the tender proceedings was the courts of justice.

Dr Ellis:-

a. reiterated his initial distinction between a works contract and a servcie contract and that the contracting authority had not acted correctly when it made reference to a service tender in its clarification;

b. stated that article 67 'Ethics Clause' quoted by Dr Vassallo did not contemplate the cancellation of the contract but contemplated the suspension or cancellation of project financing as per clause 67.11;

c. repeated that even if this were to be a services contract, which was not the case, clause 9.2 would have called on the contractor to replace the person exposed to the conflict of interest but it did not lead to the cancellation of the tender/contract;

d. in this case, the contracting authority applied inexistent or inapplicable conditions because they did not contemplate the conflict of interest under reference; and

e. requested that in view of the declarations made at the hearing by the contracting authority regarding the alleged conflict of interest arising from the fact that a key expert was the son of the chairman of Heritage Malta, the two persons concerned should be summoned as witnesses.

The A/Chairman remarked that the PCRB had enough information to deliberate on this case and therefore there was no need to summon further witnesses.

This Board:

- having noted that the appellants in terms of their letter of objection and also through their verbal submissions during the hearing of the 18th February 2013 had objected to the decision taken by the Department of Contracts to disqualify their bid as being administratively non-compliant;

- having noted the appellant's representatives claims and observations in particular to the fact that the offer submitted by the appellant was discarded as it was alleged that the fact that the Conservation Architect happened to be the son of the Chairman of Heritage Malta constituted a conflict of interest in terms of Clause 9.1 of the General Conditions of Service Tenders and in terms of Article 37.0 of the Ethics Clauses of Vol 1, Sect 1 – Instructions to Tenderers; that he was requesting a copy of the mentioned conditions since he is not aware of their existence; that this was a works contract and not a service contract and as a result different interpretations of conflict of interest are applicable; that even if hypothetically there existed a conflict of interest, then this did not necessarily lead to the non-acceptance of the tender but that there were other remedies that may be applied;

- having noted the Contracting Authority's representative's explanation that it was very clear from the reply given to clarification Note No.2 of the 2nd August 2012 in reply to question 3 "*Are nominated Key Staff who have members of their family engaged with Heritage Malta accepted?"* where tenderes were directed to clause 9 of the General Conditions of Services Tenders which dealt with these issues and included 'family or emotional ties' as a situation which could give rise to conflict of interest; that it was clearly indicated that this clarification note became an integral part of the tender document; that it was useless quoting bits and pieces of tender provisions since what really mattered was that one had to address the issue of conflict of interest and that one cannot imagine how a situation where the key expert is the son of the Chairman of Heritage Malta did not give rise to a real (if only perceived) conflict of interest;

- having noted the representatives' interested parties complaints that they were not provided with copies of the appeals, even if the PCRB was not legally obliged to do so;

came to the following conclusions:

1. that the fact that Perit Said was the son of the Chairman of Heritage Malta and that he was appointed as the key expert by the appellants was not in dispute;

2. that though this was a Works Tender the Contracting Authority made mention of the General Conditions of Services Tenders in the letter disqualifying the appellant's bid;

3. that reference was made by the Contracting Authority to the General Conditions of Services Tenders in clarification No. 2 in reply to Question 3 and thus this clarification became an integral part of the tender document;

4. that the appellant chose to tender under these conditions even though he might have had certain reservations, and thus became subject to these conditions;

5. that a perusal of the Department of Contracts website under 'Resources – General Conditions etc' would show that the words 'tender' and 'contract' are interchangeable where these conditions are concerned and thus the appellants' representatives claim that the quoted regulations did not exist are unfounded;

6. that the main scope of these General Conditions, especially the sections concerning ethics, whether entitled General Conditions of Service or Works, was to ensure the greatest possible transparency and avoid any possible conflicts of interest, whether actual or perceived.

In view of the above, the Board finds against the appellant and recommends that the deposit paid by the appellant to file his appeal be forfeited.

Joseph Croker	Carmelo Esposito	Paul Mifsud
A/Chairman	Member	Member

27 February 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 524

GGH/91/2012

Tender for the Manufacture, Supply, Delivery and Installation of Timber Doors at the Gozo General Hospital

The call for tender was published in the Government Gazette of the 18th May 2012 with a closing date of the 11th June 2012. The estimated value of the tender was €61,000 excluding VAT. The price of the recommended tender was € 52,667.74 (incl. VAT).

Aretrop Ltd filed an objection on the 28th September 2012 against the decision of the Ministry for Gozo to disqualify its offer as administratively non-compliant and to recommend award to Mario Portelli Woodworks at a higher price.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Mifsud as members convened a meeting on Tuesday 26th March 2013 to discuss the appeal.

Present:

Aretrop Ltd

Ms Ritianne Schembri	Representative
Mr Santo Portera	Managing Director

Mario Portelli Woodworks

Dr John Paul Grech	Legal Representative
Mr Mario Portelli	Representative

Central Procurement and Supplies Unit – Ministry for Health, the Elderly and Community Care

Evaluation Board

Ing. Saviour Debrincat	Chairman
Ms Loraine Apap	Member
Mr Lorry Apap	Member
Mr Anthony Cassar	Member
Ms Joanne Parnis	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Ms Ritianne Schembri, representing Aretrop Ltd, the appellant company, made the following submissions:

i. by letter dated 18th September 2012 Aretrop Ltd was informed that its offer was rejected for failure to submit certificates of a chain of custody for timber certified as FSC, PEFC or any other equivalent means of proof of compliance that the timber was procured from legal sources as per requirements of the Green procurement clause in the technical specifications of the tender dossier;

ii. the appellant company's supplier did possess FSC Certification with its code reading FSC-C023180 issued on the 8th December 2008 and expiring on the 7th December 2013;

iii. the tender document requested proof of the bidder's experience where it was demonstrated that the supplier had extensive experience in the supply of doors to various hospitals, schools and cinemas in Europe;

iv. the list of literature to be submitted included in the tender document did not mention that the tenderers had to submit the certificate of chain-of -custody for timber or equivalent;

v. the appellant company's representative had signed the Tenderer's Declaration confirming that the bidding company would comply with all tender specifications listed in Volume 3 'Technical Specifications', which included, among other things, the 'certificate' for timber in question;

vi. one had to note that the supply of these particular doors, in respect of which this certificate was being requested, made up only about 8% of the tender value;

and

vii. the tender document also provided that the contracting authority could request clarifications from tenderers but no such request had ever been made to clear this relatively minor issue.

Ing. Saviour Debrincat, chairman of the evaluation board, explained that:-

a. Section B of Volume 3 'Technical Specifications' (page 47) clearly indicated that the "Timber used for the Internal Door Frame Sets shall come from legal sources" and then it went on to specify that proof of compliance with the chain of custody tracing system had to be provided through ISO 9000 and/or ISO 14000 or EMAS management system or FSC, PEFC or any other equivalent means;

and

b. the reason for rejection stemmed from the fact that the evaluation board found no such certification in the appellant company's tender submission.

Ms Schembri stated that the supplier's FSC Certification has been submitted with the letter of objection dated 26th September 2012.

Mr Santo Portero, representing the appellant company, went through the tender submission made by Aretrop Ltd and acknowledged that no certificates had been submitted by way of proof of compliance with 'the chain of custody tracing system'.

The Public Contracts Review Board observed that:-

a. the submission of this certificate was a mandatory requirement requested in Volume 3 'Technical Specifications';

b. as per clause 16.1 'Content of Tender' (page 9) and clause 11 of the 'Tenderer's Declaration' (page 20) para. *(e)* 'Evaluation Criteria/Technical Specifications' indicated that in respect of *(i)* Tenderer's Technical Offer in response to specifications (Volume 3)' and *(ii)* 'Literature and samples' Note 3 was applicable which laid down that '*No clarification shall be allowed. Only clarifications on the submitted information may be requested'*;

c. once it has been ascertained that this certificate had not been submitted then the contracting authority was precluded from asking for a clarification on information which had not been submitted in the first place;

and

d. the signing of the Tenderer's Declaration did not exonerate the bidding company's obligation to submit the mandatory information requested in the tender document.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 26th September 2012 and also through its representatives verbal submissions presented during the hearing held on the 26th March 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 18th September 2012 Aretrop Ltd was informed that its offer was rejected for failure to submit certificates of a chain of custody for timber certified as FSC, PEFC or any other equivalent means of proof of compliance that the timber was procured from legal sources as per requirements of the Green procurement clause in the technical specifications of the tender dossier, (b) the appellant company's supplier did possess FSC Certification with its code reading FSC-C023180 issued on the 8th December 2008 and expiring on the 7th December 2013, (c) the tender document requested proof of the bidder's experience where it was demonstrated that the supplier had extensive experience in the supply of doors to various hospitals, schools and cinemas in Europe, (d) the list of literature to be submitted included in the tender document did not mention that the tenderers had to submit the certificate of chain-of -custody for timber or equivalent, (e) the appellant company's representative had signed the Tenderer's Declaration confirming that the bidding company would comply with all tender specifications listed in Volume 3 'Technical Specifications', which included, among other things, the 'certificate' for timber in question, (f) one had to note that the supply of these particular doors, in respect of which this certificate was being requested, made up only about 8% of the tender value, (g) the tender document also provided that the contracting authority could request clarifications from tenderers but no such request had ever been made to clear this relatively minor issue and (h) the supplier's FSC Certification has been submitted with the letter of objection dated 26th September 2012;

c. having considered the contracting authority's representative's reference to the fact that (a) Section B of Volume 3 'Technical Specifications' (page 47) clearly indicated that the "Timber used for the Internal Door Frame Sets shall come from legal sources" and then it went on to specify that proof of compliance with the chain of custody tracing system had to be provided through ISO 9000 and/or ISO 14000 or EMAS management system or FSC, PEFC or any other equivalent

means and (b) the reason for rejection stemmed from the fact that the evaluation board found no such certification in the appellant company's tender submission

reached the following conclusions, namely:

1. The Public Contracts Review Board has taken cognizance of the fact that during the hearing Mr Santo Portero, representing the appellant company, went through the tender submission made by Aretrop Ltd and acknowledged that no certificates had been submitted by way of proof of compliance with 'the chain of custody tracing system'. This Board notes that the submission of this certificate was a mandatory requirement requested in Volume 3 'Technical Specifications'.

2. The Public Contracts Review Board notes that, as per clause 16.1 'Content of Tender' (page 9) and clause 11 of the 'Tenderer's Declaration' (page 20), para. *(e)* 'Evaluation Criteria/Technical Specifications' indicated that in respect of *(i)* Tenderer's Technical Offer in response to specifications (Volume 3)' and *(ii)* 'Literature and samples' Note 3 was applicable which laid down that '*No clarification shall be allowed. Only clarifications on the submitted information may be requested'*,

3. The Public Contracts Review Board opines that once it has been ascertained that this certificate had not been submitted then the contracting authority was precluded from asking for a clarification on information which had not been submitted in the first place.

4. This Board establishes that the signing of the Tenderer's Declaration did not exonerate the bidding company's obligation to submit the mandatory information requested in the tender document.

In view of the above this Board finds against the appellant company and recommends that the appellant company should not be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

15 April 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 525

CPSU/CPU/2264/2012

Tender for the Supply of Supplements for Bacteriological Media Preparation

The call for tender was published in the Government Gazette of the 20th April 2012 with a closing date of the 21st May 2012. The estimated value of the tender was €19,234. The price of the recommended tender was € 18,789.

Al-Nibras for Science and Technology filed an objection on the 3rd December 2012 against the decision of the Ministry for Health, the Elderly and Community Care to disqualify its offer as technically non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Mifsud as members convened a meeting on Tuesday 26th March 2013 to discuss the appeal.

Present:

Al-Nibras for Science and Technology

Mr Sandro Ciliberti Representative

Technoline Ltd

Dr John Attard General Manager

Central Procurement and Supplies Unit (CPSU) – Ministry for Health, the Elderly and Community Care

Mr George Fenech Representative

Evaluation Board

Ms Connie Miceli Chairperson
Dr Paul Caruana Member

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Mr Sandro Ciliberti, representing Al-Nibras for Science and Technology, the appellant company, made the following submissions:

i. by letter dated 26th November 2012 the appellant firm was informed that its offer was not successful since not all supplements submitted gave satisfactory results;

ii. by letter dated 28th November 2012 the appellant firm had requested the contracting authority to sustain the reason given for rejecting its tender by forwarding the results obtained from the scientific tests carried out, which request had been met;

iii. the results of the tests carried out by the contracting authority were referred to the manufacturer overseas and the latter provided the certificates of quality assurance indicating that the supplements from the same batch number had given satisfactory results;

and

iv. albeit the appellant firm had requested to be notified well beforehand of the date for the hearing so that arrangements could be made for the technical expert to be brought over from overseas, yet only three days notice had been given such that it was not possible for this expert to attend this hearing, adding that this case had been appointed for February but which appointment had been cancelled at short notice.

Dr Paul Caruana, a member of the evaluation board and consultant in charge of the bacteriological laboratory, explained that:-

a. the laboratory carried out tests on various bacteria and, every three years or so, the contracting authority procured products from various manufacturers to enable it to carry out these tests;

b. one had to appreciate that these tests were necessary to enable the consultant to establish the appropriate medical treatment required for the patient;

c. supplements, such as the ones under reference, were mixed with other products and, through these tests, certain bacteria would experience growth whereas other types would suppress the growth;

d. samples were requested from new suppliers whereas current or previous suppliers were exempted from producing samples in respect of supplements already tested by the contracting authority;

e. the purpose of testing the supplements provided by new suppliers was to verify that their performance was, at least, equivalent to or perhaps better than that of the supplements currently used by the local health authorities, in technical terms, the concept of non-inferiority;

f. patients were checked for bacteria and then a stock of those bacteria was kept at the laboratory for testing purposes, namely in the laboratory parallel tests would be carried out on a known bacteria (supplement already in use) and on a test medium (new supplement provided by the bidder) to establish if the latter's performance equalled or exceeded that of the former, i.e. in terms of growth or reduction;

g. as evidenced in the report on the scientific tests carried out in the case of the six supplements provided by the appellant company, three supplements performed satisfactorily whereas the performance of three others was not acceptable, namely, Neisseriae, E.coli 0157 and Neomycin – whereas the first two were meant to increase the growth of the bacteria, Neomycin was meant to suppress the growth of bacteria;

h. in the case of Neisseriae, E.coli 0157 and Neomycin, when the appellant company's supplements were used in combination with other media (bacteria) in the laboratory, the expected growth/suppression did not materialise in all three tests carried out;

i. the tests of each of these supplements were not carried out once but three times for the sake of consistency;

and

j. indeed, he was providing a simplified version of what took place as the tests on these different supplements were quite complex to describe in layman's terms.

Mr Ciliberti explained that:-

a. the tender called for the supply of six supplements and the contracting authority has declared that in the case of three of them the tests were successful and in the case of the other three the tests were unacceptable;

b. these supplements were temperature and procedure sensitive, in other words one had to store these items at the required temperature and one had to conduct the tests according to established procedures, otherwise one would not obtain correct results;

c. whilst it had to be appreciated that all was being stated without casting any doubt on the professional competence of the personnel running the laboratory, yet it was also a fact that it was the responsibility of the bidder to deliver the supplements according to given conditions and whilst, in this case, they were delivered in an ice box at between 2 to 8 degrees, yet, from then onwards, it was the responsibility of the contracting authority to maintain those ideal conditions;

d. in the case of the three media which failed the test, the contracting authority, through Ms Julie Haider (Principal MLS at the Bacteriological Lab), requested the appellant company to provide a second batch of samples and the reason given was 'a procedural mistake';

e. the results obtained by the contracting authority were referred to the manufacturer, who in turn ran tests on the 'failed' supplements having the same batch numbers and produced positive results as per quality assurance certificates which were produced at the hearing but which the Public Contracts Review Board did not retain since its remit did not include the technical evaluation of the tender;

f. one had to question why the three successful supplements were not awarded to Al-Nibras for Science and Technology since the prices were cheaper;

and

g. the contracting authority failed to indicate in the tender document the organisms on which the supplements were expected to perform.

Ms Connie Miceli, chairperson of the evaluation board, explained that as per clause 3.1 (page 5), the tender was not divided into lots.

Dr Caruana remarked that:-

a. albeit he did have it in writing that the second batch of samples were requested with regard to the three 'failed' supplements, yet reason has it that it was so because it made no sense to ask for more samples with regard to the three samples in respect of which the tests were successful;

b. whilst it was correct to state that these supplements were temperature and procedure sensitive, yet, as far as the laboratory was concerned, he could vouch that such supplements were appropriately handled and stored but he could not vouch for what might have happened elsewhere;

and

c. the testing of such supplements in third party laboratories was not considered a solution because there existed the same operational risks besides the extra expenses involved.

The Chairman Public Contracts Review Board observed that:-

i. this case seemed to hinge on whether these samples were delivered by the bidder in good condition and on whether the contracting authority stored and handled the samples in a manner that preserved the good condition of the samples;

ii. this case concerned procedural issues rather than technical considerations and, as a result, technical/professional witnesses were not deemed necessary;

iii. it would have been better if the reasons for the request of additional samples had been made in writing but, on the other hand, it could well be the case that whereas, in the first instance, there could have been a procedural mistake, then, in the second instance there was no such procedural mistake and the samples still failed the test;

and

iv. with regard to the appellant company's claim of shortcomings or perceived shortcomings in the tender document, the bidder should have resorted to the pre-contractual remedy provided for in the regulations.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 3rd December 2012 and also through its representatives verbal submissions presented during the hearing held on the 26th March 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 26th November 2012 the appellant firm was informed that its offer was not successful since not all supplements submitted gave satisfactory results, (b) by letter dated 28th November 2012 the appellant firm had requested the contracting authority to sustain the reason given for rejecting its tender by forwarding the results obtained from the scientific tests carried out, which request had been met, (c) the results of the tests carried out by the contracting authority were referred to the manufacturer overseas and the latter provided the certificates of quality assurance indicating that the supplements from the same batch number

had given satisfactory results, (d) albeit the appellant firm had requested to be notified well beforehand of the date for the hearing so that arrangements could be made for the technical expert to be brought over from overseas, yet only three days notice had been given such that it was not possible for this expert to attend this hearing, adding that this case had been appointed for February but which appointment had been cancelled at short notice, (e) the tender called for the supply of six supplements and the contracting authority has declared that in the case of three of them the tests were successful and in the case of the other three the tests were unacceptable, (f) these supplements were temperature and procedure sensitive, in other words one had to store these items at the required temperature and one had to conduct the tests according to established procedures, otherwise one would not obtain correct results, (g) whilst it had to be appreciated that all was being stated without casting any doubt on the professional competence of the personnel running the laboratory, yet it was also a fact that it was the responsibility of the bidder to deliver the supplements according to given conditions and whilst, in this case, they were delivered in an ice box at between 2 to 8 degrees, yet, from then onwards, it was the responsibility of the contracting authority to maintain those ideal conditions, (h) in the case of the three media which failed the test, the contracting authority, through Ms Julie Haider (Principal MLS at the Bacteriological Lab), requested the appellant company to provide a second batch of samples and the reason given was 'a procedural mistake', (i) the results obtained by the contracting authority were referred to the manufacturer, who in turn ran tests on the 'failed' supplements having the same batch numbers and produced positive results as per quality assurance certificates which were produced at the hearing but which the Public Contracts Review Board did not retain since its remit did not include the technical evaluation of the tender, (j) one had to question why the three successful supplements were not awarded to Al-Nibras for Science and Technology since the prices were cheaper and (k) the contracting authority failed to indicate in the tender document the organisms on which the supplements were expected to perform;

a. having considered the contracting authority's representative's reference to the fact that (a) the laboratory carried out tests on various bacteria and, every three years or so, the contracting authority procured products from various manufacturers to enable it to carry out these tests, (b) one had to appreciate that these tests were necessary to enable the consultant to establish the appropriate medical treatment required for the patient, (c) supplements, such as the ones under reference, were mixed with other products and, through these tests, certain bacteria would experience growth whereas other types would suppress the growth, (d) samples were requested from new suppliers whereas current or previous suppliers were exempted from producing samples in respect of supplements already tested by the contracting authority, (e) the purpose of testing the supplements provided by new suppliers was to verify that their performance was, at least, equivalent to or perhaps better than that of the supplements currently used by the local health authorities, in technical terms, the concept of non-inferiority, (f) patients were checked for bacteria and then a stock of those bacteria was kept at the laboratory for testing purposes, namely in the laboratory parallel tests would be carried out on a known bacteria (supplement already in use) and on a test medium (new supplement provided by the bidder) to establish if the latter's performance equalled or exceeded that of the former, i.e. in terms of growth or reduction, (g) as evidenced in the report on the scientific tests carried out in the case of the six supplements provided by the appellant company, three supplements performed satisfactorily whereas the performance of three others was not acceptable, namely, Neisseriae, E.coli 0157 and Neomycin – whereas the first two were meant to increase the growth of the bacteria, Neomycin was meant to suppress the growth of bacteria, (h) in the case of Neisseriae, E.coli 0157 and Neomycin, when the appellant company's supplements were used in combination with other media (bacteria) in the laboratory, the expected growth/suppression did not materialise in all three tests carried out, (i) the tests of each of these supplements were not carried out once but three times for the sake of consistency, (j) indeed, Dr Caruana was providing a simplified version of what took place as the tests on these different supplements were quite complex to describe in layman's terms, (k) Ms Connie Miceli, chairperson of the evaluation board, explained that as per clause 3.1 (page 5), the tender was not divided into lots, (l) albeit Dr Caruana did have it in writing that the second batch of samples were requested with regard to the three 'failed' supplements, yet reason has it that it

was so because it made no sense to ask for more samples with regard to the three samples in respect of which the tests were successful, (m) whilst it was correct to state that these supplements were temperature and procedure sensitive, yet, as far as the laboratory was concerned, Dr Caruana could vouch that such supplements were appropriately handled and stored but he could not vouch for what might have happened elsewhere and (m) the testing of such supplements in third party laboratories was not considered a solution because there existed the same operational risks besides the extra expenses involved,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that whilst it is true that this case seemed to hinge on whether these samples were delivered by the bidder in good condition and on whether the contracting authority stored and handled the samples in a manner that preserved the good condition of the samples, yet it is also a fact that this case concerned procedural issues rather than technical considerations. This Board concludes that, whereas, in the first instance, there could have been a procedural mistake, in the second instance there was no such procedural mistake and the samples still failed the test.

2. This Board establishes that with regard to the appellant company's claim of shortcomings or perceived shortcomings in the tender document, the bidder should have resorted to the pre-contractual remedy provided for in the regulations.

In view of the above this Board finds against the appellant company and recommends that the appellant company should not be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

15 April 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 526

GHPST/108/11
Tender for the supply of External Collection Kit

This call for tenders was published in the Government Gazette on the 11th February 2011. The closing date for this call with an estimated budget of €48,739 (Excl. VAT) was the 14th March 2011.

Three (3) tenderers submitted their offers.

Technoline Ltd filed an objection on the 10th December 2012 against the decision of the Ministry for Health to disqualify its offer as technically non-compliant and to recommend award to A.M. Mangion Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened to public hearings, namely on Tuesday, 26th March 2013 and Monday, 15th April 2013 respectively, to discuss this objection.

Present for the hearing were:

Technoline Ltd

Ms Damaris Lofaro	Sales Executive
Mr Ivan Vassallo	Technical Expert
Mr Nicholas Sammut	Representative
Dr John Attard	Managing Director

A.M. Mangion Ltd

Mr Emanuel Spiteri	Representative
Mr Ray Vella	Representative

Central Procurement and Supplies Unit (CPSU)– Ministry for Health

Ms Connie Miceli	Representative, CPSU

Evaluation Board

Mr George Fenech	Chairman
Mr Antoine Zrinzo	Consultant Surgeon/Member
Ms Catherine Chetcuti	Sen. Pharm. Tech/Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection. A second sitting had to be resorted to because during the first

sitting the technical experts, namely, Mr Antoine Zrinzo, Consultant Surgeon/board member, and Mr Ivan Vassallo, representing the appellant company, were unable to attend.

Ms Damaris Lofaro, representing Technoline Ltd, the appellant company, made the following submissions:

i. by letter dated 4th December 2012 the appellant company was informed that its offer was not successful since the ventricular catheter had two flaps for loading and since it could dislodge easily the product was unacceptable;

ii. the product offered by Technoline Ltd did satisfy all the requirements laid down in the tender document and, in fact, it was manufactured by a globally renowned firm, *Metronic*, and no fault had ever been reported similar to that indicated by the contracting authority;

and

iii. besides being compliant, the product offered by the said bidder was about 40% cheaper than the recommended one.

Mr Ivan Vassallo, also representing the appellant company, remarked that:-

a. if the appellant firm did not object to this reason for disqualification that would automatically mean that the product was or could be dangerous to patients;

and

b. the technical specifications did not indicate the requirements for securing the ventricular catheter to the patient and, as a consequence, one could not exclude a bidder on something which did not even feature in the tender technical specifications.

Mr George Fenech, chairman of the evaluation board, explained that:-

i. although certain correspondence and annexes to the evaluation report referred to 'Codman External Collection Kit', where 'Codman' was a propriety name, yet the title of the tender read 'External Collection Kit';

ii. in layman terms, this item was used to either drain the head of the patient from excessive fluid, which would otherwise exert pressure on the brain and other organs, or else inject fluid in the head/brain if such fluid was in short supply;

iii. Volume 3 of the tender document laid down the technical specifications of this product and, among other things, it referred to 'two clamps' and although the appellant company claimed that in its case 'the flaps' represented 'the clamps', the contracting authority considered them distinct from one another;

iv. *Metronic* was a globally renowned manufacturer of medical equipment and 'Mater Dei Hospital' made use of various items supplied by *Metonic*;

and

v. the contracting authority was not, in any way, attributing bad workmanship or something of the kind to this firm but the contracting authority was simply stating that, on examining and

testing the sample provided, it was found that part of this device could easily dislodge rendering it unacceptable.

Mr Vassallo maintained that the product offered by Technoline Ltd not only met the tender specifications but it even exceeded them.

At this stage Mr Vassallo provided Mr Zrinzo with a sealed sample of the external collection kit offered by Technoline Ltd.

Mr Antoine Zrinzo, Consultant Neurological Surgeon and evaluation board member, explained that:

a. part of this device was fixed to the head of the patient usually to drain the excess fluid and the tube of that part had to join with the tube of another part of the same device;

b. at adjudication stage a problem was encountered on joining together the tubes of these two parts of the device because on tightening the flaps one of them broke and fell off with the consequence that the two tubes were not properly joined/connected together;

c. if these tubes did not connect/close properly then the patient would be exposed to infections;

d. there were other such devices where these two tubes were joined together by means of a helical thread instead of flaps, which, perhaps, rendered them more secure;

e. it was conceded that, incidentally, the sample used at adjudication stage turned out to be defective whereas other samples might not present this problem;

and

f. in fact, the sample just provided by the appellant company at the hearing provided an 'obliquely closed system', namely the two tubes were securely connected, and he would, therefore, be comfortable to use the product.

Mr Vassallo remarked that his firm undertook to take in and replace any defective items and that it was its policy to report and send any defective items to the supplier for testing.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 10th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 15th April 2013, had objected to the decision taken by the pertinent authorities;

-

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 4th December 2012 the appellant company was informed that its offer was not successful since the ventricular catheter had two flaps for loading and since it could dislodge easily the product was unacceptable, (b) the product offered by

Technoline Ltd did satisfy all the requirements laid down in the tender document and, in fact, it was manufactured by a globally renowned firm, *Metronic,* and no fault had ever been reported similar to that indicated by the contracting authority, (c) besides being compliant, the product offered by the said bidder was about 40% cheaper than the recommended one, (d) if the appellant firm did not object to this reason for disqualification that would automatically mean that the product was or could be dangerous to patients, (e) the technical specifications did not indicate the requirements for securing the ventricular catheter to the patient and, as a consequence, one could not exclude a bidder on something which did not even feature in the tender technical specifications, (f) the product offered by Technoline Ltd not only met the tender specifications but it even exceeded them and (g) the appellant firm undertook to take in and replace any defective items and that it was its policy to report and send any defective items to the supplier for testing;

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- having considered the contracting authority's representative's reference to the fact that (a) although certain correspondence and annexes to the evaluation report referred to 'Codman External Collection Kit', where 'Codman' was a propriety name, yet the title of the tender read 'External Collection Kit', (b) in layman terms, this item was used to either drain the head of the patient from excessive fluid, which would otherwise exert pressure on the brain and other organs, or else inject fluid in the head/brain if such fluid was in short supply, (c) Volume 3 of the tender document laid down the technical specifications of this product and, among other things, it referred to 'two clamps' and although the appellant company claimed that in its case 'the flaps' represented 'the clamps', the contracting authority considered them distinct from one another, (d) *Metronic* was a globally renowned manufacturer of medical equipment and 'Mater Dei Hospital' made use of various items supplied by *Metonic* and (e) the contracting authority was not, in any way, attributing bad workmanship or something of the kind to this firm but the contracting authority was simply stating that, on examining and testing the sample provided, it was found that part of this device could easily dislodge rendering it unacceptable;

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- having also considered Mr Zrinzo's references to the fact that, (a) part of this device was fixed to the head of the patient usually to drain the excess fluid and the tube of that part had to join with the tube of another part of the same device, (b) at adjudication stage a problem was encountered on joining together the tubes of these two parts of the device because, on tightening the flaps, one of them broke and fell off with the consequence that the two tubes were not properly joined/connected together, (c) if these tubes did not connect/close properly then the patient would be exposed to infections, (d) there were other such devices where these two tubes were joined together by means of a helical thread instead of flaps, which, perhaps, rendered them more secure, (e) it was conceded that, incidentally, the sample used at adjudication stage turned out to be defective whereas other samples might not present this problem and (f) in fact, the sample just provided by the appellant company at the hearing provided an 'obliquely closed system', namely the two tubes were securely connected, and he would, therefore, be comfortable to use the product,

reached the following conclusion, namely the Public Contracts Review Board opines that the very fact that the same consultant / board member (Mr Zrinzo) (a) conceded that whilst it was a fact that, whereas the sample used at adjudication stage turned out to be defective other samples might not present this problem (b) informed those present that the sample just provided by the appellant company at the hearing provided an 'obliquely closed system', namely the two tubes were securely connected, and that, as a result, he would be comfortable to use the product, provided enough

evidence to one and sundry that the product being offered by the appellant company was indeed acceptable.

In view of the above this Board finds in favour of the appellant company and, apart from recommending the reinstatement of the said appellant company in the evaluation process, this Board also recommends that the deposit paid by the same company for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Carmel Esposito	Paul Mifsud
Chairman	Member	Member

26 April 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 527

GHPST/536/11

Tender for the Supply of Sterile Powder Free Surgical Gloves, Size 7.5

The call for tender was published in the Government Gazette of the 27th May 2011 with a closing date of the 27th June 2011. The estimated value of the tender was €70,778.42. The price of the recommended tender was €64,289.52.

Drugsales Ltd filed an objection on the 11th December 2012 against the decision of the Ministry for Health, the Elderly and Community Care to disqualify its offer and to recommend award to Kemimport Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Mifsud as members convened a meeting on Tuesday 26th March 2013 to discuss the appeal.

Present:

Drugsales Ltd

Dr Andrea Gera de Petri	Director
Mr Philip Moran	Salesperson

Kemimport Ltd

Mr Reginald Fava	Representative
Mr Pierre Fava	Representative

Central Procurement and Supplies Unit – Ministry for Health, the Elderly and Community Care

Ms Connie Miceli	Representative CPSU

Evaluation Board

Mr George Fenech	Chairman
Mr N Abela	ICN/Member
Ms Josette Camilleri	Sen. Pharm. Tech./Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

The Chairman, Public Contracts Review Board, could not help noting that this tender was issued in May 2011 and, amazingly enough, two years after the evaluation process was still dragging on.

The contracting authority replied that, since then, the Central Procurement and Supplies Unit (CPSU) had undergone a rigorous re-structuring process.

Dr Andrea Gera de Petri, legal representative of Drugsales Ltd, the appellant company, made the following submissions:

i. by letter dated 4th December 2012 the appellant firm was informed that its offer was not successful since the product changed from the one it had originally submitted and, as a result, the offer could not be considered further and that the award was recommended to Kemimport Ltd at a higher price;

and

ii. on the 24th July 2012 the contracting authority asked if Drugsales Ltd would be supplying 'PROTEGRITY SMT MICRO' Sterile latex Powder-Free Surgical Gloves with Nitrile coating size 7.5 Code No 2D72NT75 and the reply submitted by the appellant firm on 26th November 2012 read that, albeit its principals had changed the brand name of this item to 'PROTEXIS' with a new product code 2D72NT75X, yet both the quality and the description remained the same - in short, the change only concerned a re-branding of the product.

Mr George Fenech, chairperson of the second evaluation board – the previous one was chaired by Ms Miriam Dowling - explained that:

a. this tender had already been the subject of an objection before the Public Contracts Review Board (Case No. 402) because the same appellant company had submitted the product description, which was mandatory, but had failed to submitted the product code number, which was not mandatory;

b. following the decision of the Public Contracts Review Board to reintegrate the offer made by Drugsales Ltd into the evaluation process, he, as chairperson of the newly appointed evaluation board, had asked, as per minute 58 in file, the Departmental Contracts Committee for guidance on the following two points, namely (a) in the course of the re-evaluation Drugsales Ltd informed that it had changed the product it was originally offering and, as a result, the evaluation board asked whether that was permissible and (b) if a product change was allowed, whether the evaluation board could ask for samples;

and

c. the reply given by the Departmental Contracts Committee was that once there had been a change to the original offer submitted, this offer should no longer be considered.

The Chairman, Public Contracts Review Board, referred to the Board's decision dated 11th May 2012 on the first appeal and to the advice given by the Departmental Contracts Committee and remarked as follows:

i. the Public Contracts Review Board had decided on the first appeal that it was in order for the contracting authority to seek a clarification from the bidder on the mandatory information already submitted and that the offer by Drugsales Ltd should be reintegrated in the evaluation process;

ii. it was not acceptable for the Departmental Contracts Committee to overturn the Public Contracts Review Board 's decision to reintegrate Drugsales Ltd offer in the evaluation process;

iii. the Public Contracts Review Board was set up to scrutinise the work of the contracting authority/Departmental Contracts Committee and not the other way round because the decisions of the Public Contracts Review Board could only be contested before the Courts;

iv. moreover, the evaluation board was entitled to take all necessary action in order to carry out the decision taken by the Public Contracts Review Board , without the need of Departmental Contracts Committee approval;

v. if the evaluation board/contracting authority faced any difficulty in carrying out the decision of the Public Contracts Review Board then the former should communicate with and seek further advice from the Public Contracts Review Board;

vi. the contracting authority should carry out forthwith the decision taken by the Public Contracts Review Board in May 2012 and, in so doing, if necessary, it should ask for samples and for certification so as to ascertain that the product being offered was of the same quality and description as originally submitted, i.e. that the change was in fact only a question of re-branding;

and

vii. the contracting authority was being given three weeks time within which to obtain the information and to report back to the Public Contracts Review Board .

At this point the hearing was brought to a close.

Following the receipt of the requested feedback from the contracting authority which followed the expiry of the term allowed by this Board, which reported that, following re-analysis of the appellant company's bid, it transpired that "item offered according *(was)* to specs" this Board herewith concludes that:

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 10th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 26th March 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 4th December 2012 the appellant firm was informed that its offer was not successful since the product changed from the one it had originally submitted and, as a result, the offer could not be considered further and that the award was recommended to Kemimport Ltd at a higher price and (b) on the 24th July 2012 the contracting authority asked if Drugsales Ltd would be supplying 'PROTEGRITY SMT MICRO' Sterile latex Powder-Free Surgical Gloves with Nitrile coating size 7.5 Code No 2D72NT75 and the reply submitted by the appellant firm on 26th November 2012 read that, albeit its principals had changed the brand name of this item to 'PROTEXIS' with a new product code 2D72NT75X, yet both the quality and the description remained the same - in short, the change only concerned a re-branding of the product;

- having considered the contracting authority's representative's reference to the fact that (a) this tender had already been the subject of an objection before the Public Contracts Review Board (Case No. 402) because the same appellant company had submitted the product description, which was mandatory, but had failed to submitted the product code number, which was not mandatory, (b) following the decision of the Public Contracts Review Board to reintegrate the offer made by Drugsales Ltd into the evaluation process, Mr Fenech, as chairperson of the newly appointed evaluation board, had asked, as per minute 58 in file, the Departmental Contracts Committee for guidance on the following two points, namely *(1)* in the course of the re-evaluation Drugsales Ltd informed that it had changed the product it was originally offering and, as a result, the evaluation board asked whether that was permissible and *(2)* if a product change was allowed, whether the evaluation board could ask for samples and (c) the reply given by the Departmental Contracts Committee was that once there had been a change to the original offer submitted, this offer should no longer be considered;

- having noted the findings as reported by the contracting authority following the time allowed by this Board for the contracting authority to re-assess the appellant company's sample;

reached the following conclusions, namely:

1. The Public Contracts Review Board reaffirms its position wherein it maintains that it was not acceptable for the Departmental Contracts Committee to overturn its decision to reintegrate Drugsales Ltd offer in the evaluation process being fully cognizant of the fact that the Public Contracts Review Board was set up to scrutinise the work of the contracting authority/Departmental Contracts Committee and not the other way round because the decisions of the Public Contracts Review Board could only be contested before the Courts.

2. This Board, whilst reiterating that the evaluation board was entitled to take all necessary action in order to carry out the decision taken by the Public Contracts Review Board, without the need of Departmental Contracts Committee approval, this Board contends that if the evaluation board/contracting authority faced any difficulty in carrying out the decision of the Public Contracts Review Board then the former should have communicated with and sought further advice from the Public Contracts Review Board only and not from any other entity or department;

3. The Public Contracts Review Board opines that, in the light of the new conclusions reached by the evaluation board following further analysis conducted on the appellant company's sample as a result of the latter's reintegration in the evaluation process, this Board has no problem with concurring with such conclusions.

In view of the above this Board finds in favour of the appellant company and recommends that the appellant company be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

26 April 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 528

ZBGLC/05/11

Tender for Cleaning of Non-Urban Areas in Haz-Zebbug

The call for tender was published in the Government Gazette of the 7th October 2011 with a closing date of the 4th November 2011. The estimated value of the tender was €24,000. The price of the recommended tender was €19,990.

Mr Owen Borg filed an objection on the 17th December 2012 against the decision of the Haz-Zebbug Local Council to disqualify his offer and to recommend award to Mr Wilson Mifsud at a higher price.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Joseph Croker and Mr Carmelo Esposito as members convened a meeting on Thursday 28th March 2013 to discuss the appeal.

Present:

Dr Gianfranco Gauci	Legal Representative
Mr Owen Borg	Appellant

Mr Wilson Mifsud

Dr John Bonello	Legal Representative
Mr Wilson Mifsud	Apellant

Haz-Zebbug Local Councl

Dr Anglu Farrugia	Legal Representative
Mr Alfred Grixti	Mayor
Mr Philip Gatt	Project Manager

Evaluation Board

Dr Stefan Vella	Member
Mr Christopher Formosa	(Executive) Secretary

After the Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Gianfranco Gauci, representing Mr Owen Borg, the appellant, made the following submissions:

i. by letter dated 7th December 2012 the contracting authority informed the appellant that the tender was being recommended for award to another bidder without giving any other details as to why his offer was not successful when he had submitted the cheapest offer;

ii. subsequently, on obtaining a copy of the evaluation report dated 30-31 October 2012 it transpired that the reason for rejection was that, a few months before, bidder Owen Borg was caught disposing of waste at the bring-in sites at Haz-Zebbug – waste which he had been contracted to collect from another locality (Santa Lucia). Furthermore it was claimed that this was established after the plastic bags were opened and, among the waste, circulars issued by another locality were found. The identity of the contractor (Mr Owen Borg) connected with these findings were verified with the local council concerned;

iii. it appeared that the appellant had been accused and found guilty of a very serious offence in his line of work without even having been given the opportunity to defend himself against such an accusation;

and

iv. the contracting authority was being asked to explain how it came to establish these 'facts' and whether it had interviewed the bidders in connection with this tender, something which other local councils did as a matter of course.

Mr Alfred Grixti, mayor of Haz-Zebbug Local Council, under oath, gave the following evidence:-

a. the Council had been receiving complaints from GreenPak Ltd, the contractor responsible for the emptying of skips at bring-in sites for recycling purposes, that a number of plastic bags full of waste resulting from street sweeping/cleaning were found a the bring-in sites and that it was evident that someone was irregularly disposing of these waste bags at these sites and that GreenPak Ltd was now refusing to dispose of this waste;

b. the bring-in sites were meant for the separation of waste for recycling purposes;

c. consequently, he had instructed the project manager, Mr Philip Gatt - even with the assistance of the Police, who, however were not in a position to detail anyone for this job - to open these rubbish bags with a view to establishing from which locality the waste originated, a procedure that was followed by other local councils localities even overseas;

d. among the waste, copies of a circular issued by the Santa Lucia Local Council were found and, subsequent to this, the local council concerned was duly informed and, from then onwards, this abuse did not repeat itself;

e. this investigation was carried out around August 2012 whereas this tender was issued in October/November 2011;

f. two photographs demonstrated the presence of a number of plastic bags full of waste lying at one of the Haz-Zebbug bring-in sites;

g. each local council was allocated a given quantity/weight of waste which could be disposed of at WasteServ facilities and if the established limit were to be exceeded the local council concerned would have to pay for it;

h. it was not acceptable that the appellant, who resided at Haz-Zebbug, would dispose at the Haz-Zebbug bring-in sites the waste he collected as contractor from the locality of Santa Lucia;

i. this had to be seen in the background of complaints placed on 'facebook' by members of the appellant's partner to the effect that certain streets at Zebbug were not being kept properly clean;

j. no measures were taken against Mr Owen Borg and he was not even spoken to once the action taken with Santa Lucia Local Council effectively stopped this abuse;

k. there were instances when the domestic waste collection contractor had to be called in to dispose of the waste which accumulated at the bring-in sites but, whenever the culprit was caught red handed, he would be compelled to collect and dispose of the waste at his expense;

l. the Santa Lucia Local Council was not asked to indicate whether it had other contractors, other than Mr Owen Borg, engaged on cleaning contracts;

and

m. unlike various other local councils, as soon as he was elected mayor, the Zebbug Local Council detached itself from the technical evaluation of tenders and that task would be assigned to an 'ad hoc' evaluation board and then the Council would consider the recommendations of the evaluation board and decide thereon.

Mr Philip Gatt, project manager with the Haz-Zebbug Local Council, under oath, gave the following evidence:-

i. the duties of project manager included the supervision of the execution of contracts;

ii. the irregular disposal of bags full of waste generated from street cleaning/sweeping, namely tree leaves and branches and other material found on streets and in public areas, was first noted at one bring-in site but then this practice spread to other similar sites and on a number of occasions;

iii. the Council had instructed Mr Gatt, who in turn roped in the executive secretary and a GreenPak representative - the police had no staff to spare for this job - to open up the rubbish bags in an effort to establish the locality from where this waste originated;

iv. the waste was scattered about and among other things they found copies of a circular issued by the Santa Lucia Local Council, a copy of which was kept as evidence;

v. through experience he could tell from the type of bags and the contents that the source of that waste were not households but evidently the waste was collected by some contractor from street sweeping/cleaning;

and

vi. whilst this was not an isolated case, yet, when the Council reported the matter to Santa Lucia Local Council this abuse did not recur.

Dr Anglu Farrugia, legal representative of the contracting authority, submitted the following remarks with regard to points raised by Dr Gauci:-

a. the contractor responsible for the upkeep of public gardens at Santa Lucia was the Environment and Landscaping Consortium (ELC), which entity had its own sites where to

dispose of the material collected from its commercial activities and it was not Environment and Landscaping Consortium's policy to irregularly dump waste at the bring-in sites of local councils;

and

b. the police were brought in only if a person was caught red-handed dumping waste illegally at bring-in sights but one could not bring in the police to look into a state of fact that waste was being illegally dumped at bring-in sites when the culprit was not caught committing the act.

Dr Stefan Vella, a member of the evaluation board, under oath, gave the following evidence:-

i. whilst the terms of reference of the evaluation board were to assess the bids and make recommendations thereon, yet, the final consideration and award decision rested with the Council;

ii. the evaluation board was not vested with the authority to investigate but to evaluate the bids received, including the past experience and record of the bidders;

and

iii. the remark that Mr Owen Borg had been disposing of waste at the Haz-Zebbug bring-in sites in an irregular manner was brought to the attention of the evaluation board by the executive secretary of the Council, who was present during the evaluation, albeit without a voting power, and the evaluation board did not question that information and neither did it interview Mr Borg in that regard.

Mr Owen Borg, the appellant, under oath, gave the following evidence:-

a. after examining the photographs taken at of the bring-in site at Haz-Zebbug, he noted that the bags were all black in colour, except for one which was white, whereas he used white bags;

b. he was never asked to comment or to give his version of events on the accusation levelled at him with regard to dumping waste at the bring-in sites at Haz-Zebbug, which accusation he categorically rejected;

c. street cleaning at Santa Lucia generated on average three to four plastic bags per day;

and

d. the Environment and Landscaping Consortium was responsible for the upkeep of gardens in Santa Lucia and besides using black plastic bags, he was aware of at least one Environment and Landscaping Consortium employee who worked on the contract in Santa Lucia and who resided in Zebbug.

Mr Anthony Saliba, representative of GreenPak Ltd, under oath, gave the following evidence:-

i. he confirmed that on one occasion he went to empty the skips at one of the Haz-Zebbug bring-in sites and, together with his colleague he found a number of bags which contained street cleaning waste which originated from Santa Lucia and he reported the matter to his superior;

ii. this abuse was noted on subsequent occasions and at more than one bring-in site and he, therefore, contacted the Haz-Zebbug Local Council stating that he was refusing to dispose of waste which originated from another locality;

iii. he had information from undisclosed eyewitnesses that the person dumping this waste was using a white van – *Mr Owen Borg confirmed that he had a white van*;

iv. he confirmed that he and his colleague found a number of the Santa Lucia circulars in white plastic bags and although he was illiterate he had no doubt about what he was saying;

and

v. this irregular dumping of waste was not carried out solely at the bring-in site that featured in the photograph but at other bring-in sites at Haz-Zebbug as well and similar Santa Lucia circulars were found at these sites.

Dr Gauci arrived at the following conclusions:-

a. what one had to consider was whether the reason for the rejection of his client's bid brought forward by the Council was just and reasonable;

b. the evaluation board did not question the information provided by the executive secretary as to Mr Borg having been responsible for the illegal dumping of waste at Haz-Zebbug bring-in sites and neither did it or the Council discuss the matter with the appellant, which they had the right to do;

c. evidently, the Council did not file a report to the Police on this matter because it had no proof;

d. although the statement indicated that Mr Owen Borg was 'caught' – giving the impression that he was caught red-handed - the fact was that the Council was led to believe that the appellant was responsible only by alleged circumstantial evidence;

e. it was clear that the Council was prejudiced against Mr Borg because his partner's relatives denounced the same Council on 'facebook';

f. the Council said that two or so Santa Lucia circulars were found whereas Mr Saliba said that many more were in fact found;

g. whilst it was correct to state that Environment and Landscaping Consortium had its own facilities where to dump waste and that it was not its declared policy to dump its waste at bring-in sites, yet one could not exclude the possibility that, on these few occasions, say, one of its employees could have in a hurry and found it expedient to dump some waste at Haz-Zebbug bring-in sites where he resided instead of dumping it at the Environment and Landscaping Consortium facility, namely it could have been the act of an irresponsible Environment and Landscaping Consortium employee;

h. the fact that the abuse ceased on contacting the Santa Lucia Local Council it could well mean that the Council had informed Environment and Landscaping Consortium which, in turn, warned its employees against such bad practices;

and

i. it was not correct for the Council to accuse the appellant of a serious act in his line of work simply on alleged 'circumstantial evidence' without discussing the matter with the person concerned and, moreover, discard his bid which was 7% cheaper than that recommended.

Dr Anglu Farrugia concluded that:-

i. the evaluation board was unanimous in its decision to reject the appellant's tender;

ii. this matter hinged on 'circumstantial evidence' gathered in the presence of three officers and as such it was not a 'criminal' matter but it was a case of circumstantial evidence which pointed in the direction of the appellant and, as a consequence, the Council could not have concluded otherwise;

iii. the Environment and Landscaping Consortium used black plastic bags whereas the printed matter issued by Santa Lucia Local Council was found in white bags similar to those used by the appellant;

iv. the Council decided to investigate the illegal dumping of waste following a series of such illegal activities;

v. this abuse ceased on reporting the matter to the Santa Lucia Local Council, where the appellant carried out street cleaning services;

and

vi. the Council acted correctly in disqualifying the appellant due to the repeated abuses committed by him against the Zebbug Local Council and it was, therefore, justified not to engage this same person on the execution of its cleaning contracts.

Dr John Bonello, legal representative of the recommended tenderer, endorsed the arguments put forward by Dr Farrugia

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 13th December 2012 and submitted on the 17th December 2012 as well as through its representatives verbal submissions presented during the hearing held on the 28th March 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to (a) the fact that by letter dated 7th December 2012 the contracting authority informed the appellant that the tender was being recommended for award to another bidder without giving any other detail as to why his offer was not successful when he had submitted the cheapest offer, (b) the fact that subsequently, apart from the fact that, on obtaining a copy of the evaluation report dated 30-31 October 2012 it transpired that the reason for rejection was that, a few months before, bidder Owen Borg was caught disposing of waste at the bring-in sites at Haz-Zebbug – waste which he had been contracted to collect from another locality (Santa Lucia), it was also claimed that *(1)* this was established after the plastic bags were opened and, among the waste, circulars issued by another locality were found and *(2)* the identity of the contractor (Mr Owen Borg) connected with these findings were verified with the local council concerned, (c) the fact that it appeared that the appellant had been accused and found guilty of a very serious offence

in his line of work without even having been given the opportunity to defend himself against such an accusation, (d) the fact that the contracting authority was being asked to explain how it came to establish these 'facts' and whether it had interviewed the bidders in connection with this tender, something which other local councils did as a matter of course, (e) Mr Owen Borg's testimony including the fact that (*1*) after examining the photographs taken at of the bring-in site at Haz-Zebbug, he noted that the bags were all black in colour, except for one which was white, whereas he used white bags, (*2*) he was never asked to comment or to give his version of events on the accusation levelled at him with regard to dumping waste at the bring-in sites at Haz-Zebbug, which accusation he categorically rejected, (*3*) street cleaning at Santa Lucia generated on average three to four plastic bags per day (*4*) the Environment and Landscaping Consortium was responsible for the upkeep of gardens in Santa Lucia and, besides using black plastic bags, he was aware of at least one Environment and Landscaping Consortium employee who worked on the contract in Santa Lucia and who resided in Zebbug, (f) the appellant lawyer's concluding remarks, especially those related to (*1*) what one had to consider was whether the reason for the rejection of the appellant's bid brought forward by the Council was just and reasonable, (*2*) the fact that the evaluation board did not question the information provided by the executive secretary as to Mr Borg having been responsible for the illegal dumping of waste at Haz-Zebbug bring-in sites and neither did it or the Council discuss the matter with the appellant, which they had the right to do, (*3*) the fact that, evidently, the Council did not file a report to the Police on this matter because it had no proof, (*4*) the fact that although the statement indicated that Mr Owen Borg was 'caught' – giving the impression that he was caught red-handed - the fact was that the Council was led to believe that the appellant was responsible only by alleged circumstantial evidence, (*5*) the fact that it was clear that the Council was prejudiced against Mr Borg because his partner's relatives denounced the same Council on 'facebook' (*6*) the fact that the Council said that two or so Santa Lucia circulars were found whereas Mr Saliba said that many more were in fact found, (*7*) the fact that whilst it was correct to state that Environment and Landscaping Consortium had its own facilities where to dump waste and that it was not its declared policy to dump its waste at bring-in sites, yet one could not exclude the possibility that, on these few occasions, say, one of its employees could have in a hurry found it and expediently dumped some waste at Haz-Zebbug bring-in sites where he resided instead of dumping it at the Environment and Landscaping Consortium facility, implying that it could have been the act of an irresponsible Environment and Landscaping Consortium employee, (*8*) the fact that the fact that the abuse ceased on contacting the Santa Lucia Local Council could well mean that the Council had informed Environment and Landscaping Consortium which, in turn, warned its employees against such bad practices and (*9*) the fact that it was not correct for the Council to accuse the appellant of a serious act in his line of work simply on alleged 'circumstantial evidence' without discussing the matter with the person concerned and, moreover, discard his bid which was 7% cheaper than that recommended;

- having considered the contracting authority's representative's reference to (a) the Mayor's testimony wherein, inter alia, he stated that *(1)* the Council had been receiving complaints from GreenPak Ltd, the contractor responsible for the emptying of skips at bring-in sites for recycling purposes, that a number of plastic bags full of waste resulting from street sweeping/cleaning were found at the bring-in sites and that it was evident that someone was irregularly disposing of these waste bags at these sites and that GreenPak Ltd was not refusing to dispose of this waste, *(2)* the bring-in sites were meant for the separation of waste for recycling purposes, *(3)* consequently, he had instructed the project manager, Mr Philip Gatt - even with the assistance of the Police, who, however were not in a position to detail anyone for this job - to open these rubbish bags with a view to establishing from which locality the waste originated, a procedure that was followed by other local councils localities even overseas, *(4)* among the waste, copies of a circular issued by the Santa Lucia Local Council were found and, subsequent to this, the local council concerned was duly informed and, from then onwards, this abuse did not repeat itself, *(5)* this investigation was carried out around August 2012 whereas this tender was issued in October/November 2011, *(6)* two photographs demonstrated the presence of a number of plastic bags full of waste lying at one of the Haz-Zebbug bring-in sites, *(7)* each local council was allocated a given quantity/weight of waste which could be disposed of at WasteServ facilities and if the established limit were to be

exceeded the local council concerned would have to pay for it, *(8)* it was not acceptable that the appellant, who resided at Haz-Zebbug, would dispose at the Haz-Zebbug bring-in sites the waste he collected as contractor from the locality of Santa Lucia, *(9)* this had to be seen in the background of complaints placed on 'facebook' by members of the appellant's partner to the effect that certain streets at Zebbug were not being kept properly clean, *(10)* no measures were taken against Mr Owen Borg and he was not even spoken to once the action taken with Santa Lucia Local Council effectively stopped this abuse, *(11)* there were instances when the domestic waste collection contractor had to be called in to dispose of the waste which accumulated at the bring-in sites but, whenever the culprit was caught red handed, he would be compelled to collect and dispose of the waste at his expense, *(12)* the Santa Lucia Local Council was not asked to indicate whether it had other contractors, other than Mr Owen Borg, engaged on cleaning contracts, *(13)* unlike various other local councils, as soon as he was elected mayor, the Zebbug Local Council detached itself from the technical evaluation of tenders and that task would be assigned to an 'ad hoc' evaluation board and then the Council would consider the recommendations of the evaluation board and decide thereon, (b) the Project Manager's testimony wherein, inter alia, he stated that *(1)* the duties of the project manager included the supervision of the execution of contracts, *(2)* the irregular disposal of bags full of waste generated from street cleaning/sweeping, namely tree leaves and branches and other material found on streets and in public areas, was first noted at one bring-in site but then this practice spread to other similar sites and on a number of occasions, *(3)* the Council had instructed Mr Gatt, who in turn roped in the executive secretary and a GreenPak representative - the police had no staff to spare for this job - to open up the rubbish bags in an effort to establish the locality from where this waste originated, *(4)* the waste was scattered about and among other things they found copies of a circular issued by the Santa Lucia Local Council, a copy of which was kept as evidence, *(5)* through experience he could tell from the type of bags and the contents that the source of that waste were not households but evidently the waste was collected by some contractor from street sweeping/cleaning, *(6)* whilst this was not an isolated case, yet, when the Council reported the matter to Santa Lucia Local Council this abuse did not recur, (c) Dr Vella's testimony especially to references to the fact that *(1)* whilst the terms of reference of the evaluation board were to assess the bids and make recommendations thereon, yet, the final consideration and award decision rested with the Council, *(2)* the evaluation board was not vested with the authority to investigate but to evaluate the bids received, including the past experience and record of the bidders, *(3)* the remark that Mr Owen Borg had been disposing of waste at the Haz-Zebbug bring-in sites in an irregular manner was brought to the attention of the evaluation board by the executive secretary of the Council, who was present during the evaluation, albeit without a voting power, and the evaluation board did not question that information and neither did it interview Mr Borg in that regard, (d) the contracting authority's legal representative's concluding remarks, especially, *(1)* the evaluation board was unanimous in its decision to reject the appellant's tender, *(2)* this matter hinged on 'circumstantial evidence' gathered in the presence of three officers and as such it was not a 'criminal' matter but it was a case of circumstantial evidence which pointed in the direction of the appellant and, as a consequence, the Council could not have concluded otherwise, *(3)* the Environment and Landscaping Consortium used black plastic bags whereas the printed matter issued by Santa Lucia Local Council was found in white bags similar to those used by the appellant, *(4)* the Council decided to investigate the illegal dumping of waste following a series of such illegal activities, *(5)* this abuse ceased on reporting the matter to the Santa Lucia Local Council, where the appellant carried out street cleaning services and *(6)* the Council acted correctly in disqualifying the appellant due to the repeated abuses committed by him against the Zebbug Local Council and it was, therefore, justified not to engage this same person on the execution of its cleaning contracts;

- having also considered GreenPak Ltd's representative's reference to the fact that (a) he confirmed that on one occasion he went to empty the skips at one of the Haz-Zebbug bring-in sites and, together with his colleague, he found a number of bags which contained street cleaning waste which originated from Santa Lucia and he reported the matter to his superior, (b) this abuse was noted on subsequent occasions and at more than one bring-in site and he, therefore, contacted the

Haz-Zebbug Local Council stating that he was refusing to dispose of waste which originated from another locality, (c) he had information from undisclosed eyewitnesses that the person dumping this waste was using a white van – *Mr Owen Borg confirmed that he had a white van*, (d) he confirmed that he and his colleague found a number of the Santa Lucia circulars in white plastic bags and although he was illiterate he had no doubt about what he was saying and (e) this irregular dumping of waste was not carried out solely at the bring-in site that featured in the photograph but at other bring-in sites at Haz-Zebbug as well and similar Santa Lucia circulars were found at these sites,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the evaluation board was, at least, morally obliged to (a) question the information provided by the executive secretary as to Mr Borg having been responsible for the illegal dumping of waste at Haz-Zebbug bring-in sites, as well as (b) discuss the matter with the appellant.

2. The Public Contracts Review Board feels that although the statement indicated that Mr Owen Borg was 'caught' – giving the impression that he was caught red-handed - the fact was that the Council was led to believe that the appellant was responsible only by alleged circumstantial evidence.

3. The Public Contracts Review Board has taken note of the divergent responses given during the hearing wherein, whilst the Council's representatives claimed that two or so Santa Lucia circulars were found, Mr Saliba said that many more were in fact found.

4. This Board has positively taken cognizance of the comment passed by the appellant's representative wherein it was stated that the fact that the abuse ceased on contacting the Santa Lucia Local Council it could well mean that the Council had informed Environment and Landscaping Consortium which, in turn, warned its employees against such bad practices.

5. This Board further opines that the fact that the evaluation board was unanimous in its decision to reject the appellant's tender does not carry more import than if it were not to have been the outcome of a unanimous decision. This Board feels that the decision, regardless of its unanimity, was based on the wrong premise and thus considered to be flawed.

6. The Public Contracts Review Board thus contends that, in the circumstance, it disagrees with the arguments raised by the contracting authority's representatives, namely that the Zebbug Local Council had acted correctly in disqualifying the appellant due to the repeated abuses committed by him against the same Local Council and it was, therefore, justified not to engage this same person on the execution of its cleaning contracts. This Board claims that such justification was also flawed.

In view of the above this Board finds in favour of the appellant and recommends that the said appellant's offer be reintegrated in the evaluation process. Moreover, the Public Contracts Review Board establishes that the appellant should be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Joseph Croker	Carmelo Esposito
Chairman	Member	Member

17 April 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 529

ZBGLC/04/11
Tender for Cleaning of Urban Areas in Haz Zebbug

This call for tenders was published in the Government Gazette on the 7th October 2011. The closing date for this call with an estimated budget of €55,000 was the 4thNovember 2011.

Three (3) tenderers submitted their offers.

Xuereb Bros filed an objection on the 17th December 2012 against the decision of the Zebbug Local Council to recommend the award of the tender to Mr Bryden Azzopardi at the price of €64,000.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Monday, 15th April 2013 to discuss this objection.

Xuereb Bros

Dr Marion Camilleri	Legal Representative
Mr Noel Xuereb	Representative

Mr Bryden Azzopardi – although notified, nobody turned up.

Zebbug Local Councl

Dr Edward Gatt	Legal Representative
Mr Alfred Grixti	Mayor
Mr Philip Gatt	Project Manager

Evaluation Board

Ms Paula Valletta	Chairperson
Mr Christopher Formosa	(Executive) Secretary

After the Chairman's brief introduction, the appellant company's legal representative was invited to explain the motives of the company's objection.

Dr Marion Camilleri, legal representative of Xuereb Bros, the appellant company, made the following submissions:

i. by letters dated 7th and 15th December 2012 the contracting authority informed the appellant company that the tender was being recommended for award to Mr Bryden Azzopardi for the price of €64,000;

ii. the main argument she was putting forward against the proposed award was that if the recommended price of €64,000 did not cover the payment of the minimum wage then it was reasonable to assume that the payment of, at least, the minimum wage was not going to be met;

iii. such practice was not fair on bidders who wanted to operate according to regulations;

and

iv. the Zebbug Local Council had also remarked in its deliberations that the service offered by the appellant company, which also happened to be the current contractor, was not satisfactory and evidence to that effect were the complaints received and the results obtained following the launch of a survey. Yet, despite this, Dr Camilleri placed emphasis on the fact that, in actual fact, Xuereb Bros had not been served with any default notices, which was the only procedure provided by regulations to communicate complaints to contractors.

Dr Edward Gatt, legal representative of the Zebbug Local Council, submitted the following:-

a. it was not correct for the appellant company to declare that the recommended price did not cover the minimum wage requirement according to law because the contracting authority had undertaken the following exercise which proved otherwise, that is:

	€
Minimum wage per employee	8,221.72
National insurance contribution	688.48
Bonuses	512.36
Total	9,422.56
Annual wages for 5 employees	47,112.80
5% management fee	2,355.64
18% VAT	8,904.32
Total	58,372.76
Recommended price	64,000.00

b. on another occasion he had represented the contractor engaged on cleaning services, namely Gafa' Safeway Ltd, before both the Public Contracts Appeals Board and, on various similar occasions, the Public Contracts Review Board and it had invariably been maintained that it was not up to the Public Contracts Review Board to ensure that employers paid their employees according to labour legislation because that responsibility rested with the Employment and Industrial Relations Department;

c. the local councils were precluded by legislation from rendering this service by employing their own human resources, in which case they would save money on the payment of VAT and profit margins;

and

d. as a consequence, the appellant company's assumption that the recommended bid did not cover the minimum wage payment was unfounded and, even if that were to be correct, it was up to the Employment and Industrial Relations Department to supervise whether employers paid their employees according to labour legislation.

The Chairman remarked that, albeit the Public Contracts Review Board had repeatedly recommended to the authorities concerned that, in order to safeguard the interests of the workers, such tenders should not be awarded below a certain threshold that being the payment of the minimum wage, yet

those recommendations had not been taken up. He added that once the minimum wage standard was met then the contract would be awarded on commercial considerations, such as profit margins.

Mr Alfred Grixti, mayor of the Zebbug Local Council, stated that, to his recollection, both political parties agreed that tenders should respect the minimum standards of employment. Mr Grixti added that, in this case, all bidders had been furnished with a copy of the evaluation report which included the reasons for discarding certain offers and the award recommendation.

The Public Contracts Review Board noted from the evaluation report that, besides the price, another reason that led to the disqualification of the appellant company was that it had failed to submit evidence that it had taken out an insurance policy as requested in the tender document – clause 19 of the General Conditions. It also observed that, failure to provide such proof, which was a mandatory requirement, should have led to the disqualification of the appellant company at the administrative compliance stage.

Mr Noel Xuereb, representing the appellant company, confirmed that Xuereb Bros had not provided any proof with regard to insurance cover.

The Chairman Public Contracts Review Board noted that whilst it was a fact that, in this case, bidders were furinshed with a copy of the evaluation report, yet, he called upon the contracting authority to ensure that, in the future, it includes the reasons for non award of tender in the letter informing the bidder of the individual's or entity's exclusion so that the latter would be better positioned to determine whether to lodge an appeal or not.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 17th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 15th April 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letters dated 7th and 15th December 2012 the contracting authority informed the appellant company that the tender was being recommended for award to Mr Bryden Azzopardi for the price of €64,000, (b) the main argument she was putting forward against the proposed award was that if the recommended price of €64,000 did not cover the payment of the minimum wage then it was reasonable to assume that the payment of, at least, the minimum wage was not going to be met, (c) such practice was not fair on bidders who wanted to operate according to regulations, (d) the Zebbug Local Council had also remarked in its deliberations that the service offered by the appellant company, which also happened to be the current contractor, was not satisfactory and evidence to that effect were the complaints received and the results obtained following the launch of a survey, even though, in actual fact, Xuereb Bros had not been served with any default notices, which was the only procedure provided by regulations to communicate complaints to contractors and (e) Mr Noel Xuereb, representing the appellant company, confirmed that Xuereb Bros had not provided any proof with regard to insurance cover;

- having considered the contracting authority's representative's reference to the fact that (a) it was not correct for the appellant company to declare that the recommended price did not cover the

minimum wage requirement according to law because the contracting authority had undertaken an exercise which proved otherwise, (b) on other similar occasions it had, invariably, been maintained that it was not up to the Public Contracts Review Board to ensure that employers paid their employees according to labour legislation because that responsibility rested with the Employment and Industrial Relations Department, (c) the local councils were precluded by legislation from rendering this service by employing their own human resources, in which case they would save money on the payment of VAT and profit margins, (d) as a consequence, the appellant company's assumption that the recommended bid did not cover the minimum wage payment was unfounded and, even if that were to be correct, it was up to the Employment and Industrial Relations Department to supervise whether employers paid their employees according to labour legislation and (e) in this case, all bidders had been furnished with a copy of the evaluation report which included the reasons for discarding certain offers and the award recommendation,

reached the following conclusions, namely:

1. The Public Contracts Review Board noted from the evaluation report that, besides the price, another reason that led to the disqualification of the appellant company was that it had failed to submit evidence that it had taken out an insurance policy as requested in the tender document – clause 19 of the General Conditions. It also observed that, failure to provide such proof, which was a mandatory requirement, should have led to the disqualification of the appellant company at the administrative compliance stage and, apart from the fact that the appellant company had committed a mistake by not adhering to the tender's terms and conditions, yet, it was equally correct for this Board to state that the contracting authority had, erroneously, decided to proceed with the evaluation of the appellant company's offer when the latter's offer did not even manage to adhere to the administrative requisites of this tender.

2. The Public Contracts Review Board establishes that, whilst it was a fact that, in this case, bidders were furnished with a copy of the evaluation report, yet, it would like to call upon the contracting authority to ensure that, in the future, the latter would include the reasons for the non award of tender in the letter informing the bidder of the individual's or entity's exclusion so that the said bidder would be better positioned to determine whether to lodge an appeal or not.

In view of the above this Board finds against the appellant company and, as a result, recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Carmel Esposito	Paul Mifsud
Chairman	Member	Member

26 April 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 530

CT/2200/2011

Tender for the Provision of Insurance Services to all MCAST sites in Malta and Gozo

The call for tender was published in the Government Gazette of the 13th January 2012 with a closing date of the 6th March 2012. The estimated value of the tender was €300,000. The price of the recommended tender was €168,832.89 inclusive of VAT for a period of three (3) years.

Mediterranean Insurance Brokers (Malta) Ltd filed an objection on the 27th December 2012 against the decision of the Department of Contracts to recommend award of tender to Island Insurance Brokers (Malta) Ltd for the price of €168,832.89.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Joseph Croker and Mr Carmelo Esposito as members convened a meeting on Thursday 28th March 2013 to discuss the appeal.

Present:

Mediterranean Insurance Brokers (Malta) Ltd

Dr Steven Decesare	Legal Representative
Ms Fiona Borg	Divisional Director

Island Insurance Brokers (Malta) Ltd

Dr Stephen Muscat	Legal Representative
Mr Lawrence Pavia	Representative
Mr Mark Spiteri	Representative
Mr David Agius	Representative

Malta College of Arts, Science and Technology (MCAST)

Dr Lena Sammut	Legal Representative
Mr Stephen Caruana	Purchasing Manager

Evaluation Board

Mr Oscar Borg	Chairman
Ms Irene Bugeja	Member
Mr John Vella	Member
Ms Audrey Farrugia	Secretary

Contracts Department

Ms Joelle Mifsud Bonnici	Representative

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Dr Steven Decesare, legal representative of the appellant company, made the following submissions:

i. in its tender submission, the appellant company had erroneously quoted the total price for one year instead of for the period of three years requested in the tender document with the consequence that the price quoted was abnormally low;

ii. aware of this mistake in the original tender submission, the appellant company had informed the Malta College of Arts, Science and Technology that it had erroneously quoted the price for one year instead of for three years as requested and asked the Malta College of Arts, Science and Technology to take this clarification into consideration;

iii. the prices were amended simply to reflect the three year period and not to undercut competition because it turned out that the amended prices were higher than those of the competitors;

iv. nonetheless, whilst the tender had been awarded to the appellant company at the abnormally low price – effectively, at one third of the price following the company's clarification/amendment – yet, the same company declined to honour the contract at the awarded price and so it refused to sign the contract;

v. the purpose of this objection was not to reintegrate the appellant company's bid in the tendering process but to dispute the award of the tender at the recommended price of €168,832.89, which price did not feature in the schedule of prices displayed on the Contracts Department's website, as, in fact, the recommended tenderer had offered two options, namely, €133,486.68 and €147,917.70;

and

vi. the tender document also requested options with regard to 'Industrial All Risks' and 'Public Liability' policies to cover different excess limits and it turned out that only Mediterranean Insurance Brokers (Malta) Ltd submitted six options covering all the options requested whereas Island Insurance Brokers (Malta) Ltd offered two options and Allcare Insurance Brokers Ltd offered one option.

Dr Lena Sammut, legal representative of the Malta College of Arts, Science and Technology, explained that:-

a. as per clause 1.2 of the 'General Instructions', this tender covered a period of three years (36 months) and the contracting authority requested a number of options;

b. whilst, in the 'Financial Bid' of each of its six options the appellant company quoted the cheapest price under the column 'Aggregate Cost per policy over the duration of the contract (3 years)', yet, it later on became apparent that the appellant company had, mistakenly, quoted the price for one instead of for three years, which mistake was acknowledged by the appellant company itself through a letter of clarification it sent to the Contracts Department after the submission of its tender;

and

c. the appellant company's request to alter the quoted prices could not be acceded to.

Mr Oscar Borg, chairman of the evaluation board, remarked that:-

i. the contracting authority was made aware that the price quoted by the appellant actually covered one year instead of the requested period of three years by letter sent after the tender opening stage;

ii. for all intents and purposes, in the appellant company's original tender submission the prices quoted in the respective 'Financial Bid' form clearly indicated that the quotes covered a three year period;

and

iii. the contracting authority pressed on with recommending the award to Mediterranean Insurance Brokers (Malta) Ltd because, in its letter clarifying/amending the prices quoted, the same company did not formally declare that it was withdrawing its tender and, as a result, the evaluation board considered Mediterranean Insurance Brokers (Malta) Ltd's original offer while discarding the amended prices proposed in its letter of clarification.

Ms Fiona Borg, also representing Mediterranean Insurance Brokers (Malta) Ltd, confirmed that the company had informed the contracting authority that the quoted prices were incorrect and furnished the correct quotes without altering the annual premium originally quoted through a letter dated 8th March 2012, namely, two days after the closing date of the tender.

The Chairman Public Contracts Review Board remarked that:-

a. it appeared that the contracting authority pressed on with the award of the tender to the appellant company even though the said company had made it aware that the prices quoted in its original tender submission were incorrect;

b. such a written declaration/admission by the same bidder should have rendered its tender submission inadmissible from the very beginning of the evaluation process;

and

c. it was not acceptable for anyone to alter the prices, for whatever reason, even in good faith, after the tender opening stage.

Mr Stephen Caruana, Purchasing Manager at the Malta College of Arts, Science and Technology, and Mr Borg explained that:-

i. eventually, the Contracts Department revoked the award issued in favour of Mediterranean Insurance Brokers (Malta) Ltd and recommended the award of the tender to the second cheapest offer submitted by Island Insurance Brokers (Malta) Ltd for the price of €168,832.89;

ii. whilst Island Insurance Brokers (Malta) Ltd had, in fact, submitted Option 1 at €133,486.68, excluding taxes and VAT, and option 2 at €147,917.70, including all taxes and VAT, yet, at pages 37 and 48 of the tender document, the contracting authority requested options with regard to two policies for different excess cover levels, namely item 1 'Industrial All Risks' and item 8 'Public Liability';

iii. the recommended final price of €168,832.89 was arrived at from prices given by the tendering company in its original submission as follows:-

	€147,917.70 – Option 2 because the price was requested inclusive of all taxes and VAT
less	46,095.51 – item 1 as per Financial Bid form of Option 2
less	20,812.50 – item 8 as per Financial Bid form of Option 2
	81,009.69
add	61,460.70 – option 1 with regard to item 1
add	26,362.50 – option B with regard to item 8
	168,862.89

iv. the same methodology was applied to the other offers.

Dr Decesare remarked that:-

a. Volume 4 'Financial Bid' (page 59 of the tender document) clearly stated that: (i) *(A) Total Cost to Contracting Authority for the Duration of the Contract inclusive of all taxes and including VAT* and (ii) *This tender is a global priced contract as provided in clause 1.3 of the Instructions to Tenderers therefore for adjudication purposes, to establish the cheapest offer only the figure in the final box (A) will be taken into consideration*;

b. it was evident that the calculations and modifications effected by the contracting authority with regard to the two prices quoted by the recommended tenderer in the respective 'Financial Bid' forms were not admissible in terms of the conditions laid down in the tender document;

and

c. on the other hand, the appellant company had submitted six separate Financial Bid forms for each option offered (ranging from €48,980.01 to €53,595.93).

At this point the Chairman Public Contracts Review Board remarked that:-

i. evidently, the two options submitted by the recommended tenderer were for the prices of €133,486.68 and €147,917.70 as per respective 'Financial Bid' form;

ii. the bidder was bound by the prices quoted and signed for in the 'Financial Bid' and it was not permissible for anyone to alter or temper with those prices for whatever reason, even if in good faith, otherwise that would undermine the purpose of requesting signed declarations;

iii. Volume 1 Section 2 'Tender Form' stated in bold print that *'A separate, distinct Tender Form must be submitted for each option – if applicable – submitted*' and, furthermore, clause 3 of the part 'C' 'Tenderer's Declaration' stated that: *The total cost to Contracting Authority for the duration of the contract (inclusive of duties, VAT, other taxes and any discounts) is as per Financial Bid in Volume 4 of the tender document*;

and

iv. therefore, a separate 'Tender Form' and 'Financial Bid Form' had to be submitted for each option offered.

Mr Borg expressed the view that the contracting authority would act correctly if it were to discard the options offered by the recommended tendering company and to accept its option 2 of €147,917.70 as per respective 'Financial Bid Form'.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 7th January 2013 and also through its representatives verbal submissions presented during the hearing held on the 28th March 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) in its tender submission, the appellant company had erroneously quoted the total price for one year instead of for the period of three years requested in the tender document with the consequence that the price quoted was abnormally low, (b) aware of this mistake in the original tender submission, the appellant company had informed the Malta College of Arts, Science and Technology that it had erroneously quoted the price for one year instead of for three years as requested and asked the Malta College of Arts, Science and Technology to take this clarification into consideration, (c) the prices were amended simply to reflect the three year period and not to undercut competition because it turned out that the amended prices were higher than those of the competitors, (d) nonetheless, whilst the tender had been awarded to the appellant company at the abnormally low price – effectively, at one third of the price following the company's clarification/amendment – yet, the same company declined to honour the contract at the awarded price and so it refused to sign the contract, (e) the purpose of this objection was not to reintegrate the appellant company's bid in the tendering process but to dispute the award of the tender at the recommended price of €168,832.89, which price did not feature in the schedule of prices displayed on the Contracts Department's website, as, in fact, the recommended tenderer had offered two options, namely, €133,486.68 and €147,917.70, (f) the tender document also requested options with regard to 'Industrial All Risks' and 'Public Liability' policies to cover different excess limits and it turned out that only Mediterranean Insurance Brokers (Malta) Ltd submitted six options covering all the options requested whereas Island Insurance Brokers (Malta) Ltd offered two options and Allcare Insurance Brokers Ltd offered one option, (g) Volume 4 'Financial Bid' (page 59 of the tender document) clearly stated that: *(i) (A) Total Cost to Contracting Authority for the Duration of the Contract inclusive of all taxes and including VAT* and *(ii) This tender is a global priced contract as provided in clause 1.3 of the Instructions to Tenderers therefore for adjudication purposes, to establish the cheapest offer <u>only</u> the figure in the final box (A) will be taken into consideration*, (h) it was evident that the calculations and modifications effected by the contracting authority with regard to the two prices quoted by the recommended tenderer in the respective 'Financial Bid' forms were not admissible in terms of the conditions laid down in the tender document and (i) on the other hand, the appellant company had submitted six separate Financial Bid forms for each option offered (ranging from €48,980.01 to €53,595.93);

- having considered the contracting authority's representative's reference to the fact that (a) as per clause 1.2 of the 'General Instructions', this tender covered a period of three years (36 months) and the contracting authority requested a number of options, (b) whilst, in the 'Financial Bid' of each of its six options the appellant company quoted the cheapest price under the column 'Aggregate Cost per policy over the duration of the contract (3 years)', yet, it later on became apparent that the appellant company had, mistakenly, quoted the price for one instead of for three years, which mistake was acknowledged by the appellant company itself through a letter of clarification it sent to the Contracts Department after the submission of its tender, (c) the appellant company's request to alter the quoted prices could not be acceded to, (d) the contracting authority

was made aware that the price quoted by the appellant actually covered one year instead of the requested period of three years by letter sent after the tender opening stage, (e) for all intents and purposes, in the appellant company's original tender submission the prices quoted in the respective 'Financial Bid' form clearly indicated that the quotes covered a three year period, (f) the contracting authority pressed on with recommending the award to Mediterranean Insurance Brokers (Malta) Ltd because, in its letter clarifying/amending the prices quoted, the same company did not formally declare that it was withdrawing its tender and, as a result, the evaluation board considered Mediterranean Insurance Brokers (Malta) Ltd's original offer while discarding the amended prices proposed in its letter of clarification, (g) confirmed that the company had informed the contracting authority that the quoted prices were incorrect and furnished the correct quotes without altering the annual premium originally quoted through a letter dated 8th March 2012, namely, two days after the closing date of the tender, (h) eventually, the Contracts Department revoked the award issued in favour of Mediterranean Insurance Brokers (Malta) Ltd and recommended the award of the tender to the second cheapest offer submitted by Island Insurance Brokers (Malta) Ltd for the price of €168,832.89, (i) whilst Island Insurance Brokers (Malta) Ltd had, in fact, submitted Option 1 at €133,486.68, excluding taxes and VAT, and option 2 at €147,917.70, including all taxes and VAT, yet, at pages 37 and 48 of the tender document, the contracting authority requested options with regard to two policies for different excess cover levels, namely item 1 'Industrial All Risks' and item 8 'Public Liability', (j) the recommended final price of €168,832.89 was arrived at from prices given by the tendering company in its original submission and that the same methodology was applied to the other offers and (k) Mr Borg expressed the view that the contracting authority would act correctly if it were to discard the options offered by the recommended tendering company and to accept its option 2 of €147,917.70 as per respective 'Financial Bid Form',

reached the following conclusions, namely:

1. The Public Contracts Review Board argues against the fact that the contracting authority pressed on with the award of the tender to the appellant company even though the latter had made it aware that the prices quoted in its original tender submission were incorrect. Furthermore, this Board also contends that such a written declaration / admission by the same bidder should have rendered its tender submission inadmissible from the very beginning of the evaluation process.

2. The Public Contracts Review Board establishes that whilst, evidently, the two options submitted by the recommended tenderer were for the prices of €133,486.68 and €147,917.70 as per respective 'Financial Bid' form, it was also true that the bidder was bound by the prices quoted and signed for in the 'Financial Bid'. Also, this Board further argues that it is never acceptable for anyone to alter the prices, for whatever reason, even in good faith, after the tender opening stage otherwise that would undermine the purpose of requesting signed declarations.

3. The Public Contracts Review Board notes that Volume 1 Section 2 'Tender Form' stated in bold print that *'A separate, distinct Tender Form must be submitted for each option – if applicable – submitted*' and, furthermore, clause 3 of the part 'C' 'Tenderer's Declaration' stated that '*The total cost to Contracting Authority for the duration of the contract (inclusive of duties, VAT, other taxes and any discounts) is as per Financial Bid in Volume 4 of the tender document*'. As a consequence, in this particular instance, a separate 'Tender Form' and 'Financial Bid Form' had to be submitted for each option offered.

In view of the above this Board finds in favour of the appellant company to the extent that the Contracting Authority had taken erroneous administrative decisions which resulted in the bid offered by the recommended tenderer being, to all intents and purposes, unlawfully modified. The Board, however, recommends that once the Contracting Authority is satisfied with the cover offered by the recommended tenderer strictly at the cost and conditions as originally tendered in the Financial Bid

form, then the award of the tender may proceed. The Board also recommends that the appellant company be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Joseph Croker	Carmelo Esposito
Chairman	Member	Member

17 April 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 531

LCA/01/2013
Tender for the provision of research and consultancy for the selective collection of the organic waste in tourist areas and valorisation in farm composting plants (SCOW)

This call for tender was published on the 1st February 2013 with a closing dated of the 4th March 2013. The estimated value of this tender amounted to €55,000 inclusive of VAT.

Two tenderers submitted a quote following this call.

Mr Lawrence Attard filed a letter of objection on the 4th April 2013 against the decision of the Local Councils' Association to recommend the award of the tender to AIS Environmental Ltd.

The Public Contracts Review Board composed of Mr Joseph Croker as Acting Chairman with Messrs Carmel Esposito and Paul Mifsud as members convened a public hearing on the 25th April 2013 to discuss this complaint.

Present for the meeting were:

Mr Lawrence Attard

Dr Philip Manduca	Legal Representative
Mr Lawrence Attard	Appellant

AIS Environmental Ltd

Mr Mario Schembri	Engineer

Local Councils Association (LCA)

Dr Mark Sant	President
Mr Jimmy Magro	Secretary
Ms Lara Schranz	Project Co-ordinator

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Philip Manduca, on behalf of Mr Lawrence Attard, the appellant, made the following submissions:

i. by email dated 1st April 2013 his client was informed that his offer was not successful;

ii. on going through the evaluation report, particularly the evaluation grid at section 2.5, it was evident that his client was found technically compliant as he obtained 5 points or more in all ten categories totalling a score of 71 out of 100 points;

iii. moreover, the price of €13.95 per hour offered by his client was substantially cheaper than the recommended offer of €17.70;

iv. government invariably recommended the practice that whenever bids were technically compliant then the deciding factor ought to be the price;

v. one had to keep in mind that certain criteria were rather subjective and therefore one could question the allocation of marks in their respect and that was why one had to give more weight to objective criteria such as the price; and

vi. given that his client's offer was both technically compliant and substantially cheaper then it was being submitted that the tender ought to be awarded to Mr Lawrence Attard.

The A/Chairman PCRB asked whether the tender document provided for this tender to be adjudicated on the basis of the cheapest compliant offer or on the basis of the most economically advantageous tender (MEAT) as provided for in the procurement regulations. He added that if this tender was to be awarded on the basis of MEAT, then the tender document should have included the evaluation grid displaying the various criteria, the allocation of points to each criterion and the weighting given to each aspect, e.g.experience and qualifications.

Mr Jimmy Magro, executive secretary of the Local Councils Association, explained that:-

a. the tender document did not indicate whether this tender was going to be adjudicated on the basis of the cheapest compliant offer or on the basis of the most economically advantageous tender (MEAT);

b. the tender document was a standard one and the LCA made use of it on various other occasions;

c. for example, with regard to qualifications requested in clause 6 (a), that is, to be in possession of Environmental/Agriculture Engineer and have knowledge and experience on biomass composting plants, the evaluation board found that the recommeded tenderer provided what was requested whereas the appellent did not as per respective tenderer's profile;

d. this tender concerned the setting up of a biomass composting plant and therefore one had to possess experience in the various stages of the supply chain of the bio composting plant; and

e. with regard to clause 6 (b), concrete experience in the thematic aspect of the project, the recommended tender had demonstrated that he had much more experience than the appellant.

Mr Lawrence Attard, the appellant, explained that:-

i. with the tender submission he had provided his personal experience and that of Mr Peter Calamatta, who was well known for his extensive experience in the agricultural and environmental sectors;

ii. the contracting authority did not specify the academic qualification/s that the bidder had to provide, i.e. which warrant/s would satisfy this requirement;

iii. the LCA had already awarded three contracts where the tender conditions and specifications were practically identical to the tender under review and in all three cases the award was made in favour of the cheapest compliant bidder;

iv. it was not acceptable for the evaluation board to opt for MEAT during the evaluation process when that was not laid down in the tender document; and

v. from the evaluation report it emerged that his bid qualified in all respects and was even the cheaper offer.

Mr Magro remarked that:-

a. part of this contract involved the carrying out of an environmental impact assessment and other such studies together with the filing of development application/s with the Malta Environment and Planning Authority (MEPA), and therefore qualifications and practical experience were required to follow this process;

b. with regard to criteria (a) and (b) the appellant was given 5 out of 10 points because he had carried out limited related works but on the other hand the recommended bidder was allocated 9 out of 10 points because it was an established firm with considerable experience in the setting up of composting plants, of which there was one in Marsascala together with two other smaller ones; and

c. the award criteria of such a tender should not be solely the price otherwise bidders would simply quote a price slightly lower that the offer accepted in the previous tender in an effort to win the contract but that did not always provide the desired result.

The A/Chairman PCRB remarked that:-

i. it would appear that there were reasons behind the conclusions arrived at by evaluation board however it was evident that the methodology used, e.g. the evaluation grid laying out the various criteria and the maximum points allocated reflecting the weighting given to each of the criteria, was not published in the tender document;

ii. the selection/award criteria had to be included in the tender document for the benefit of bidders and for the sake of transparency and

iii. selection/award criteria should not be established during the adjudication process.

Mr Mario Schembri, obo AIS Environmental Ltd, the recommended bidder, argued that:-

a. the term engineer as laid down in clause 6 (a) of the tender document definately referred to an engineer who was in possession of the appropriate warrant issued by the state which in turn put onerous responsibilities on its holder;

b. the tender was very clear in its requirements, e.g. the processing of waste generated by the tourism industry, and his firm had provided what was required backed by years of experience in this specific area; and

c. he, himself, was a warranted engineer however, Mr Peter Calamatta was not a warranted engineer as requested in the tender document even though he was undoubtedly an expert in horticulture and related fields.

The Board:

- having noted that Mr Lawrence Attard had lodged an appeal on the 4th April 2013 against the decision taken by the Local Government Association to award the tender to AIS Environmental Limited;

- having noted that the appellant's claim that since the tender was not clear as to the method of adjudication and as such one were to assume that the cheapest compliant offer method was to be used; that according to the adjudication report he (ie. the appellant) obtained 71 out of 100 points and as such was adjudicated as being compliant in all respects;

- having also noted that the Contracting Authority admitted that it had used a standard tender document which did not lay down the evaluation criteria; having also noted that in view of the particular complexity of the service required any tenderer would have to have considerable experience in the field;

- having also noted the preferred bidder's contention that his firm had the experience and technical background to provide the service;

came to the following conclusions:

1. That the tender document did not lay down the criteria to be used for adjudication purposes;

2. That had the Contracting Authority desired to use the MEAT principle (as it had the right to do) it should have included the appropriate grid in the tender document showing the particular specifications it required together with the weightings assigned to each criterion.

In view of the above the Board finds in favour of the appellant and recommends that the tender be re-issued using a tender template published by the Department of Contracts, laying down in a clear manner the specifications required and the method to be used for adjudication purposes.

Moreover, the Contracting Authority's attention is to be drawn to the fact that it has to adhere to the regulations laid down in the Public Procurement Regulations on the processes to be used throughout the whole tendering procedure, including the adjudication process.

The Board also recommends that the deposit paid by the appellant be reimbursed in full.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

29th April 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 532

ESF/EMP/168/12
Tender for the Provision of Training Services in ICT related subjects

This call for tender was published 31st July 2012 with a closing dated of the 31st August 2012. The estimated value of the tender amounted to €46,500 exclusive of VAT.

Messrs TCTC Ltd filed an objection 9 November 2012 against the decision of the Employment and Training Corporation to disqualify its offer and to recommend the cancellation of the tender.

The Public Contracts Review Board with Mr Joseph Croker as Acting Chairman and Messrs Carmel Esposito and Paul Mifsud as Members convened a public meeting on the 25th April 2013 to discuss this appeal.

Present:

TCTC Ltd

Dr George Hyzler	Legal Representative
Mr Ray Abela	Managing Director

Employment and Training Corporation

Dr Ian Spiteri Bailey	Legal Representative

Evaluation Board

Mr Jonathan Ferrito	Chairman
Ms Jennifer Debono	Member
Ms Mariella Vella	Member
Ms Mathea Gauci	Member

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr George Hyzler, on behalf of TCTC Ltd, the appellant, stated that by letter dated 5th November 2012 his client was informed that his offer was found administratively not complaint because (a) the tender form had been modified and (b) a rate for each course was submitted instead of one rate for all courses.

(A) Tender Form

Dr Hyzler explained with regard to the tender form that:-

i. it appeared that his client had ommitted Sections A and B which provided the details of the tenderer and of the contact person, together with the details of the sub-contractors where in the case of his client there were no sub-contractors;

ii. the details of the tenderer and of the contact person were made available in other sections of his client's tender submission;

iii. in the case of the details of sub-contractors, it would have been more appropriate had his client submitted a 'Nil' return, however, it was a fact that his client was not going to engage any sub-contractors; and

iv. his client did not submit the tender form in the format provided in the tender document but he reproduced the tender form in another format which basically provided the same information with the exception that it made no reference to subcontracting because he was not going to engage any sub-contractors.

Dr Ian Spiteri Bailey, on behalf of ETC, remarked that:-

a. the appellant omitted the first page (page 20) of the Tender Form, which basically requested details of the bidder, the contact person and the sub-contractors;

b. the fact that his offer did not involve any sub-contracting did not mean that the appellant was at liberty to leave out the entire page but he should have given the details where applicable or indicate 'Nil' where not applicable; and

c. it was not acceptable to leave it up to the bidder's judgement as to which part of the tender document to fill in and submit and which to leave out entirely, especially in the case of mandatory documentation such as the Tender Form.

(B) Rates

Dr Hyzler submitted that:-

i. the contracting authority requested one rate for all the courses however his client undertsood it differently in that he submitted a rate for each course;

ii. it made more sense to quote a rate for each course because different courses required different levels in terms of skills and other resources besides being more economically advantageous to the contracting authority; and

iii. it was conceded that the contracting authority had the right to determine its requirements however in this case it made more sense to request a rate for each course and his client made his submission in this logical manner.

Mr Ray Abela, on behalf of the appellant, remarked that:-

a. in previous instances, the ETC used to engage tutors to teach these courses and it used to pay these tutors different rates according to each particular course concerning digital literacy or ECDL; and

b. it therefore made sense to offer different rates for the four different courses and it was important to point out that all the rates quoted by his firm were much cheaper than the single rate quoted by the other bidders.

Dr Ian Spiteri Bailey, on behalf of the ETC, submitted that:-

i. the contracting authority was not bound by what it requested in previous calls for tenders but it was bound by what it requested in the call for tenderers under review which was quite clear in this regard so much so that clause 1.3 of the 'General Instructions' stated that:

> *This is an hourly rate-based contract. The hourly rate is applicable for training given in all the subjects listed in section 1.2 whether delivered in Malta or Gozo.*

ii. moreover, clause 3 of the Tenderer's Declaration asked for the: *Rate per hour (excluding VAT)*;

iii. the clarification notes displayed on ETC's website indicated that 'only one single rate shall be quoted' – a snapshot of the relevant website was produced and it indicated that the minutes of clarification meeting and other clarifications with regard to tenders ref. nos. ESP/EMP/163-177/12 were publicly available; and

iv. it was regretable that the appellant misunderstood the tender conditions but in all fairness the tender document was very clear in this respect.

Dr Hyzler maintained that it was much better for the contracting authority to have a rate applicable for each course than one flat rate for all courses and the schedule of tenders received was clear evidence of that.

The Board:

- having noted that Messrs TCTC Ltd on the 8th of November 2012 filed a letter of objection against the decision of the Contracting Authority to disqualify him and to cancel the tender;

- having noted that the appellant admitted to the fact that he had failed to include a page of the tender document which concerned sub-contracting since he did not feel it applied to him seeing that he did not intend to carry out any sub-contracting; having noted that the appellant submitted different rates for different subjects;

- having noted the Contracting Authority representative's contention that the tenderers were obliged to submit the tender document as published by the authority and could not be allowed to choose what to include and what to leave out; having noted also the representative's statement that the authority was not bound by previous tenders but had the right to adjust its requirements as necessary and that in this instance the authority requested one hourly rate to cover all subjects;

reached the following conclusions:

1. It was manifestly clear that the appellant failed to submit the tender document as published by the Contracting Authority;

2. It was also manifestly clear that the appellant did not provide a single rate for the various subjects as requested by the Contracting Authority and as clearly laid down during a clarification meeting which minutes were also published on the authority's website.

In view of the above, the Board finds against the appellant and recommends that the deposit paid be forfeited.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

29th April 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 533

LGA/REG02/2012
Framework Contract for the Provision of System and Financial Auditing

This call for tender was published on the 4th November 2012 with a closing date on the 26th November 2012. Since this was a Framework Contract and all costs related to this service were paid by the applicants to the Lotteries and Gaming Authority, no estimated value was included in the call.

Quinel SA lodged an objection on the 4th March 2013 against the decision of the Lotteries and Gaming Authority not to consider its (Quinel SA) tender submission since the tender document was not inserted in the tender box by the closing date/time for the receipt of offers.

The Public Contracts Review composed of Mr Joseph Croker as A/Chairman with Messrs Carmel Esposito and Paul Mifsud as Members convened a hearing on the 26th April 2013 to discuss the objection.

Present at the hearing:

Quinel SA

Dr Robert Zammit	Legal Representative

Capstone Group

Mr Nicholas Gouder	Director
Mr Bernard Farrugia	Representative

Kyte Consultants

Mr Trevor Axiaq	Representative

FACT Group

Mr Andrew Galea	Representative

Lotteries and Gaming Authority (LGA)

Evaluation Board

Mr Daniel Cilia	Chairman
Mr Damien Xuereb	Member
Mr Jason Farrugia	Member
Dr Corinne Gatt	Secretary

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Robert Zammit, on behalf of Quinel SA, the appellant**,** made the following submissions:

i. by email dated 27th February 2013 the contracting authority had informed his client that the reason for his exclusion was that his tender submission was not found in the tender box by noon of the 27th November 2012 as requested in the tender document;

ii. this tender submission was delivered by courier service at the offices of the LGA on Friday 23rd November 2012 at abour 3:15pm however it was not inserted in the tender box and consequently at tender opening stage on the following Monday at noon his client's tender submission was not found in the tender box;

iii. his client's tender submission was traced by the LGA about an hour after the closing time for the receipt of tenders since it had been handled as normal mail rather than as a tender submission;

iv. his client was requesting that his tender submission be included in the tendering process for consideration in the light of the facts that this was not a competitive tendering procedure but it involved the selection of competent contractors to carry out system and financial auditing at an established rate, in this case at €2,330 per audit.

Dr Corinne Gatt, on behalf of of LGA, the contracting authority**,** explained that:

a. following enquiries by the LGA it transpired that (i) three tender submissions made by Quinel SA bearing reference nos. LGA/REG02, 03 and 04 of 2012 had been delivered by TNT courier on Friday 23rd November 2012 at 3.18pm, (ii) the TNT envelopes displayed special instructions to the courier in the sense that he/she had to insert the envelopes in the Tender Box; and (iii) the courier/deliveryman failed to insert these tender submissions in the tender box but instead simply handed them over to the receptionist without drawing attention that they were tender submissions with the consequence that the envelopes were handled by the LGA as normal mail and the LGA learned that these were in fact tender submissions on Monday 27th November 2012 at 1:30pm, i.e. 1hr 30 mins after the closing date/time for the receipt of tenders;

b. these events were recorded on CCTV cameras and in respective files;

c. LGA's receptionist could not be held responsible for the non insertion of the tender submissions in the tender box because that responsibility rested with the courier; and

d. in an effort to integrate the appellant in the tendering process, the LGA sought the advice of the Departmental Contracts Committee (DCC) and subsequently that of the Department of Contracts however these two bodies advised the LGA to comply with and stick to the tender conditions – emails dated 15th and 21st January 2013 referred.

Mr Damian Xuereb, member of the evaluation board, explained that:-

a. the LGA regretted this incident because Quinel SA was one of its current contractors and the LGA was satisfied with the services provided; however, on the other hand, the conditions of tender were very clear, namely, clauses 1.2 and 1.6; and

b. the management of TNT courier service had conceded that once the courier had clear instructions on the envelope to insert it in the tender box then it was his responsibility to do so.

Dr Zammit acknowledged that this incident was attributable to the courier charged with the delivery of the envelope in question however he could not fail to point out that (a) there was concrete evidence that the tender submission had reached the LGA on Friday whereas the closing date was the following Monday and (b) that this was not a competitive tender but its purpose was to select compliant bidders to provide an audit service at an established rate.

Dr Zammit stated that should his client's request to be integrated in this tendering process be turned down then, reluctantly, he would have to raise the issue as to whether it was regular for the contracting authority not to publish the estimated value of the tender as per Reg. 16 of the Public Procurement Regulations, which omission could render this tendering process null.

Dr Gatt on behalf of LGA explained that:-

i. the LGA was not obliged to publish the estimated contract value because this was a framework contract and Reg. 16 (11) laid out how the framework contract value had to be arrived at;

ii. in this case the price per audit was fixed at €2,330 however the LGA could not fix the total contract because that depended on the number of current and future licensees that would be subjected to such an audit;

iii. this issue was raised with the DCC prior to the issue of the tender and it was agreed not to publish the total estimated contract value but to publish the rate per audit since the LGA could not guarantee the number of such audits, all this was fully explained in file; and

iv. as a result of this framework contract, the LGA charged the cost of the audit to the licensee and then the LGA passed on the money to the contractor, which meant that these audits did not involve any income or expenditure on the part of the LGA.

Mr Xuereb remarked that if tenderers required clarification/s on any aspect of the tender, they had the opportunity to do so prior to the closing date of the tender.

At this point the hearing came to a close.

This Board,

- having noted that Quinel SA by letter dated 4th March 2013 had objected to the LGA's decision to exclude them from the tendering procedure since the tender documents were not posted in the tender box;

- having noted that the fact that the documents were delivered to the contracting authority in good time before the closing date for their submission was not in dispute;

- having noted the contracting authority's claim that it was the tenderer's responsibility to ensure that the documents were posted in the tender box as laid down in the tender document; having also noted that once this was a Framework Contract and any fees collected from applicants were passed on by the contracting authority to the contractor and

since the number of audits could not be foreseen the authority was not in a position to establish the tender value;

came to the following conclusions:

1. the Board understands that this was an unfortunate incident which led to the tender documents not being deposited in the tender box as per tender conditions;

2. the Board may not ignore the fact that it was the appellant's duty to ensure that any condition laid down in the tender document was strictly adhered to and that the contracting authority could not be held responsible for any shortcoming by the appellant and/or third parties.

In view of the above this Board finds against the appellant and recommends that the deposit lodged for the appeal to be heard be forfeited.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

2nd May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 534

LGA/REG04/2012
Framework Contract for the Provision of Compliance Auditing

This call for tender was published on the 4th November 2012 with a closing date of the 26th November 2012. Once this was a Framework Contract no estimated value was included in the tender since the Lotteries and Gaming Authority was not in a position to know beforehand the number of audits that will be required to be carried out. Moreoever all fees collected from applicants were forwarded to the contractors.

GLI Europe filed an objection on the 4th March 2013 against the decision of the Lotteries and Gaming Authority to disqualify its offer on the grounds that the three reference letters requested in the tender were not submitted.

The Public Contracts Review Board composed of Mr Joseph Croker as A/Chairman and Messrs Carmel Esposito and Paul Mifsud as Members convened a hearing on the 26th April 2013 to discuss the objection.

Present for the sitting:

GLI Europe

Dr Robert Zammit	Legal Representative

Capstone Group

Mr Nicholas Gouder	Director
Mr Bernard Farrugia	Representative

Kyte Consultants

Mr Trevor Axiaq	Representative

FACT Group

Mr Andrew Galea	Representative

Lotteries and Gaming Authority (LGA)

Evaluation Board

Mr Daniel Cilia	Chairman
Mr Damien Xuereb	Member
Mr Jason Farrugia	Member
Dr Corinne Gatt	Secretary

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Robert Zammit, on behalf of GLI Europe, the appellant**,** made the following submissions:

i. GLI Europe has been offering its services related to the regulation of the gaming industry in many countries for a number of years and it has also provided its services to the LGA since its setting up by assisting in the drafting of regulations and in carrying out audits on licensees;

ii. in his tender submission his client had included a list of referees, which included various regulatory bodies and large firms operating in the gaming industry however through an oversight he failed to submit the three reference letters requested; and

iii. given his good reputation locally and abroad and his long working relationship with the LGA itself, his client was requesting that the contracting authority be allowed to use a measure of discretion by either accepting the tender submission as presented or else to ask his client by way of clarification to provide the three reference letters.

Dr Corinne Gatt, on behalf of LGA, the contracting authority, submitted that:-

a. as was informed by email dated 1st March 2013, the appellant had submitted references to companies or organisations which had made use of his services however he had failed to submit the three reference letters as requested in Section 4.2 (e) of the 'General Requirements' of the Framework Contract, besides the fact that the LGA could not form part of those references;

b. clause 4.2 stated, among other things, that: *Absence of adherence to any one of the 'General Requirements' shall nullify the Offer* - the submission of the three reference letters was one of these requirements;

c. although the appellant had indicated 'Yes' with regard to the submission of the three reference letters, no such letters were traced in his tender submission; and

d. the LGA acknowledged that it has had a long and satisfactory working relationship with GLI Europe and it was regretable to disqualify this firm from this tendering process however the tender conditions were very clear in that the appellant's tender as submitted was not compliant.

Mr Damian Xuereb, member of the evaluation board, remarked that with regard to LGA asking by way of clarification GLI Europe to submit these three reference letters, the advice given by the Departmental Contracts Committee (DCC) was to adhere to the tender conditions, in other words, that absence of adherence to the 'General Requirements' led to the disqualification of the offer as per clause 4.2.

Dr Gatt referred also to clause 1.10.3 which read as follows:-

The Evaluation Committee may, in writing and according to the correct legal procedure, require any of the interested parties to provide clarifications in regard to the submtted offer or any part thereof. This is permitted in the interest of transparency and the equal treatment of all interested parties. In such cases, the party requested to clarify shall not be permitted to modify the submitted offer but merely provide clarifications.

Dr Zammit held that in such circumstances the contracting authority should be afforded a measure of discretion especially once this was not a competitive procedure but its purpose was to identify competent contractors to render a service at an established price. He added that should the PCRB reject this line of reasoning on the part of his client, then he would have to reluctantly raise the issue as to whether it was regular for the contracting authority not to publish the estimated value of the tender as per Reg. 16 of the Public Procurement Regulations, which omission could render this tendering process null.

Dr Gatt explained that:-

i. the LGA was not obliged to publish the total estimated contract value because this was a framework contract and Reg. 16 (11) laid out how the framework contract value had to be arrived;

ii. in this case the price per audit was fixed at €2,750 however the total contract value depended on the number of current and future licensees who would be subjected to such an audit;

iii. this issue was raised with the DCC prior to the issue of the tender and it was agreed not to publish the total estimated value of the contract but to publish the rate per audit since the LGA could not guarantee the number of such audits, this was fully explained in file; and

iv. the LGA would charge the cost of the audit to the licensee and then the LGA would pass on the money to the contractor, which meant that these audits did not involve any income or expenditure on the part of the LGA.

Mr Xuereb remarked that if tenderers required clarification on any aspect of the tender, they had the opportunity to do so prior to the closing date of the tender.

At this point the hearing came to a close.

This Board,

- having noted that the GLI Europe had through a letter dated 4th March 2013 objected to their being excluded from the tendering procedure;

- having also noted that the tender required the submission of three reference letters with the tender document; having noted that appellant submitted a list of references but did not submit the requested letters;

- having noted that the contracting authority stated that the tender document required the submission of reference letters and not lists;

- having also noted that the fact that the mentioned letters were not submitted was not in dispute;

came to the following conclusions:

1. the Public Contracts Board while acknowledging the fact that the reference letters might not have been included with the tender document through an administrative mistake;

2. the Board is of the opinion that the submission of a list of referees does not satisfy the requirement for the submission of reference letters; and

3. the Board also notes that it is the tenderer's responsibility to ensure full adherence with the conditions laid down in the tender document, and that once the tender required the submission of reference letters, the fact that the appellant was already offering a service to the contracting authority should not to be understood as enabling the appellant to do away with this requirement.

In view of the above, the Board finds against the appellant and recommends that the deposit lodged to cover the appeal be forfeited.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

2nd May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 535

LGA/REG04/2012
Framework Contract for the Provision of System and Financial Auditing

This call for tender was published on the 4th November 2012 with a closing date on the 26th November 2012. Since this was a Framework Contract and all costs related to this service were paid by the applicants to the Lotteries and Gaming Authority, no estimated value was included in the call.

Quinel SA lodged an objection on the 4th March 2013 against the decision of the Lotteries and Gaming Authority not to consider its (Quinel SA) tender submission since the tender document was not inserted in the tender box by the closing date/time for the receipt of offers.

The Public Contracts Review composed of Mr Joseph Croker as A/Chairman with Messrs Carmel Esposito and Paul Mifsud as Members convened a hearing on the 26th April 2013 to discuss the objection.

Present at the hearing:

Quinel SA

Dr Robert Zammit	Legal Representative

Capstone Group

Mr Nicholas Gouder	Director
Mr Bernard Farrugia	Representative

Kyte Consultants

Mr Trevor Axiaq	Representative

FACT Group

Mr Andrew Galea	Representative

Lotteries and Gaming Authority (LGA)

Evaluation Board

Mr Daniel Cilia	Chairman
Mr Damien Xuereb	Member
Mr Jason Farrugia	Member
Dr Corinne Gatt	Secretary

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Robert Zammit, on behalf of Quinel SA, the appellant**,** made the following submissions:

i. by email dated 27th February 2013 the contracting authority had informed his client that the reason for his exclusion was that his tender submission was not found in the tender box by noon of the 27th November 2012 as requested in the tender document;

ii. this tender submission was delivered by courier service at the offices of the LGA on Friday 23rd November 2012 at abour 3:15pm however it was not inserted in the tender box and consequently at tender opening stage on the following Monday at noon his client's tender submission was not found in the tender box;

iii. his client's tender submission was traced by the LGA about an hour after the closing time for the receipt of tenders since it had been handled as normal mail rather than as a tender submission;

iv. his client was requesting that his tender submission be included in the tendering process for consideration in the light of the facts that this was not a competitive tendering procedure but it involved the selection of competent contractors to carry out system and financial auditing at an established rate, in this case at €2,330 per audit.

Dr Corinne Gatt, on behalf of of LGA, the contracting authority**,** explained that:

i. following enquiries by the LGA it transpired that (i) three tender submissions made by Quinel SA bearing reference nos. LGA/REG02, 03 and 04 of 2012 had been delivered by TNT courier on Friday 23rd November 2012 at 3.18pm, (ii) the TNT envelopes displayed special instructions to the courier in the sense that he/she had to insert the envelopes in the Tender Box; and (iii) the courier/deliveryman failed to insert these tender submissions in the tender box but instead simply handed them over to the receptionist without drawing attention that they were tender submissions with the consequence that the envelopes were handled by the LGA as normal mail and the LGA learned that these were in fact tender submissions on Monday 27th November 2012 at 1:30pm, i.e. 1hr 30 mins after the closing date/time for the receipt of tenders;

ii. these events were recorded on CCTV cameras and in respective files;

iii. LGA's receptionist could not be held responsible for the non insertion of the tender submissions in the tender box because that responsibility rested with the courier; and

iv. in an effort to integrate the appellant in the tendering process, the LGA sought the advice of the Departmental Contracts Committee (DCC) and subsequently that of the Department of Contracts however these two bodies advised the LGA to comply with and stick to the tender conditions – emails dated 15th and 21st January 2013 referred.

Mr Damian Xuereb, member of the evaluation board, explained that:-

i. the LGA regretted this incident because Quinel SA was one of its current contractors and the LGA was satisfied with the services provided; however, on the other hand, the conditions of tender were very clear, namely, clauses 1.2 and 1.6; and

ii. the management of TNT courier service had conceded that once the courier had clear instructions on the envelope to insert it in the tender box then it was his responsibility to do so.

Dr Zammit acknowledged that this incident was attributable to the courier charged with the delivery of the envelope in question however he could not fail to point out that (a) there was concrete evidence that the tender submission had reached the LGA on Friday whereas the closing date was the following Monday and (b) that this was not a competitive tender but its purpose was to select compliant bidders to provide an audit service at an established rate.

Dr Zammit stated that should his client's request to be integrated in this tendering process be turned down then, reluctantly, he would have to raise the issue as to whether it was regular for the contracting authority not to publish the estimated value of the tender as per Reg. 16 of the Public Procurement Regulations, which omission could render this tendering process null.

Dr Gatt on behalf of LGA explained that:-

i. the LGA was not obliged to publish the estimated contract value because this was a framework contract and Reg. 16 (11) laid out how the framework contract value had to be arrived at;

ii. in this case the price per audit was fixed at €2,330 however the LGA could not fix the total contract because that depended on the number of current and future licensees that would be subjected to such an audit;

iii. this issue was raised with the DCC prior to the issue of the tender and it was agreed not to publish the total estimated contract value but to publish the rate per audit since the LGA could not guarantee the number of such audits, all this was fully explained in file; and

iv. as a result of this framework contract, the LGA charged the cost of the audit to the licensee and then the LGA passed on the money to the contractor, which meant that these audits did not involve any income or expenditure on the part of the LGA.

Mr Xuereb remarked that if tenderers required clarification/s on any aspect of the tender, they had the opportunity to do so prior to the closing date of the tender.

At this point the hearing came to a close.

This Board,

- having noted that Quinel SA by letter dated 4th March 2013 had objected to the LGA's decision to exclude them from the tendering procedure since the tender documents were not posted in the tender box;

- having noted that the fact that the documents were delivered to the contracting authority in good time before the closing date for their submission was not in dispute;

- having noted the contracting authority's claim that it was the tenderer's responsibility to ensure that the documents were posted in the tender box as laid down in the tender document;

having also noted that once this was a Framework Contract and any fees collected from applicants were passed on by the contracting authority to the contractor and since the number of audits could not be foreseen the authority was not in a position to establish the tender value;

came to the following conclusions:

1. the Board understands that this was an unfortunate incident which led to the tender documents not being deposited in the tender box as per tender conditions;

2. the Board may not ignore the fact that it was the appellant's duty to ensure that any condition laid down in the tender document was strictly adhered to and that the contracting authority could not be held responsible for any shortcoming by the appellant and/or third parties.

In view of the above this Board finds against the appellant and recommends that the deposit lodged for the appeal to be heard be forfeited.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

2nd May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 536

LGA/REG/04/2012
Framework Contract for the Provision of Compliance Auditing

This call for tender was published on the 4th November 2012 with a closing date on the 26th November 2012. Once this was a Framework Contract and the Contracting Authority was not in a position to envisage the number of audits, no contract value was inserted. All fees collected from applicants by the Authority are directly forwarded to the contractors.

DSG Consulting Ltd filed an objection on the 5th March 2013 against the decision of the Lotteries and Gaming Authority to disqualify its offer on the grounds that the three reference letters requested in the tender were not submitted.

The Public Contracts Review Board composed of Mr Joseph Croker as A/Chairman and Messrs Carmel Esposito and Paul Mifsud as Members convened a hearing on the 26th April 2013 to discuss the objection.

Present for the hearing:

DGS Consulting Ltd

Dr Paul Borg Costanzi	Legal Representative

Kyte Consultants

Mr Trevor Axiaq	Representative

FACT Group

Mr Andrew Galea	Representative

Lotteries and Gaming Authority

Evaluation Board

Mr Daniel Cilia	Chairman
Mr Damien Xuereb	Member
Mr Jason Farrugia	Member
Dr Corinne Gatt	Secretary

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Paul Borg Costanzi, on behalf of DGS Consulting Ltd, the appellant**,** made the following submissions:

i. by email dated 1st March 2013 his client was informed that his offer had been disqualified because he failed to submit the three reference letters as requested in the tender document;

ii. his client acknowledged that it was a genuine administrative error on his part not to have included these three reference letters however he maintained that a bidder should not be discarded because of an administrative mistake, which mistake could have been rectified through a request for clarifications with which he would have complied forthwith;

iii. this shortcoming did not in any way affect his client's technically competent so much so that he was executing a three year contract providing similar services to the satisfaction of the LGA; and

iv. had the LGA requested the appellant to submit these three reference letters, it would not have altered the substance of the original tender submission.

Dr Corinne Gatt, on behalf of the LGA**,** explained that:-

a. the LGA acknowledged that it already had a good working relationship with DSG Consulting Ltd however this was a new tendering procedure and all bidders had to abide by the tender conditions, including the submission of three reference letters;

b. the LGA displayed the answers to the clarifications sought by interested parties on its website and so they were publicly available;

c. the appellant did submit the list of references to companies and organisations which made use of his services however he failed to submit the three reference letters as per clause 4.2 (e) under 'General Requirements';

d. the LGA had sought the advice of the Departmental Contracts Committee and of the Department of Contracts as to whether it could ask DSG Consulting Ltd to submit the missing reference letters and the advice given was to abide strictly by the tender conditions – emails dated 15th and 18th January 2013 referred;

e. clause 4.2 'General Requirements' provided, among other things, that: *Absence of adherence to any one of the 'General Requirements' shall nullify the offer* – and (e) of the General Requirements referred specifically to the submission of the three reference letters; and

f. moreover, clause 1.10.3 read as follows:-

> *The Evaluation Committee may, in writing and according to the correct legal procedure, require any of the interested parties to provide clarifications in regard to the submtted offer or any part thereof. This is permitted in the interest of transparency and the equal treatment of all interested parties. In such cases, the party requested to clarify shall not be permitted to modify the submitted offer but merely provide clarifications.*

Mr Daniel Cilia, chairman of the evaluation board, remarked that the appellant's tender submission made reference to his website where there was a list of reference letters however the tender document requested the submission of reference lettes and not to references displayed on websites.

Mr Damien Xuereb, member of the evaluation board, remarked that on visiting the appellant's website one found letters of reference from clients of DSG Consulting Ltd and if the appellant had submitted those letters with his tender submission they would have sufficed.

Dr Borg Costanzi reiterated that his client was not contesting the fact that the three reference letters were not submitted, even if this was through a genuine oversight, but the bone of contention was that the absence of these reference letters was mitigated by the fact the DSG Consulting Ltd was already rendering this service to the LGA and that kind of concrete proof of experience and competence was by far better and more reliable than any reference letter. He added that the reference letters available on his client's website, even if not addressed to the LGA, were further proof of his experience and competence.

At this point the hearing came to a close.

This Board,

- having noted that the DSG Consulting Ltd had through a letter dated 5th March 2013 objected to their being excluded from the tendering procedure;

- having also noted that the tender required the submission of three reference letters with the tender document; having noted that appellant submitted a list of references but did not submit the requested letters;

- having noted that the contracting authority stated that the tender document required the submission of reference letters and not lists;

- having also noted that the fact that the mentioned letters were not submitted was not in dispute;

came to the following conclusions:

1. the Public Contracts Board while acknowledging the fact that the reference letters might not have been included with the tender document through an administrative mistake;

2. the Board is of the opinion that the submission of a list of referees does not satisfy the requirement for the submission of reference letters; and

3. the Board also notes that it is the tenderer's responsibility to ensure full adherence with the conditions laid down in the tender document.

In view of the above, the Board finds against the appellant and recommends that the deposit lodged to cover the appeal be forfeited.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member
2nd May 2013		

PUBLIC CONTRACTS REVIEW BOARD

Case No. 537
LGA/REG 03/2012
Framework Contract for the Provision of System Auditing

This call for tender was published on the 4th November 2012 with a closing date on the 26th November 2012. Since this was a Framework Contract and all costs related to this service were paid by the applicants to the Lotteries and Gaming Authority, no estimated value was included in the call.

Quinel SA lodged an objection on the 4th March 2013 against the decision of the Lotteries and Gaming Authority not to consider its (Quinel SA) tender submission since the tender document was not inserted in the tender box by the closing date/time for the receipt of offers.

The Public Contracts Review composed of Mr Joseph Croker as A/Chairman with Messrs Carmel Esposito and Paul Mifsud as Members convened a hearing on the 26th April 2013 to discuss the objection.

Present at the hearing:

Quinel SA

Dr Robert Zammit	Legal Representative

Capstone Group

Mr Nicholas Gouder	Director
Mr Bernard Farrugia	Representative

Kyte Consultants

Mr Trevor Axiaq	Representative

FACT Group

Mr Andrew Galea	Representative

Lotteries and Gaming Authority (LGA)

Evaluation Board

Mr Daniel Cilia	Chairman
Mr Damien Xuereb	Member
Mr Jason Farrugia	Member
Dr Corinne Gatt	Secretary

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Robert Zammit, on behalf of Quinel SA, the appellant**,** made the following submissions:

v. by email dated 27th February 2013 the contracting authority had informed his client that the reason for his exclusion was that his tender submission was not found in the tender box by noon of the 27th November 2012 as requested in the tender document;

vi. this tender submission was delivered by courier service at the offices of the LGA on Friday 23rd November 2012 at abour 3:15pm however it was not inserted in the tender box and consequently at tender opening stage on the following Monday at noon his client's tender submission was not found in the tender box;

vii. his client's tender submission was traced by the LGA about an hour after the closing time for the receipt of tenders since it had been handled as normal mail rather than as a tender submission;

viii. his client was requesting that his tender submission be included in the tendering process for consideration in the light of the facts that this was not a competitive tendering procedure but it involved the selection of competent contractors to carry out system and financial auditing at an established rate, in this case at €2,330 per audit.

Dr Corinne Gatt, on behalf of of LGA, the contracting authority**,** explained that:

v. following enquiries by the LGA it transpired that (i) three tender submissions made by Quinel SA bearing reference nos. LGA/REG02, 03 and 04 of 2012 had been delivered by TNT courier on Friday 23rd November 2012 at 3.18pm, (ii) the TNT envelopes displayed special instructions to the courier in the sense that he/she had to insert the envelopes in the Tender Box; and (iii) the courier/deliveryman failed to insert these tender submissions in the tender box but instead simply handed them over to the receptionist without drawing attention that they were tender submissions with the consequence that the envelopes were handled by the LGA as normal mail and the LGA learned that these were in fact tender submissions on Monday 27th November 2012 at 1:30pm, i.e. 1hr 30 mins after the closing date/time for the receipt of tenders;

vi. these events were recorded on CCTV cameras and in respective files;

vii. LGA's receptionist could not be held responsible for the non insertion of the tender submissions in the tender box because that responsibility rested with the courier; and

viii. in an effort to integrate the appellant in the tendering process, the LGA sought the advice of the Departmental Contracts Committee (DCC) and subsequently that of the Department of Contracts however these two bodies advised the LGA to comply with and stick to the tender conditions – emails dated 15th and 21st January 2013 referred.

Mr Damian Xuereb, member of the evaluation board, explained that:-

iii. the LGA regretted this incident because Quinel SA was one of its current contractors and the LGA was satisfied with the services provided; however, on the other hand, the conditions of tender were very clear, namely, clauses 1.2 and 1.6; and

iv. the management of TNT courier service had conceded that once the courier had clear instructions on the envelope to insert it in the tender box then it was his responsibility to do so.

Dr Zammit acknowledged that this incident was attributable to the courier charged with the delivery of the envelope in question however he could not fail to point out that (a) there was concrete evidence

that the tender submission had reached the LGA on Friday whereas the closing date was the following Monday and (b) that this was not a competitive tender but its purpose was to select compliant bidders to provide an audit service at an established rate.

Dr Zammit stated that should his client's request to be integrated in this tendering process be turned down then, reluctantly, he would have to raise the issue as to whether it was regular for the contracting authority not to publish the estimated value of the tender as per Reg. 16 of the Public Procurement Regulations, which omission could render this tendering process null.

Dr Gatt on behalf of LGA explained that:-

i. the LGA was not obliged to publish the estimated contract value because this was a framework contract and Reg. 16 (11) laid out how the framework contract value had to be arrived at;

ii. in this case the price per audit was fixed at €2,330 however the LGA could not fix the total contract because that depended on the number of current and future licensees that would be subjected to such an audit;

iii. this issue was raised with the DCC prior to the issue of the tender and it was agreed not to publish the total estimated contract value but to publish the rate per audit since the LGA could not guarantee the number of such audits, all this was fully explained in file; and

iv. as a result of this framework contract, the LGA charged the cost of the audit to the licensee and then the LGA passed on the money to the contractor, which meant that these audits did not involve any income or expenditure on the part of the LGA.

Mr Xuereb remarked that if tenderers required clarification/s on any aspect of the tender, they had the opportunity to do so prior to the closing date of the tender.

At this point the hearing came to a close.

This Board,

- having noted that Quinel SA by letter dated 4th March 2013 had objected to the LGA's decision to exclude them from the tendering procedure since the tender documents were not posted in the tender box;

- having noted that the fact that the documents were delivered to the contracting authority in good time before the closing date for their submission was not in dispute;

- having noted the contracting authority's claim that it was the tenderer's responsibility to ensure that the documents were posted in the tender box as laid down in the tender document; having also noted that once this was a Framework Contract and any fees collected from applicants were passed on by the contracting authority to the contractor and since the number of audits could not be foreseen the authority was not in a position to establish the tender value;

came to the following conclusions:

3. the Board understands that this was an unfortunate incident which led to the tender documents not being deposited in the tender box as per tender conditions;

4. the Board may not ignore the fact that it was the appellant's duty to ensure that any condition laid down in the tender document was strictly adhered to and that the contracting authority could not be held responsible for any shortcoming by the appellant and/or third parties.

In view of the above this Board finds against the appellant and recommends that the deposit lodged for the appeal to be heard be forfeited.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

2nd May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 538

LGA/REG/03/2012
Framework Contract for the Provision of System Auditing Services

This call for tender was published on the 4th November 2012 with a closing dated on the 26th November 2012. Once this was a Framework Contract and the Contracting Authority was not in a position to envisage the number of audits, no contract value was inserted. All fees collected from applicants by the Authority are directly forwarded to the contractors.

DSG Consulting Ltd filed an objection on the 5th March 2013 against the decision of the Lotteries and Gaming Authority to disqualify its offer on the grounds that the three reference letters requested in the tender were not submitted.

The Public Contracts Review Board composed of Mr Joseph Croker as A/Chairman and Messrs Carmel Esposito and Paul Mifsud as Members convened a hearing on the 26th April 2013 to discuss the objection.

Present for the hearing:

DGS Consulting Ltd

Dr Paul Borg Costanzi	Legal Representative

Kyte Consultants

Mr Trevor Axiaq	Representative

FACT Group

Mr Andrew Galea	Representative

Lotteries and Gaming Authority

Evaluation Board

Mr Daniel Cilia	Chairman
Mr Damien Xuereb	Member
Mr Jason Farrugia	Member
Dr Corinne Gatt	Secretary

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Paul Borg Costanzi, on behalf of DGS Consulting Ltd, the appellant**,** made the following submissions:

i. by email dated 1st March 2013 his client was informed that his offer had been disqualified because he failed to submit the three reference letters as requested in the tender document;

ii. his client acknowledged that it was a genuine administrative error on his part not to have included these three reference letters however he maintained that a bidder should not be discarded because of an administrative mistake, which mistake could have been rectified through a request for clarifications with which he would have complied forthwith;

iii. this shortcoming did not in any way affect his client's technically competent so much so that he was executing a three year contract providing similar services to the satisfaction of the LGA; and

iv. had the LGA requested the appellant to submit these three reference letters, it would not have altered the substance of the original tender submission.

Dr Corinne Gatt, on behalf of the LGA**,** explained that:-

a. the LGA acknowledged that it already had a good working relationship with DSG Consulting Ltd however this was a new tendering procedure and all bidders had to abide by the tender conditions, including the submission of three reference letters;

b. the LGA displayed the answers to the clarifications sought by interested parties on its website and so they were publicly available;

c. the appellant did submit the list of references to companies and organisations which made use of his services however he failed to submit the three reference letters as per clause 4.2 (e) under 'General Requirements';

d. the LGA had sought the advice of the Departmental Contracts Committee and of the Department of Contracts as to whether it could ask DSG Consulting Ltd to submit the missing reference letters and the advice given was to abide strictly by the tender conditions – emails dated 15th and 18th January 2013 referred;

e. clause 4.2 'General Requirements' provided, among other things, that: *Absence of adherence to any one of the 'General Requirements' shall nullify the offer* – and (e) of the General Requirements referred specifically to the submission of the three reference letters; and

f. moreover, clause 1.10.3 read as follows:-

The Evaluation Committee may, in writing and according to the correct legal procedure, require any of the interested parties to provide clarifications in regard to the submtted offer or any part thereof. This is permitted in the interest of transparency and the equal treatment of all interested parties. In such cases, the party requested to clarify shall not be permitted to modify the submitted offer but merely provide clarifications.

Mr Daniel Cilia, chairman of the evaluation board, remarked that the appellant's tender submission made reference to his website where there was a list of reference letters however the tender document requested the submission of reference lettes and not to references displayed on websites.

Mr Damien Xuereb, member of the evaluation board, remarked that on visiting the appellant's website one found letters of reference from clients of DSG Consulting Ltd and if the appellant had submitted those letters with his tender submission they would have sufficed.

Dr Borg Costanzi reiterated that his client was not contesting the fact that the three reference letters were not submitted, even if this was through a genuine oversight, but the bone of contention was that the absence of these reference letters was mitigated by the fact the DSG Consulting Ltd was already rendering this service to the LGA and that kind of concrete proof of experience and competence was by far better and more reliable than any reference letter. He added that the reference letters available on his client's website, even if not addressed to the LGA, were further proof of his experience and competence.

At this point the hearing came to a close.

This Board,

- having noted that the DSG Consulting Ltd had through a letter dated 5th March 2013 objected to their being excluded from the tendering procedure;

- having also noted that the tender required the submission of three reference letters with the tender document; having noted that appellant submitted a list of references but did not submit the requested letters;

- having noted that the contracting authority stated that the tender document required the submission of reference letters and not lists;

- having also noted that the fact that the mentioned letters were not submitted was not in dispute;

came to the following conclusions:

1. the Public Contracts Board while acknowledging the fact that the reference letters might not have been included with the tender document through an administrative mistake;

2. the Board is of the opinion that the submission of a list of referees does not satisfy the requirement for the submission of reference letters; and

3. the Board also notes that it is the tenderer's responsibility to ensure full adherence with the conditions laid down in the tender document.

In view of the above, the Board finds against the appellant and recommends that the deposit lodged to cover the appeal be forfeited.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

2nd May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 539

VLC/CMHW/1/12
Tender for the Collection of Mixed Household Waste in Valletta

The call for tender was published in the Government Gazette of the 2nd October 2012 with a closing date of the 2nd November 2012. The estimated value of the tender was €600,000 (excl. VAT).

Five (5) tenderers submitted their offers.

Mr Victor Borg and Mr Antoine Bartolo filed an objection on the 19th December 2012 against the decision of the Valletta Local Council to discard their offer and to recommend the award of the tender to Waste Collection Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Vella as members convened a meeting on Friday 3rd May 2013 to discuss the appeal.

Present:

Mr Victor Borg and Mr Antoine Bartolo

Dr George Cutajar	Legal Representative
Mr Victor Borg	Appellant
Mr Antoine Bartolo	Appellant
Mr Tony Zammit	Representative
Mr Joe Attard	Representative

Waste Collection Ltd

Dr George Hyzler	Legal Representative
Mr Mario Muscat	Representative

Valletta Local Council (VLC)

Dr Joe Borg	Legal Representative

Evaluation Board

Dr Alexiei Dingli	Mayor/Chairman
Ms Gabriella Agius	Executive Secretary

After the Chairman's brief introduction, the appellant's representative was invited to explain the motives of the objection.

Dr George Cutajar, legal representative of Mr Victor Borg and Mr Antoine Bartolo, the appellants, made the following submissions:-

i. by letter dated 14th December 2012 the appellants were informed that their offer was discarded and that the tender was recommended for award to the cheapest administratively and technically compliant bidder, namely, Waste Collection Ltd.

ii. this tender was similar to another two tenders concerning waste collection/cleaning services issued by the Valletta Local Council and decided upon by the Public Contracts Review Board in the previous weeks/months;

iii. these tenders were awarded by the Valletta Local Council in an irregular and arbitrary manner so much so that the Public Contracts Review Board had declared that the recommended awards were null and that the tenders had to be re-issued and, moreover, these decisions taken by the Public Contracts Review Board even ended up before the Law Courts;

iv. the appellants were requesting that, in this case, the award recommendation by the Valletta Local Council should be revoked and, in the first instance, the tender be awarded to them;

v. moreover, if this tender were to be re-issued, the appellants were also requesting the Public Contracts Review Board to direct that the tender be issued under the same conditions that existed at the closing date of the original tender, namely 2nd November 2012, so that the recommended tenderer would not be allowed to rectify his shortcomings;

vi. among the shortcomings attributable to the recommended tenderer one found that no waste collection trucks were registered with the Malta Environment and Planning Authority by the closing date of the tender;

and

vii. it would, therefore, be unfair on the appellants, once they had everything in order at the closing date of this tender, whereas the recommended tenderer failed to satisfy the tender condition by the same date.

The Chairman Public Contracts Review Board remarked that, in case this Board would decide on the cancellation of this tender, it could not impose conditions with regard to the re-issue of the tender. He added that, however, it would be the responsibility of the contracting authority to include conditions and specifications which would allow fair competition and level playing field for all bidders. He reminded those present that, up to the closing date for the receipt of tenders, bidders had the right to raise objections with regard to unfair tender conditions or specifications.

Dr Cutajar remarked that:-

a. it would not be fair if a tenderer who did not qualify to participate in the original tender would be allowed to use the time between the closing dates of the original tender and the second call to his advantage to rectify his original shortcomings;

b. the appellants had submitted an offer amounting to €540,200 which was substantially cheaper than the recommended offer of €862,860;

and

c. by the closing date of the tender, the recommended tenderer did not possess the Malta Environment and Planning Authority vehicle authorisation, did not have the required personnel on his books and did not have the necessary experience requested in the tender document.

Dr Joe Bonnici, legal representative of the Valletta Local Council, submitted as follows:-

i. the appellant was requesting that, in case his appeal would be upheld and the tender re-issued, then the tender had to be issued under the same conditions of the original tender. However, as already pointed out by the Public Contracts Review Board, that was certainly not permissible because that would exclude new bidders from participating in the second call for tenders;

ii. allegations made in public to the effect that the present contractor was engaged without a valid contract were unfounded since this contractor was engaged on a temporary basis to carry out the service of waste collection which, from a public health and commercial point of view, was both essential and urgent;

iii. on the 3rd December 2012 the contracting authority had requested clarifications from the appellant who submitted their reply on the following day;

iv. the price difference between the offers made by the appellant and the recommended bidder amounted to about €300,000 over four years however the appellant failed to explain how they arrived at the quoted price;

v. this tender concerned the collection of household waste and the emptying of skips in respect of which the appellant submitted the daily rate of €370 for household waste collection whereas he proposed to empty of skips free of charge;

vi. the recommended bidder quoted the daily rate of €230 for household waste collection, which was 50% cheaper than the appellant's, and the daily rate of €340 for the emptying of skips;

vii. the part of the tender which the appellant proposed to carry out free of charge consisted of the emptying of 33 skips (25 skips as per Annex 4 page 58) three times daily, i.e. 99 skips (75 skips) daily, at three different times of the day, which involved vehicles, manpower and dumping at approved sites;

viii. the appellant's proposal to carry out the emptying of skips, which was a substantial part of the contract, free of charge, did not make commercial sense to the contracting authority so much so that it was compelled to seek clarifications in this regard;

ix. the appellant was the current contractor to the Zebbug Local Council and he explained that he would service the Valletta contract with the same resources applied on the execution of the Zebbug contract, something which did not make sense to the Valletta Local Council because the physical and commercial environment of Valletta were certainly not comparable to those of Zebbug;

x. for example, the appellant declared that one of the partners, after having finished his duties at Zebbug, would go to Valletta to empty the skips with one truck and the driver between 7am and 10 am - which was a very busy time during which services had to be delivered prior to closing down the commercial parts for traffic – and it was not possible or practical for one

truck and the driver to deliver that service when the current contractor employed three trucks and five employees, apart from the drivers, to deliver this service;

xi. the waste tipping fees were paid directly by the Council and therefore, in order to minimise his losses or to make a profit, the appellant could perhaps save on tipping fees from other contracts by attributing those costs to the Valletta Local Council;

xii. the Valletta Local Council considered that, with the price quoted, the appellant would not make a profit but would operate at a loss and, in order to avoid that situation, he would either provide an inferior/incomplete service and/or burden the Valletta Local Council with tipping fees on waste which did not originate from this contract;

xiii. it was conceded that whilst, at the closing date of the tender, namely the 2nd November 2012, the recommended tenderer did not have his vehicle/s registered with the Malta Environment and Planning Authority, yet it was a fact that, by that same date, he had purchased the vehicle/s and lodged the relative applications with the Malta Environment and Planning Authority so much so that a few days later – *the appellant indicated the Malta Environment and Planning Auth*ority *(JBR 119) dated 8th November 2012* – he obtained the Malta Environment and Planning Authority permit;

xiv. it was agreed that the vehicles' registration with the Malta Environment and Planning Authority was a mandatory requirement;

xv. the appellant had indicated that whilst, by way of experience, he had worked for various local councils however it was evident that, instead of expanding his business, the appellant kept moving from one local council to another, apparently unable to hold on for long with any one of the councils he worked for;

xvi. whilst it was correct that the recommended tenderer did not possess experience in waste collection, yet it was equally true that, with regard to the provision of transport services, he was second to none and the services requested in this tender mainly concerned the transport of waste;

xvii. the vehicles/equipment presented by the recommended tenderer were superior to those presented by the appellant in terms of environmental considerations;

xviii. the tender document requested that the contractor ought to have an office in Valletta, a trash compactor (*Annex 1 page 55*) and a work plan (*according to Annex 5 after award*) and it was only the recommended bidder who complied in these respects which were mandatory requirements;

and

xix. the Valletta Local Council arrived at its recommendation after taking into consideration all the above in order to engage a suitable contractor.

Dr George Hyzler, legal representative of the recommended tenderer, submitted that:-

a. one had to appreciate that the Valletta Local Council was faced with a situation where none of the bidders satisfied all the mandatory requirements;

b. at the closing date of the tender, the recommended tenderer had purchased the vehicles and had also submitted the relative applications with the Malta Environment and Planning

Authority so much so that the authorisation was issued a few days after the closing date of tender;

c. one could not help noting an article published in 'The Times" just the day before this hearing with the sole purpose of influencing the Public Contracts Review Board. Nevertheless, Dr Hyzler continued that, he was confident that this article would not serve its intended purpose;

d. one tended to assume that, in this case, the Public Contracts Review Board would be consistent with its previous rulings;

and

e. the appellant was not correct in his request to stop the clock as at the 2nd November 2012 in the event of the tender being re-issued and neither was he correct that this contract ought to be awarded to him for the simple reason that his bid was not compliant.

The Chairman Public Contracts Review Board remarked that no exceptions could be made with regard to mandatory requirements otherwise the term 'mandatory' would end up meaningless.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 18th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 3rd May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 14th December 2012 the appellants were informed that their offer was discarded and that the tender was recommended for award to the cheapest administratively and technically compliant bidder, namely, Waste Collection Ltd, (b) this tender was similar to another two tenders concerning waste collection/cleaning services issued by the Valletta Local Council and decided upon by the Public Contracts Review Board in the previous weeks/months, (c) these tenders were awarded by the Valletta Local Council in an irregular and arbitrary manner so much so that the Public Contracts Review Board had declared that the recommended awards were null and that the tenders had to be re-issued and, moreover, these decisions taken by the Public Contracts Review Board even ended up before the Law Courts, (d) the appellants were requesting that, in this case, the award recommendation by the Valletta Local Council should be revoked and, in the first instance, the tender be awarded to them, (e) moreover, if this tender were to be re-issued, the appellants were also requesting the Public Contracts Review Board to direct that the tender be issued under the same conditions that existed at the closing date of the original tender, namely 2nd November 2012, so that the recommended tenderer would not be allowed to rectify his shortcomings, (f) among the shortcomings attributable to the recommended tenderer one found that no waste collection trucks were registered with the Malta Environment and Planning Authority by the closing date of the tender, (f) it would be unfair on the appellants for a fresh tender to be reissued with the same conditions allowing the recommended bidder to participate, once the said appellant had everything in order at the closing date of this tender, whereas the recommended tenderer failed to satisfy the tender condition by the same date, (g) it would not be fair if a tenderer who did not qualify to participate in the original tender would be allowed to use the time between the closing dates of the original tender and the second call to his advantage to rectify his original shortcomings, (h) the appellants had submitted an offer amounting to €540,200 which was substantially cheaper than the recommended offer of €862,860 and (i) by the closing date of the tender, the recommended

tenderer did not possess the Malta Environment and Planning Authority vehicle authorisation, did not have the required personnel on his books and did not have the necessary experience requested in the tender document;

- having considered the contracting authority's representative's reference to the fact that (a) the appellant was requesting that, in case his appeal would be upheld and the tender re-issued, then the tender had to be issued under the same conditions of the original tender and, as already pointed out by the Public Contracts Review Board, that was certainly not permissible because that would exclude new bidders from participating in the second call for tenders, (b) allegations made in public to the effect that the present contractor was engaged without a valid contract were unfounded since this contractor was engaged on a temporary basis to carry out the service of waste collection which, from a public health and commercial point of view, was both essential and urgent, (c) on the 3rd December 2012 the contracting authority had requested clarifications from the appellants who submitted their reply on the following day, (d) albeit the price difference between the offers made by the appellant and the recommended bidder amounted to about €300,000 over four years, yet the appellant failed to explain how they arrived at the quoted price, (e) this tender concerned the collection of household waste and the emptying of skips in respect of which the appellant submitted the daily rate of €370 for household waste collection whereas he proposed to empty of skips free of charge, (f) the recommended bidder quoted the daily rate of €230 for household waste collection, which was 50% cheaper than the appellant's, and the daily rate of €340 for the emptying of skips, (g) the part of the tender which the appellant proposed to carry out free of charge consisted of the emptying of 33 skips (25 skips as per Annex 4 page 58) three times daily, i.e. 99 skips (75 skips) daily, at three different times of the day, which involved vehicles, manpower and dumping at approved sites, (h) the appellant's proposal to carry out the emptying of skips, which was a substantial part of the contract, free of charge, did not make commercial sense to the contracting authority so much so that it was compelled to seek clarifications in this regard, (i) the appellant was the current contractor to the Zebbug Local Council and he explained that he would service the Valletta contract with the same resources applied on the execution of the Zebbug contract, something which did not make sense to the Valletta Local Council because the physical and commercial environment of Valletta were certainly not comparable to those of Zebbug, giving as an example that one of the partners, after having finished his duties at Zebbug, would go to Valletta to empty the skips with one truck and the driver between 7am and 10 am - which was a very busy time during which services had to be delivered prior to closing down the commercial parts for traffic – and it was not possible or practical for one truck and the driver to deliver that service when the current contractor employed three trucks and five employees, apart from the drivers, to deliver this service, (j) the waste tipping fees were paid directly by the Council and therefore, in order to minimise his losses or to make a profit, the appellant could perhaps save on tipping fees from other contracts by attributing those costs to the Valletta Local Council, (k) the Valletta Local Council considered that, with the price quoted, the appellant would not make a profit but would operate at a loss and, in order to avoid that situation, he would either provide an inferior/incomplete service and/or burden the Valletta Local Council with tipping fees on waste which did not originate from this contract, (l) it was conceded that whilst, at the closing date of the tender, namely the 2nd November 2012, the recommended tenderer did not have his vehicle/s registered with the Malta Environment and Planning Authority, yet it was a fact that, by that same date, he had purchased the vehicle/s and lodged the relative applications with the Malta Environment and Planning Authority so much so that a few days later – *the appellant indicated the Malta Environment and Planning Auth*ority *(JBR 119) dated 8th November 2012* – he obtained the Malta Environment and Planning Authority permit, (m) it was agreed that the vehicles' registration with the Malta Environment and Planning Authority was a mandatory requirement, (n) the appellant had indicated that whilst, by way of experience, he had worked for various local councils, yet it was evident that, instead of expanding his business, the appellant kept moving from one local council to another, apparently unable to hold on for long with any one of the councils he worked for, (o) whilst it was correct that the recommended tenderer did not possess experience in waste collection, yet it was equally true that, with regard to the provision of transport services, he was second to none and the services

requested in this tender mainly concerned the transport of waste, (p) the vehicles/equipment presented by the recommended tenderer were superior to those presented by the appellant in terms of environmental considerations, (q) the tender document requested that the contractor ought to have an office in Valletta, a trash compactor (*Annex 1 page 55*) and a work plan (*according to Annex 5 after award*) and it was only the recommended bidder who complied in these respects which were mandatory requirements and (r) the Valletta Local Council arrived at its recommendation after taking into consideration all the above in order to engage a suitable contractor;

- having also considered the recommended tenderer's representative's reference to the fact that (a) one had to appreciate that the Valletta Local Council was faced with a situation where none of the bidders satisfied all the mandatory requirements, (b) at the closing date of the tender, the recommended tenderer had purchased the vehicles and had also submitted the relative applications with the Malta Environment and Planning Authority so much so that the authorisation was issued a few days after the closing date of tender, (c) whilst one could not help but noting an article published in 'The Times" just the day before this hearing with the sole purpose of influencing the Public Contracts Review Board, yet Dr Hyzler was confident that this article would not serve its intended purpose, (d) one tended to assume that, in this case, the Public Contracts Review Board would be consistent with its previous rulings, (e) the appellant was not correct in his request to stop the clock as at the 2nd November 2012 in the event of the tender being re-issued and neither was he correct that this contract ought to be awarded to him for the simple reason that his bid was not compliant;

reached the following conclusions, namely:

5. The Public Contracts Review Board opines that the contracting authority should not issue a set of tender conditions and specifications and then, during the evaluation process, ignore mandatory requirements and carry on with the evaluation and award. This Board is not against a certain degree of flexibility being applied to the tendering procedure but it is imperative that such flexibility has to be reflected in the published tender conditions and specifications for the benefit of all potential bidders because it is not acceptable for one to introduce and to apply a high degree of flexibility during the evaluation process.

6. This Board cannot overlook the fact that, whilst the tender document states in no equivocal term that tenderers had to be in possession of the required vehicles and relevant MEPA registrations prior to the closing date of the tender, subsequent to this, the evaluation board decided, out of its own free will, to carry on with the evaluation of the recommended tenderer notwithstanding the fact that the latter did not provide the MEPA vehicle registration at closing date of tender.

7. This Board notes that members of the evaluation committee admitted that all the tenderers failed to fully satisfy the evaluation criteria. Taking full cognisance of these comments this Board feels that such comments should be enough for it to establish that this tender has to be cancelled.

In view of the above this Board recommends that this tender be cancelled and that another call be issued.

The Public Contracts Review Board also recommends that the contracting authority should ensure that (a) a more coherent tender be re-issued with clearer and unambiguous tender specifications and (b) it abides with the Procurement Regulations when assessing the offers.

Furthermore, in view of the fact that, all in all, the appeal filed by the appellant was not frivolous, this Board recommends that the deposit paid by the appellant for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

7 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 540

SVLC/T/07/2012
Tender for Street/Pavement Sweeping, Weeding and Cleaning of Soft Areas, Gardens and Playing Fields - Santa Venera

The call for tender was published in the Government Gazette of the 30th October 2012 with a closing date of the 30th November 2012. The estimated value of the tender was €25,272 (excl. VAT).

Eleven (11) tenderers submitted their offers.

Mr Owen Borg filed an objection on the 7th January 2013 against the decision of the Santa Venera Local Council to discard his offer and to recommend the award of the tender to Mr Carmel Mifsud.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Vella as members convened a meeting on Friday 3rd May 2013 to discuss the appeal.

Present:

Mr Owen Borg

Dr Gianfranco Gauci	Legal Representative
Mr Owen Borg	Appellant

Mr Carmel Mifsud – no one was present

Santa Venera Local Council (SVLC)

Evaluation Board

Mr Horace Anastasi	Chairman (ex Mayor)
Ms Louise Gusman	A/Executive Secretary

After the Chairman's brief introduction, the appellant's representative was invited to explain the motives of the appellant's objection.

Dr Gianfranco Gauci, legal advisor of Mr Owen Borg, the appellant, submitted that:-

i. the appellant had submitted an offer which was cheaper than the recommended one and, for that matter, the cheapest out of the eleven tenders submitted;

ii. by letter dated 2nd January 2013 the appellant was informed that the tender was recommended for award to Mr Carmel Mifsud who submitted the most advantageous offer;

iii. following the receipt of the letter dated 2nd January 2013, the appellant was verbally informed that his offer was excluded because the tender was submitted by an individual and not by a

limited liability company. If this were to be the case that reason for exclusion was incorrect at law and, besides, it turned out that the recommended tenderer also submitted his bid as an individual and not as a company;

and

iv. albeit the contracting authority refused the appellant's repeated requests for a copy of the minutes of the relevant Council meeting/s, yet he then managed to access the Council minutes of meeting held on 28th December 2012 (approved on 7th February 2013) on the Santa Venera Local Council's website which had merely approved the recommendation of adjudicating board without giving any reasons.

The Chairman Public Contracts Review Board noted that the letter of exclusion did not include the reasons why the bidder had been disqualified as required by regulations and he pointed out that it was the bidder's right to be informed of the reasons for his exclusion both for the sake of transparency and to enable him to decide if it was the case to file an appeal.

Ms Louise Gusman, A/Executive Secretary of the Santa Venera Local Council, remarked that the reasons for rejection were in the evaluation report, the minutes of the Council meetings were publicly displayed on the website and, in this case, the appellant had called at her office and she had verbally informed him of the reasons for his exclusion. She added that, during the tendering process, she had followed the instructions of the Local Government Department.

The Chairman Public Contracts Review Board remarked that the Public Contracts Review Board could not help noting that, time and again, the local councils were not informing all unsuccessful bidders of the reasons for the rejection of their bids in a formal manner, whether by mail or electronic means, and it was certainly not fair on bidders to have to lodge an appeal before the Public Contracts Review Board simply to learn why their offer had been excluded. He added that contracting authorities had to, invariably, abide by regulations and that instructions had to be issued in line with regulations.

The Chairman Public Contracts Review Board read out the reason for the appellant's exclusion as indicated in the adjudicating report, namely, the lowest quote however no experience with local councils and no profile provided. He noted that once the Santa Venera Local Council acknowledged that the appellant had presented the lowest quote then the bone of contention was the non-submission of his profile and of details about his experience.

Mr Horace Anastasi, former mayor and chairman of the adjudication board, declared that he was prepared to state under oath that the appellant's submission did neither include his profile nor details about his experience. He added that, during the tender opening stage, those present, about twelve persons including bidders, were given the opportunity to scrutinise the process at close range for the sake of transparency. Mr Anastasi recalled that Mr Borg called twice at the offices of the Santa Venera Local Council where, on the first occasion, he did not mention that the missing information had, in fact, been submitted and that it was on the second occasion that he insisted that the missing information had, in fact, been submitted.

Mr Owen Borg, the appellant, under oath gave the following evidence:-

a. he confirmed that he was not present at the tender opening stage.

b. on two occasions the Santa Venera Local Council had refused to hand him the Council minutes;

c. he had been informed that the reason for his rejection was that he submitted the bid as an individual and not in the name of a limited liability company;

d. whilst in his tender submission he had included his profile and information about his experience, yet, it could be the case that these papers might have been mislaid at the contracting authority's end;

e. with regard to experience, he had rendered satisfactory service to the San Gwann Local Council for two years and to the Santa Lucia Local Council for 18 months and he had letters of recommendation from these local councils which he claimed to have also submitted with his tender;

and

f. if his wife were to be present at the hearing she would have confirmed the alleged missing information was, in fact, presented in the original tender.

On being handed over his tender submission to go through it with a view to verifying if he had in fact submitted the alleged missing information, Mr Borg confirmed that he could not trace the information.

Dr Gauci's request to defer the hearing so that the spouse of the appellant would give evidence was not entertained by the Public Contracts Review Board since it would amount to her affidavit against that of members of the contracting authority, whereas what mattered most was what had actually been presented in the original tender submission.

Ms Gusman, under oath, gave the following evidence:-

i. the first bullet of Annex 8 titled 'Documents to be submitted with the tender' referred to detailed covering letter including personal details and experience;

ii. the appellant called twice at the Council's office, once to give notice of appeal and the next to pay the deposit but he never asked for the Council minutes;

iii. the schedule of tenders received was compiled and endorsed by the board in the presence of all those present at tender opening stage and that schedule was then displayed on the Council's notice board;

iv. the reasons for rejection were those indicated in the notes on the schedule of offers received which were then reflected in the adjudication report;

v. the Council file contained all the information submitted by the appellant and the Santa Venera Local Council had no interest in withholding or destroying any documentation;

and

vi. as per instructions given by the Local Government Department, the tender document requested bidders to submit only one tender submission, that is, without requesting them to submit an identical copy.

The Chairman Public Contracts Review Board remarked that both the contracting authority and the bidders should communicate with one another formally in writing and that bidders should, invariably, be requested to submit the original submission along with an 'identical' copy which would be kept sealed so that, in case of any allegations of mislaid or missing documentation, one would open the

sealed copy to verify if documentation found missing in the original submission were or were not in the copy.

Dr Gauci concluded that this tendering procedure should be rendered null if, according to regulations, the contracting authority should have requested bidders to submit the original and a copy of the tender submission for the sake of verification in case of alleged missing/mislaid documentation. He also pointed out that the appellant had declared under oath that he had submitted all the information requested.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 7th January 2013 and also through its representatives verbal submissions presented during the hearing held on the 3rd May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) the appellant had submitted an offer which was cheaper than the recommended one and, for that matter, the cheapest out of the eleven tenders submitted, (b) by letter dated 2nd January 2013 the appellant was informed that the tender was recommended for award to Mr Carmel Mifsud who submitted the most advantageous offer, (c) whilst claiming that, following the receipt of the letter dated 2nd January 2013, the appellant was verbally informed that his offer was excluded because the tender was submitted by an individual and not by a limited liability company, yet, if this were to be the case, that reason for exclusion would be incorrect at law, apart from the fact that the recommended tenderer also submitted his bid as an individual and not as a company, (d) albeit the contracting authority refused the appellant's repeated requests for a copy of the minutes of the relevant Council meeting/s, yet the appellant then managed to access the Council minutes of meeting held on 28th December 2012 (approved on 7th February 2013) on the Santa Venera Local Council's website which had merely approved the recommendation of the adjudicating board without giving any reasons, (e) the appellant confirmed that he was not present at the tender opening stage, (f) on two occasions the Santa Venera Local Council had refused to hand the appellant the Council minutes, (g) whilst in his tender submission the appellant had included his profile and information about his experience, yet, it could be the case that these papers might have been mislaid at the contracting authority's end, (h) with regard to experience, the appellant had rendered satisfactory service to the San Gwann Local Council for two years and to the Santa Lucia Local Council for 18 months and he had letters of recommendation from these local councils which he claimed to have also submitted with his tender, (i) if the appellant's wife were to be present at the hearing she would have confirmed that the alleged missing information was, in fact, presented in the original tender, (j) this hearing should be deferred so that the spouse of the appellant would give evidence and (k) Dr Gauci concluded that this tendering procedure should be rendered null if, according to regulations, the contracting authority should have requested bidders to submit the original and a copy of the tender submission for the sake of verification in case of alleged missing/mislaid documentation;

- having also considered the fact that during his testimony, on being handed over his tender submission to go through it with a view to verifying if he had in fact submitted the alleged missing information, Mr Borg confirmed that he could not trace the information;

- having considered the contracting authority's representatives' reference to the fact that (a) the reasons for rejection were in the evaluation report, the minutes of the Council meetings were publicly displayed on the website and, in this case, the appellant had called at her office and she had verbally informed him of the reasons for his exclusion, (b) during the tendering process, Ms

Gusman, on behalf of the said Local Council, had followed the instructions of the Local Government Department, (c) she (Ms Gusman) was prepared to state under oath that the appellant's submission did neither include his profile nor details about his experience, (d) Mr Anastasi claimed that, during the tender opening stage, those present, about twelve persons including bidders, were given the opportunity to scrutinise the process at close range for the sake of transparency, (e) Mr Anastasi recalled that Mr Borg called twice at the offices of the Santa Venera Local Council where, on the first occasion, he did not mention that the missing information had, in fact, been submitted and that it was on the second occasion that he insisted that the missing information had, in fact, been submitted, (f) the first bullet of Annex 8 titled '*Documents to be submitted with the tender*' referred to a detailed covering letter including personal details and experience, (g) the appellant called twice at the Council's office, once to give notice of appeal and the next to pay the deposit but he never asked for the Council minutes, (h) the schedule of tenders received was compiled and endorsed by the board in the presence of all those present at tender opening stage and that schedule was then displayed on the Council's notice board, (i) the reasons for rejection were those indicated in the notes on the schedule of offers received which were then reflected in the adjudication report, (j) the Council file contained all the information submitted by the appellant and the Santa Venera Local Council had no interest in withholding or destroying any documentation and (k) as per instructions given by the Local Government Department, the tender document requested bidders to submit only one tender submission, that is, without requesting them to submit an identical copy,

reached the following conclusions, namely:

1. The Public Contracts Review Board contends that the letter of exclusion did not include the reasons why the bidder had been disqualified as required by regulations. This Board places emphasis on the fact that it was the bidder's right to be informed of the reasons for his exclusion both for the sake of transparency and to enable him to decide if it was the case to file an appeal. The Public Contracts Review Board could not help noting that, time and again, the local councils were not informing all unsuccessful bidders of the reasons for the rejection of their bids in a formal manner, whether by mail or electronic means, and it was certainly not fair on bidders to have to lodge an appeal before the Public Contracts Review Board simply to learn why their offer had been excluded. This Board cannot but stress enough that contracting authorities have to, invariably, abide by regulations and that instructions have to be issued in line with regulations.

2. Ideally, this Board suggests that both the contracting authority and the bidders should communicate with one another formally in writing and that bidders should, invariably, be requested to submit the original submission along with an 'identical' copy which would be kept sealed so that, in case of any allegations of mislaid or missing documentation, one would open the sealed copy to verify if documentation found missing in the original submission were or were not in the copy. The Public Contracts Review Board uses the word "suggests" rather than anything else as, on this particular matter, it transpires that albiet there exists a requirement (wherein tenderers are requested to comply with the condition to submit their tender in one original, marked 'original' and one copy marked 'copy') in the '*Instructions to Tenderers*' in the tender document, yet it is not stipulated in the Public Procurement Regulations. With regard to tenders issued by Local Councils no one from the Contracts Department could confirm whether such praxis is also being strictly observed at this level, namely in the Local Council tenders.

3. This Board also argues that, despite verbal claims during the hearing to the contrary by the appellant, one cannot disregard conflicting claims made by the contracting authority as regards the non-submission of the appellant's profile. This Board fully acknowledges the fact that, in this particular objection, the bones of contention were the non-submission of the appellant's profile and of details about his experience. With regard to the former, this Board feels that (a) once requirement for the inclusion of request by Local Councils for tenderers to

comply with the condition to submit their tender in one original, marked 'original' and one copy marked 'copy is not mandatory and (b) also, considering that in this particular instance, the Local Council refrained from rendering such request formally, all this leaves this Board with a dubious scenario facing conflicting statements, both given under oath. In this particular instance this Board feels that one has to give the benefit of the doubt to the appellant and this is not because the version of the Council representative was not believed but because it could have well been the case that such profile could have been provided and was, eventually, genuinely misplaced. As a result both versions were deemed to have been given in good faith. With regards to level of 'experience' this Board feels that it would be better for the evaluation board to properly analyse the appellant's profile once this is (re) submitted.

In view of the above this Board finds in favour of the appellant and recommends that he be reinstated in the evaluation process. Furthermore, the Public Contracts Review Board is allowing seven (7) working days from the date of this decision for the appellant to submit the said 'profile' to the contracting authority to enable a quick analysis of same by the said authority.

Finally, this Board recommends that the deposit paid by the same appellant for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

7 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 541

BLC/025/2012
Tender for the Construction of Fleur-de-Lys Arch

The call for tender was published in the Government Gazette of the 14th November 2012 with a closing date of the 10th December 2012. The estimated value of the tender was €241,488.50 (Excl. VAT).

Three (3) tenderers submitted their offers.

Vaults Ltd filed an objection on the 23rd January 2013 against the decision of the B'Kara Local Council to discard its offer and to recommend the award of the tender to V & C Contractors Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Vella as members convened a meeting on Friday 3rd May 2013 to discuss the appeal.

Present:

Vaults Ltd

Dr Alessandro Lia	Legal Representative
Mr Ivan Farrugia	Operations Manager
Ms Yvonne Farrugia	Representative

V & C Contractors Ltd

Mr Vincent Borg	Managing Director

Contracting Authority – B'Kara Local Council (including Santa Venera Local Council and Fleur de Lys Administration Commission)

Dr Sandra Sladden	Legal Representative
Mr Michael Fenech Adami	Councillor/Former Mayor B'Kara Local Council
Mr Stephen Sultana	Mayor, Santa Venera LC
Mr Arthur Pizzuto	Executive Secretary (B'Kara Local Council)

Evaluation Board

Mr Joseph Sammut	Chairman
Ms Doris Borg	Member
Mr Anthony Buttigieg	Member
Mr Emanuel Farrugia	Member
Mr Antoine Attard	Member
Mr Paul Micallef	Secretary
Mr Arthur Pizzuto	Executive Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Alessandro Lia, legal representative of Vaults Ltd, the appellant company, submitted that:-

i. around the 15th January 2013 the appellant company's representative had called at the B'Kara Local Council to enquire about developments with regard to the adjudication of this tender and thereupon he was informed that the tender had in fact been awarded on the 24th December 2012;

ii. on the 15th January 2013 the appellant company was issued with a letter informing it that, following the Council meeting held on 24th December 2012, it was decided not to accept its offer and to recommend the award of the tender in favour of V & C Contractors Ltd;

iii. this action by the contracting authority was in violation of the Public Procurement Regulations and of the principles of natural justice and, moreover, the appellant company was still in the dark as to why its offer had been rejected and, as a result, it was not in a position to prepare its defence;

and

iv. one had to point out that the contracting authority had contacted the appellant company on two occasions asking for information which it complied with in time.

Dr Sandra Sladden, legal advisor of the B'Kara Local Council, submitted that:-

a. as correctly stated by the appellant company the contracting authority had communicated with the company in two instances and whilst, in both cases, the appellant company replied in time, however, in the third instance, namely to the letter of clarification dated 20th December 2012, the appellant company failed to send its reply within the stipulated date/time, i.e. 9:30 am of Monday 24th December 2012, i.e. within 4 days;

b. the third request for clarification dealt with three specific issues which were crucial to the execution and to the costing of this contract;

c. any mail received by the mayor was automatically transmitted to all the councillors and to the executive secretary and it was confirmed that none of them had received the reply from the appellant company to the letter dated 20th December 2012;

d. moreover, emails received in the Council's email box was also transmitted to the gmail account of the executive secretary and, likewise, there was no trace of any email received from the appellant company concerning the clarification letter;

e. during the Council meeting held on 24th December 2012 the adjudicating board noted that the appellant company had failed to react to the request for clarification dated 20th December 2012 neither by mail nor by email, and, as a result, it had no option but to discard its offer;

f. had the appellant company sent its reply in time, the Council would have taken it into account during adjudication because, as far as the Council was concerned, it would have been better to have as many bidders as possible so as to obtain the required service at the most competitive price;

and

g. the appellant company was correct that, through an oversight, the contracting authority had not informed the appellant company and the other unsuccessful tenderer that their offers were rejected and the tender awarded.

Mr Michael Fenech Adami, former mayor of B'Kara Local Council, explained that:-

i. this tendering procedure had been in progress for quite some time and the central government was exerting pressure to expedite matters so as to absorb the funds already allocated to this project;

ii. according to the architect in charge, the issues raised in the third request for clarifications dealt with the main aspects of the project and in respect of which there resulted a substantial difference in the financial offers received;

iii. whilst it was correct for one to state that, through an oversight, the appellant company and another unsuccessful tenderer were not informed of the award of the tender, yet, while acknowledging its mistake, the contracting authority took care that when issuing the exclusion letter to these two unsuccessful tenderers the date of the letter would not be backdated so as not to prejudice their position should they opt to lodge an objection;

and

iv. he even took the time to, personally, explain to the appellant company's representative the reasons for the company's bid rejection.

Mr Ivan Farrugia, another representative of the appellant company, explained that:-

a. the request for clarification, although dated Thursday 20th December 2012, was, in fact, received on Friday 21st December 2012, namely on the last day prior to the Christmas shutdown, and, as a result, effectively, only three days were given for the company to submit the reply which included Saturday and Sunday;

b. the company had, in fact, sent its reply to the clarification on Monday 24th December 2012 at 8:30 am, i.e. one hour prior to the deadline, from Mr Farrugia's gmail account to the B'Kara Local Council's email address ,,, birkirkara.lc@gov.mt;

and

c. he could confirm this as a state of fact at the hearing by accessing his gmail account on his smart phone, a record which he could not temper with.

Dr Lia argued that the appellant company had, in fact, submitted its reply to the clarification letter dated 20th December 2012 within the deadline established by the contracting authority and, as a result, the reason for the appellant company's rejection quoted in the adjudication report was not a valid one.

Dr Sladden stated that whilst the email box where the appellant company was claiming to have sent its reply could be accessed by the mayor, all the councillors and the executive secretary simultaneously, yet, she reiterated that none of them had received the appellant company's reply.

The Chairman Public Contracts Review Board remarked that it was the right of participating tenderers to be informed in writing of the reasons behind their disqualification, irrespective of whether the Council minutes were publicly available on the website, and the Board was certainly not the proper venue for tenderers to learn the reasons for their rejection.

Dr Lia pointed out that, at that stage, the appellant company was requesting the revocation of the award recommendation once the reason for rejection was unfounded and to award the company the tender since it presented the cheapest offer. He added that, if that would not be the case, then the appellant company should be given another opportunity to look into the substance of any new reasons for rejection that the contracting authority might come up with.

Dr Sladden argued that, in view of the way things have developed, it would seem that the way forward was to reintegrate the appellant company in the tendering process, adjudicate its tender submission and, if necessary, review the original award recommendation.

Mr Stephen Sultana, mayor of Santa Venera, pointed out that since the adjudication of this tender there have been changes within the local councils of both B'Kara and Santa Venera as a consequence of recent local elections in both localities and, therefore, the adjudicating board would probably have to be reconstituted.

The Chairman Public Contracts Review Board and Dr Sladden shared the view that, whilst this tendering procedure should stand irrespective of the changes that took place in the local councils following the elections, yet the adjudicating board might require changes in view of the developments that had taken place.

Dr Sladden concluded that the contracting authority was presently in possession of the email and the accompanying documents which the appellant company claimed to have sent at 8:30 am of the 24th December 2012.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 23rd January 2013 and also through its representatives verbal submissions presented during the hearing held on the 3rd May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) around the 15th January 2013 the appellant company's representative had called at the B'Kara Local Council to enquire about developments with regard to the adjudication of this tender and thereupon he was informed that the tender had, in fact, been awarded on the 24th December 2012, (b) on the 15th January 2013 the appellant company was issued with a letter informing it that, following the Council meeting held on 24th December 2012, it was decided that its offer was not to be accepted and that the award of the tender in favour of V & C Contractors Ltd should be recommended, (c) this action by the contracting authority was in violation of the Public Procurement Regulations and of the principles of natural justice and, moreover, the appellant company was still in the dark as to why its offer had been rejected and, as a result, it was not in a position to prepare its defence, (d) one had to point out that the contracting authority had contacted the appellant company on two occasions asking for information which it complied with in time, (e) the request for clarification, although dated Thursday 20th December 2012, was, in fact, received on Friday 21st December 2012, namely on the last day prior to the Christmas shutdown, and, as a result, effectively, only three days were given for the company to submit the reply which included Saturday and Sunday, (f) the company had, in fact, sent its reply to the clarification on Monday 24th December 2012 at 8:30 am, namely one hour prior to the deadline, from Mr Farrugia's gmail account to the B'Kara Local Council's email address ,,, birkirkara.lc@gov.mt, (g) the appellant could confirm this as a state of fact at the hearing by accessing his gmail account on his smart phone, a record which he could not temper with, (h) Dr Lia argued that the appellant company had, in fact, submitted its reply to the clarification letter

dated 20th December 2012 within the deadline established by the contracting authority and, as a result, the reason for the appellant company's rejection quoted in the adjudication report was not a valid one and (i) the appellant company's legal representative pointed out that, at that stage, the appellant company was requesting the revocation of the award recommendation once the reason for rejection was unfounded and to award the company the tender since it presented the cheapest offer, adding that, if that would not be the case, then the appellant company should be given another opportunity to look into the substance of any new reasons for rejection that the contracting authority might come up with;

- having considered the contracting authority's representative's reference to the fact that (a) as correctly stated by the appellant company the contracting authority had communicated with the company in two instances and whilst, in both cases, the appellant company replied in time, yet, in the third instance, namely to the letter of clarification dated 20th December 2012, the appellant company failed to send its reply within the stipulated date/time, i.e. 9:30 am of Monday 24th December 2012, i.e. within 4 days, (b) the third request for clarification dealt with three specific issues which were crucial to the execution and to the costing of this contract, (c) any mail received by the mayor was automatically transmitted to all the councillors and to the executive secretary and it was confirmed that none of them had received the reply from the appellant company to the letter dated 20th December 2012, (d) moreover, emails received in the Council's email box was also transmitted to the gmail account of the executive secretary and, likewise, there was no trace of any email received from the appellant company concerning the clarification letter, (e) during the Council meeting held on 24th December 2012 the adjudicating board noted that the appellant company had failed to react to the request for clarification dated 20th December 2012 neither by mail nor by email, and, as a result, it had no option but to discard its offer; (f) had the appellant company sent its reply in time, the Council would have taken it into account during adjudication because, as far as the Council was concerned, it would have been better to have as many bidders as possible so as to obtain the required service at the most competitive price, (g) the appellant company was correct that, through an oversight, the contracting authority had not informed the appellant company and the other unsuccessful tenderer that their offers were rejected and the tender awarded, (h) this tendering procedure had been in progress for quite some time and the central government was exerting pressure to expedite matters so as to absorb the funds already allocated to this project, (i) according to the architect in charge, the issues raised in the third request for clarifications dealt with the main aspects of the project and in respect of which there resulted a substantial difference in the financial offers received, (j) whilst it was correct for one to state that, through an oversight, the appellant company and another unsuccessful tenderer were not informed of the award of the tender, yet, while acknowledging its mistake, the contracting authority took care that when issuing the exclusion letter to these two unsuccessful tenderers the date of the letter would not be backdated so as not to prejudice their position should they opt to lodge an objection, (k) the former mayor even took the time to, personally, explain to the appellant company's representative the reasons for the company's bid rejection, (l) Dr Sladden argued that, in view of the way things have developed, it would seem that the way forward was to reintegrate the appellant company in the tendering process, adjudicate its tender submission and, if necessary, review the original award recommendation and (m) Dr Sladden concluded that the contracting authority was presently in possession of the email and the accompanying documents which the appellant company claimed to have sent at 8:30 am of the 24th December 2012,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that it was the right of participating tenderers to be informed in writing of the reasons behind their disqualification, irrespective of whether the Council minutes were publicly available on the website and the Public Contracts Review Board was certainly not the proper venue for tenderers to learn the reasons for their rejection.

2. This Board has to give the benefit of the doubt to the appellant company with regard to the timely transmission of the requested information as, after all, it is clearly manifested in the

document submitted at the hearing for all those present to be able to view a copy of which had already been made available prior to this hearing to the contracting authority by the same appellant.

3. Having also considered points raised during the hearing by Mr Stephen Sultana, mayor of Santa Venera, particularly those relating to the fact that, following the adjudication of this tender, there have been developments within the local councils of both B'Kara and Santa Venera as a consequence of recent local elections in both localities and, as a result, the adjudicating board would, probably, have to be reconstituted, this Board concurs with the contracting authority's view, namely that, whilst this tendering procedure should stand irrespective of the changes that took place in the local councils following the elections, yet the adjudicating board might require changes in view of the developments that had taken place.

In view of the above this Board finds in favour of the appellant company. The Board also recommends that the appellant company shall not only be reintegrated in the adjudication process but also reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

7 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 542

KLBO/02/2012
Tender for the Up-keep and Maintenance of soft areas within 'Access Roads', 'Access Only and Pedestrian Streets' and 'Parks and Gardens' using environmentally friendly materials and practices – Bormla Local Council

The call for tender was published in the Government Gazette of the 23-24 October 2012 with a closing date of the 22nd November 2012.

Two (2) tenderers submitted their offers.

V & A Services filed an objection on the 28th January 2013 against the decision of the Bormla Local Council to recommend the award of the tender to Environmental Landscaping Consortium Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Vella as members convened a meeting on Friday 3rd May 2013 to discuss the appeal.

Present:

V & A Services Limited

Dr Michael Grech	Legal Representative
Mr Ronald Attard	Representative
Mr Brian Vella	Representative

Environmental Landscaping Consortium Ltd (ELC) –no representative turned up

Bormla Local Council

Dr Luciano Busuttil	Legal Representative
Mr Ivan Agius	Deputy Mayor

Evaluation Board

Mr Joseph Caruana	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Michael Grech, legal advisor of V & A Services, the appellant company, made the following submissions:-

i. by public notice issued by the Bormla Local Council on the 23rd January 2013 it was announced that the tender was recommended for award to Environmental Landscaping Consortium Ltd, which quoted the cheapest and most advantageous offer;

ii. the appellant company was contending that the recommended tenderer had, in fact, submitted an incomplete tender submission as explained hereunder:-

a. according to the tender document, the bidder had to submit a monthly schedule of works, something which the recommended bidder did not provide and this was supported by the statement made by Mr Joseph Scerri, Mayor, Bormla Local Council, in the evaluation report dated 22nd January 2013 where he explained that he voted against the recommendation to award the tender to Environmental Landscaping Consortium Ltd because Environmental Landscaping Consortium Ltd did not indicate the number of hours in respect of two items which it marked as 'under construction';

b. the tender document provided a site plan indicating the sites where the services were to be delivered and this site plan included the areas which Environmental Landscaping Consortium Ltd indicated as 'under construction' and in respect of which it did not provide the man-days on the lists it submitted;

c. that meant that the price quoted by Environmental Landscaping Consortium Ltd did not include the sites marked 'under construction' and therefore the price quote by Environmental Landscaping Consortium Ltd might or would increase to take into account the sites presently 'under construction' once these would be completed;

d. this point of view was reinforced by the comments made by Mr John Vella, Councillor, in the evaluation report where he stated that he voted in favour of awarding the tender to Environmental Landscaping Consortium Ltd on the proviso that the price quoted included the servicing of the soft areas which it indicated as 'under construction', namely, no extra costs were involved;

e. one had to keep in mind that the areas Environmental Landscaping Consortium Ltd indicated as 'under construction' were quite substantial;

f. in this case the variation procedure contemplated under Reg. 79 of the Public Procurement Regulations was not applicable because this was not a *force majeure* or unforeseen or unforeseeable case but these soft areas were already included in the tender document;

g. even if, for the sake of the argument, Environmental Landscaping Consortium Ltd could increase its overall quoted price then one would have to question whether the amended price would remain the cheapest compliant;

h. Reg. 28 (3) of the Public Procurement Regulations laid down the award criteria, in this case, the cheapest offer compliant with the tender specifications and in this case, although Environmental Landscaping Consortium Ltd's offer was the cheapest, it was not compliant because it amounted to an incomplete tender submission

and

i. in the light of the above, the appellant company was calling on the Public Contracts Review Board to revoke the award decision made by the Bormla Local Council whilst also requesting that the tender be awarded to the appellant company since it, effectively, submitted the cheapest compliant offer.

Dr Luciano Busuttil, legal representative of the Bormla Local Council, made the following submissions:-

a. the first issue raised by the appellant company concerned the non-submission of the monthly work schedule and, in this regard, one had to refer to clause 8 of the 'General Conditions' which provided that the contractor had to submit his proposed programme and proposed method of work for the performance of the service within 7 days from the date of the letter of acceptance, and not at tender stage;

b. what Environmental Landscaping Consortium Ltd submitted was a list of the sites which had to be serviced and, against each one of them, it indicated the number of man days involved by way of 'minimum yearly intervention';

c. the sites Environmental Landscaping Consortium Ltd marked as 'under construction' were Triq Santa Teresa, Triq ix-Xatt ta' Bormla and Pjazza Anthony Coleiro, although the appellant company also included in its letter of appeal Pjazza Gavino Gulia and Pjazza Paolino Vassallo;

d. Environmental Landscaping Consortium Ltd offered the price of €34,500, including VAT and contract manager's fee at 5% free, but it did not indicate, in any way, that it would depart from that offer, in other words, the Council would only pay €34,500 for the services requested in the call for tenders and so it should be because the price tendered could not be conditional;

e. Environmental Landscaping Consortium Ltd noted that, at the time of drawing up its tender submission, certain sites were still under construction but it did not indicate that it would charge extra to service these sites once works were completed;

f. the remarks made by the Mayor Joseph Scerri and Councillor John Vella were meant only to explain their vote but, nonetheless, their vote remained unchanged, namely the former against and the latter in favour of the proposed award to Environmental Landscaping Consortium Ltd;

g. the contract would, eventually, reflect the tender document and Environmental Landscaping Consortium Ltd did not make any reservations with regards to what was requested in the tender document;

h. Environmental Landscaping Consortium Ltd chose not to assume when the works under construction would be completed and what services they would entail under this contract but, still, it included them in its global offer of €34,500;

and

i. Environmental Landscaping Consortium Ltd was recommended for award because it submitted an offer which was compliant and about €5,000 cheaper even though it also offered some extras.

Dr Grech remarked that:-

i. the fact remained that the mayor voted against, councillor John Vella voted in favour and councillor Raymond Balzan abstained, with the former two expressing reservations as to the way they voted and it appeared that no clarifications were requested from Environmental Landscaping Consortium Ltd in these respects;

ii. by inserting a note, namely, 'under construction', Environmental Landscaping Consortium Ltd had qualified its offer and that amounted to a conditional offer which was not permissible;

and

iii. at page 8 of its tender submission, Environmental Landscaping Consortium Ltd stated that 'The quoted price is inclusive of seasonal pruning and trimming of trees within the areas included and covered by the contract' and that statement made matters worse because it meant that Environmental Landscaping Consortium Ltd only guaranteed seasonal pruning and trimming to the exclusion of the other services thus rendering the tender submission incomplete.

Mr Brian Vella, also representing the appellant company, remarked that Environmental Landscaping Consortium Ltd made reference to pruning and trimming because in previous similar calls for tenders this service had been excluded.

Dr Busuttil explained that:-

a. whilst the areas under construction referred to works in hand on the Bormla Quay project, yet Environmental Landscaping Consortium Ltd's offer covered all the areas and services included in the tender;

b. if, for the sake of the argument, the Bormla Quay project would remain work in progress for the duration of the two year contract period the global sum tendered by Environmental Landscaping Consortium Ltd would remain the same;

and

c. the appellant company's tender submission just listed the sites where the service was to be provided but it did not mention the services that it was going to provide and this, apparently, because it was understood that it would be rendering the services requested in the tender document and, by the same token, one could argue that Environmental Landscaping Consortium Ltd was going to provide all the services requested in the tender including the pruning and trimming.

Dr Grech argued that;-

i. once Environmental Landscaping Consortium Ltd decided to indicate the man-days against each site and, in so doing, it did not allocate any man-days against the sites 'under construction' then that meant that no works were contemplated in the latter sites except, perhaps, the seasonal pruning and trimming mentioned at page 8 of the submission which covered all the areas in the contract;

ii. the appellant company chose to mention only the sites without indicating the relative man-days or services which, in itself, meant that the sites would be serviced as requested in the tender.

Dr Busuttil stated that with the same argument put forward by the appellant company then the contracting authority could not request the said company to perform any services on any site because in its tender submission it did not indicate the services which it would provide in every site.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 28th January 2013 and also through its representatives verbal submissions presented during the hearing held on the 3rd May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by public notice issued by the Bormla Local Council on the 23rd January 2013 it was announced that the tender was recommended for award to Environmental Landscaping Consortium Ltd, which quoted the cheapest and most advantageous offer, (b) the appellant company was contending that the recommended tenderer had, in fact, submitted an incomplete tender submission as *(1)* according to the tender document, the bidder had to submit a monthly schedule of works, something which the recommended bidder did not provide and this was supported by the statement made by Mr Joseph Scerri, Mayor, Bormla Local Council, in the evaluation report dated 22nd January 2013 where he explained that he voted against the recommendation to award the tender to Environmental Landscaping Consortium Ltd because Environmental Landscaping Consortium Ltd did not indicate the number of hours in respect of two items which it marked as 'under construction', *(2)* the tender document provided a site plan indicating the sites where the services were to be delivered and this site plan included the areas which Environmental Landscaping Consortium Ltd indicated as 'under construction' and in respect of which it did not provide the man-days on the lists it submitted, *(3)* that meant that the price quoted by Environmental Landscaping Consortium Ltd did not include the sites marked 'under construction' and, as a result, the price quoted by Environmental Landscaping Consortium Ltd might or would increase to take into account the sites presently 'under construction' once these would be completed, *(4)* this point of view was reinforced by the comments made by Mr John Vella, Councillor, in the evaluation report where he stated that he voted in favour of awarding the tender to Environmental Landscaping Consortium Ltd on the proviso that the price quoted included the servicing of the soft areas which it indicated as 'under construction', namely, no extra costs were involved, *(5)* one had to keep in mind that the areas Environmental Landscaping Consortium Ltd indicated as 'under construction' were quite substantial, *(6)* in this case the variation procedure contemplated under Reg. 79 of the Public Procurement Regulations was not applicable because this was not a *force majeure* or unforeseen or unforeseeable case but these soft areas were already included in the tender document, *(7)* even if, for the sake of the argument, Environmental Landscaping Consortium Ltd could increase its overall quoted price then one would have to question whether the amended price would remain the cheapest compliant, *(8)* Reg. 28 (3) of the Public Procurement Regulations laid down the award criteria, in this case, the cheapest offer compliant with the tender specifications and in this case, although Environmental Landscaping Consortium Ltd's offer was the cheapest, it was not compliant because it amounted to an incomplete tender submission, *(9)* in the light of the above, the appellant company was calling on the Public Contracts Review Board to revoke the award decision made by the Bormla Local Council whilst also requesting that the tender be awarded to the appellant company since it, effectively, submitted the cheapest compliant offer, *(10)* the fact remained that the mayor voted against, councillor John Vella voted in favour and councillor Raymond Balzan abstained, with the former two expressing reservations as to the way they voted and it appeared that no clarifications were requested from Environmental Landscaping Consortium Ltd in these respects, *(11)* by inserting a note, namely, 'under construction', Environmental Landscaping Consortium Ltd had qualified its offer and that amounted to a conditional offer which was not permissible and *(12)* at page 8 of its tender submission, Environmental Landscaping Consortium Ltd stated that 'The quoted price is inclusive of seasonal pruning and trimming of trees within the areas included and covered by the contract' and that statement made matters worse because it meant that Environmental Landscaping Consortium Ltd only guaranteed seasonal pruning and trimming to the exclusion of the other services thus rendering the tender submission incomplete, (c) Mr Brian Vella, also representing the appellant company, remarked that Environmental Landscaping Consortium Ltd made reference to pruning and trimming because, in previous similar calls for tenders, this service had been excluded, (d)

once Environmental Landscaping Consortium Ltd decided to indicate the man-days against each site and, in so doing, it did not allocate any man-days against the sites 'under construction' then that meant that no works were contemplated in the latter sites except, perhaps, the seasonal pruning and trimming mentioned at page 8 of the submission which covered all the areas in the contract and (e) the appellant company chose to mention only the sites without indicating the relative man-days or services which, in itself, meant that the sites would be serviced as requested in the tender;

- having considered the contracting authority's representative's reference to the fact that (a) the first issue raised by the appellant company concerned the non-submission of the monthly work schedule and, in this regard, one had to refer to clause 8 of the 'General Conditions' which provided that the contractor had to submit his proposed programme and proposed method of work for the performance of the service within 7 days from the date of the letter of acceptance, and not at tender stage, (b) what Environmental Landscaping Consortium Ltd submitted was a list of the sites which had to be serviced and, against each one of them, it indicated the number of man days involved by way of 'minimum yearly intervention', (c) the sites Environmental Landscaping Consortium Ltd marked as 'under construction' were Triq Santa Teresa, Triq ix-Xatt ta' Bormla and Pjazza Anthony Coleiro, although the appellant company also included in its letter of appeal Pjazza Gavino Gulia and Pjazza Paolino Vassallo, (d) Environmental Landscaping Consortium Ltd offered the price of €34,500, including VAT and contract manager's fee at 5% free, but it did not indicate, in any way, that it would depart from that offer, in other words, the Council would only pay €34,500 for the services requested in the call for tenders and so it should be because the price tendered could not be conditional, (e) Environmental Landscaping Consortium Ltd noted that, at the time of drawing up its tender submission, certain sites were still under construction but it did not indicate that it would charge extra to service these sites once works were completed, (f) the remarks made by the Mayor Joseph Scerri and Councillor John Vella were meant only to explain their vote but, nonetheless, their vote remained unchanged, namely the former against and the latter in favour of the proposed award to Environmental Landscaping Consortium Ltd, (g) the contract would, eventually, reflect the tender document and Environmental Landscaping Consortium Ltd did not make any reservations with regards to what was requested in the tender document, (h) Environmental Landscaping Consortium Ltd chose not to assume when the works under construction would be completed and what services they would entail under this contract but, still, it included them in its global offer of €34,500, (i) Environmental Landscaping Consortium Ltd was recommended for award because it submitted an offer which was compliant and about €5,000 cheaper even though it also offered some extras, (j) whilst the areas under construction referred to works in hand on the Bormla Quay project, yet Environmental Landscaping Consortium Ltd's offer covered all the areas and services included in the tender, (k) if, for the sake of the argument, the Bormla Quay project would remain work in progress for the duration of the two year contract period the global sum tendered by Environmental Landscaping Consortium Ltd would remain the same, (l) the appellant company's tender submission just listed the sites where the service was to be provided but it did not mention the services that it was going to provide and this, apparently, because it was understood that it would be rendering the services requested in the tender document, (m) by the same token, one could argue that Environmental Landscaping Consortium Ltd was going to provide all the services requested in the tender including the pruning and trimming and (n) with the same argument put forward by the appellant company then the contracting authority could not request the said company to perform any services on any site because in its tender submission it did not indicate the services which it would provide in every site,

reached the following conclusions, namely:

1. The Public Contracts Review Board argues that the first issue raised by the appellant company concerned the non-submission of the monthly work schedule and, in this regard, one had to refer to clause 8 of the 'General Conditions' which provided that the contractor had to

submit his proposed programme and proposed method of work for the performance of the service within 7 days from the date of the letter of acceptance, and not at tender stage.

2. This Board contends that what Environmental Landscaping Consortium Ltd submitted was a list of the sites which had to be serviced and against each one of them it indicated the number of man days involved by way of minimum yearly intervention.

3. The Public Contracts Review Board opines that the remarks made by the Mayor Joseph Scerri and Councillor John Vella were meant only to explain their vote but, nonetheless, their vote remained unchanged, namely the former against and the latter in favour of the proposed award to Environmental Landscaping Consortium Ltd.

4. This Board cannot but agree that submissions made by tenderers should not be conditional.

5. Nevertheless, in order to ensure that there is no misunderstanding at a later stage, prior to signing any agreement, this Board recommends that the Council should formally place emphasis on its terms and conditions, namely that, in line with contract still to be signed, it would be only paying the recommended tenderer, in this case Environmental Landscaping Consortium Ltd, the sum of €34,500 including VAT for the services requested in the call for tenders.

In view of the above this Board finds against the appellant company. The Board also recommends that the appellant company shall not be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

7 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 543

SLC/06/2012
Tender for the Supply of Outdoor Gym Equipment

The call for tender was published in the Government Gazette of the 3rd January 2013 with a closing date of the 4th February 2013. The estimated value of the tender was €15,000 (excl. VAT). The price of the recommended tender was €14,668.78 (incl. VAT).

Three (3) tenderers submitted their offers.

JGC Ltd filed an objection on the 8th March 2013 against the decision of the Swieqi Local Council to discard its offer and to recommend the award of the tender to Forestals Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Mifsud as members convened a meeting on Tuesday 7th May 2013 to discuss the appeal.

Present:

JGC Ltd

Dr Alex Schembri	Legal Representative
Mr Pierre Cuschieri	Representative
Mr Simon Micallef	Representative

Forestals Ltd

Dr David Zahra	Legal Representative
Mr Gordon Dimech	CEO (Commercial)

Swieqi Local Council

Mr Noel Muscat	Mayor
Dr Justin Fenech	Deputy Mayor
Mr Hugh Zammit	Executive Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Alex Schembri, legal representative of JGC Ltd, the appellant company, made the following submissions:-

iii. by letter dated 28th February 2013 the Swieqi Local Council informed the appellant company that its offer had been refused without giving any reasons for discarding its offer;

iv. according to regulations and to clause 34.2 of the tender document the contracting authority was obliged to furnish all unsuccessful tenderers with the reasons for the rejection of their bids and with the details of the recommneded award;

v. in the circumstances, the appellant company was totally in the dark as to why its offer had been rejected and as to whether there were sufficient grounds to file an appeal so much so that the company ended up filing a generic appeal stating that its offer was in line with specifications and the cheapest;

and

vi. the appellant company was calling for the cancellation of the award recommendation even on the grounds that the contacting authority did not abide by the provisions of the tender document and of regulations as indicated above.

Mr Noel Muscat, Mayor of Swieqi Local Council, explained that:-

a. this was practically his first experience in the adjudication of tenders;

b. the procedure followed was that the Council appointed an expert, in this case architect Dieter Falzon, to advice on the offers received and then the Council decided on the award of the tender;

c. the expert expressed the professional opinion that the most advantageous offer was that of JGC Ltd – report dated 9th February 2013;

d. although he could not clearly recall all the reasons why the Council had decided on the award of the tender in favour of Forestals Ltd, it appeared that the main issue was that the appellant's product was made in Korea while that of the recommended tenderer was made in the EU;

e. the difference between the cheaper price offered by the appellant company, €12,994.75 and the cheaper price offered by the recommended tenderer, €14,668.78 was not that significant;

f. he acknowledged that although the product offered by the appellant company was made in Korea it must have been up to EU standards as, otherwise, it could not have been marketed in EU Member States;

g. after the award, Council members did visit sites where the products offered by both the appellant company and the recommended tenderer had already been installed and it was conceded that it would have been better had the decision been taken after these site visits;

and

h. the tender document did not stipulate that the equipment had to be made in the EU.

Dr Justin Fenech, Deputy Mayor of the Swieqi Local Council, explained that when comparing prices, one would note that the appellant company offered a product made in Korea for the price of €12,994.75 and another product made in Spain (EU) for the price of €23,324.25 whereas the recommended tenderer offered two options with the cheaper priced at €14,668.78 and made in the EU. He added that the Council opted for the latter since it was made in the EU, aesthetically it looked

better, other councils had opted for this kind of equipment and the price for EU-made equipment was cheaper, namely €14,668.78 as against €23,324.25.

The Chairman Public Contracts Review Board remarked that:-

i. the appellant company was correct that it should have been notified, by mail or electronic mail, of the reasons why its offer had not been recommended for award and that it had to be so notified within a stipulated time frame;

ii. it was not enough for a bidder to be referred to the Council's notice board or website but a participating tenderer had to be notified as soon as the decision was taken, which often took quite some time;

iii. the appellant company had the right of appeal and the company could only exercise that right if it was informed of the reasons that led to its disqualification/rejection and it was certainly not the case that a bidder had to lodge an appeal to obtain that information;

and

iv. if the tender document did not specify that the product had to be manufactured in the EU then the contracting authority should not disqualify the appellant company merely because it offered a product manufactured in Korea.

Mr Muscat acknowledged that, given the benefit of hindsight, the Council could have acted more diligently in its deliberations, however, the Council acted the way it did through inexperience and in good faith and not for any other ulterior motive.

The Chairman Public Contracts Review Board remarked that technically compliant offers had then to be considered on the basis of price as per clause 32.1 of the tender document.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 7th March 2013 and also through its representatives verbal submissions presented during the hearing held on the 7th May 2013, had objected to the decision taken by the pertinent authority;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 28th February 2013 the Swieqi Local Council informed the appellant company that its offer had been refused without giving any reasons for discarding its offer, (b) according to regulations and to clause 34.2 of the tender document the contracting authority was obliged to furnish all unsuccessful tenderers with the reasons for the rejection of their bids and with the details of the recommneded award, (c) in the circumstances, the appellant company was totally in the dark as to why its offer had been rejected and as to whether there were sufficient grounds to file an appeal so much so that the company ended up filing a generic appeal stating that its offer was in line with specifications and the cheapest and (d) the appellant company was calling for the cancellation of the award recommendation even on the grounds that the contacting authority did not abide by the provisions of the tender document and of regulations as indicated above;

- having considered the contracting authority's representative's reference to the fact that (a) this was practically the Mayor's first experience in the adjudication of tenders, (b) the procedure followed was that the Council appointed an expert, in this case architect Dieter Falzon, to advice on the offers received and then the Council decided on the award of the tender, (c) the expert expressed the professional opinion that the most advantageous offer was that of JGC Ltd – report dated 9th February 2013, (d) although the Mayor could not clearly recall all the reasons why the Council had decided on the award of the tender in favour of Forestals Ltd, it appeared that the main issue was that the appellant company's product was made in Korea while that of the recommended tenderer was made in the EU, (e) the difference between the cheaper price offered by the appellant company, €12,994.75 and the cheaper price offered by the recommended tenderer, €14,668.78 was not that significant, (f) the Mayor acknowledged that although the product offered by the appellant company was made in Korea it must have been up to EU standards as, otherwise, it could not have been marketed in EU Member States, (g) after the award, Council members did visit sites where the products offered by both the appellant company and the recommended tenderer had already been installed and it was conceded that it would have been better had the decision been taken after these site visits, (h) the tender document did not stipulate that the equipment had to be made in the EU and (i) whilst, given the benefit of hindsight, the Council could have acted more diligently in its deliberations, yet, the Council acted the way it did through inexperience and in good faith and not for any other ulterior motive,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the appellant company was correct in claiming that it should have been notified, by mail or electronic mail, of the reasons why its offer had not been recommended for award and that it had to be so notified within a stipulated time frame.

2. This Board feels it was not enough for a bidder to be referred to the Council's notice board or website arguing that a participating tenderer has to be notified as soon as the decision is taken.

3. The Public Contracts Review Board also argues that the appellant company had the right of appeal and the company could only exercise that right if it was informed of the reasons that led to its disqualification/rejection and it was certainly not the case that a bidder had to lodge an appeal to obtain that information.

4. The Public Contracts Review Board contends that if the tender document did not specify that the product had to be manufactured in the EU then the contracting authority should not have disqualified the appellant company merely because it offered a product manufactured in Korea.

5. This Board further remarks that technically compliant offers had to be considered on the basis of price as per clause 32.1 of the tender document.

In view of the above this Board finds in favour of the appellant company and recommends that the said company, apart from being reintegrated in the evaluation process, it should also be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

16 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 544

SPBLC/009/2013
Tender for the Building and Maintenance of Footpaths

The call for tender was published in the Government Gazette of the 21st December 2012 with a closing date of the 2nd January 2013. The estimated value of the tender was €25,000 (excl. VAT).

Seven (7) tenderers submitted their offers.

Dimbros Ltd filed an objection on the 6th February 2013 against the decision of the St Paul's Bay Local Council to discard its offer and to recommend the award of the tender to Mr Emanuel Pisani.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Mifsud as members convened a meeting on Tuesday 7th May 2013 to discuss the appeal.

Present:

Dimbros Ltd

Dr Gianfranco Gauci	Legal Representative
Ms Josephine Dimech	Representative

Mr Emanuel Pisani

Mr Emanuel Pisani	Appellant

St Paul's Bay Local Council

Dr Alex Sciberras	Legal Representative
Mr Mario Salerno	Mayor
Mr Raymond Tabone	Councillor
Mr Frans Chircop	Executive Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Gianfranco Gauci, legal representative of Dimbros Ltd, the appellant company, made the following submissions:-

i. by letter issued by the St Paul's Bay Local Council on the 27th January 2013 the appellant company was informed that its offer was not accepted and that the tender was recommended for award to the most advantageous bid;

ii. according to the workings of the appellant company the latter's offer was about 30% cheaper than the recommended offer;

iii. the appellant company tried to obtain the reason behind its rejection but all it obtained was the Council's declaration dated 24th January 2013 which simply stated that the tender was awarded to Mr Emanuel Pisani and that the Council based its decision on the most frequently required items intended for pavement construction;

and

iv. in the circumstances, the appellant company had to lodge this appeal while still in the dark as to what had led to the rejection of its offer.

Dr Alex Sciberras, legal representative of the contracting authority, submitted that:-

a. the appellant company's claim that it submitted the cheaper offer was disputable and, even if it were to be so, the tender document did not lay down that the award would be made to the cheapest offer but to the most favourable offer;

and

b. with regard to the appellant company's complaint that it had not been informed of the reasons that led to its offer being rejected, he proposed that this sitting be postponed so that the appellant company, in all fairness, would have the time to prepare its case.

The Chairman Public Contracts Review Board expressed the view that the hearing should continue and if, from the information gathered, it would be reasonable to continue the hearing on another day then action would be taken in that direction. He remarked that whilst, if the tender was adjudicated on the basis of MEAT (Most Economically Advantageous Tender) then a procedure had to be followed whereby the evaluation grid would have to be published in the tender document and so forth, yet clause 12 of the tender document seemed to indicate that the award would be made on the basis of the cheapest compliant tender.

The Chairman Public Contracts Review Board stressed that contracting authorities were obliged by regulations to inform, either by post or email, unsuccessful tenderers of the reasons for the rejection of their bids and that it was not appropriate to direct them to a website, because one should not expect bidders to continuously check websites especially when tendering processes tended to take months to conclude.

Mr Mario Salerno, Mayor of the St Paul's Bay Local Council, under oath, gave the following evidence:-

a. from an examination of the offers received, the evaluation board shortlisted the best two offers, namely those of Dimbros Ltd and Emanuel Pisani which data read as follows:-

Tenderer	Hourly Rate	Taking up Kerbs	Laying of Kerbs	Laying of curved Kerbs
	€	€	€	€
Emanuel Pisani	13.00	3.40	16.00	5.40
Dimbros Ltd	19.50	3.59	11.95	1.20

b. from enquiries carried out on these two bidders it transpired that Dimbros Ltd had been issued by two default notices with regard to the collection of bulky refuse issued by the Council's two former executive secretaries namely Mr John Camilleri in October 2011 and Mr George Abdilla in July 2012;

c. the Council had information about an incident which took place in Paola between a representative of the appellant company, namely Mr Melchiore Dimech, and the Mayor of Paola over the quality of the work carried out on pavement construction, which incident was reported to the Police and ended up before the Law Courts;

d. WasteServ Malta Ltd had also reported to the St Paul's Bay Local Council that representative/s of Dimbros Ltd, the bulk refuse contractor of the St Paul's Bay Local Council, was regularly disobeying instructions issued by WasterServ Malta Ltd and appropriate action was being contemplated which could affect the St Paul's Bay Local Council;

e. Council members were not comfortable to work with the appellant company;

f. the advice given by the architect engaged to assist in the adjudication was that the rates of the recommended tenderer and of the appellant company were, more or less, at the same level and that the final decision rested with the Council;

g. with regard to the rates quoted by the recommended tenderer and the appellant company it was noted that there was quite a difference in the hourly rate and in his opinion the hourly rate was an element common to all works and which influenced the overall price of works the most;

h. when he personally compared the work carried out by Mr Emanuel Pisani and Dimbros Ltd it clearly transpired that the works carried out by the former were superior in quality;

i. the Council arrived at its decision after taking into account all these elements together;

and

j. he was aware that Dimbros Ltd had carried out pavement works at Paola and at Zebbug (Hal Muxi) and that Dimbros Ltd was the contractor of the St Paul's Bay Local Council on the collection of bulky refuse.

Dr Gauci pointed out that:-

i. the two default notices mentioned by Mr Salerno had, eventually, been withdrawn and that had the appellant company been informed beforehand of the reasons for rejection it would have presented documentary evidence to this effect at the hearing;

ii. the incident that took place between the appellant company and the Mayor of Paola was still *sub-judice* and, as a result, it should not be taken into consideration since the outcome was not yet known and the appellant company was still presumed innocent;

iii. contrary to what was being claimed, he was informed that in fact it was the Mayor of Paola who attacked the appellant company's representative and that the quarrel arose through no fault on the part of the appellant company;

iv. with regard to the claim that the Council was not comfortable to work with the appellant company because of its staff member/s behaviour, it was worth noting that the St Paul's Bay

Local Council had renewed the company's contract for the collection of bulky refuse only recently;

and

v. Dimbros Ltd did not perform any previous pavement construction and/or maintenance works at Zebbug.

Dr Sciberras argued that:-

a. it was evident that the Council had evaluated the bids and found that the recommended tenderer and the appellant company were both competitive as far as price was concerned;

b. the next step that followed was that the Council considered a number of other factors, such as past experiences and default notices, which distinguished one bidder from the other;

c. the Council minutes were publicly available but the evaluation report was not available to all tenderers in its entirety because of commercial/confidential informationl but each tenderer had the right to view that part which concerned the adjudication of one's bid;

d. the bidders had the right of access to the decisions of the contracting authority but not to the deliberations of the evaluation board;

e. the technical evaluation was the sole responsibility of the adjudicating board and what one had to ensure was transparency and equal treatment in the process;

and

f. the Local Councils faced the problem that they had to manage their affairs by Local Government legislation dating back to 1993 and 1996 whereas, for example, the Public Procurement Regulations were amended as recently as 2010.

Ms Josephine Dimech, also representing the appellant company, under oath, gave the following evidence:-

i. according to architect Stephen Farrugia, who advised Dimbros Ltd on the matter, the offer made by Dimbros Ltd was 30% cheaper than the recommended one;

ii. the two default notices mentioned by Mr Salerno had been withdrawn and those two instances involved issues connected with the collection of bulky refuse;

iii. the case involving the representative of Dimbros Ltd and the Paola Mayor was still pending before the Courts and it was worth pointing out that those works were carried out on behalf of the Water Services Corporation, whose architects had certified that the work was to their satisfaction even though the Paola Mayor intervened because he thought otherwise;

and

iv. Dimbros Ltd never carried out any works at Zebbug.

The Chairman Public Contracts Review Board observed that:-

a. one was dealing with rates and it was therefore questionable how one could arrive at a total price when the quantities involved were unknown;

b. at page 29 "Bills of Quantity" the bidder was required to fill in items 1 to 6 from the Annex 3 (Schedule of Works) and, whereas Mr Emanuel Pisani provided this information, Dimbros Ltd did not;

c. if the information requested at page 29 of the tender document was mandatory then the tender submitted by Dimbros Ltd should have been considered non-compliant from the start because the bidder had, practically, signed a blank statement;

d. if the appellant company encountered difficulties in filling in the details requested at page 29, then it should have asked for a clarification prior to submitting its bid because it was not an option for the bidder to omit that information;

and

e. on the other hand, it was not clear how the recommended tenderer arrived at the amounts quoted adjacent to items 1 to 6 at page 29 of its submission from the rates he quoted in Annex 3.

Ms Dimech replied that Dimbros Ltd was not in a position to provide this information because certain data, such as the number of hours and the volume of works, were unknown.

Dr Gauci concluded that:-

i. it appeared to be evidently clear that the only written report relating to the adjudication of this tender was the declaration or resolution dated 24th January 2013;

ii. no written record was kept listing the strengths and deficiencies of the bids received but the records available simply indicated that Mr Pisani's bid was the most advantageous;

iii. according to the St Paul's Bay Local Council Mayor, the architect compared the four rates quoted and whilst he opined that the rates given by the recommended tenderer and the appellant company were at the same level yet, the mayor later remarked that, in his opinion, the hourly rate prevailed over the other rates;

iv. the two default notices which, apparently, were used against the appellant company had, eventually, been withdrawn and the relevant documentation would be made available;

v. it transpired that the Paola mayor got into an argument with Mr Melchiore Dimech, a representative of the appellant company, over a contract which the latter was executing on behalf of the Water Services Corporation, which incident was *sub-judice* and, therefore, that incident should not be taken into account – this prejudice by itself should vitiate the tendering process;

vi. contrary to what the St Paul's Bay Local Council Mayor said, the appellant company never carried out any pavement works in Zebbug and, in all probability, he mentioned works at Paola because of the incident which occurred between the appellant company's representative and the Paola Mayor and not because Mr Salerno had actually viewed the works;

and

vii. it was not amiss to consider other elements given that whilst, on the basis of the price, the two offers were at par, yet the Council should have verified those other elements/circumstances.

Dr Sciberras concluded that:-

a. at law the adjudicating board had discretion over the technical evaluation of the tenders;

b. the tender spelled out that the award had to be made to the most advantageous offer and, in its final declaration dated 24th January 2013, the evaluation board did just that;

c. if the bidders did not agree with the tender conditions then they had the opportunity to question them prior to the closing date of the tender;

d. the architect assisting the evaluation board expressed the opinion that the recommended tenderer and the appellant company had submitted offers which, on the basis of price, were at the same level but the ultimate decision rested with the Council;

e. the Council then took into account other elements such as past work experience with contractors and, therefore, given that on the objective criteria, namely the price, they were at par, then the deciding factor/s had to be rather subjective ones, e.g. past experiences and reputation;

f. the fact that the appellant company had been awarded other contracts by the same Council proved that the Council was not blatantly prejudiced against Dimbros Ltd, besides, it could well be that, on those occasions, the price difference was such that it was advantageous to award the contract/s to Dimbros Ltd;

g. cases which were *sub-judice* could not always be overlooked especially when it was a matter of trust so much so that, at times, one had to resign one's post until the case would be decided upon;

and

h. it appeared evident that the Council did not abuse of its discretion but acted diligently considering all the circumstances it was operating in.

Dr Gauci undertook to present the costings and the documentation attesting to the default notices having been withdrawn. This information was in fact made available on the 8th May 2013.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 4th February 2013 and also through its representatives verbal submissions presented during the hearing held on the 7th May 2013, had objected to the decision taken by the pertinent authority;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter issued by the St Paul's Bay Local Council on the 27th January 2013 the appellant company was informed that its offer was not accepted and that the tender was recommended for award to the most advantageous bid, (b) according to the workings of the appellant company the latter's offer was about 30% cheaper than the recommended offer, (c) the appellant company tried to obtain the reason behind its rejection but all it obtained was the Council's declaration dated 24th January 2013 which simply stated that the tender was awarded to Mr Emanuel Pisani and that the Council based its decision on the most frequently required items intended for pavement construction, (d) in the circumstances, the appellant company had to lodge this appeal while still in the dark as to what had led to the

rejection of its offer, (e) the two default notices mentioned by Mr Salerno had, eventually, been withdrawn and that had the appellant company been informed beforehand of the reasons for rejection it would have presented documentary evidence to this effect at the hearing, (f) the incident that took place between the appellant company and the Mayor of Paola was still *sub-judice* and, as a result, it should not be taken into consideration since the outcome was not yet known and the appellant company was still presumed innocent, (g) contrary to what was being claimed it was the Mayor of Paola who attacked the appellant company's representative and that the quarrel arose through no fault on the part of the appellant company, (h) with regard to the claim that the Council was not comfortable to work with the appellant company because of its staff member/s behaviour, it was worth noting that the St Paul's Bay Local Council had renewed the company's contract for the collection of bulky refuse only recently, (i) Dimbros Ltd did not perform any previous pavement construction and/or maintenance works, (j) according to architect Stephen Farrugia, who advised Dimbros Ltd on the matter, the offer made by Dimbros Ltd was 30% cheaper than the recommended one, (k) the two default notices mentioned by Mr Salerno had been withdrawn and those two instances involved issues connected with the collection of bulky refuse, (l) in the case involving the representative of Dimbros Ltd and the Paola Mayor it was worth pointing out that those works were carried out on behalf of the Water Services Corporation, whose architects had certified that the work was to their satisfaction even though the Paola Mayor intervened because he thought otherwise, (m) Dimbros Ltd never carried out any works at Zebbug, (n) Dimbros Ltd was not in a position to provide this information because certain data, such as the number of hours and the volume of works, were unknown, (o) it appeared to be evidently clear that the only written report relating to the adjudication of this tender was the declaration or resolution dated 24th January 2013, (p) no written record was kept listing the strengths and deficiencies of the bids received but the records available simply indicated that Mr Pisani's bid was the most advantageous, (q) according to the St Paul's Bay Local Council Mayor, the architect compared the four rates quoted and whilst he opined that the rates given by the recommended tenderer and the appellant company were at the same level yet, the mayor later remarked that, in his opinion, the hourly rate prevailed over the other rates, (r) it transpired that the Paola mayor got into an argument with Mr Melchiore Dimech, a representative of the appellant company, over a contract which the latter was executing on behalf of the Water Services Corporation, which incident was *sub-judice* and, therefore, that incident should not be taken into account – this prejudice by itself should vitiate the tendering process; (s) contrary to what the St Paul's Bay Local Council Mayor said, the appellant company never carried out any pavement works in Zebbug and, in all probability, he mentioned works at Paola because of the incident which occurred between the appellant company's representative and the Paola Mayor and not because Mr Salerno had actually viewed the works and (u) it was not amiss to consider other elements given that whilst, on the basis of the price, the two offers were at par, yet the Council should have verified those other elements / circumstances;

- having considered the contracting authority's representative's reference to the fact that (a) the appellant company's claim that it submitted the cheaper offer was disputable and, even if it were to be so, the tender document did not lay down that the award would be made to the cheapest offer but to the most favourable offer, (b) with regard to the appellant company's complaint that it had not been informed of the reasons that led to its offer being rejected, the contracting authority's legal representative proposed that this sitting be postponed so that the appellant company, in all fairness, would have the time to prepare its case, (c) from an examination of the offers received, the evaluation board shortlisted the best two offers, namely those of Dimbros Ltd and Emanuel Pisani, (d) from enquiries carried out on these two bidders it transpired that Dimbros Ltd had been issued by two default notices with regard to the collection of bulky refuse issued by the Council's two former executive secretaries namely Mr John Camilleri in October 2011 and Mr George Abdilla in July 2012, (e) the Council had information about an incident which took place in Paola between a representative of the appellant company, namely Mr Melchiore Dimech, and the Mayor of Paola over the quality of the work carried out on pavement construction, which incident was reported to the Police and ended up before the Law Courts, (f) WasteServ Malta Ltd had also reported to the St Paul's Bay Local Council that representative/s of Dimbros Ltd, the

bulk refuse contractor of the St Paul's Bay Local Council, was regularly disobeying instructions issued by WasterServ Malta Ltd and appropriate action was being contemplated which could affect the St Paul's Bay Local Council, (g) Council members were not comfortable to work with the appellant company, (h) the advice given by the architect engaged to assist in the adjudication was that the rates of the recommended tenderer and of the appellant company were, more or less, at the same level and that the final decision rested with the Council, (i) with regard to the rates quoted by the recommended tenderer and the appellant company it was noted that there was quite a difference in the hourly rate and, in the contracting authority's legal advisor's opinion, the hourly rate was an element common to all works and which influenced the overall price of works the most, (j) when the St Paul's Bay Local Council Mayor, personally, compared the work carried out by Mr Emanuel Pisani and Dimbros Ltd it clearly transpired that the works carried out by the former were superior in quality, (k) the Council arrived at its decision after taking into account all these elements together, (l) Mr Salerno claimed that he was aware that Dimbros Ltd had carried out pavement works at Paola and at Zebbug (Hal Muxi) and that Dimbros Ltd was the contractor of the St Paul's Bay Local Council on the collection of bulky refuse, (m) it was evident that the Council had evaluated the bids and found that the recommended tenderer and the appellant company were both competitive as far as price was concerned, (n) the next step that followed was that the Council considered a number of other factors, such as past experiences and default notices, which distinguished one bidder from the other, (o) the Council minutes were publicly available but the evaluation report was not available to all tenderers in its entirety because of commercial/confidential information but each tenderer had the right to view that part which concerned the adjudication of one's bid, (p) the bidders had the right of access to the decisions of the contracting authority but not to the deliberations of the evaluation board, (q) the technical evaluation was the sole responsibility of the adjudicating board and what one had to ensure was transparency and equal treatment in the process, (r) the Local Councils faced the problem that they had to manage their affairs by Local Government legislation dating back to 1993 and 1996 whereas, for example, the Public Procurement Regulations were amended as recently as 2010, (s) at law the adjudicating board had discretion over the technical evaluation of the tenders, (t) the tender spelled out that the award had to be made to the most advantageous offer and, in its final declaration dated 24th January 2013, the evaluation board did just that, (u) if the bidders did not agree with the tender conditions then they had the opportunity to question them prior to the closing date of the tender, (v) the architect assisting the evaluation board expressed the opinion that the recommended tenderer and the appellant company had submitted offers which, on the basis of price, were at the same level but the ultimate decision rested with the Council, (w) the Council then took into account other elements such as past work experience with contractors and, therefore, given that on the objective criteria, namely the price, they were at par, then the deciding factor/s had to be rather subjective ones, e.g. past experiences and reputation, (x) the fact that the appellant company had been awarded other contracts by the same Council proved that the Council was not blatantly prejudiced against Dimbros Ltd, besides, it could well be that, on those occasions, the price difference was such that it was advantageous to award the contract/s to Dimbros Ltd, (y) cases which were *sub-judice* could not always be overlooked especially when it was a matter of trust so much so that, at times, one had to resign one's post until the case would be decided upon and (z) it appeared evident that the Council did not abuse of its discretion but acted diligently considering all the circumstances it was operating in,

reached the following conclusions, namely:

1. The Public Contracts Review Board places emphasis on the fact that contracting authorities are obliged by regulations to inform, either by post or email, unsuccessful tenderers of the reasons for the rejection of their bids and that it was not appropriate to direct such tenderers to a website because one should not expect bidders to continuously check third party websites especially when tendering processes tend to take months to conclude.

2. This Board contends that the evaluation board was wrong in stating that its members based their decision "on the most frequent items required for pavement construction" without being able to

3. provide, at least those present during the hearing, with any workings they may have done to reach this conclusion. 'Transparency' requires such workings to be available and not arrived at verbally and forgotten. In fact, two items out of four of the appellant company's bid were substanially lower than the preferred bidder's. This Board argues that, in this particular instance, one was dealing with rates and, as a result, it was questionable how one could, for example, arrive at a total price when the quantities involved were unknown. It is also still unclear for this Board as to how the recommended tenderer arrived at the amounts quoted adjacent to items 1 to 6 at page 29 of its submission from the rates he quoted in Annex 3.

4. The Public Contracts Review Board argues that, with regard to the other factors that have been taken into consideration during adjudication, no proof of any such apprehensions were properly minuted and explained.

5. This Board feels that, as it transpired following the hearing, the fact that the default notices referred to during the hearing had already been withdrawn more than placed emphasis on the fact that such issue would have very likely prejudiced the appellant company's position during the evaluation stage.

6. The Public Contracts Review Board could not but notice that, during the hearing, members of the adjudication board could not show any documentation in connection with the reason for choosing the preferred bidder.

7. This Board contends that any adjudicator must be able to show how he / she arrived at one's decision - whatever this may be. It is not acceptable just to state that a decision was arrived at unless the reasoning behind it is transparent. This Board establishes that it is even more critical when the decision being made involves highly subjective criteria as is in the present case where the *"most advantageous"* offer was being chosen.

8. The Public Contracts Review Board could not but notice that at page 29, "Bills of Quantity", the bidder was required to fill in items 1 to 6 from the Annex 3 ('Schedule of Works') – however, whereas Mr Emanuel Pisani provided this information, Dimbros Ltd, the appellant company did not. Needless to say that this constituted a breach of tender document's conditions in view of the 'Schedule's' mandatory requirement. At this point this Board feels that once this 'Schedule' was mandatory and the appellant company failed to submit it then the tender submitted by Dimbros Ltd should have been considered non-compliant from the start because the bidder had, practically, signed a blank statement. Undoubtedly, this Board contends that if the appellant company encountered difficulties in filling in the details requested at page 29, then it should have asked for a clarification prior to submitting its bid because it was not an option for the bidder to omit that information.

9. This Board acknowledges that the pertinent 'Form' could not be filled since the tender prices were rates without any quantities. Nevertheless, this Board also notes that the totals shown on the said 'Form' by Mr Emanuel Pisani are not correct either.

10. In the circumstance the Public Contracts Review Board expresses its view that none of the interested parties managed to convince the members with the points / arguments raised.

In view of the above this Board recommends that this tender be cancelled and reissued.

Furthermore, this Board finds in favour of the appellant company since it had no idea on what the rejection was about and recommends that the said company be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

16 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 545

SPBLC/08/2013
Tender for the Upkeep and Maintenance of Soft Areas

The call for tender was published in the Government Gazette of the 30th November 2012 with a closing date of the 2nd January 2013. The estimated value of the tender was €40,000 (excl. VAT). The price of the recommended tender was €36,700 (incl. VAT).

Seven (7) tenderers submitted their offers.

Environmental and Landscapes Consortium Ltd filed an objection on the 6th February 2013 against the decision of the St Paul's Bay Local Council to recommend the award of the tender to WM Environmental Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Mifsud as members convened a meeting on Tuesday 7th May 2013 to discuss the appeal.

Present:

Environmental and Landscapes Consortium Ltd

Dr Ronald Cuschieri	General Manager
Mr Charles Attard	Representative
Mr Charles Zammit	Representative

WM Environmental Ltd

Dr Joe Mizzi	Legal Representative
Mr Wilson Mifsud	Appellant

St Paul's Bay Local Council

Dr John Bonello	Legal Representative
Dr Josef Laferla	Legal Representative
Mr Mario Salerno	Mayor

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Ronald Cuschieri, representing Environmental and Landscapes Consortium Ltd, the appellant company, made the following submissions:-

i. by letter dated 27th January 2013 the St Paul's Bay Local Council informed the appellant company that its offer was not accepted as the tender was recommended for award to the most advantageous offer;

ii. the appellant company was not informed when the award was made so as to guide itself as up to when it should lodge its appeal besides not knowing the reasons for the offer having been unsuccessful;

iii. the firm operated about 38 contracts similar to the one under reference and, in submitting its tender, Environmental and Landscapes Consortium Ltd took into account all that was required including adherence to the Green Public Procurement Criteria for Gardening Services as detailed in Contracts Circular No. 21/2011 dated 14th December 2011 which, among other things, directed that "Departmental Contracts Committees of each Ministry are being directed not to approve the award of tenders for the chosen Green Public Procurement products or services without the confirmation that the mandatory technical specifications have been adopted" and 'gardening products and services" were among the products and services which had to be fully compliant with the Green Public Procurement criteria and, therefore mandatory requirements;

iv. on the 21st January 2013, namely, prior to the award of the tender, the Environmental and Landscapes Consortium Ltd had drawn the attention of the Council that the tender in question did not include the mandatory Green Public Procurement criteria and that might render the tendering process null, which communication remained unanswered;

v. the observance of the Green Public Procurement criteria imposed costs and, as a result, it amounted to unfair competition if contracting authorities allowed tenderers who did not abide by Green Public Procurement criteria to compete with tenderers who did comply with the Green Public Procurement mandatory criteria;

vi. notwithstanding the exclusion of the Green Public Procurement criteria, the Environmental and Landscapes Consortium Ltd participated in this tendering process as stopping the whole process was considered to be a drastic measure when considering that the attention of the contracting authority had been drawn up and, if need be, there was recourse to appeal;

vii. the Environmental and Landscapes Consortium Ltd presented the cheapest compliant tender in line with mandatory directives in force considering also that it provided for the permanent placement of three qualified staff on this site as was the case with the current contract Environmental and Landscapes Consortium Ltd operated at the St Paul's Bay Local Council.;

viii. the appellant company was not going to go into the bids submitted by competitors but its intention was to explain its submission and to express its view that, in this case, it appeared that the bids were not submitted and adjudicated on a like-with-like basis.

The Chairman Public Contracts Review Board remarked that contracting authorities operated within a given budget and their requirements normally reflected those budgetary constraints and, therefore, the bidder's offer should not go much beyond those requirements otherwise it would become uncompetitive in terms of price even if superior in quality.

Dr John Bonello, legal advisor of the contracting authority, submitted that:-

a) albeit, prior to the closing date of the tender, the appellant company and, for that matter, all other bidders could have requested the contracting authority to amend the tender conditions/specifications, yet no one presented any such request for a pre-contractual remedy;

b) once bidders submitted compliant offers then the deciding factor had to be the price and if a bidder offered something which was over and above what was requested in the tender document that would be taken into account only if the prices were at the same level;

c) the contracting authority had to adjudicate bids on a like-with-like basis and to do that it had to stick strictly to the requisites contained in the tender document;

d) it was correct that circulars had been issued with regard to Green Public Procurement criteria but this tender was issued by a local council and, in line with Schedule 3 of the Public Procurement Regulations, local councils were allowed to administer their own public procurement in accordance with the provisions of Public Procurement Regulations and, as a consequence, in this case the tender document should prevail;

e) the difference between the recommended tenderer and the appellant company's offers was quite significant especially considering the budgetary constraints that local councils had to operate with;

f) in the case of the appellant company and the recommended tenderers, the contracting authority was presented with two compliant bids and it simply opted for the significantly cheaper one.

The Public Contracts Review Board noted that from the schedule of tenders received dated 8th January 2013, the site which had to be covered was divided into five areas and against the offer made by the recommended bidder, namely WM Environment Ltd, there was a note with read "less 5% if awarded all tender" (or areas) and that this condition was, likewise, included in the tender's covering letter date 31st December 2012 which stated as follows, viz "*Il-Kumpanija lesta li toffri roħs ta' ħamsa fil-mija f'każ li l-kunsill jiddeċiedi li jagħti l-ħames offerti l-kumpanija*."

One of the notes in the Specific Conditions of Contract read "This tender can be split between different contractors the Council may deem necessary". Therefore the tenderer had to state the costing factor according to the area as indicated in Annex 2;

One of the notes to the Bill of Quantities at page 30 of the tender document clearly stated that "*The Council reserves the right to award each area to different contractors".* As a result, the recommended offer amounted to a conditional offer, not a discount because, whilst a discount would apply across the board, yet, the price reduction by 5% was on condition that all areas would be awarded in the recommended tenderer's favour. The Public Contracts Review Board argues that this amounted to a conditional offer and that rendered the tender to be administratively non compliant.

Mr Mario Salerno, Mayor of St Paul's Bay Local Council, remarked that it appeared that the Council could still award each and every area to the respective cheapest compliant bidder.

Dr Cuschieri insisted that it was a mandatory requirement for a bidder to include the Green Public Procurement Criteria in the tender document and, as a consequence, that rendered the tender document as published invalid and any decisions on the basis of that tender document should be considered null.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 4th February 2013 and also through its representatives verbal submissions presented during the hearing held on the 7th May 2013, had objected to the decision taken by the pertinent authority;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 27th January 2013 the St Paul's Bay Local Council informed the appellant company that its offer was not accepted as the tender was recommended for award to the most advantageous offer, (b) the appellant company was not informed when the award was made so as to guide itself as up to when it should lodge its appeal besides not knowing the reasons for the offer having been unsuccessful, (c) the firm operated about 38 contracts similar to the one under reference and, in submitting its tender, Environmental and Landscapes Consortium Ltd took into account all that was required including adherence to the Green Public Procurement Criteria for Gardening Services as detailed in Contracts Circular No. 21/2011 dated 14th December 2011 which, among other things, directed that "Departmental Contracts Committees of each Ministry are being directed not to approve the award of tenders for the chosen Green Public Procurement products or services without the confirmation that the mandatory technical specifications have been adopted" and 'gardening products and services" were among the products and services which had to be fully compliant with the Green Public Procurement criteria and, therefore mandatory requirements, (d) on the 21st January 2013, namely, prior to the award of the tender, the Environmental and Landscapes Consortium Ltd had drawn the attention of the Council that the tender in question did not include the mandatory Green Public Procurement criteria and that might render the tendering process null, which communication remained unanswered, (e) the observance of the Green Public Procurement criteria imposed costs and, as a result, it amounted to unfair competition if contracting authorities allowed tenderers who did not abide by Green Public Procurement criteria to compete with tenderers who did comply with the Green Public Procurement mandatory criteria, (f) notwithstanding the exclusion of the Green Public Procurement criteria, the Environmental and Landscapes Consortium Ltd participated in this tendering process as stopping the whole process was considered to be a drastic measure when considering that the attention of the contracting authority had been drawn up and, if need be, there was recourse to appeal, (g) the Environmental and Landscapes Consortium Ltd presented the cheapest compliant tender in line with mandatory directives in force considering also that it provided for the permanent placement of three qualified staff on this site as was the case with the current contract Environmental and Landscapes Consortium Ltd operated at the St Paul's Bay Local Council and (h) the appellant company was not going to go into the bids submitted by competitors but its intention was to explain its submission and to express its view that, in this case, it appeared that the bids were not submitted and adjudicated on a like-with-like basis;

- having considered the contracting authority's representative's reference to the fact that (a) albeit, prior to the closing date of the tender, the appellant company and, for that matter, all other bidders could have requested the contracting authority to amend the tender conditions/specifications, yet no one presented any such request for a pre-contractual remedy, (b) once bidders submitted compliant offers then the deciding factor had to be the price and if a bidder offered something which was over and above what was requested in the tender document that would be taken into account only if the prices were at the same level, (c) the contracting authority had to adjudicate bids on a like-with-like basis and to do that it had to stick strictly to the requisites contained in the tender document, (d) it was correct that circulars had been issued with regard to Green Public Procurement criteria but this tender was issued by a local council and, in line with Schedule 3 of the Public Procurement Regulations, local councils were allowed to administer their own public procurement in accordance with the provisions of Public Procurement Regulations and, as a consequence, in this case the tender document should prevail, (e) the difference between the recommended tenderer and the appellant company's offers was quite significant especially considering the budgetary constraints that local councils had to operate with and (f) in the case of the appellant company and the recommended tenderers, the contracting authority was presented with two compliant bids and it simply opted for the significantly cheaper one.

reached the following conclusions, namely:

1. The Public Contracts Review Board notes that contracting authorities operate within a given budget and their requirements normally reflected those budgetary constraints and, therefore, the bidder's offer should not go much beyond those requirements otherwise it would become uncompetitive in terms of price even if superior in quality.

2. The Public Contracts Review Board noted that, from the schedule of tenders received dated 8th January 2013, the site which had to be covered was divided into five areas and against the offer made by the recommended bidder, namely WM Environment Ltd, there was a note which read "less 5% if awarded all tender" (or areas) and that this condition was, likewise, included in the tender's covering letter date 31st December 2012 which stated as follows, viz "*Il-Kumpanija lesta li toffri roħs ta' ħamsa fil-mija f'każ li l-kunsill jiddeċiedi li jagħti l-ħames offerti l-kumpanija*.". As a result, this Board concludes that the recommended offer amounted to a conditional offer, not a discount because, whilst a discount would apply across the board, yet, the price reduction by 5% was on condition that all areas would be awarded in the recommended tenderer's favour. The Public Contracts Review Board argues that this amounted to a conditional offer and that rendered the recommended tenderer's bid to be administratively non compliant.

3. This Board acknowledges that one of the notes in the 'Specific Conditions of Contract' read that "This tender can be split between different contractors the Council may deem necessary". As a result, the tenderer had to state the costing factor according to the area as indicated in Annex 2.

4. The Public Contracts Review Board argues that, albeit, prior to the closing date of the tender, the appellant company and, for that matter, all other bidders could have requested the contracting authority to amend the tender conditions/specifications, yet no one presented any such request for a pre-contractual remedy.

In view of the above this Board finds against the appellant company and recommends that the appellant company should not be reimbursed with the deposit paid to lodge the appeal.

Furthermore, the Public Contracts Review Board, now fully aware of the fact that the offer submitted by the recommended tenderer was found to be 'conditional' thus rendering it to be administratively non-compliant, recommends that this offer be withdrawn.

Finally, this Board recommends that the evaluation process should proceed with the remaining bidders.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

16 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 546

GHPST/651/2012
Tender for the Supply of Bandages Wadding 7.5 cm

The call for tender was published on the 13th August 2010 with a closing date on the 13th September 2010. Nine tenders were placed in the tender box by the closing date.

On the 11th January 2013, Messrs Krypton Chemists Ltd filed an objection against the decision of the contracting authority to award the tender to EJ Busuttil Ltd.

The Public Contracts Review Board composed of Mr Joseph Croker, Acting Chairman, and Messrs Carmel Esposito and Paul Mifsud, convened a hearing on the 10th May 2013 to discuss the appeal.

Present:

Krypton Chemists Ltd

Mrs Lorraine Arrigo	Representative
Mrs Patricia Engerer	Representative

E.J. Busuttil Ltd

Ms Nadia Boffa	Representative

Central Procurement and Supplies Unit (CPSU) – Ministry for Health

Mr Joseph Xuereb	Representative

Evaluation Board

Mrs Connie Miceli	Chairperson
Ms Alicia Vella Lethridge	Secretary
Ms Juliet Pace	Member
Mr George Debono	Member

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Mrs Patricia Engerer on behalf of Krypton Chemists Ltd, the appellant, made the following submissions:-

i. by letter dated 4th January 2013 the contracting authority informed her firm that its offer "was not successful since the material was too stiff and shreds easily";
ii. Krypton Chemists has been the CPSU's supplier of bandages sizes 7.5cm, 10cm and 15cm for the previous three years and no complaints had ever been made regarding their use;

iii. these products carried all the international quality certifications required, e.g. ISO and so forth, and these were submitted with the previous tender but were not required this time round since her firm was the current supplier – copies provided at the hearing; and

iv. the overseas manufacturer, Santex SPA of Italy, had reacted to the exclusion of this offer by stating that the product was up to standard and that the product had never been the subject to such negative remarks.

Mrs Lorraine Arrigo, also on behalf of the appellant, remarked that following this appeal, the contracting authority had placed two direct orders with her firm for the supply of the same product offered in connection with this tendering procedure and therefore it was incomprehensible how the same contracting authority would place two orders if the product did not perform satisactory. She added that samples had been provided from stock.

Mrs Connie Miceli, chairperson of the evaluation board, remarked that:

a. the appellant's offer was discarded once the evaluators found the material of the product too stiff and shredded easily; and

b. she did not exclude the fact that direct orders had been placed with the appellant to bridge the gap between one tender and the next however it could be that different evaluators were involved in the various orders placed for this product.

Ms Juliet Pace, member of the evaluation board, under oath gave the following evidence:-

i. presently she was performing hospital management duties however she worked as nursing officer at the Orthopaedic Department for about 15 years;

ii. when analysing the sample provided, the three evaluators, inlcuding Dr Jason Zammit, consultant (on duties abroad), were of the opinion that the bandage was of stiff material and that it shredded easily rendering it unsafe for use on patients;

iii. the evaluation grids were filled in after the evaluators had discussed the case among themselves; and

iv. she acknowledged that she had filled in the evaluation grid in the name of Dr Jason Zammit, consultant, on his instructions but that the signature was his.

The A/Chairman pointed out that the evaluation should be carried out individually, i.e. each evaluator had to assess the bids independently from the other evaluators.

Mr George Debono, member of the evaluation board and nursing officer at the Children's Department, under oath, explained that:-

a. the evaluators first examined the samples and discussed them among themselves and there was general agreement that the product, as per samples provided, was not safe for use on patients, especially in the Paediatric Department;

b. when comparing the products offered by the bidders participating in this tendering procedure it was noted that there were products which were superior to that offered by the appellant and therefore the evaluators recommended the product which they considered best for the treatment of patients;

c. when queried by the A/Chairman, Mr Debono confirmed that the appellant's product was compliant with tender specifications; and

d. he could not tell which product/brand he had recently been using in the course of his duties.

Mrs Lorraine Arrigo remarked that Mr Debono must have been using the bandages provided by Krypton Chemists because for the past three years or so it was the only supplier of this product.

The PCRB could not help noting that it has taken the Ministry for Health almost three years to adjudicate this tender for the provision of bandages which, whatever the circumstance, was an inordinately long time.

The Board:

- having noted that Messrs Krypton Chemists had on the 4th January 2013 submitted an objection to the decision taken by the contracting authority to reject their offer and award it to Messrs EJ Busuttil Ltd.;

- having noted the appellant's claims that they have been supplying identical products to the Contracting Authority for a number of years and that they are still supplying this product to this very day, and that they have never received any adverse remark; having noted that the product is covered by various quality certificates issued by international certifying agencies; and

- having noted that the Contracting Authority did not confute the appellant's claim that they have continued to procure identical supplies from the appellant through alternative procurement procedures; having also noted that the product was up to tender specifications;

came to the following conclusions:

1 That the product was according to the specifications laid down in the tender document;

2 That there does not seem to be any tangible reason why the product should have been discarded, so much so that despite the mentioned evaluation report, the contracting authority continued to purchase the product from the appellant.

In view of the above, the Board finds in favour of the appellant and recommends that their bid be reintegrated into the adjudication process. It is also recommended that the deposit paid for their objection to be heard be re-imbursed in full.

The Board urges the Contracting Authority to take all necessary steps to ensure that adjudication processes, especially those concerning ordinary procurement and minimal quantities, are concluded as expeditiously as possible, and within a reasonable time-frame.

Joseph Croker A/Chairman	Carmel Esposito Member	Paul Mifsud Member

17 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 547

DH 4023/10
Tender for the Supply, Installation and Commissioning of an Ultrasound Machine for ENT

The tender under reference was published on the 20th April 2012 with a closing date of the 23rd May 2012. Seven tenders were submitted by the closing date.

On the 30th October 2012 Associated Equipment Ltd filed an objection against the decision of the Ministry for Health to disqualify its offer and to recommend the award of the tender to Suratek Ltd.

The Public Contracts Review Board, composed of Mr Joseph Croker as A/Chairman and Messrs Carmel Esposito and Paul Mifsud as Members convened a hearing on the 10th May 2013 to discuss the objection.

Present:

Associated Equipment Ltd

Mr Charles Mifsud	Director
Mr Ray Theuma	Director
Mr Keith Vassalo	Representative

Suratek Ltd

Mr Kevin Galea	Representative

Central Procurement and Supplies Unit (CPSU) – Ministry for Health

Dr Adrian Mallia	Legal Representative

Evaluation Board

Mr Stephen Mercieca	Chairman
Mr Domnic Camilleri	Secretary
Mr Eric Farrugia	Member
Ms Christine Sammut	Member
Ing. Chris Attard Montalto	Member

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Mr Charles Mifsud, on behalf of Associated Equipment Ltd, the appellant, made the following submissions:-

i. by letter/email dated 24th October 2012 the contracting authority informed his firm that its offer was found technically non-compliant since the ultrasound machine had to have a minimum of two (2) active ultrasound probe ports whereas the unit offered only had one active port available;

ii. the tender document requested the compact version of an ultrasound machine, i.e. the laptop type version, together with a mobile cart or trolley;

iii. item 5 of his product's description dated 22 May 2012 and included in his tender submission referred to "Isolation cart 240V. Able to accept up to three transducers connected simultaneously", which item was also requested in the tender document and that meant that effectively the equipment offered had more than the two ports requested, i.e. the one in the laptop and another 3 in the trolley; and

iv. the contracting authority already made use of the type of ultrasound machine offered by his firm and it was considered as standard equipment.

Dr Adrian Mallia, on behalf of the contracting authority, submitted that:-

a. Section 4 'Construction' at page 33 of the tender document specified that this had to be a portable unit which could be carried about single handedly, user friendly and with a dedicated trolley;

b. Section 6 'Transducer socket/port' at page 33 of the tender document stated that: *The Unit shall have two active socket or port to allow connection and interchange of the ultrasound probes;*

c. Therefore, it followed that as per tender specifications the unit, i.e. the laptop, independently of the trolley, had to be the portable type and with two ports whereas that offered by the appellant had only one port as evidenced in page 2 of the technical brochure under the heading 'Console Design' which referred to '1 probe port with micro-connector', and this fact was not being contested by the appellant;

d. Section 12 'Mobile Cart' at page 35 of the tender document stated, among other things, that "*It shall include holders for at least three ultrasound transducers"* and therefore, the mobile cart, independently of the unit, had to have three transducers as that provided by the appellant; and

e. It was quite clear in the tender specifications that the two ports of the laptop were requested in addition to the three transducers of the trolley.

Mr Mifsud remarked that:-

i. the laptop could only make use of only one transducer at any one time, because one could not scan a patient with two probes at the same time;

ii. besides, the trolley, with its three transducers, was easy to move about in a hospital environment; and

iii. although he could not rule out the availability of units with two ports it was the first time that he had heard about it because this type of unit was so compact that it had only one port.

Dr Mallia pointed out that:-

a. it was up to the contracting authority to set out its requirements and it was made quite clear in the tender document that the unit had to have two active ports;

b. the contracting authority requested a portable unit that could be carried about manually and it did not request a mobile unit, which could be moved about on a trolley; and

c. if the appellant had any problem to satisfy the tender specifications as published, he could have raised the issue prior to the closing date of the tender.

Mr Kevin Galea, representing the recommended tenderer, shared the arguments expressed by the contracting authority.

The Board;

- having noted that Messrs Associated Equipment Limited had by letter dated 29th October 2012 objected to the decision taken by the Contracting Authority to dismiss their bid as technically non-compliant and recommend the award to Messrs Suratek Limited;

- having noted the appellant's claim that his product satisfied the technical specs in that it had one port on the ultrasound unit proper and three additional ones on the trolley; having also noted the appellant's argument that only one probe at a time could be used and that the unit could be moved around in a hospital environment even when attached to the trolley and could not understand the necessity of the portable unit to be provided with two ports; and

- having noted the Contracting Authority's counter claims that it was up to them to lay down the specifications and had the appellant had any doubts about the specs he could have easily raised a query before tender closing date,

came to the following conclusions:

1. The fact that the tender specifications required the portable unit to be furnished with two ports was clearly established;

2. The fact that the appellant's product was equipped with one port was not in dispute; and

3. That had the appellant had any doubt about the tender specifications, he could have raised a query in good time.

In view of the above, the Board finds against the appellant and recommends that the deposit paid for the appeal to be heard be forfeited.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

17 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 548

CT/2017/2012
Pre-Contractual Complaint - Tender for the supply of Topiramate 100mg tablets

The closing date of the tender which was due on the 26th April 2012 was later extended to the 10th May 2012.

Messrs Rodel Ltd filed a pre-contractual objection on the 9th May 2012 against the decision of the Ministry for Health to issue a call for tenders calling for the supply of these tablets specifying the brand name Topamax ®.

The Public Contracts Review Board composed of Mr Joseph Croker as Acting Chairman with Messrs Carmel Esposito and Paul Mifsud as Members convened a hearing on the 10th May 2013 to discuss the objection.

Present:

Rodel Ltd (representing Accord Healthcare)

Dr Norman Vella	Director

Central Procurement and Supplies Unit – Ministry for Health

Ms Astrid Sammut	Representative
Ms Jennifer Farrugia	Senior Pharmacist

Evaluation Board

Mr Joseph Xuereb	Chairman
Mr Mark Spiteri	Member
Ms Sonya Bonnici	Member
Ms Alison Brincat	Member

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Norman Vella, on behalf of Rodel Ltd, the appellant, made the following submissions:-

i. by email dated 5th March 2012 he had requested the Contracts Department, the contracting authority, and copying the Ministry of Health, (i) to remove the restriction imposd in Volume 3 'Technical Specifications' at page 46 of the tender document which called for the supply of the Topiramate 100mg specifying the brand Topamax® (Keppra) or (ii) to confirm that

should Accord Healthcare Ltd offer its generic Levetiracetam 500 mg tablets, which were being supplied to hospitals in England and Wales, such tender would be considered;

ii. the purpose of his objection was to allow his overseas principals to participate in the tendering procedure which circumstances applied also to about four other prospective bidders who could offer their generic product;

iii. on the 26th April 2012 he even phoned the Director of Contracts and his advice was to wait as no developments had taken place up till then;

iv. his series of emails to the Contracts Department, the last one dated 2nd May 2012, i.e. the day before the extended closing date for the submission of tenders, remained unaswered and therefore he was left with no alternative but to have recourse to the PCRB in terms of Part XIV Reg. 85 (1) (a);

v. Accord Healthcare Ltd confirmed that its generic medicine was registered and marketed in England, the Netherlands and Italy with the appropriate market authorisations in place;

vi. at the hearing he provided a hard copy and a soft copy of the complete dossier of the bioequivalence study in respect of Accord Healthcare's Tipiromate 100 mg tablets, which study had been presented to the Health Authorities of the UK who eventually tested and approved the generic product with regard to its bioequivalence with Topamax®;

vii. he cited various technical quotes to domonstrate the bioequivalence of Accord Healthcare Ltd's generic Topiramate medicine to that of Tiporamate Topmax®, which brand was requested in the tender document; and

viii. besides being in his interest and in the interest of other bidder who would be able to offer similar generic medicines, it was also in the interest of the Ministry for Health and of patients to have as many bidders as possible in order to obtain a product of the same quality but at a cheaper price.

Mr Joseph Xurerb, chairperson of the evaluation board, stated that the specifications for the procurement of such medicinces were provided by the Department of Pharmaceutical Affairs (DPA) and in this case it recommended the procurement of tablets of a particular brand, i.e. Topamax®.

Ms Jennifer Farrugia, senior pharmacist, remarked that:-

a. Dr Norbert Vella, consultant, recommended that a patient should be given the same brand of anti-epileptic drug (AED) and that patients should not be shifted onto generic versions; and

b. this advice was in line with the Royal Pharmateutical Society of Great Britain and the NHS website, which provided practice guidance on epilepsy, which similarly indicated that it was important that, whenever possible, patients with epilepsy always received the same brand of anti-epileptic dug because switching versions could potentially affect seizures control and numerous academic research papers urged caution and recommended further research into the effects of substituting AEDs.

The A/Chairman PCRB remarked that it would appear that it was medically adviseable that patients using tablets of a certain brand should stick to that particular brand however new patients could start on a different generic drug and he therefore asked if any other drug, besides Topamax, has been procured.

Mr Xuereb reported that:-

i. in response to the tender in question only one bidder participated, even though it was an open tender which allowed for parallel trading to take place;

ii. in the meantime there had been a change in the administration of the CPSU and he recalled that the supply of this item was made through a direct order; and

iii. Dr Norbert Vella, consultant, could not attend the hearing because on Fridays he, along with the other neurologists, were detailed on duty in clinics.

Dr. Norman Vella concluded that he could understand a situation where a consultant would advice that a limited number of patients should stay on the brand of AED and therefore a limited stock be kept for such cases but it was not justified that the CPSU should pay a higher price for a particular brand when the same requirement could be satisfied by a cheaper generic drug in the case of new patients or patients who could tolerate a change in brand.

The Board,

- having noted that Messrs Rodel Ltd had by email dated 9th May 2012 submitted a pre-contractual objection in terms of the Public Procurement Regulations whereby it objected that the tender had specified the procurement of a medicinal with a particular brand name;

- having noted the appellant's claim that the generic product he represented was bio-equivalent to the branded originator drug, that the product in question was widely supplied to the NHS hospitals in the UK; that the inclusion of the generic product would be beneficial to the Contracting Authority since it would increase competition and thus it would be able to procure quality products at an advantageous price;

- having noted that the Contracting Authority's contention that the specifications are drawn up by the Department of Pharmaceutical Affairs and that the consultant recommended that patients be retained on the same brand of pharmaceuticals since changes in brands may cause undue side effects; having also noted that in spite of this recommendation, new patients could be introduced to different brands as long as the use of a particular brand per patient is retained;

came to the following conclusions:

1. that generic products which seem to be bio-equivalent to the originator drug are available on the market;

2. that though there is only one representative for the originator product in Malta, the tender was published on the international market and anyone could participate in the call;

3. that though it is highly recommended that epileptic patients be kept on the same brand of medicine, there is nothing untoward in new patients being prescribed different brands as long as they be kept on the same brand.

In view of the above, the Board finds in favour of the appellant and recommends that the tender be cancelled and replaced by a new tender showing the generic chemical name of the medicine. In order not to jeopardise the well being of patients who are already on a particular brand the Contracting Authority is urged to continue to supplying them with their medicine through alternative procurement procedures.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

17 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 549

MCH/136/2012
Tender for Security Services at Mount Carmel Hospital

The tender under reference was published on the 18th September 2012 with a closing date on the 24th October 2012. Four candidates submitted a tender by the closing date.

Executive Security Ltd on the 13 February 2013 filed an objection against the decision of the Ministry for Health to disqualify its offer as administratively non-compliant and to recommned the award of tender to JF Security Ltd.

The Public Contracts Review Board composed of Mr Joseph Croker as Acting Chairman and Messrs Carmel Esposito and Paul Mifsud as Members convened a public meeting on the 10th May 2013 to discuss the appeal.

Present:

Executive Security Ltd

Dr Veronique Dalli	Legal Representative
Dr Dean Hili	Legal Representative
Mr Stephen Ciangura	Representative

JF Security Ltd

Dr Matthew Pulis	Legal Representative
Mr Matthew Formosa	Representative

Central Procurement and Supplies Unit – Ministry for Health

Dr Adrian Mallia	Legal Representative

Evaluation Board

Mr Joseph Piscopo	Chairman
Mr Jude Taddeo Camilleri	Member
Ms Sally Zammit	Member
Mr Oswald Balzan	Member

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Veronique Dalli, on behalf of Executive Security Ltd, the appellant, made the following submissions:-

i. by letter dated 7th February 2013 the contracting authority informed her client that his offer was adjudicated administratively non-compliant because (i) the Licence Form was incomplete and (ii) the Police Conduct was incomplete, and, moreover, that the award was recommended in favour of JF Security at the rate of €7.10/hr when her client had offered the rate of €6.29/hr;

ii. her client maintained that the two reasons for exclusion did not influence the substance of the tender submission but were rather of mininal importance and which could have been rectified by a request for clarification against the payment of the statutory €50 fee;

iii. in his tender submission her client had indicated the names of the personnel who would be detailed to provide this service and against each one of them quoted the respective licence number and it was therefore quite obvious that each one of them was the holder of a security guard licence;

iv. whoever possessd the licence of a security guard had to have a clean Police conduct, i.e. even as far as administrative fines and pending court cases were concerned;

v. moreover, given the nature of the duties involved the Police, the authority which issued security guard licences, had to renew the licence on an annual basis and therefore the holder had to maintain a clean police conduct at all times;

vi. the PCRB was an administrative tribunal and therefore these minor shortcomings, termed *de minimis*, and which had no bearing on the substance of the tender submission, should be dealt with according to administrative law and therefore the PCRB and the contracting authortiy should apply the principle of reasonableness, whereby the bidder be asked to provide the minor missing details against an administrative fee but not disqualify the bidder and in so doing end up paying a high price for the service requested; and

vii. the license number itself meant that that person did possess a licence and that he/she had a clean Police conduct.

Dr Adrian Mallia, on behalf of the contracting authority, submitted that:-

a. it appeared that the appellant was not contesting the fact that a number of licences and police conduct certificates had not been submitted;

b. Volume 1 Section 3 Form 2 titled ‘Documents to be furnished’ indicated ‘the list of documents to be submitted with the tender’ and (a) item 1.2 requested the ‘private guard license of the proposed security guards’ i.e. the licence itself

c. and not the licence number, and item 1.3 requested the ‘Police conduct of the proposed security guards’;

d. these requirements were essential considering that these personnel would be engaged on security duties which entailed a considerable degree of responsibility;

e. clause 16.1 of the ‘General Instructions’ para. (f) ‘Evaluation Criteria/Technical Specifications’ (ii) ‘Documents to be furnished with the tender (Volume 1 Section 3 Form 2)’ which referred, among other things, to the submission of the licence and the Police conduct;

f. Note 3 was applicable with regard to clause 16.1 (f) which read as follows: *No rectification shall be allowed. Only clarifications on the submitted information may be requested.*

g. Note 3 was significantly different from Note 2 which stated that: *Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents withn two working days from notificaiton*.

h. therefore, once the missing documentation fell under Note 3 then the contracting authority was precluded from seeking a rectification and the contracting authority had no discretion in the matter;

i. for the sake of equal treatment to all bidders, the contracting authority was legally bound to abide by the tender conditions;

j. price was taken into account once a bid was adjudicated administratively and technically compliant;

k. it was not enough for the appellant to submit the licence number because that meant that the person concerned had once been issued with a security guard licence but it did not provide the contracting authority with the comfort that the person concerned did possess a licence and, more importantly, a valid licence;

l. one should not expect the contracting authority to check the licence numbers provided as to whether they in fact represented security guard licences and if they had been regularly renewed and still valid; and

m. it was the responsibility of the contracting authority to publish a correct and complete tender document however it was the responsibility of the bidder to provide a complete and correct tender submission.

Dr Matthew Paris, on behalf of the recommended tenderer, shared the arguments put forward by the contracting authority while adding that this was not a question of *de minimis* but a question of whether a bid was compliant or not and, moreover, if the appellant had any questions to raise with regard to the tender conditions he should have raised them prior to the closing date for the receipt of tenders.

Dr Dalli stated that her client had submitted his tender in good faith and one should not infer that her client tried in some way to mislead the contracting authority by providing false or invalid licence number. She reiterated that the tender document provided the means to the contracting authority to seek clarifications and that in such instances the principle of reasonableness should prevail.

The Board,

- having noted that Messrs Executive Security had by letter dated 13th February 2013 objected to the decision taken by the Contracting Authority to refuse his bid and recommend the award of the tender in question to Messrs JF Security;

- having noted that in his submission appellant maintained that the tender was submitted correctly albeit some documentation i.e. copies of licence forms and police conduct certificates, were not attached to the document; that the fact that a licence number was placed against the name of each proposed guard meant that the person in question was licensed and that as a result he/she also had a clean conduct certificate since that was one of the conditions for the retention of a licence to act as a security guard; that this was a minor infraction and

could have been rectified through the payment of an administrative fine of €50 had the contracting authority sought a clarification;

- having noted the contracting authority's counter statements that the submission of the mentioned documentation was a crucial requirement given the nature of the service to be provided; that if breached this condition could not be rectified but only clarified according to the tender conditions; that the tendered price could only be taken into consideration once the tender submission was determined to be both technically and administratively compliant,

came to the following conclusions:

1. that the submission of the mentioned documentation was required by the tender document;

2. that non-submission of the documentation could not be rectified by a simple request for clarification; and

3. that the fact that not all the documentation requested was attached to the tender submitted by the appellant was not in doubt.

In view of the above, the Board finds against the appellant and recommends that the deposit paid for the appeal to be heard be forfeited in full.

Joseph Croker	Carmel Esposito	Paul Mifsud
A/Chairman	Member	Member

17 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 550

CT/3004/2012
Negotiated Procedure: Tender for the Design, Fabrication, Construction and Erection of a Protective Shelter over the Tarxien Megalithic Temples

The call for tender, with an estimated value of €1,230,000 (excl. VAT), was published in the Government Gazette of the 10th April 2012 with a closing date of the 17th May 2012. Four (4) tenderers submitted their offers.

Pillow Space Frame Ltd filed an objection on 4th March 2013 against the decision of the Contracts Department to recommend the award of tender to Malta Restoration JV.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Joseph Croker and Mr Carmelo Esposito as members convened a meeting on Wednesday 15th May 2013 to discuss the appeal in the presence of:

Pillow Space Frame Ltd

Dr Godwin Muscat Azzopardi	Legal Representative
Mr Martin Pillow	Managing Director
Mr Pierre Abela	Representative

Steel Shape Ltd – interested party

Dr John Gauci	Legal Representative
Mr Ivan Coleiro	Representative
Mr Iomar Vella	Representative
Mr Joseph Vella	Representative

Malta Restoration JV – recommended tenderer

Dr Massimo Vella	Legal Representative
Dr David Vella	Legal Representative
Ing. Johann Bondin	Representative
Architect Mark Camilleri	Representative
Mr Francis Vella	Representative

Contracts Department

Mr Jonathan Barbara	Procurement Manager

Planning and Priorities Coordination Department – Office of the Prime Minister and Heritage Malta

Dr Ruth Baldacchino	Legal Representative
Dr Patrick Valentino	Legal Representative

Evaluation Board

Ms Joanne Mallia	Chairperson
Architect Ruben Abela	Member
Mr Reuben Grima	Member

Ms Katya Stroud	Member
Mr Kevin Abela	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the appellant's objection.

Dr Godwin Muscat Azzopardi, legal advisor of Pillow Space Frame Ltd, the appellant company, made the following submissions:-

viii. by letter dated 22nd February 2013 the Contracts Department informed the appellant company that its offer had been ranked second and that the award of the tender was recommended in favour of Malta Restoration JV;

and

ix. the appellant company was objecting for two main reasons, (a) the recommended bidder had not submitted the original bid bond in the open tender procedure which rendered its bid to be administrative non-compliant and, as a result, should not have been allowed to participate in the negotiated procedure and (b) the recommended bidder in the negotiated procedure had not participated in the original open tender.

A) The Recommended Bidder had not Submitted the Original Bid Bond in the Original Open Tender Procedure

Dr Muscat Azzopardi stated that:-

a. in the 'Schedule of Tenders Received' pertaining to the original open tender procedure there was a note against the name of the recommended bidder, namely Malta Restoration JV, in the sense that it had not submitted an original bid bond;

and

b. whilst, in the light of that shortcoming, the recommended bidder should have been disqualified as it was not administratively compliant, yet, this bidder had been allowed to participate in the negotiated procedure and, subsequently, its offer was recommended for award.

Dr Patrick Valentino, legal advisor of Heritage Malta, stated that it was correct for one to state that the appellant company had not submitted the original bid bond in the open tender procedure so much so that the company was disqualified from that tendering process. He added that, for all that matters, the tenderers who participated in the open tender procedure had been disqualified for one reason or other, except for one, but, then again, the offer of this compliant tenderer was too much on the high side and, as a result, it had to be refused for being well above the budget of Heritage Malta.

Ms Joanne Mallia, chairperson of the evaluation board, confirmed that:-

i. the open tender procedure had been cancelled because all offers received were found to be administratively or technically non-compliant except for one which, then again, was well beyond the budget and had likewise to be discarded;

ii. it was then recommended to the Contracts Department to go for the negotiated procedure whereby all the bidders who participated in the open tender procedure were invited to take part and, in fact, they all did except for the compliant tenderer whose offer was too expensive;

and

iii. although the appellant company's bid in the open tender procedure was non-compliant, yet in the negotiated procedure it submitted the information which was missing in its original submission and that opportunity was available to all the other bidders participating in the negotiated procedure.

Mr Jonathan Barbara, representing the Contracts Department, under oath, confirmed that the bid bond submitted by Malta Restoration JV in connection with the open tender procedure was a copy and not the original and that was the reason, or one of the reasons, for its disqualification from the open tender procedure.

The Chairman Public Contracts Review Board observed that there must have been something wrong with the department's estimate which was put at €1,230,000, excluding VAT, whereas the only compliant bid amounted to €3,499,811.63 and the recommended bid amounted to €2,239,435, after evidently reviewing the scope of works.

B) **The Recommended Bidder did not Participate in the Original Open Tender**.

Dr Muscat Azzopardi stated that:-

i. the recommended bidder, namely Malta Restoration JV, did not appear on the Schedule of Tenders Received of the open tender procedure and the appellant company client had drawn the attention of the contracting authority that one of the tenderers who was participating in the negotiated procedure had not participated in the original open tender procedure and, as a consequence, it should not have been invited to take part in the negotiated procedure;

ii. although this communication was acknowledged to have been received by Heritage Malta and that it had been forwarded to the Contracts Departments, still, it remained unanswered;

and

iii. at one stage the contracting authority released information that the Contracts Department, by mistake, had listed on the Schedule of Tenders Received the name of the lead partner instead of the joint venture and, in the circumstances, it had requested confirmation from the Contracts Department as to whether by error it had put down the name of the lead partner instead of that of the joint venture itself.

Dr Ruth Baldacchino, also representing the contracting authority, explained that the Contracts Department officer who filled in the Schedule of Tenders Received, which was eventually displayed on the Contracts Department's notice board, in the case of Malta Restoration JV, erroneously, quoted the name of the lead partner instead of the name of the joint venture.

Ms Joanne Mallia, chairperson of the evaluation board, confirmed that since the evaluation board could not communicate with the bidders, it had informed the Contracts Department that the name of one of the bidders, namely Malta Restoration JV, had been erroneously quoted in the Schedule of Tenders Received.

Dr Muscat Azzopardi argued that had his client been informed of the correct state of affairs it would have raised other queries in its letter of objection such as the fact that the lead partner had to undertake 50% of the works when, according to its website, the lead partner of the recommended bidder only employed five to six persons. He added that it was at this hearing that the appellant company has learned that the name of the lead partner had been mistakenly listed instead of that of the recommended tenderer, Malta Restoration JV.

Mr Barbara, under oath, confirmed that when drawing up the Schedule of Tenders Received, the department, by mistake, displayed the name of the lead partner instead of that of the joint venture.

Dr Massimo Vella, legal representative of the recommended tenderer, submitted that:-

i. the only requirement for a bidder to participate in the negotiated procedure was that the bidder had participated in the open tendering procedure and that requirement had been satisfied by the recommended tenderer, especially once it had been made clear once that a mistake had been committed when the contracting authority drew up the Schedule of Tenders Received;

ii. the recommended tendering joint venture had been disqualified due to technical shortcomings and not because it had submitted a copy instead of the original bid bond;

and

iii. none of the tenderers who had participated in the open tendering procedure had challenged within the prescribed time the cancellation of that procedure or had objected as to why a bidder had qualified administratively when it should not have qualified and therefore the open tender procedure should be considered a closed chapter.

Dr Muscat Azzopardi insisted that the recommended bidder should not have been allowed to participate in the negotiated procedure because clause 20.1 stated, among other things, that 'the guarantee ..... must be an original ..' and that "Offers that are not accompanied with the mandatory Tender Guarantee by the closing date and time of the tender will be automatically disqualified."

Mr Barbara stated that once the open tender procedure was cancelled then that was considered a closed case and that the negotiated procedure was a new process altogether except that the participants had to be the same bidders who participated in the open tender procedure. He added that the evaluation board of Heritage Malta had recommended that it proceeds with the negotiated procedure which recommendation was accepted by the General Contracts Committee.

Mr Martin Pillow, also representing Pillow Space Frame Ltd, remarked that:-

a. at the meeting held on site only three out of the six bidders participating in the negotiated procedure were present;

b. albeit the contracting authority had hinted that its budget for these works was limited, yet it refrained from, officially, divulging the estimated value of works

c. if one were to take the bid bond as a yardstick, then the estimated value was of about €1.2 million;

d. the appellant company had quoted the price of almost €3.5 million and it was considered to be rather on the conservative side given the complexity of the works involved and, as a result, the appellant company opined that both the department's estimate of €1.2 million and the recommended price of €2.588 million were unrealistic;

and

e. one feared that the recommended joint venture would not be able to execute this contract as per published specifications given that the lead partner employed only 5 to 6 persons and had to undertake 50% of the works.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 1st March 2013 and also through its representatives verbal submissions presented during the hearing held on the 15th May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 22nd February 2013 the Contracts Department informed the appellant company that its offer had been ranked second and that the award of the tender was recommended in favour of Malta Restoration JV, (b) the appellant company was objecting for two main reasons, *(1)* the recommended bidder had not submitted the original bid bond in the open tender procedure which rendered its bid to be administrative non-compliant and, as a result, should not have been allowed to participate in the negotiated procedure and *(2)* the recommended bidder in the negotiated procedure had not participated in the original open tender, (c) in the 'Schedule of Tenders Received' pertaining to the original open tender procedure there was a note against the name of the recommended bidder, namely Malta Restoration JV, in the sense that it had not submitted an original bid bond, (d) whilst, in the light of that shortcoming, the recommended bidder should have been disqualified as it was not administratively compliant, yet, this bidder had been allowed to participate in the negotiated procedure and, subsequently, its offer was recommended for award, (e) the recommended bidder, namely Malta Restoration JV, did not appear on the Schedule of Tenders Received of the open tender procedure and the appellant company client had drawn the attention of the contracting authority that one of the tenderers who was participating in the negotiated procedure had not participated in the original open tender procedure and, as a consequence, it should not have been invited to take part in the negotiated procedure, (f) although this communication was acknowledged to have been received by Heritage Malta and that it had been forwarded to the Contracts Departments, still, it remained unanswered, (g) at one stage the contracting authority released information that the Contracts Department, by mistake, had listed on the Schedule of Tenders Received the name of the lead partner instead of the joint venture and, in the

circumstances, it had requested confirmation from the Contracts Department as to whether by error it had put down the name of the lead partner instead of that of the joint venture itself, (h) had it been informed of the correct state of affairs it would have raised other queries in its letter of objection such as the fact that *(1)* the lead partner had to undertake 50% of the works when, according to its website, the lead partner of the recommended bidder only employed five to six persons and *(2)* it was at this hearing that the appellant company has learned that the name of the lead partner had been mistakenly listed instead of that of the recommended tenderer, Malta Restoration JV, (i) the recommended bidder should not have been allowed to participate in the negotiated procedure because clause 20.1 stated, among other things, that 'the guarantee ..... must be an original .." and that "Offers that are not accompanied with the mandatory Tender Guarantee by the closing date and time of the tender will be automatically disqualified", (i) at the meeting held on site only three out of the six bidders participating in the negotiated procedure were present, (j) albeit the contracting authority had hinted that its budget for these works was limited, yet it refrained from, officially, divulging the estimated value of works, (k) if one were to take the bid bond as a yardstick, then the estimated value was of about €1.2 million, (l) the appellant company had quoted the price of almost €3.5 million and it was considered to be rather on the conservative side given the complexity of the works involved and, as a result, the appellant company opined that both the department's estimate of €1.2 million and the recommended price of €2.588 million were unrealistic and (m) one feared that the recommended joint venture would not be able to execute this contract as per published specifications given that the lead partner employed only 5 to 6 persons and had to undertake 50% of the works;

- having considered the contracting authority's representative's reference to the fact that (a) it was correct for one to state that *(1)* the appellant company had not submitted the original bid bond in the open tender procedure so much so that the company was disqualified from that tendering process and *(2)* for all that matters, the tenderers who participated in the open tender procedure had been disqualified for one reason or other, except for one, but, then again, the offer of this compliant tenderer was too much on the high side and, as a result, it had to be refused for being well above the budget of Heritage Malta, (b) the open tender procedure had been cancelled because all offers received were found to be administratively or technically non-compliant except for one which, then again, was well beyond the budget and had likewise to be discarded, (c) it was then recommended to the Contracts Department to go for the negotiated procedure whereby all the bidders who participated in the open tender procedure were invited to take part and, in fact, they all did except for the compliant tenderer whose offer was too expensive, (d) although the appellant company's bid in the open tender procedure was non-compliant, yet in the negotiated procedure it submitted the information which was missing in its original submission and that opportunity was available to all the other bidders participating in the negotiated procedure, (e) the Contracts Department officer who filled in the Schedule of Tenders Received, which was eventually displayed on the Contracts Department's notice board, in the case of Malta Restoration JV, erroneously, quoted the name of the lead partner instead of the name of the joint venture and (f) since the evaluation board could not communicate with the bidders, it had informed the Contracts Department that the name of one of the bidders, namely Malta Restoration JV, had been erroneously quoted in the Schedule of Tenders Received;

- having also considered the department of contract's representative's testimony, particularly the references made to the fact that (a) the bid bond submitted by Malta Restoration JV in connection with the open tender procedure was a copy and not the original and that was the reason, or one of the reasons, for its disqualification from the open tender procedure, (b) when drawing up the Schedule of Tenders Received, the department, by mistake, displayed the name of the lead partner instead of that of the joint venture and (c) once the open tender procedure was cancelled then that was considered a closed case and that *(1)* the negotiated procedure was a new process altogether except that the participants had to be the same bidders who participated in the open tender procedure and *(2)* the evaluation board of Heritage Malta had recommended that it proceeds with the negotiated procedure which recommendation was accepted by the General Contracts Committee;

- having also considered the recommended tenderer's representative's reference to the fact that (a) the only requirement for a bidder to participate in the negotiated procedure was that the bidder had participated in the open tendering procedure and that requirement had been satisfied by the recommended tenderer, especially once it had been made clear that a mistake had been committed when the contracting authority drew up the Schedule of Tenders Received, (b) the recommended tendering joint venture had been disqualified due to technical shortcomings and not because it had submitted a copy instead of the original bid bond and (c) none of the tenderers who had participated in the open tendering procedure had challenged within the prescribed time the cancellation of that procedure or had objected as to why a bidder had qualified administratively when it should not have qualified and therefore the open tender procedure should be considered a closed chapter

reached the following conclusions, namely:

6. The Public Contracts Review Board observes that there must have been something wrong with the department's estimate which was put at €1,230,000, excluding VAT, whereas the only compliant bid amounted to €3,499,811.63 and the recommended bid amounted to €2,239,435, after, evidently, reviewing the scope of works.

7. The Public Contracts Review Board concurs with the procedure adopted by the contracting authority wherein, as a result of the fact that tenderers who had participated in the open tender procedure - except for one whose offer, albeit compliant, was too much on the high side - and who, for one reason or other, had been disqualified , the contracting authority decided to recommend to the Contracts Department to go for the negotiated procedure whereby all the said bidders were invited to take part and, in fact, they all did (except for the compliant tenderer whose offer was too expensive).

8. The Public Contracts Review Board opines that, despite the fact that, in the same way that the appellant company's bid in the open tender procedure was considered to be non-compliant, yet, since in the negotiated procedure it submitted the information which was missing in its original submission, then it was right for the contracting authority to allow it to participate but, at the same time, ensure that this opportunity – negotiated procedure - be equally made available to all the other bidders who had participated in the open tender procedure as, after all, all such bidders were considered as non compliant in the first instance.

9. The Public Contracts Review Board opines that the explanation given under oath by the Contracts Department officer regarding the fact that the 'Schedule of Tenders Received', which was eventually displayed on the Contracts Department's notice board, in the case of Malta Restoration JV, had erroneously quoted the name of the lead partner instead of the name of the joint venture, was credible enough.

In view of the above this Board finds against the appellant company. Furthermore, this Board recommends that the appellant company shall forfeit the deposit paid to lodge the appeal.

Alfred R Triganza	Joseph Croker	Carmelo Esposito
Chairman	Member	Member

22 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 551

CT/3004/2012
Negotiated Procedure: Tender for the Design, Fabrication, Construction and Erection of a Protective Shelter over the Tarxien Megalithic Temples

The call for tender, with an estimated value of €1,230,000 (excl. VAT), was published in the Government Gazette of the 10th April 2012 with a closing date of the 17th May 2012. Four (4) tenderers submitted their offers.

Steel Shape Ltd filed an objection on the 4th March 2013 against the decision of the Contracts Department, to recommend the award of tender to Malta Restoration JV.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Joseph Croker and Mr Carmelo Esposito as members convened a meeting on Wednesday 15th May 2013 to discuss the appeal in the presence of:

Steel Shape Ltd

Dr John Gauci	Legal Representative
Mr Ivan Coleiro	Representative
Mr Iomar Vella	Representative
Mr Joseph Vella	Representative

Pillow Space Frame Ltd– interested party

Dr Godwin Muscat Azzopardi	Legal Representative
Mr Martin Pillow	Managing Director
Mr Pierre Abela	Representative

Malta Restoration JV – recommended tenderer

Dr Massimo Vella	Legal Representative
Dr David Vella	Legal Representative
Ing. Johann Bondin	Representative
Architect Mark Camilleri	Representative
Mr Francis Vella	Representative

Contracts Department

Mr Jonathan Barbara	Procurement Manager

Planning and Priorities Coordination Department – Office of the Prime Minister and Heritage Malta

Dr Ruth Baldacchino	Legal Representative
Dr Patrick Valentino	Legal Representative

Evaluation Board

Ms Joanne Mallia	Chairperson
Architect Ruben Abela	Member
Mr Reuben Grima	Member

Ms Katya Stroud	Member
Mr Kevin Abela	Secretary

After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Dr John Gauci, legal representative of Steel Shape Ltd, the appellant company, made the following submissions:-

i. by letter dated 22nd February 2013 the Contracts Department informed the appellant company that its offer had been adjudicated to be technically non-compliant;

ii. in the same letter of disqualification it was stated that the tender was recommended for award to Malta Restoration JV for the price of €2,239,435, including VAT, which happened to be the same price quoted by the appellant company;

iii. on seeking a clarification, the Department of Contracts, by email dated 27th February 2013, confirmed that the tender was being awarded at the price of €2,239,435 but to Malta Restoration JV and the appellant company was therefore requesting the contracting authority to state how did the recommended tenderer scale down its quoted price of €2,587,978 to the awarded price of €2,239,435, which was quite substantial and it, therefore, followed that there must have been some kind of negotiation entailing a reduction in the works/specifications originally requested;

iv. the three shortcomings listed in the letter of disqualification could have easily been settled through a clarification all the more when the contracting authority had already sought clarifications from the appellant company on similar issues. In fact, on the 11th July 2012 the appellant company had received a request for more information on 9 points which it had complied with on the 17th July 2012;

v. in the same clarification letter dated 11th July 2012, the contracting authority referred to 6 other issues, which included issues cited for disqualification, in respect of which the appellant company was simply asked to 'indicate' where the contracting authority could find the relevant information and the appellant company complied without, however, submitting any additional information since none was requested;

and

vi. consequently, it was considered not fair to exclude the appellant company due to alleged lack of information on issues in respect of which the contracting authority did not ask it for any additional information but was simply asked to indicate where one could trace the information in its tender submission.

Ms Joanne Mallia, chairperson of the evaluation board, explained that:-

a. after examining the bids received through the negotiated procedure it resulted that, whilst the recommended bid was administratively and technically compliant, yet the price of €2,587,978 was too high compared to the funds available;

b. in an effort to scale down the price of the cheapest compliant tender, namely that of Malta Restoration Malta JV, Heritage Malta decided to reduce certain items in the scope of works

which were not considered crucial to the project overall and that was how the offer of Malta Restoration JV was reduced from €2,587,978 to €2,239,435;

c. with regard to mandatory requirements, the evaluation board was entitled to ask only for clarifications on information already submitted by the bidder;

d. prior to resorting to exclusion, the contracting authority gave all bidders the opportunity to indicate where it could find the information in case the evaluation board might have missed it;

e. it was correct for one to state that in its letter dated 11th July 2012, Heritage Malta had asked for more information with regard to 9 issues whereas with regard to 6 other issues it only requested directions as to where it could trace the information in the bidder's tender submission, which latter mandatory information should have already been submitted;

f. the appellant company's response dated 17th July 2012 included certain additional information as requested but it failed to lead the evaluation board to finding all the mandatory information indicated in the second part of the letter at points 1 to 6;

g. the clarification letter dated 17 July 2012, among the questions and answers one found the following:

> *Question 8: Item 3.2 - Can you clarify whether the scaffolding listed in the Method Statement is to be used as the protective working platform over the whole site required by the MEPA permit and Volume 3: Technical specifications; Constraints clause 32?*
>
> *Reply: We confirm that a protective working platform will be installed over the whole site required by the MEPA permit and Volume 3: Technical specifications; Constraints clause 3.2.*

h. the letter of rejection dated 22nd February 2013 conveyed the same reasons laid down in the evaluation report and one of them, namely para. 2 of bullet 2 read as follows:-

> *The information contained in Bid 1 (*Steel Shape Ltd*) on the installation of a protective platform are a sparse reference to the use of scaffolding in "Section 6.3 Appendix A "Method Statement" of "Quality Assurance Plan - Steel Erection and Finishing Trades", which was confirmed to be part of the protective platform in reply to clarification number 8 sent on the 20th July. The clarification also states that it will be erected manually in two phases. These references provide no specifications on the scaffolding to be used as a working platform, nor any information on how this will be erected and dismantled and/or what precautions will be taken during the process to avoid damage to the prehistoric remains as requested in Item 3.2. As such, the submission is considered non-compliant.*

i. the information provided by the appellant company in its tender submission was not sufficient and if it were to provide it at adjudication stage it would have amounted to a rectification.

Dr Gauci stated that the MEPA permit was so detailed that it was not necessary to reproduce all those details all over again but the appellant company's reference that the platform would be installed as per MEPA permit was enough.

The Chairman Public Contracts Review Board asked the appellant company to trace the relative 'Method Statement' in its tender submission but the appellant company's representatives' efforts proved fruitless.

Ms Mallia continued that there were other deficiencies in the appellant company's tender submission and one of them was highlighted in the third bullet of the reasons for rejection which read as follows:

> *In Section 5 of the Design Proposal (Form 7) the tender document requires 5.1 the submission of a detailed maintenance programme for the first 10 years indicating means of access, protection of temple, etc.; and 5.2 a proposal for the following 15 years of the warranty period (including costs).*
>
> *Bid 1 (*the appellant*) contains no information on the maintenance programme for the first 10 years nor a proposal for the following 15 years. In the reply to clarifications sent on the 20th July (Section 2, No. 4) the Bidder indicates that a working platform will be erected "should the need for maintenance works to be carried out" as well as his willingness to comply with any relevant conditions in the tender document, particularly Article 58, Article 71 and Article 72, "and therefore the maintenance programme and the general extended warranty are as stipulated in the tender document itself." However, the tender document stipulates only the duration of the maintenance agreement and does not specify qualitatively the type, frequency or method of works necessary to maintain the shelter structure over the stipulated period. As such, the submission is considered incomplete and therefore non-compliant.*

Dr Gauci retorted that:-

i. once the bidder submitted its tender it meant that it was going to abide by its conditions and specifications;

ii. with regard to maintenance, reference was made to Doc. D, attached to the appellant company's letter of objection, para. 4 'Rules for maintenance and repair' where it was stated that the frequency of maintenance for external elements was twice a year while for interior elements it was, approximately, every ten years;

and

iii. therefore it resulted that certain details were, in fact, given and if more information was required then the contracting authority could have asked for it.

Ms Mallia reiterated that the information given by the appellant company was insufficient.

The Chairman Public Contracts Review Board remarked that besides the bidder's undertaking to abide by tender conditions and specifications, one had also to submit all the information requested so as to demonstrate to the contracting authority that one had the capacity and the know-how to execute the works otherwise what would be the purpose of submitting a tender.

Ms Mallia referred to first bullet of the reasons for rejection which read as follows:-

a. In Section 1 of the Design Proposal (Form 7), the tender document requires the submission of detail design, drawings, methodologies and material specifications for:

Rock anchoring and foundation works to be carried out.

*The (*appellant's*) bid provides drawings (under section "Images Design and Calculation" of the bid) of the shelter supported by single pillars with no evident supporting base as well as the*

detailed method statement for micropiling. In fact, at the point of contact with the ground the pillar is partly covered by a plant-like representation and there are no detail designs of the interface between the micropiles and the pillar. When asked to clarify, the same drawings were re-submitted in the reply to the clarification received on the 20/07/2012. As the bid does not provide any detail design, drawings or methodologies for the interface between the pillar and the micropiles, and with no indication of size, shape or impact on the archaeologically sensitive ground, the submission was considered non-compliant;

b. this was an essential requirement considering that one was dealing with a highly sensitive archaeological site and the appellant company failed to provide what was requested of the bidder since it provided details of the micropile by itself but not of the interface between the pillar and the micropile;

and

c. Volume 1 Section 7 listed the forms to be submitted by the tenderer and Form 7 referred to 'Design Proposal' which at page 41 of the tender document stated that 'The submission is to include the following sections' among them, 1.1.1, 1.3.3, 3.2.1, 3.2.2.1., 5.1 and 5.2 all of which were indicated in the reasons for disqualification – in respect of Volume 1 Section 7 Form 7 applied Note 3 as per Tender Form, which provided for clarification but no rectification.

The Chairman Public Contracts Review Board requested the appellant company to go through its tender submission and identify the information which Ms Mallia had alleged to be missing. He added that when dealing with highly sensitive archaeological sites as the one in question one would expect a certain amount of detail in the tender submission because the contracting authority had to take all the foreseeable precautions to protect the site.

Mr Jonathan Barbara, procurement manager and representing the Contracts Department, under oath, stated that Heritage Malta had requested permission from the General Contracts Committee with a view to entering into negotiations with the cheapest compliant bidder and that request was acceded to provided that the tender specifications would not be fundamentally altered.

Ms Mallia remarked that whilst, in the open tender procedure, all bids were found to be non-compliant, yet, in the negotiated procedure, all bidders had the same opportunity to submit the information which was missing in their open tender submission.

Mr Martin Pillow, also representing Pillow Space Frame Ltd, remarked that:-

a. at the meeting held on site only three out of the six bidders participating in the negotiated procedure were present;

b. albeit the contracting authority had hinted that its budget for these works was limited, yet it refrained from, officially, divulging the estimated value of works

c. if one were to take the bid bond as a yardstick, then the estimated value was of about €1.2 million;

d. the appellant company had quoted the price of almost €3.5 million and it was considered to be rather on the conservative side given the complexity of the works involved and, as a result,

the appellant company opined that both the department's estimate of €1.2 million and the recommended price of €2.588 million were unrealistic;

and

e. one feared that the recommended joint venture would not be able to execute this contract as per published specifications given that the lead partner employed only 5 to 6 persons and had to undertake 50% of the works.

Dr Gauci complained that this process represented a negotiated procedure within a negotiated procedure. He went on to question the fact that the contracting authority negotiated the price with the recommended tenderer with the consequent reduction in the scope of works but, on the other hand, the contracting authority failed to seek clarifications from the appellant company who, in the first instance, offered the same price for all the works included in the tender.

Ms Mallia explained that since this was the second attempt to award a tender to carry out this project which was crucial for the protection of this site, a request was made and accepted so that the budget of €1.2m be increased up to the value of the cheapest offer received, namely €2,239,495 which was tendered by Steel Shape Ltd, whose bid, however, was not technically compliant and so the contracting authority turned to the next cheapest tenderer, Malta Restoration JV, and negotiated the reduction of its price from €2,587,978 to €2,239,495 by effecting a reduction in the scope of works by removing those items, such as lighting, which, though desirable, were not crucial to the main purpose which was the protection of this unique site.

Dr Patrick Valentino, legal representative of the contracting authority, concluded that it emerged clear that the appellant company's tender submission was technically non-compliant, especially with regard to the rock anchoring and foundation works, the detailed maintenance programme and the proposed installation method.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 4th March 2013 and also through its representatives verbal submissions presented during the hearing held on the 15th May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 22nd February 2013 the Contracts Department informed the appellant company that its offer had been adjudicated to be technically non-compliant, (b) in the same letter of disqualification it was stated that the tender was recommended for award to Malta Restoration JV for the price of €2,239,435, including VAT, which happened to be the same price quoted by the appellant company, (c) on seeking a clarification, the Department of Contracts, by email dated 27th February 2013, confirmed that the tender was being awarded at the price of €2,239,435 but to Malta Restoration JV and the appellant company was therefore requesting the contracting authority to state how did the recommended tenderer scale down its quoted price of €2,587,978 to the awarded price of €2,239,435, which was quite substantial and it, therefore, followed that there must have been some kind of negotiation entailing a reduction in the works/specifications originally requested, (d) the three shortcomings listed in the letter of disqualification could have easily been settled through a clarification all the more when the contracting authority had already sought clarifications from the appellant company

on similar issues. In fact, on the 11th July 2012 the appellant company had received a request for more information on 9 points which it had complied with on the 17th July 2012, (e) in the same clarification letter dated 11th July 2012, the contracting authority referred to 6 other issues, which included issues cited for disqualification, in respect of which the appellant company was simply asked to 'indicate' where the contracting authority could find the relevant information and the appellant company complied without, however, submitting any additional information since none was requested, (f) consequently, it was considered not fair to exclude the appellant company due to alleged lack of information on issues in respect of which the contracting authority did not ask it for any additional information but was simply asked to indicate where one could trace the information in its tender submission, (g) the MEPA permit was so detailed that it was not necessary to reproduce all those details all over again but the appellant company's reference that the platform would be installed as per MEPA permit was enough, (h) once the bidder submitted its tender it meant that it was going to abide by its conditions and specifications, (i) with regard to maintenance, reference was made to Doc. D, attached to the appellant company's letter of objection, para. 4 'Rules for maintenance and repair' where it was stated that the frequency of maintenance for external elements was twice a year while for interior elements it was, approximately, every ten years, (j) therefore it resulted that certain details were, in fact, given and if more information was required then the contracting authority could have asked for it, (k) complained that this process represented a negotiated procedure within a negotiated procedure and (l) one questioned the fact that the contracting authority negotiated the price with the recommended tenderer with the consequent reduction in the scope of works but, on the other hand, the contracting authority failed to seek clarifications from the appellant company who, in the first instance, offered the same price for all the works included in the tender;

- having considered the contracting authority's representative's reference to the fact that (a) after examining the bids received through the negotiated procedure it resulted that, whilst the recommended bid was administratively and technically compliant, yet the price of €2,587,978 was too high compared to the funds available, (b) in an effort to scale down the price of the cheapest compliant tender, namely that of Malta Restoration Malta JV, Heritage Malta decided to reduce certain items in the scope of works which were not considered crucial to the project overall and that was how the offer of Malta Restoration JV was reduced from €2,587,978 to €2,239,435, (c) with regard to mandatory requirements, the evaluation board was entitled to ask only for clarifications on information already submitted by the bidder, (d) prior to resorting to exclusion, the contracting authority gave all bidders the opportunity to indicate where it could find the information in case the evaluation board might have missed it, (e) it was correct for one to state that in its letter dated 11th July 2012, Heritage Malta had asked for more information with regard to 9 issues whereas with regard to 6 other issues it only requested directions as to where it could trace the information in the bidder's tender submission, which latter mandatory information should have already been submitted, (f) the appellant company's response dated 17th July 2012 included certain additional information as requested but it failed to lead the evaluation board to finding all the mandatory information indicated in the second part of the letter at points 1 to 6, (g) the clarification letter dated 17 July 2012 included the following reply, namely "*We confirm that a protective working platform will be installed over the whole site required by the MEPA permit and Volume 3: Technical specifications; Constraints clause 3.2"*, (h) the letter of rejection dated 22nd February 2013 conveyed the same reasons laid down in the evaluation report, (i) the information provided by the appellant company in its tender submission was not sufficient and if it were to provide it at adjudication stage it would have amounted to a rectification, (j) there were other deficiencies in the appellant company's tender submission such as those relating to the *Design Proposal (Form 7)* which information was an essential requirement considering that one was dealing with a highly sensitive archaeological site and the appellant company failed to provide what was requested of the bidder since it provided details of the micropile by itself but not of the interface between the pillar and the micropile, (k) whilst, in the open tender procedure, all bids were found to be non-compliant, yet, in the negotiated procedure, all bidders had the same opportunity to submit the information which was missing in their open tender submission, (l) since this was the second attempt to award a tender to carry out this project which was crucial for

the protection of this site, a request was made and accepted so that the budget of €1.2m be increased up to the value of the cheapest offer received, namely €2,239,495 which was tendered by Steel Shape Ltd, whose bid, however, was not technically compliant and so the contracting authority turned to the next cheapest tenderer, Malta Restoration JV, and negotiated the reduction of its price from €2,587,978 to €2,239,495 by effecting a reduction in the scope of works by removing those items, such as lighting, which, though desirable, were not crucial to the main purpose which was the protection of this unique site and (m) concluded that it emerged clear that the appellant company's tender submission was technically non-compliant, especially with regard to the rock anchoring and foundation works, the detailed maintenance programme and the proposed installation method;

- having also considered the department of contract's representative's testimony, particularly the references made to the fact that Heritage Malta had requested permission from the General Contracts Committee with a view to entering into negotiations with the cheapest compliant bidder and that request was acceded to provided that the tender specifications would not be fundamentally altered,

reached the following conclusions, namely:

1. The Public Contracts Review Board observes that there must have been something wrong with the department's estimate which was put at €1,230,000, excluding VAT, whereas the only compliant bid amounted to €3,499,811.63 and the recommended bid amounted to €2,239,435, after evidently reviewing the scope of works.

2. The Public Contracts Review Board takes full cognisance of the fact that, during the hearing it asked the appellant company to trace the relative 'Method Statement' in its tender submission but the appellant company's representatives' efforts proved fruitless.

3. This Board has also favourably acknowledged the point made by the contracting authority that after examining the bids received through the negotiated procedure it resulted that, whilst the recommended bid was administratively and technically compliant, yet the price of €2,587,978 was too high compared to the funds available.

4. The Public Contracts Review Board argues that, besides the bidder's undertaking to abide by tender conditions and specifications, one had also to submit all the information requested so as to demonstrate to the contracting authority that one had the capacity and the know-how to execute the works otherwise what would be the purpose of submitting a tender?

5. The Public Contracts Review Board opines that when dealing with highly sensitive archaeological sites as the one in question one would expect a certain amount of detail in the tender submission because the contracting authority had to take all the foreseeable precautions to protect the site.

6. This Board contends that <u>generic</u> submissions as those made by the appellant company in its bid should not be considered compliant - them being based solely on the premise that *(1)* once the bidder would have submitted its tender this would have automatically meant that it was going to abide by the terms, conditions and specifications and *(2)* with regard to 'maintenance', reference was uniquely made to Doc. D attached to the appellant company's letter of objection, para. 4 'Rules for maintenance and repair' where it was stated that the frequency of maintenance for external elements was twice a year while for interior elements it was, approximately, every ten years.

7. This Board also argues that <u>mandatory</u> requests listed in tender document should be submitted and not be considered as an arbitrary choice. As a consequence, it is unacceptable for the

appellant company to claim that the MEPA permit was so detailed that it was not necessary to reproduce all those details all over again and that its reference that the platform would be installed as per MEPA permit was enough.

8. The Public Contracts Review Board has favourably considered the fact that, during the hearing it was claimed that prior to resorting to exclusion the contracting authority gave all bidders the opportunity to indicate where it could find the information in case the evaluation board might have missed it.

9. This Board agrees with the contracting authority's viewpoint, namely that, in this particular instance, the information provided by the appellant company in its tender submission was not sufficient and if it were to provide it at adjudication stage it would have amounted to a rectification.

10. The Public Contracts Review Board concurs with the contracting authority's remarks in connection with the fact that whilst, in the open tender procedure, all bids were found to be non-compliant, yet, in the negotiated procedure, all bidders had the same opportunity to submit the information which was missing in their open tender submission.

11. This Board also acknowledges the fact that the contracting authority turned to the next cheapest tenderer, Malta Restoration JV, and negotiated the reduction of its price from €2,587,978 to €2,239,495 by effecting a reduction in the scope of works by removing those items, such as lighting, which, though desirable, were not crucial to the main purpose which was the protection of this unique site.

12. In conclusion, this Board reiterates the arguments raised during the hearing in relation to the fact that the appellant company's tender submission was technically non-compliant, especially with regard to the rock anchoring and foundation works, the detailed maintenance programme and the proposed installation method.

In view of the above this Board finds against the appellant company. Furthermore, this Board recommends that the appellant company shall forfeit the deposit paid to lodge the appeal.

Alfred R Triganza	Joseph Croker	Carmelo Esposito
Chairman	Member	Member

22 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 552

HM/22/02/2012
Service Tender for 3D Documentation of Fort St Angelo, Birgu

The call for tender with an estimated value of €120,000 (excl. VAT) was published in the Government Gazette of the 3rd April 2012 with a closing date of the 14th May 2012.

Four (4) tenderers submitted their offers.

St Angelo JV filed an objection on the 30th January 2013 against the decision of Heritage Malta to cancel the tender as per clause 33.3 (b) of the tender document since "the economic or technical parameters of the project have been fundamentally altered".

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Joseph Croker and Mr Carmelo Esposito as members convened a meeting on Wednesday 15th May 2013 to discuss the appeal.

Present:

Fort St Angelo

Dr Franco Galea	Legal Representative
Perit Mariello Spiteri	Representative
Perit Vanessa Pisani	Representative

Heritage Malta

Dr Ruth Baldacchino	Legal Representative
Mr Kenneth Gambin	Chied Executive Officer

Evaluation Board

Perit Ruben Abela	Chairman
Ms Joanne Mallia	Member

After the Chairman's brief introduction, the appellant joint venture's representative was invited to explain the motives of the said appellant's objection.

Dr Franco Galea, legal representative of St Angelo JV, the appellant, made the following submissions:-

i. by letter dated 24th January 2013 the contracting authority informed the appellant that this tender was being recommended for cancellation as per clause 33.3 (b) of the tender document since "the economic or technical parameters of the project have been fundamentally altered" and, furthermore, the specified original time-frames became impossible to be met and that funds were not currently available due to the imposition of budgetary restrictions;

ii. one could perhaps understand that position at the time when the budget had not been approved but now the budget was approved and, according to public announcements, works on the Fort St Angelo project were to be continued;

and

iii. therefore, the contracting authority was requested to explain the current state of affairs.

Architect Ruben Abela, chairman of the evaluation board, explained that:-

a. it was correct that works on Fort St Angelo were to continue and that there was a commitment to conclude certain works by 2015;

b. apart from works financed through EU funds, there were other urgent structural works which were taken in hand and financed by local funds and in 2010 the government had allocated €1.5m for this purpose;

c. whilst the works contemplated in the tender under reference were earmarked for financing out of ERDF funds and these 3D surveys were planned to be taken in hand prior to embarking on major structural works, yet the ERDF budget of €17m was curtailed to €13.4m and, as a consequence, certain works/services, which included the works in this tender, had to be excluded from foreign financing;

d. albeit at the time of issuing the tender, namely April 2012, local funds were available to carry out these 3D surveys, yet these works experienced delay at adjudication stage and because two appeals had been lodged before the Public Contracts Review Board which were decided on the 26th October 2012;

e. at one stage, during 2012, although government had decided to reduce the local funds available to Heritage Malta yet the *quantum* had not been communicated;

f. in the meantime contracts had been entered into for urgent structural works financed out of local funds;

g. given that the urgent structural works had been contracted and works were in hand – the 3D scanning had been intended to start prior to the commencement of major structural works – and the severe restrictions imposed of local funds, it was decided to do away with the 3D scanning and to cancel the tender under reference so that the limited funds available would be dedicated to the most urgent structural works already in hand;

and

h. no 3D scanning was going to be undertaken.

Mr Kenneth Gambin, CEO Heritage Malta, remarked that, at the time the 2013 budget was being drawn up, the Ministry of Finance had clearly indicated that there would be a reduction in the funds allocated to Heritage Malta and towards the end of 2012 that indication materialised.

Architect Mariello Spiteri, representing the appellant, asked how was Heritage Malta going to meet its obligations to record all the structural alterations which were being contemplated and which had to be approved by the Malta Environment and Planning Authority unless such 3D documentation/surveys were carried out.

Architect Abela explained that:-

i. whilst 3D documentation was only one of the methods as to how Heritage Malta could keep a record yet there were other tools available for the same purpose, such as, (a) photographic surveys, which were carried out prior to the issue of this tender and (b) the traditional land surveys, which were already available as part of the documentation required to apply for EU funds;

ii. the ERDF financed tenders which were being issued for structural works and these were obliging contractors to furnish Heritage Malta with all documentation/surveys relative to the works carried out, however, this did not refer to laser scanning which was the subject of the tender under review;

and

iii. this service, although desirable, was no longer considered necessary given the financial situation and the priorities of Heritage Malta.

Dr Galea referred to clause 33.3 (b) of the tender document which stated that cancellation may occur where "*the economic or technical parameters of the project have been fundamentally altered*" and argued that this provision did not cover the situation pictured by the contracting authority because, during adjudication, the works were not increased by such a measure as to render it uneconomical to carry out.

The Chairman Public Contracts Review Board remarked that tenders were issued provided that funds for the purpose were available and, in this case, the appellant's offer, apparently, turned out to be below the estimated value of the tender.

Mr Gambin gave the following timeline:-

i. in March 2012 funds were available for this project;

ii. during the year, the local funds originally allocated to Heritage Malta were reduced by the Ministry of Finance and, in order to abide by Finance directives, no new works/services were to be undertaken;

and

iii. for financial year 2013 funds from local sources were provided only for contracts already awarded and in execution stage but no allocation was provided for new works.

Dr Galea alleged that it was not a question that this project was not required but, apparently, the intention was not to award this contract to the appellant.

The Chairman Public Contracts Review Board referred to the email Mr David Zahra sent to Mr Joseph Scerri (CEO), both employed at Heritage Malta, on 11th January 2013 where he outlined the reasons why this tender should be cancelled, namely:

a. this service was meant for execution prior to the start on major structural works, which works had, however, already been taken in hand due to the length of time taken to adjudicate the tender and to the conclusion of the two appeals lodged by bidders, and, as a consequence, the purpose of this survey was defeated

   and

b. the review downwards of Heritage Malta's allocation of local funds towards the end of 2012 and the proposed 2013 budget only provided funds to manage the high priority works/commitments in hand but did not provide for such a commitment.

Dr Ruth Baldacchino, on behalf of the contracting authority, remarked that, at one stage, funds were not even available to meet the wage bill or to attend conferences abroad. She added that it was not correct to allege that these works were being carried out by other contractors.

The Chairman Public Contracts Review Board pointed out that:-

a. it was not fair on the Public Contracts Review Board to employ time and energy to hear and decide on two separate appeals and then discover that the tender ended up cancelled because it was no longer considered 'a priority';

b. in another case involving the protection of Tarxien Temples (CT/3004/2012), the estimated budget was increased from €1.2m to €2.24m but, apparently, no funds could be found for a project costing in the region of €73,000, which, then again, was below the entity's estimate;

c. the decision of the Public Contracts Review Board in the previous appeal had been quite clear, namely that St Angelo JV had to be reintegrated in the tendering process, which decision had to be carried out and if one disagreed with that decision then one could only challenge it before the Law Courts but, definitely, not decide, arbitrarily, to renege from carrying it through;

d. it appeared that Heritage Malta had a very ambitious programme of works but lacked the necessary funds to carry it out;

e. even for the sake of transparency, it should not be the case that a bidder who, successfully, appealed against exclusion from a tendering procedure would then be faced with the cancellation of the tender;

   and

f. no ulterior motives were being attributed as to the way this case has developed but the fact remained that the outcome was not acceptable.

Mr Gambin remarked that it would have been desirable had Heritage Malta embarked on this and other new projects but it simply could not due to budgetary constraints and it was not a question of which new project Heritage Malta had to shelf but it had to shelf them all and carry on with the works already in hand or which were financed out of the ERDF.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 26th January 2013 and also through its representatives verbal submissions presented during the hearing held on the 15th May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 24th January 2013 the contracting authority informed the appellant that this tender was being recommended for cancellation as per clause *33.3 (b)* of the tender document since "the economic or technical parameters of the project have been fundamentally altered" and, furthermore, the specified original time-frames became impossible to be met and that funds were not currently available due to the imposition of budgetary restrictions, (b) one could perhaps understand that position at the time when the budget had not been approved but now the budget was approved and, according to public announcements, works on the Fort St Angelo project were to be continued, (c) therefore, the contracting authority was requested to explain the current state of affairs, (d) at the time the 2013 budget was being drawn up, the Ministry of Finance had clearly indicated that there would be a reduction in the funds allocated to Heritage Malta and towards the end of 2012 that indication materialised, (e) asked how was Heritage Malta going to meet its obligations to record all the structural alterations which were being contemplated and which had to be approved by the Malta Environment and Planning Authority unless such 3D documentation/surveys were carried out, (f) referred to clause *33.3 (b)* of the tender document which stated that cancellation may occur where "*the economic or technical parameters of the project have been fundamentally altered*" and argued that this provision did not cover the situation pictured by the contracting authority because, during adjudication, the works were not increased by such a measure as to render it uneconomical to carry out and (g) alleged that it was not a question that this project was not required but, apparently, the intention was not to award this contract to the appellant;

- having considered the contracting authority's representative's reference to the fact that (a) it was correct that works on Fort St Angelo were to continue and that there was a commitment to conclude certain works by 2015, (b) apart from works financed through EU funds, there were other urgent structural works which were taken in hand and financed by local funds and in 2010 the government had allocated €1.5m for this purpose, (c) whilst the works contemplated in the tender under reference were earmarked for financing out of ERDF funds and these 3D surveys were planned to be taken in hand prior to embarking on major structural works, yet the ERDF budget of €17m was curtailed to €13.4m and, as a consequence, certain works/services, which included the works in this tender, had to be excluded from foreign financing, (d) albeit at the time of issuing the tender, namely April 2012, local funds were available to carry out these 3D surveys, yet these works experienced delay at adjudication stage and because two appeals had been lodged before the Public Contracts Review Board which were decided on the 26th October 2012, (e) at one stage, during 2012, although government had decided to reduce the local funds available to Heritage Malta yet the *quantum* had not been communicated, (f) in the meantime contracts had been entered into for urgent structural works financed out of local funds, (g) given that the urgent structural works had been contracted and works were in hand – the 3D scanning had been

intended to start prior to the commencement of major structural works – and the severe restrictions imposed of local funds, it was decided to do away with the 3D scanning and to cancel the tender under reference so that the limited funds available would be dedicated to the most urgent structural works already in hand, (h) no 3D scanning was going to be undertaken, (i) whilst 3D documentation was only one of the methods as to how Heritage Malta could keep a record yet there were other tools available for the same purpose, such as, *(1)* photographic surveys, which were carried out prior to the issue of this tender and *(2)* the traditional land surveys, which were already available as part of the documentation required to apply for EU funds, (j) the ERDF financed tenders which were being issued for structural works and these were obliging contractors to furnish Heritage Malta with all documentation/surveys relative to the works carried out, however, this did not refer to laser scanning which was the subject of the tender under review, (k) this service, although desirable, was no longer considered necessary given the financial situation and the priorities of Heritage Malta, (l) in March 2012 funds were available for this project, (m) during the year, the local funds originally allocated to Heritage Malta were reduced by the Ministry of Finance and, in order to abide by Finance directives, no new works/services were to be undertaken, (n) for financial year 2013 funds from local sources were provided only for contracts already awarded and in execution stage but no allocation was provided for new works, (o) this service was meant for execution prior to the start on major structural works, which works had, however, already been taken in hand due to the length of time taken to adjudicate the tender and to the conclusion of the two appeals lodged by bidders, and, as a consequence, the purpose of this survey was defeated, (p) the review downwards of Heritage Malta's allocation of local funds towards the end of 2012 and the proposed 2013 budget only provided funds to manage the high priority works/commitments in hand but did not provide for such a commitment and (q) at one stage, funds were not even available to meet the wage bill or to attend conferences abroad and that it was not correct for one to allege that these works were being carried out by other contractors,

reached the following conclusions, namely:

1. The Public Contracts Review Board acknowledges and bases its judgement on the premise that tenders are issued provided that funds for the purpose are available and, in this case, the appellant's offer, apparently, turned out to be below the estimated value of the tender.

2. The Public Contracts Review Board argues that it was not fair for it to employ time and energy to hear and decide on two separate appeals and then discover that the tender ended up being cancelled because it was no longer considered 'a priority'. This Board feels that the issue of a tender being a 'priority' or not should be decided upon prior to any stage as it is not sound management for any entity to completely disregard the amount of time and money invested by any tenderer deciding to participate in public calls.

3. The Public Contracts Review Board opines that considering that, in another case involving the protection of Tarxien Temples (CT/3004/2012), the estimated budget was increased from €1.2m to €2.24m, in this instance funds could have been found for a project costing in the region of €73,000, which, then again, was below the entity's original estimate.

4. This Board contends that the decision of the Public Contracts Review Board in the previous appeal had been quite clear, namely that St Angelo JV had to be reintegrated in the tendering process, which decision had to be carried out and if one disagreed with that decision then one could only challenge it before the Law Courts but, definitely, not decide, arbitrarily, to renege from carrying it through.

In view of the above this Board finds in favour of the appellant. Apart from recommending that the appellant's bid be reintegrated in the evaluation process which has to proceed and finalised, this Board also recommends that the appellant be reimbursed with the deposit paid to lodge the appeal.

The Public Contracts Review Board is adamant that this time its decision shall not be ignored once again by the contracting authority.

Alfred R Triganza	Joseph Croker	Carmelo Esposito
Chairman	Member	Member

22 May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 553

MTA/828/2012
Service Tender for the Provision of Mathematical Modelling for a Beach Replenishment Project (II)

This call for tenders was published in the Government Gazette on the 13th July 2012. The closing date for this call with an estimated budget of €45,000 (excl. VAT) was the 7th August 2012.

Two (2) tenderers submitted their offers.

Tektraco Ltd filed an objection on the 4th February 2013 against the decision of the Malta Tourism Authority to disqualify its offer as technically non-compliant and to award the tender to Artelia Group.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 22nd May 2013 to discuss this objection.

Present for the hearing were:

Tektraco Ltd

Dr Jean Farrugia	Legal representative
Dr Maria Micallef	Legal Representative
Mr Colbert Balzan	Representative
Mr Joe Camilleri	Representative

Artelia Group – notified that no one will be attending

Malta Tourism Authority

Dr Frank Testa	Legal Representative

Evaluation Board

Mr Francis Albani	Chairman
Mr Oliver Farrugia	Member
Ms Stephanie Attard	Member
Mr Patrick Attard	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the appellant company's objection.

Dr Jean Farrugia, legal representative of Tektraco Ltd, the appellant company, made the following submissions:-

i. by letter dated 28th January 2013 the contracting authority informed the appellant company that its tender was being disqualified as it was considered to be technically non-compliant because "*when evaluating clause 30.3 (ii) (evidence of technical capacity sub-clause 6.1.2) the evaluation committee noted that the bidder (Tektraco) failed to supply any evidence as requested and instead submitted details of a company named Nautilus Ing. Maritima S.L. which relationship between the companies could not be established";*

ii. with its tender submission, the appellant company had presented a commitment letter dated 1st March 2012 from Nautilus Ingenieria Maritima S.L. (Nautilus) which stated that Nautilus was ready to collaborate with Tektraco Ltd for the services requested in this tender using all the resources necessary for the execution of the contract in accordance with the terms of reference for the 'Mathematical Modelling';

iii. as a consequence it was made clear from the outset that the appellant company was going to rely on the experience and expertise of Nautilus;

iv. unlike what the contracting authority was contending, the appellant company did spell out the relationship it had with Nautilus and, having also submitted the cheapest bid, the appellant company should have been awarded this contract;

and

v. in the light of the above, the contracting authority was being requested to confirm whether the only reason for exclusion was that it could not establish the relationship between Tektrako Ltd and Nautilus.

Dr Frank Testa, legal representative of the contracting authority, submitted that:-

- the reason for exclusion was the appellant company's complete reliance on Nautilus;

- in its letter of objection the appellant company was quoting Regulation 52 (3) of the Public Procurement Regulations (PPR) whereby "an economic operator may, where appropriate and for the particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them...." ;

and

- the fact was that the tender document did not include the provisions of Regulation 52 (3) of the PPR and, as a result, the appellant company could not rely on the services of third parties.

Dr Farrugia argued that:-

a. once the tender document did not mention Reg. 52 (3) at all, then it did not preclude bidders from relying on third parties to execute this contract;

b. it must be stressed that the contracting authority did not exclude the appellant company because it intended to utilise the services of a third party but because the contracting authority could not establish the relationship between the tenderer and the third party, Nautilus, and at appeal stage one had to stick to that one and only reason for exclusion;

c. clause 30.2 of the tender document provided, among other things, that "the evaluation committee shall, after having obtained the approval of the MTA's Tenders Committee request rectifications in respect of incomplete/non-submitted information pertinent to the documentation as outlined in sub-clause 16.1 (a), (b) and (c) of these Instructions to Tenderers";

d. the appellant company contended that the point at issue fell under 16.1 (c) and, therefore, the contracting authority was obliged to ask the tenderer for a clarification and/or rectification in this regard within 2 working days rather than resort to outright disqualification;

e. the appellant company had clearly indicated its relationship with Nautilus in its tender submission and the term 'sub-contracting' referred to third parties not mentioned in the appellant company's tender submission;

and

f. in the circumstances, it was not justified or reasonable to exclude the appellant company.

The Chairman Public Contracts Review Board remarked that in case of doubt the bidder could have asked whether it was permissible to rely on the resources of third parties prior to the closing date of the tender.

Dr Testa explained that:-

i. the bidder's reliance on the resources of third parties was not allowed and referred to the following:-

- clause 6.1.2 requested in the most clear terms information about the tenderer's technical capacity and technical expertise available (own staff);

- clause 16.1 (c) 'Technical Capacity' which was mentioned by the appellant company corresponded to Note 3 of clause 16 which read as follows, "*No rectification shall be allowed. Only clarifications on the submitted information may be requested"*;

ii. in Part A of Volume 1 Section 2 'Tender Form' (page 18) the appellant company indicated that Tektraco Ltd would assume 100% responsibility for this project when, elsewhere in the tender submission it indicated that it was going to rely on the experience and expertise of Nautilus, a third party;

iii. Note 3 of Part A of the 'Tender Form' clearly stated that '*Sub-contracting is not allowed';*

and

iv. the appellant company's tender submission was so clear that it left no room for the request of any clarifications.

The Chairman Public Contracts Review Board observed that the term 'to collaborate' used by Nautilus in its letter dated 1st March 2012 meant that Nautilus was going to be responsible for part of this project but that was not reflected in the tender submission because Tektraco Ltd declared that it was assuming 100% responsibility.

Mr Patrick Attard, secretary to the evaluation board, remarked that the recommended tenderer was a foreign firm which relied completely on its own resources.

Dr Testa argued that:-

a. the letter of objection demonstrated that the appellant company had understood the reasons behind its exclusion so much so that it mentioned the provisions of Reg. 53 (2) of the PPR which dealt with the bidder' reliance on third parties which the tender document prohibited in this case;

and

b. it was quite clear that the appellant company had tendered for a contract which it was not going to execute itself.

Mr Francis Albani, chairman of the evaluation board, remarked that once the appellant company's tender submission did not indicate that the tenderer was a joint venture between Tektraco Ltd and Nautilus then, by default, Nautilus was going to be a sub-contractor. Nevertheless, continued Mr Albani, at this stage one had to place emphasis on the fact that sub-contracting was not allowed, adding that had Nautilus submitted the tender in its own name then it would have been on the same level as the recommended tenderer.

The Chairman Public Contracts Review Board observed that Note 2 of Part A of the 'Tender Form' provided that partners had to indicate their share of responsibility in the execution of the contract and that the lead partner, in this case Tektraco Ltd, had to carry out at least 50% of the contract.

Mr Colbert Balzan, also on behalf of the appellant company, under oath, gave the following evidence:-

i. there were no local service providers who possessed the necessary expertise to deliver this specialised service and that was why Tektraco Ltd relied on the resources of Nautilus;

and

ii. Nautilus was going to be responsible for about 90% of the contract works.

Dr Farrugia reiterated that the reason for exclusion was not the appellant company's almost total reliance on Nautilus or that it could not resort to sub-contracting but the sole reason was that the contracting authority could not establish the relationship between the bidder and Nautilus and at appeal stage one could not come up with additional reasons for exclusion.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 4th February 2013 and also through its representatives verbal submissions presented during the hearing held on the 22nd May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 28th January 2013 the contracting authority informed the appellant company that its tender was being disqualified as it was considered to be technically non-compliant because "*when evaluating clause 30.3 (ii) (evidence of technical capacity sub-clause 6.1.2) the evaluation committee noted that the bidder (Tektraco) failed to supply any evidence as requested and instead submitted details of a company named Nautilus Ing. Maritima S.L. which relationship between the companies could not be established"*, (b) with its tender submission, the appellant company had presented a commitment letter dated 1st March 2012 from Nautilus Ingenieria Maritima S.L. (Nautilus) which stated that Nautilus was ready to collaborate with Tektraco Ltd for the services requested in this tender using all the resources necessary for the execution of the contract in accordance with the terms of reference for the 'Mathematical Modelling', (c) as a consequence it was made clear from the outset that the appellant company was going to rely on the experience and expertise of Nautilus, (d) unlike what the contracting authority was contending, the appellant company did spell out the relationship it had with Nautilus and, having also submitted the cheapest bid, the appellant company should have been awarded this contract, (e) in the light of the arguments raised during the hearing, the contracting authority was being requested to confirm whether the only reason for exclusion was that it could not establish the relationship between Tektrako Ltd and Nautilus, (f) once the tender document did not mention Reg. 52 (3) at all, then it did not preclude bidders from relying on third parties to execute this contract, (g) it must be stressed that the contracting authority did not exclude the appellant company because it intended to utilise the services of a third party but because the contracting authority could not establish the relationship between the tenderer and the third party, Nautilus, and at appeal stage one had to stick to that one and only reason for exclusion, (h) clause 30.2 of the tender document provided, among other things, that "the evaluation committee shall, after having obtained the approval of the Malta Tourism Authority's Tenders Committee, request rectifications in respect of incomplete/non-submitted information pertinent to the documentation as outlined in sub-clause 16.1 (a), (b) and (c) of these Instructions to Tenderers", (i) the appellant company contended that the point at issue fell under 16.1 (c) and, therefore, the contracting authority was obliged to ask the tenderer for a clarification and/or rectification in this regard within 2 working days rather than resort to outright disqualification, (j) the appellant company had clearly indicated its relationship with Nautilus in its tender submission and the term 'sub-contracting' referred to third parties not mentioned in the appellant company's tender submission, (k) in the circumstances, it was not justified or reasonable to exclude the appellant company, (l) there were no local service providers who possessed the necessary expertise to deliver this specialised service and that was why Tektraco Ltd relied on the resources of Nautilus and (m) Nautilus was going to be responsible for about 90% of the contract works;

- having considered the contracting authority's reference to the fact that (a) the reason for exclusion was the appellant company's complete reliance on Nautilus, (b) in its letter of objection the appellant company was quoting Regulation 52 (3) of the Public Procurement Regulations (PPR) whereby "an economic operator may, where appropriate and for the particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them....", (c) the fact was that the tender document did not include the provisions of Regulation 52 (3) of the PPR and, as a result, the appellant company could not rely on the services of third parties, (d) the bidder's reliance on the resources of third parties was not allowed and referred to the following *(1)* clause 6.1.2 requested in the most clear terms information about the tenderer's technical capacity and technical expertise available (own staff) and *(2)* clause 16.1 (c) 'Technical Capacity' which was mentioned by the appellant company corresponded to Note 3 of clause 16 which read as follows, "*No rectification shall be allowed. Only clarifications on the submitted information may be requested"*, (e) in Part A of Volume 1 Section 2 'Tender Form' (page 18) the appellant company indicated that Tektraco Ltd would assume 100% responsibility for this project when, elsewhere in the tender submission it indicated that it was going to rely on the experience and expertise of Nautilus, a third party, (f) Note 3 of Part A of the 'Tender Form' clearly stated that '*Sub-contracting is not allowed'*, (g) the appellant company's tender submission was so clear that it left no room for the request of any clarifications, (h) the recommended tenderer was a

foreign firm which relied completely on its own resources, (i) the letter of objection demonstrated that the appellant company had understood the reasons behind its exclusion so much so that it mentioned the provisions of Reg. 53 (2) of the PPR which dealt with the bidder' reliance on third parties which the tender document prohibited in this case, (j) it was quite clear that the appellant company had tendered for a contract which it was not going to execute itself, (k) once the appellant company's tender submission did not indicate that the tenderer was a joint venture between Tektraco Ltd and Nautilus then, by default, Nautilus was going to be a sub-contractor and (l) had Nautilus submitted the tender in its own name then it would have been on the same level as the recommended tenderer,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that in case of doubt the bidder could have asked whether it was permissible to rely on the resources of third parties prior to the closing date of the tender.

2. The Public Contracts Review Board contends that the term 'to collaborate' used by Nautilus in its letter dated 1st March 2012 meant that Nautilus was going to be responsible for part of this project but that was not reflected in the tender submission because Tektraco Ltd declared that it was assuming 100% responsibility. At this stage this Board places emphasis on the fact that Note 2 of Part A of the 'Tender Form' provided that partners had to indicate their share of responsibility in the execution of the contract and that the lead partner, in this case Tektraco Ltd, had to carry out at least 50% of the contract. Furthermore, during the hearing the appellant company's representative, under oath, stated that Nautilus was going to be responsible for about 90% of the contract works.

3. This Board is fully cognisant of the fact that Note 3 of Part A of the 'Tender Form' clearly stated that '*Sub-contracting is not allowed'*

4. The Public Contracts Review Board opines that (a) the appellant company's tender submission was so clear that it left no room for the request of any clarifications and that (b) it was quite clear that the appellant company had tendered for a contract which it was not going to execute itself.

5. This Board concurs with the statement made by one of the contracting authority's representatives, namely that had Nautilus submitted the tender in its own name then it would have been considered on the same level as the recommended tenderer.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

31st May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 554

MIP/TQF/GEN/D32/12
Tender for the Provision of Security Services at the Airmalta Head Office, Luqa

This call for tenders was published in the Government Gazette on the 16th October 2012. The closing date for this call with an estimated budget of €105,000 (excl. VAT) was the 7th November 2012.

Five (5) tenderers submitted their offers.

Executive Security Services Ltd filed an objection on the 22nd February 2013 against the decision of the Malta Industrial Parks to disqualify its offer as technically non-compliant and to recommend the award of the tender to J&F Security & Consultancy Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 22nd May 2013 to discuss this objection.

Present for the hearing were:

Executive Security Services Ltd

Dr Veronique Dalli	Legal Representative
Dr Dean Hili	Legal Representative
Mr Stephen Ciangura	Representative

J&F Security & Consultancy Ltd

Dr Matthew Paris	Legal Representative
Mr Peter Formosa	Representative

Malta Industrial Parks (MIP)

Mr Edwin Ebejer	Representative

Evaluation Board

Col David Mifsud	Chairman
Mr Victor Camilleri Bowman	Member
Mr John Degiorgio	Member

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Veronique Dalli , legal advisor of Executive Security Services Ltd, the appellant company, made the following submissions:-

i. by letter dated 18th February 2013 the contracting authority informed the appellant company that its tender was being disqualified as it was considered to be technically non-compliant because it did not provide photos showing the proposed uniform;

ii. although this was requested under Volume 3 Section 2 'Tenderer's Technical Offer' it was not crucial for the adjudication of the appellant company's tender submission, especially given that it had considerable experience in this sector;

iii. the Public Contracts Review Board was an administrative tribunal and it should, therefore, be guided by the principles emerging from administrative law, among them, the principle of reasonableness;

iv. although the price was not the sole award criterion, the appellant company contended that such a minor detail should not compel the contracting authority to award a tender which was about €10,000 more expensive;

and

v. the contracting authority ought to have asked the appellant company to provide the missing photo of the proposed uniform against the statutory payment of €50 as provided by regulations rather than disqualifying its offer outright and, in that way, reasonableness would prevail over detail.

The Chairman Public Contracts Review Board noted that, according to the letter of rejection dated 18th February 2013, the appellant company was refused because *"the offer did not include proper details, as required, regarding training provisions, personnel uniforms, contingency planning and risk and assumptions (Volume 3 Section 2 – Tenderer's Technical Offer).*"

Col David Mifsud, chairman of the evaluation board, explained that:-

a. in its letter of objection dated 21st February 2013 the appellant company conceded that there were four missing items and, whilst the photo of the proposed uniform might seem trivial, such other missing information, such as the provision of training so as to assess the level of training given to security personnel, contingency planning, namely in case of industrial action and national calamities, together with risks and assumptions affecting the execution of the contract, was considered very important in the light of the nature of the services requested;

b. all these requirements featured under Volume 3 Section 2 'Tenderer's Technical Offer' which fell under the provisions of clause 16.1 (e) 'Tenderer's Technical Offer (Volume 3 Section 2) in response to terms of reference (Volume 3 Section 1) (cheapest technically compliant) and Note 3 to clause 16.1 rendered the submission of the information in question a mandatory requirement in which case no rectification was allowed;

c. out of the five participating bidders only one turned out to be fully compliant;

and

d. it could well be the case that the appellant company omitted this information through a genuine oversight but the fact remained that the evaluation board had no other option but to reject the offer for the non-submission of mandatory information.

The Chairman Public Contracts Review Board noted that, albeit the clause 3 'Assumptions and Risks' of the Terms of Reference (page 45) referred to 'the contractor' and not to 'the tenderer' and, as such, this could have been provided at a later stage. Yet, the Chairman Public Contracts Review Board added that if this was in contradiction with the provisions of clause 16.1, then the bidder could have asked for a clarification and not opted to leave out the information.

Mr Stephen Ciangura, also acting on behalf of the appellant company, acknowledged that information with regard to the 'provision of training' and the 'contingency planning' had not been submitted and that this information had not been requested in previous tenders to which the Public Contracts Review Board noted that that did not mean that a contracting authority has to follow the same structure and content every time and that each tender has to be addressed and evaluated by all parties concerned in its own right.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 21st February 2013 and also through its representatives verbal submissions presented during the hearing held on the 22nd May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 18th February 2013 the contracting authority informed the appellant company that its tender was being disqualified as it was considered to be technically non-compliant because it did not provide photos showing the proposed uniform, (b) although this was requested under Volume 3 Section 2 'Tenderer' Technical Offer' it was not crucial for the adjudication of the appellant company's tender submission, especially given that it had considerable experience in this sector, (c) the Public Contracts Review Board was an administrative tribunal and it should, therefore, be guided by the principles emerging from administrative law, among them, the principle of reasonableness, (d) although the price was not the sole award criterion, the appellant company contended that such a minor detail should not compel the contracting authority to award a tender which was about €10,000 more expensive, (e) the contracting authority ought to have asked the appellant company to provide the missing photo of the proposed uniform against the statutory payment of €50 as provided by regulations rather than disqualifying its offer outright and, in that way, reasonableness would prevail over detail and (f) it was acknowledging the fact that information with regard to the 'provision of training' and the 'contingency planning' had not been submitted and that this information had not been requested in previous tenders;

- having considered the contracting authority's reference to the fact that (a) in its letter of objection dated 21st February 2013 the appellant company conceded that there were four missing items and, whilst the photo of the proposed uniform might seem trivial, such other missing information, such as the provision of training so as to assess the level of training given to security personnel, contingency planning, namely in case of industrial action and national calamities, together with risks and assumptions affecting the execution of the contract, was considered very important in the light of the nature of the services requested, (b) all these requirements featured under Volume 3 Section 2 'Tenderer's Technical Offer' which fell under the provisions of clause 16.1 (e) 'Tenderer's Technical Offer (Volume 3 Section 2) in response to terms of reference (Volume 3 Section 1) (cheapest technically compliant) and Note 3 to clause 16.1 rendered the submission of the information in question a mandatory requirement in which case no rectification was allowed, (c) out of the five participating bidders only one turned out to be fully compliant and (d) it could well be the case that the appellant company omitted this information through a genuine oversight

but the fact remained that the evaluation board had no other option but to reject the offer for the non-submission of mandatory information,

reached the following conclusions, namely:

1. The Public Contracts Review Board noted that, according to the letter of rejection dated 18th February 2013, the appellant company was refused because *"the offer did not include proper details, as required, regarding training provisions, personnel uniforms, contingency planning and risk and assumptions (Volume 3 Section 2 – Tenderer's Technical Offer)*." During the hearing the appellant company's representative admitted that he was acknowledging the fact that information with regard to the 'provision of training' and the 'contingency planning' had not been submitted. In this Board's opinion, this, in itself, was enough for the appellant company's bid to be rejected.

2. Also, this Board took note of the appellant company's remark that this tender requested information that had not been requested in previous tenders. Undoubtedly, in this instance, the Public Contracts Review Board cannot but demonstrate its adverse opinion in this regard as one has to bear in mind that a contracting authority is not obliged to follow the same structure and content every time – as a direct consequence this Board argues that each tender has to be addressed and evaluated by all parties concerned on its own merit.

3. This Board agrees with the remark passed by the contracting authority's representative during the hearing, namely that it could well be the case that the appellant company omitted information through a genuine oversight but the fact remained that the evaluation board had no other option but to reject the offer for the non-submission of mandatory information.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

31st May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 555

T 1/2013
Tender for the Leasing of Thirty-Seven A4 Energy Efficient Black & White Multifunction Printing Devices including Full Service Maintenance Agreement (FSMS) over a period of three years within the Ministry of Justice, Dialogue and the Family (MJDF)

This call for tenders was published in the Government Gazette on the 8th January 2013. The closing date for this call with an estimated budget of €20,000 (excl. VAT) was the 1st February 2013.

Four (4) tenderers submitted their offers.

Office Group Ltd filed an objection on the 14th March 2013 against the decision of the Ministry of Justice, Dialogue and the Family to recommend the award of the tender to Strand Electronics Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 22nd May 2013 to discuss this objection.

Present for the hearing were:

Office Group Ltd

Dr Lorna Mifsud Cachia	Legal Representative
Mr Joseph Camilleri	Corporate Solutions Executive
Mr Steve Holland	Representative

Strand Electronics Ltd

Mr Ray Azzopardi	Sales Manager, Office Equipment

Ministry for Justice, Dialogue and the Family (MJDF)

Mr John Degiorgio	Director Corporate Services

Evaluation Board

Mr Clifford Schembri	Chairman
Mr Jean Paul St. John	Member
Mr Jesmond Mugliett	Member
Mr Jason Zammit	Member

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Lorna Mifsud Cachia, legal advisor of Office Group Ltd, the appellant company, made the following submissions:-

i. by notice dated 5th March 2013 the contracting authority announced that the tender was being awarded to Strand Electronics Ltd at the rate of €0.02124 per copy;

ii. given the substantial difference between the awarded price and the other offers submitted, it was being assumed, or, it was most likely, that the recommended tenderer might have not satisfied all of the tender specifications and, therefore, for the sake of transparency and fair hearing, which principles were enshrined in legislation, the contracting authority was called upon to indicate at this stage the make and model of the equipment offered by the recommended tenderer;

iii. the appellant company did not have information on the equipment offered by participating tenderers and when it requested such information it was referred to clause 28.2 of the 'Instructions to Tenders' which stated that

> *'Information concerning checking, explanations, opinions and comparison of tenders and recommendations concerning the award of contract, may not be disclosed to tenderers or any other person not officially involved in the process unless otherwise permitted or required by law*'

Nevertheless, Dr Mifsud Cachia contended that the information requested by the appellant company did not fall under this category;

As a matter of fact, continued Dr Mifsud Cachia, clause 28.1 provided that

> '*After the opening of the tenders, no information about the examination, clarification, evaluation or comparison of tenders or decisions about the contract award may be disclosed before the notification of award'*

Therefore, stated Dr Mifsud Cachia, clause 28.1 made it clear that no information could be made available about the evaluation process itself 'before the notification of award' and that meant that, after the notification of award, the contracting authority was allowed to give certain information even about the 'evaluation or comparison of tenders';

iv. the appellant company visited the website of the winning bidder and it discovered that none of the equipment displayed could meet the high standards requested in the tender specifications;

and

v. on the other hand, the appellant company had satisfied the tender specifications by offering the appropriate kind of equipment.

Mr John Degiorgio, representing the contracting authority, remarked that:-

a. all the four participating bids were found to be technically compliant and, as a result, the award was then decided upon on the basis of the cheapest price as per clause 32.1 of the tender document;

and

b. the evaluation board did receive a request for information from the appellant company about the type of machine/s offered by the recommended bidder about which it had sought the advice of the Contracts Department, which, as per email dated 12th March 2013, read as follows

> *"When communicating with unsuccessful bidders we give them the reasons for their offer being rejected or not being awarded the contract but not information about the offer submitted by the successful bidder*"

and the appellant was made aware of this advice.

Mr Clifford Schembri, chief information officer and chairman of the evaluation board, explained that:-

i. the technical evaluation was carried out by comparing the equipment offered by each tenderer against a template which was provided in the tender document itself at Annex I of Volume 3 Section 1;

and

ii. as an additional safeguard, the tender document also requested the submission of an undertaking by the manufacturer/supplier that the equipment offered met the tender specifications and to indicate where those specifications could be traced in the technical brochure.

The Chairman Public Contracts Review Board remarked that the appellant company had the right to know what equipment was offered by the other bidder/s as otherwise one would not be able to conclude whether there were sufficient grounds to lodge an appeal. In view of this the Chairman took it upon himself to inform the appellant company's representative/s that the type of equipment offered by the recommended tenderer was '*Kyocera FS-3140MFP+*'.

Dr Mifsud Cachia presented the technical brochure relative to '*Kryocera FS-3140MFP+*' offered by the recommended tenderer - which matched that submitted by the recommended tenderer in its tender submission - and she pointed out that:

a. with regard to the 'paper weight' this equipment supported 60-120 g/m² whereas the tender specified 60-200 g/m²;

b. the appellant company offered equipment which met the specification 60-200 g/m² and that rendered the equipment much more expensive that the one offered by the recommended tenderer which met the lower standard of 60-120 g/m²;

and

c. the appellant company could have offered cheaper machines which met the 60-120 g/m² specification but that would not have been up to tender specifications.

Mr Schembri noted that against "Input capacity" the technical brochure indicated "100-sheet multi-purpose tray, 60-220 g/m²', which did meet the tender specifications under 'paper capacity';

Dr Mifsud Cachia however pointed out that:-

i. the same brochure also read "500-sheet universal paper cassette, 60-120 g/m²' and that against 'Paper handling' Annex I of the tender document indicated "1 tray for A4 size Paper – capacity 500 sheets" and right under it under '"Paper Weight" it specified "60-200 g/m²";

and

ii. the machine had two feeding trays, one 100-sheet tray and one 500-sheet tray, and the tender document was requesting 60-200 g/m² paper with regard to both feeding trays.

The Chairman Public Contracts Review Board recapitulated that from Dr Mifsud Cachia's submission it appeared that the equipment offered by the preferred bidder supported 60-220 g/m² as to the 100-sheet multi-purpose tray whereas it supported 60-120 g/m² as to the 500-sheet universal paper cassette, where the latter fell outside the 60-200 g/m² indicated in the tender specifications.

Mr Ray Azzopardi, representing the recommended tenderer, explained that whilst the equipment offered supported 60-120 g/m² paper in the 'duplex unit', yet the 'Input capacity' could go up to 60-220 g/m².

Mr Joseph Camilleri, also on behalf of the appellant company, pointed out that the equipment offered supported 60-200 g/m² paper and, as a consequence, it was compliant and superior to that offered by the preferred bidder which only supported 60-120 g/m² paper.

Mr Jean Paul St. John, representing the contracting authority, explained that:-

a. the equipment requested had to have one 100-sheet tray and one 500-sheet tray and the recommended equipment met that requirement;

b. the crux of the matter was that the specification '60-200 g/m²' represented a 'range' which applied to both the 100-sheet and the 500-sheet trays;

c. by way of minimum specifications the equipment was meant to support paper ranging from 60-200 g/m² paper with regard to both paper trays and the equipment offered by the preferred bidder supported 60-120 g/m² paper which fell within the requested range and so the bid was compliant;

d. anything above the minimum specifications would render the equipment equally compliant but with superior specifications;

and

e. if bidders encountered difficulty in the interpretation of the specifications they could have asked for a clarification.

The Chairman Public Contracts Review Board remarked that, whilst it could be the case that the appellant company's offered equipment of a superior quality which could support paper up to 200 g/m², yet, on the other hand, the equipment offered by the preferred bidder supported 60-120 g/m² paper which did fall within the range specified in the tender.

Dr Mifsud Cachia concluded that:-

i. the interpretation being given by the contracting authority at the hearing was not reflected in the tender document or else it was ambiguous so much so that judging from the offers received, apparently all the bidders except the preferred bidder, interpreted the specifications in such a way that the equipment had to support paper up to 200 g/m²;

ii. if the tender document had reflected the contracting authority's intentions expressed at the hearing the appellant company would have offered compliant equipment at a much cheaper price;

and

iii. the published specifications were quite clear and there was no need for a clarification in that regard.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 11th March 2013 and also through its representatives verbal submissions presented during the hearing held on the 22nd May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by notice dated 5th March 2013 the contracting authority announced that the tender was being awarded to Strand Electronics Ltd at the rate of €0.02124 per copy, (b) given the substantial difference between the awarded price and the other offers submitted, it was being assumed, or, it was most likely, that the recommended tenderer might have not satisfied all of the tender specifications and, therefore, for the sake of transparency and fair hearing, which principles were enshrined in legislation, the contracting authority was called upon to indicate at this stage the make and model of the equipment offered by the recommended tenderer, (c) the appellant company did not have information on the equipment offered by participating tenderers and when it requested such information it was referred to clause 28.2 of the 'Instructions to Tenders' which stated that *'Information concerning checking, explanations, opinions and comparison of tenders and recommendations concerning the award of contract, may not be disclosed to tenderers or any other person not officially involved in the process unless otherwise permitted or required by law*', (d) the information requested by the appellant company did not fall under the category referred to in clause 28.2 and that, as a matter of fact, clause 28.1 provided that '*After the opening of the tenders, no information about the examination, clarification, evaluation or comparison of tenders or decisions about the contract award may be disclosed before the notification of award'*, (f) clause 28.1 made it clear that no information could be made available about the evaluation process itself 'before the notification of award' and that meant that, after the notification of award, the contracting authority was allowed to give certain information even about the 'evaluation or comparison of tenders', (g) the appellant company visited the website of the winning bidder and it discovered that none of the equipment displayed could meet the high standards requested in the tender specifications, (h) on the other hand, the appellant company had satisfied the tender specifications by offering the appropriate kind of equipment, (i) the technical brochure presented by the recommended tenderer during the hearing - which matched that submitted by the recommended tenderer in its tender submission – referred, amongst other things, to '*Kryocera FS-3140MFP+*' – namely, the model being offered by the recommended tenderer, which highlighted the fact that the 'paper weight' this equipment supported fell within the 60-120 g/m² parameter, whereas the tender specified 60-200 g/m², (j) the appellant company offered equipment which met the specification 60-200 g/m² and that rendered the equipment much more expensive that the one offered by the recommended tenderer which met

the lower standard of 60-120 g/m², (k) the appellant company could have offered cheaper machines which met the 60-120 g/m² specification but that would not have been up to tender specifications, (l) the same brochure also read "500-sheet universal paper cassette, 60-120 g/m²' and that against 'Paper handling' Annex I of the tender document indicated "1 tray for A4 size Paper – capacity 500 sheets" and right under it, under '"Paper Weight", it specified "60-200 g/m²", (m) the machine had two feeding trays, one 100-sheet tray and one 500-sheet tray, and the tender document was requesting 60-200 g/m² paper with regard to both feeding trays, (n) the equipment offered supported 60-200 g/m² paper and, as a consequence, it was compliant and superior to that offered by the preferred bidder which only supported 60-120 g/m² paper, (o) the interpretation being given by the contracting authority at the hearing was not reflected in the tender document or else it was ambiguous so much so that, judging from the offers received, apparently, all the bidders except the preferred bidder, interpreted the specifications in such a way that the equipment had to support paper up to 200 g/m², (p) if the tender document had reflected the contracting authority's intentions expressed at the hearing the appellant company would have offered compliant equipment at a much cheaper price and (q) the published specifications were quite clear and there was need for a clarification in that regard;

- having considered the contracting authority's reference to the fact that (a) all the four participating bids were found to be technically compliant and, as a result, the award was then decided upon on the basis of the cheapest price as per clause 32.1 of the tender document, (b) the evaluation board did receive a request for information from the appellant company about the type of machine/s offered by the recommended bidder about which it had sought the advice of the Contracts Department, which, as per email dated 12th March 2013, stated that when *"... communicating with unsuccessful bidders we give them the reasons for their offer being rejected or not being awarded the contract but not information about the offer submitted by the successful bidder*" and the appellant company was made aware of this advice, (c) the technical evaluation was carried out by comparing the equipment offered by each tenderer against a template which was provided in the tender document itself at Annex I of Volume 3 Section 1, (d) as an additional safeguard, the tender document also requested the tenderer to *(1)* submit an undertaking by the manufacturer/supplier that the equipment offered met the tender specifications and *(2)* indicate where those specifications could be traced in the technical brochure, (e) against "Input capacity" the technical brochure indicated "100-sheet multi-purpose tray, 60-220 g/m²', which did meet the tender specifications under 'paper capacity', (f) the equipment requested had to have one 100-sheet tray and one 500-sheet tray and the recommended equipment met that requirement, (g) the crux of the matter was that the specification '60-200 g/m²' represented a 'range' which applied to both the 100-sheet and the 500-sheet trays, (h) by way of minimum specifications the equipment was meant to support paper ranging from 60-200 g/m² paper with regard to both paper trays and the equipment offered by the preferred bidder supported 60-120 g/m² paper which fell within the requested range and so the bid was compliant, (i) anything above the minimum specifications would render the equipment equally compliant but with superior specifications and (j) if bidders encountered difficulty in the interpretation of the specifications they could have asked for a clarification;

- having also considered the recommended tenderer's reference to the fact that whilst the equipment offered supported 60-120 g/m² paper in the 'duplex unit', yet the 'Input capacity' could go up to 60-220 g/m²,

reached the following conclusions, namely:

1. The Public Contracts Review Board remarked that the appellant company had the right to know what equipment was offered by the other bidder/s as, otherwise, one would not be able

to conclude whether there were sufficient grounds to lodge an appeal. In this instance this Board concludes that the contracting authority should have acted in a more transparent manner.

2. The Chairman Public Contracts Review Board remarked that, whilst it could be the case that the appellant company's offered equipment of a superior quality which could support paper up to 200 g/m², yet, on the other hand, the equipment offered by the preferred bidder supported 60-120 g/m² paper (and 60-220 g/m²), which did fall within the range specified in the tender.

3. This Board takes full cognisance of the fact that the crux of the matter was in fact that the specification '60-200 g/m²' represented a 'range' which applied to both the 100-sheet and the 500-sheet trays. In this regard this Board feels that, by way of minimum specifications, the equipment was meant to support paper ranging from 60-200 g/m² paper with regard to both paper trays and this Board contends that the equipment offered by the preferred bidder supported 60-120 g/m² paper which fell within the requested range and so the bid was compliant.

In view of the above this Board finds against the appellant company but, considering that the said appellant was forced to file an appeal due to lack of access to basic records which would have allowed the company to establish a proper way forward, recommends that the deposit paid by the same company for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

31st May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 556

MXR/005/2012
Tender for the Supply and Fixing of Pedestrian Guardrails and Construction of Pavements at Triq il-Kantra, ix-Xlendi and Supply and Fixing of Street Furniture for ix-Xlendi Bay

This call for tenders was published in the Government Gazette on the 26th and 28th September 2012 respectively. The closing date for this call with an estimated budget of Lot 1 - €120,087.27 and Lot 2 - €69,918.70 (excl. VAT and Contract Manager) was the 29th October 2012.

Six (6) tenderers submitted their offers.

Bugeja Bros (Gozo) Ltd filed an objection on the 4th February 2013 against the decisions of the Munxar Local Council to disqualify its offers and to recommend the award of Lot 1 to Road Construction Ltd and Lot 2 to Mr Peter Paul Said.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 22nd May 2013 to discuss this objection.

Present for the hearing were:

Bugeja Bros. (Gozo) Ltd

Dr John Gauci	Legal Representative
Mr Mario Bugeja	Representative
Architect Walter Portelli	Representative

Road Construction Ltd – no one attended

Mr Peter Paul Said

Dr Damien Bigeni	Legal Representative
Mr Peter Paul Said	Appellant's Representative

Munxar Local Council

Dr Mario Scerri	Legal Representative
Mr Joseph Sultana	Mayor
Mr Anthony Grech	Executive Secretary
Architect William Lewis	Adviser

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr John Gauci, legal representative of Bugeja Bros. (Gozo) Ltd, the appellant company, made the following submissions:-

vi. by letter dated 25th January 2013 the contracting authority informed the appellant company that this tender was being recommended for award as follows:

- Lot 1, concerning civil works, to Road Construction Ltd
- Lot 2, concerning street furniture, to Mr Peter Paul Said;

vii. the appellant company had submitted the cheapest offer with regard to both lots;

and

viii. according to the adjudication report dated January 2013 the appellant company was found to be non-compliant because (a) in Lot 1 the railing offered did not conform to the tender requirements and (b) in Lot 2 the appellant company submitted two options for 'benches', one cast locally and one imported. Yet, in this particular instance only the locally cast option was accompanied by the bill of quantities (BOQ) and, as a result, the options were not accepted since no separate BOQ was presented with each option.

A) Lot 1 – Civil Works – Railings

Dr Gauci explained that:-

a. drawing No. 05 at page 68 of the tender document referred to, among other things, the proposed railing;

b. following the appellant company's submission as to how it was going to supply this guard railing, the Munxar Local Council requested it, by email dated 17th November 2012, to present a diagram indicating which rods were solid and which ones were hollow as per quoted price of €112.50 per linear metre;

c. in a previous email dated 15th November 2012, the appellant company had indicated that it could also provide vertical steel in circular shape at no extra cost if that was what was required besides pointing out that the drawings failed to specify type of section to be used for vertical steel;

d. by email dated 19th November 2012 the appellant company informed the Council as follows:-

> *"(Attached) Also a diagram showing the type of bars proposed in the railing. However one is to note that a section of 12.5m cannot be galvanised as a whole section. Thus it has to be divided into sections and therefore square hollow sections are ideally used to facilitate jointing. Also rectangular hollow sections of 50*25mm can be used. Re the horizontal bars, ideally a flat bar or a rectangular hollow section are used to avoid unsightly joints between two circular elements. There are many options that we are ready to provide with the price of Euro 12.50/lin.m. but these can be better discussed after you forward exactly your requirements";*

e. therefore the appellant company provided its suggestions as to how the work ought to be carried out and it was also prepared to abide by whatever the contracting authority had in mind at the quoted price and so one could not comprehend the comments made at page 10 of

the evaluation report to the effect that "the tender requirement and the submission are different";

f. the evaluation report further stated at page 10 that "*following a clarification with Road Construction Ltd, Mr Victor Hili confirmed that the railing quoted for this tender is in line with the tender drawings/requirements*";

and

g. one could not comprehend how Road Construction Ltd was awarded the tender on the confirmation that it would provide what was requested whereas in the case of the appellant company, who likewise offered to provide according to tender requirements – apart from its suggestions – and who quoted the cheapest price, the offer was disqualified.

Dr Joe Scerri, legal representative of the contracting authority, submitted that:-

i. albeit the tender document did not request options but the bidders were requested to provide the only option indicated in the tender document, yet the appellant company provided four options for the provision of the guard rails;

ii. even if one were to overlook the fact that no options were requested for the guard rails still none of the options provided by the appellant company satisfied the drawings included in the tender document;

iii. page 8 of the evaluation report reproduced the tender's diagram (MXR 06) wherein it was indicated that the sections should be all circular and that they had to be galvanised metal rods;

iv. in spite of those specifications, in all four options the appellant company proposed a 50mm diameter hollow section, 25mm*4mm solid flat bars, a 50mm square hollow section and a 12 diameter circular solid section or a 16mm diameter hollow circular section, which specifications the appellant company confirmed in response to the clarification letter;

v. whilst, following the clarification letter the appellant company limited itself to Option 1 which was the only one accompanied by the BOQ, yet, this option was still technically non-compliant;

and

vi. although the tender specifications were quite clear, the appellant company stuck to the use of flat bars and hollow sections even after being requested to clarify its submission.

Architect William Lewis, adviser to the contracting authority, under oath, gave the following evidence:-

a. the tender document requested three options only with regard to the finishing material of the pavement and in that respect the tender document provided three separate BOQs (pages 55 to 57 referred);

b. the recommended tenderer had filled in the BOQ according to the diagram provided in the tender document without adding any comments and so, prior to assuming that it was going to abide by what was requested, the contracting authority asked for a confirmation that it was

offering what was requested and the recommended bidder confirmed – the intention of the contracting authority was to make doubly sure;

c. on the contrary, in its original tender submission Option 1 – reproduced in page 9 of the evaluation report - the appellant company had indicated that its offer included hollow sections, round pipes and flat bars when the diagram in the tender document referred to circular sections and galvanised solid bars and, when the contracting authority asked the appellant company for clarifications it, basically, confirmed its original submission;

d. whilst when the contracting authority required options it explicitly asked for them in the tender document as was the case with the pavement concrete finishing, however, it requested no options with regard to the railings;

and

e. albeit the appellant company submitted four options of railings although only Option 1 turned out to be complete, namely accompanied by the BOQ, yet none of the railings options offered by the appellant company reflected the one requested by the contracting authority.

Architect Walter Portelli, also representing the appellant company, explained that:-

i. according to the diagram provided in the tender document, the vertical bars were not indicated as circular or rectangular however the horizontal bars were clearly indicated as circular;

and

ii. the diagram the architect submitted on behalf of the appellant company with an email dated 19th November 2012 indicated horizontal bars as being made of 25mm*4mm solid flat bars and 50mm diagram circular hollow section and, in addition, he offered to provide whatever the contracting authority would order.

The Chairman Public Contracts Review Board remarked that:-

a. if it was not clear to the appellant company as to whether the vertical bars had to be circular or otherwise it's representatives should have asked for a clarification;

b. with regard to the horizontal bars it was clear that they had to be circular but the appellant company offered solid flat bars and a circular hollow section;

c. the bidder was not obliged to recommend alternatives but to provide what was requested in the tender document;

and

d. once the original tender submission of the appellant company was not technically compliant then there should have been no room for any clarification.

Dr Gauci reiterated that although the appellant company offered alternatives it still offered to provide what was requested as, according to the evaluation report, was the case with the recommended tenderer.

B) Lot 2 – Street Furniture - Benches

Dr Gauci explained that:-

i. whilst, with regard to the provision of benches, the tender document requested options which the appellant company provided, yet its offers were excluded for not providing a separate bill of quantities for each option;

ii. if, for the sake of the argument, the contracting authority discarded the option/s provided by the appellant company which could be termed as incomplete, namely without the relative BOQ, the fact remained that the appellant company had submitted one complete option which was the cheapest, however, the contracting authority discarded that option, apparently, because those benches were going to be manufactured locally so much so that, in this regard, the evaluation report (page 11) stated as follows:-

> *"Bugeja Bros (Gozo) Ltd submitted two options for the benches, one cast locally and one imported ready-made. The locally cast price was included in the BOQ.*
> *Options are not accepted since this was not presented as a separate BOQ.*
> *Following a clarification with Peter Paul Said, it was confirmed that the concrete benches are imported from Italy and the benches of item 5 are made of recyclable material";*

iii. the tender document did not specify that the benches had to be made from recyclable material;

iv. it appeared that the preferred bidder confirmed that the benches would be imported from Italy only following a clarification;

and

v. it was evident that, in this case, the appellant company had submitted the cheapest compliant offer.

Architect Lewis remarked that:-

a. the product offered by the preferred bidder was considered of a higher standard than that offered by the appellant company and since it was also within the budget it was recommended for award;

and

b. the product offered by the appellant company did meet the minimum tender specifications.

Architect Portelli remarked that in its tender submission the appellant company indicated that the bench was going to have a smooth finish in exposed grey concrete.

Dr Scerri pointed out that, once again, the appellant company presented two options, one for locally made benches and the other for imported ones - nevertheless, only the former was accompanied by the BOQ. He added that, although the appellant company's product met the minimum technical specifications when it came to analysing the finished product, the Local Council opted for that presented by Mr Peter Paul Said which was more attractive and highly finished.

Dr Gauci explained that:-

i. the award criterion was the most favourable bid satisfying tender requirements as per clause 12 and, accordingly, lot 2 should be awarded to the appellant company;

and

ii. if the contracting authority wished to adjudicate the tender on the basis of the most economically advantageous tender then it should have laid that down in the tender document.

Dr Gauci concluded that the Public Contracts Review Board had to keep in view that each lot could be awarded to different bidders.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 1st February 2013 and also through its representatives verbal submissions presented during the hearing held on the 22nd May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 25th January 2013 the contracting authority informed the appellant company that this tender was being recommended for award as follows *(1)* Lot 1, concerning civil works, to Road Construction Ltd and *(2)* Lot 2, concerning street furniture, to Mr Peter Paul Said, (b) the appellant company had submitted the cheapest offer with regard to both lots, (c) according to the adjudication report dated January 2013 the appellant company was found to be non-compliant because *(1)* in Lot 1 the railing offered did not conform to the tender requirements and *(2)* in Lot 2 the appellant company submitted two options for 'benches', one cast locally and one imported, (d) in this particular instance only the locally cast option was accompanied by the bill of quantities (BOQ) and, as a result, the options were not accepted since no separate BOQ was presented with each option, (e) with regard to Lot 1 – Civil Works – Railings *(1)* drawing No. 05 at page 68 of the tender document referred to, among other things, the proposed railing, *(2)* following the appellant company's submission as to how it was going to supply this guard railing, the Munxar Local Council requested it, by email dated 17th November 2012, to present a diagram indicating which rods were solid and which ones were hollow as per quoted price of €112.50 per linear metre, *(3)* in a previous email dated 15th November 2012, the appellant company had indicated that it could also provide vertical steel in circular shape at no extra cost if that was what was required besides pointing out that the drawings failed to specify type of section to be used for vertical steel, *(4)* by email dated 19th November 2012 the appellant company *attached a diagram, (5)* since the appellant company provided its suggestions as to how the work ought to be carried out and it was also prepared to abide by whatever the contracting authority had in mind at the quoted price, one could not comprehend the comments made at page 10 of the evaluation report to the effect that "the tender requirement and the submission are different", *(6)* the evaluation report further stated at page 10 that "*following a clarification with Road Construction Ltd, Mr Victor Hili confirmed that the railing quoted for this tender is in line with the tender drawings/requirements*", *(7)* one could not comprehend how Road Construction Ltd was awarded the tender on the confirmation that it would provide what was requested whereas, in the case of the appellant company, who, likewise, offered to provide according to tender requirements – apart from its suggestions – and who quoted the cheapest price, the offer was disqualified, *(8)* according to the diagram provided in the tender document, the vertical bars were not indicated as circular or rectangular however the horizontal bars were clearly indicated as circular, *(9)* the diagram the architect submitted on behalf of the appellant company with an email

dated 19th November 2012 indicated horizontal bars as being made of 25mm*4mm solid flat bars and 50mm diagram circular hollow section and, in addition, he offered to provide whatever the contracting authority would order and *(10)* although the appellant company offered alternatives it still offered to provide what was requested as, according to the evaluation report, was the case with the recommended tenderer, (f) with regard to Lot 2 – Street Furniture – Benches *(1)* whilst, with regard to the provision of benches, the tender document requested options which the appellant company provided, yet its offers were excluded for not providing a separate bill of quantities for each option, *(2)* if, for the sake of the argument, the contracting authority discarded the option/s provided by the appellant company which could be termed as incomplete, namely without the relative BOQ, the fact remained that albeit the appellant company had submitted one complete option which was the cheapest, yet, the contracting authority discarded that option, apparently, because those benches were going to be manufactured locally so much so that, in this regard, the evaluation report (page 11) stated that *"Bugeja Bros (Gozo) Ltd submitted two options for the benches, one cast locally and one imported ready-made. The locally cast price was included in the BOQ. Options are not accepted since this was not presented as a separate BOQ. Following a clarification with Peter Paul Said, it was confirmed that the concrete benches are imported from Italy and the benches of item 5 are made of recyclable material", (3)* the tender document did not specify that the benches had to be made from recyclable material, *(4)* it appeared that the preferred bidder confirmed that the benches would be imported from Italy only following a clarification, *(5)* it was evident that, in this case, the appellant company had submitted the cheapest compliant offer, *(6)* remarked that in its tender submission the appellant company indicated that the bench was going to have a smooth finish in exposed grey concrete, *(7)* the award criterion was the most favourable bid satisfying tender requirements as per clause 12 and, accordingly, lot 2 should be awarded to the appellant company, *(8)* if the contracting authority wished to adjudicate the tender on the basis of the most economically advantageous tender then it should have laid that down in the tender document and *(8)* the Public Contracts Review Board had to keep in view that each lot could be awarded to different bidders;

- having considered the contracting authority's reference to the fact that (a) albeit the tender document did not request options but the bidders were requested to provide the only option indicated in the tender document, yet the appellant company provided four options for the provision of the guard rails, (b) even if one were to overlook the fact that no options were requested for the guard rails still none of the options provided by the appellant company satisfied the drawings included in the tender document, (c) page 8 of the evaluation report reproduced the tender's diagram (MXR 06) wherein it was indicated that the sections should be all circular and that they had to be galvanised metal rods, (d) in spite of those specifications, in all four options the appellant company proposed a 50mm diameter hollow section, 25mm*4mm solid flat bars, a 50mm square hollow section and a 12 diameter circular solid section or a 16mm diameter hollow circular section, which specifications the appellant company confirmed in response to the clarification letter, (e) whilst, following the clarification letter the appellant company limited itself to Option 1 which was the only one accompanied by the BOQ, yet, this option was still technically non-compliant, (f) although the tender specifications were quite clear, the appellant company stuck to the use of flat bars and hollow sections even after being requested to clarify its submission, (g) the tender document requested three options only with regard to the finishing material of the pavement and, in that respect, the tender document provided three separate BOQs (pages 55 to 57 referred), (h) the recommended tenderer had filled in the BOQ according to the diagram provided in the tender document without adding any comments and so, prior to assuming that it was going to abide by what was requested, the contracting authority asked for a confirmation that it was offering what was requested and the recommended bidder confirmed – the intention of the contracting authority was to make doubly sure, (i) on the contrary, in its original tender submission Option 1 – reproduced in page 9 of the evaluation report - the appellant company had indicated that its offer included hollow sections, round pipes and flat bars when the diagram in the tender document referred to circular sections and galvanised solid bars and, when the contracting authority asked the appellant company for clarifications it, basically, confirmed its original submission, (j) whilst when the contracting authority required options it explicitly asked

for them in the tender document as was the case with the pavement concrete finishing, yet, it requested no options with regard to the railings, (k) albeit the appellant company submitted four options of railings, although only Option 1 turned out to be complete, namely accompanied by the BOQ, yet none of the railings options offered by the appellant company reflected the one requested by the contracting authority, (l) the product offered by the preferred bidder was considered of a higher standard than that offered by the appellant company and since it was also within the budget it was recommended for award, (m) the product offered by the appellant company did meet the minimum tender specifications, (n) once again, the appellant company presented two options, one for locally made benches and the other for imported ones - nevertheless, only the former was accompanied by the BOQ and (o) although the appellant company's product met the minimum technical specifications, when it came to analysing the finished product, the Local Council opted for that presented by Mr Peter Paul Said which was more attractive and highly finished,

reached the following conclusions, namely:

1. The Public Contracts Review Board argues that if it was not clear to the appellant company as to whether the vertical bars had to be circular or otherwise its representatives should have asked for a clarification.

2. The Public Contracts Review Board opines that with regard to the horizontal bars it was clear that they had to be circular but the appellant company offered solid flat bars and a circular hollow section. This Board contends that a bidder was not obliged to recommend alternatives but to provide what was requested in the tender document.

3. The Public Contracts Review Board agrees with the 'modus operandi' adopted by the evaluation committee whereas, in the case of the recommended bidder it was not a rectification but a simple clarification but, with regard to the appellant company, it would have been a case of rectification had it accepted options to standard referred to in the tender document. This Board feels that once the original tender submission of the appellant company was not technically compliant then there was no scope for any clarification.

4. With regard to the street furniture this Board feels that, considering that during the hearing, Architect Lewis had stated under oath that the product offered by the appellant company did meet the minimum tender specifications thus overcoming the administrative and technical stage, then all deliberations should have focused on the price factor and, as a consequence, the contracting authority had no right to opt for another tenderer's offer once that of the appellant company was lower in price. Needless to say that subjective opinion, whilst permissible in other circumstances, yet, at this juncture, during the course of an evaluation process, is not permissible.

In view of the above this Board finds

A. Re Lot 1, concerning civil works, to Road Construction Ltd, against the appellant company;

B. Re Lot 2, concerning street furniture, to Mr Peter Paul Said, in favour of the appellant company.

As a result, this Board also recommends that, apart from the appellant company's bid being reintegrated in the evaluation process with regard to Lot 2, this Board recommends also that the deposit paid by the same company for the appeal to be lodged should be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

31st May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 557

DH/1093/2012
Tender for Electrical Works at Rabat Health Centre

This call for tenders was published in the Government Gazette on the 2nd November 2012. The closing date for this call with an estimated budget of €93,203.14 (excl. VAT) was the 5th December 2012.

Six (6) tenderers submitted their offers.

Solutions & Infrastruture Services Ltd filed an objection on the 26th April 2013 against the decisions of the Ministry for Health to discard its offer and to recommend the award of the tender to EPM Solutions Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Monday, 27th May 2013 to discuss this objection.

Present for the hearing were:

Solutions & Infrastruture Services Ltd

Ing. Jesmond Zammit	Chief Operating Officer
Ing. Joseph Caruana	Representative

EPM Solutions Ltd

Mr Dione Zahra	Representative

Ministry for Health

Ms Stephanie Abela	Representative
Ing. Paul Vassallo	Adviser

Evaluation Board

Mr Charlot Muscat	Chairman
Mr Mario Attard	Member
Ms Marie Louise Grech	Member
Ms Rita Tirchett	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Ing. Jesmond Zammit, representing Solutions & Infrastruture Services Ltd, the appellant company, made the following submissions:-

i. by email dated 22nd April 2013 the contracting authority informed the appellant company that its offer was not accepted "*since the statement of compliance with the technical specifications (Volume 3) was not submitted as requested in clause 16 (e) (ii) of the Instructions to Tenderers*";

ii. whilst, admittedly, the statement of complaince had not been presented with the orignal tender submission through an oversight, yet this statement only requested the bidding company to declare that its tender submission was according to tender specifications;

iii. the offer was technically compliant and there was no need to highlight any non-compliance issues or anything abnormal and, as a result, (1) the submission of the 'statement of compliance' with the tehnical specifications was not necesaary apart from the fact that (2) the adjudicating board could have verified compliance from the product literature and the other documentation presented with the tender submission;

and

iv. a simple request for clarification would have settled the matter as the appellant company would have readily provided this 'statement of complaince' which, basically, confirmed that the tender submission was according or even exceeded the published tender specifications.

Mr Charlot Muscat, chairman of the evaluation board, remarked that the 'Statement of Compliance with the Technical Specifications (Volume 3)' featured in clause 16.1 (e) (ii) of the tender document in respect of which Note 3 to clause 16.1 applied, which read:

> '*No rectification shall be allowed. Only clarifications on the submitted information may be requested*.'

Ing. Paul Vassallo, adviser to the evaluation board, explained that:-

a. although the tender submission could be compliant with tender specifications instances might arise when working on site that the contractor would have to adjust things according to the prevailing conditions on site;

b. such a blanket statement as the 'Statement of Compliance' was required by the contracting authority and it could add costs to the contractor;

and

c. the appellant company's tender submission had not been evaluated technically because it was disqualified as soon as this compliance statement was discovered missing.

Ms Stephanie Abela, also representing the contracting authority, remarked that the appellant company was not disqualified due to administrative non-compliance otherwise the contracting authority would have been allowed to seek a clarification and/or rectification as per Note 2 to clause 16.1 but the appellant company was disqualified due to a technical shortcoming because the 'Statement of Compliance' represented a technical specification under clause 16.1 (e) (ii) in respect to which Note 3 was applicable.

Mr Dione Zahra, a representative of the recommended tenderer, remarked that one had to keep in mind that the appellant company's tender submission had not yet been technically evaluated and that in the statement of compliance the bidder was obliged to point out any variations from published specifications and any minor changes had to be approved by the client.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 24th April 2013 and also through its representatives verbal submissions presented during the hearing held on the 27th May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 22nd April 2013 the contracting authority informed the appellant company that its offer was not accepted "*since the statement of compliance with the technical specifications (Volume 3) was not submitted as requested in clause 16 (e) (ii) of the Instructions to Tenderers*", (b) whilst, admittedly, the statement of complaince had not been presented with the orignal tender submission through an oversight, yet this statement only requested the bidding company to declare that its tender submission was according to tender specifications, (c) the offer was technically compliant and there was no need to highlight any non-compliance issues or anything abnormal and, as a result, *(1)* the submission of the 'statement of compliance' with the tehnical specifications was not necesaary apart from the fact that *(2)* the adjudicating board could have verified compliance from the product literature and the other documentation presented with the tender submission and (d) a simple request for clarification would have settled the matter as the appellant company would have readily provided this 'statement of complaince' which, basically, confirmed that the tender submission was according or even exceeded the published tender specifications;

- having considered the contracting authority's reference to the fact that (a) the 'Statement of Compliance with the Technical Specifications (Volume 3)' featured in clause 16.1 (e) (ii) of the tender document in respect of which Note 3 to clause 16.1 applied, which read '*No rectification shall be allowed. Only clarifications on the submitted information may be requested*', (b) although the tender submission could be compliant with tender specifications, instances might arise when working on site that the contractor would have to adjust things according to the prevailing conditions on site, (c) such a blanket statement as the 'Statement of Compliance' was required by the contracting authority and it could add costs to the contractor, (d) the appellant company's tender submission had not been evaluated technically because it was disqualified as soon as this compliance statement was discovered missing and (e) the appellant company was not disqualified due to administrative non-compliance otherwise the contracting authority would have been allowed to seek a clarification and/or rectification as per Note 2 to clause 16.1 but the appellant company was disqualified due to a technical shortcoming because the 'Statement of Compliance' represented a technical specification under clause 16.1 (e) (ii) in respect to which Note 3 was applicable,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that a mandatory requirement, regardless of the importance given to it by a participating tenderer, cannot be seen as something which may be arbitrarily decided upon by the same tenderer as to whether one should provide whatever is requested or not. In similar circumstances there is no room for arbitrary decisions.

2. This Board feels that the adjudication board was correct in establishing that the appellant company was not disqualified due to administrative non-compliance otherwise the contracting authority would have been allowed to seek a clarification and/or rectification as per Note 2 to clause 16.1 but the appellant company was disqualified due to a technical shortcoming because the 'Statement of Compliance' represented a technical specification under clause 16.1 (e) (ii) in respect to which Note 3 was applicable.

3. This Public Contracts Review Board acknowledges that, in view of the above, the adjudicating board could not (a) verify compliance from the product literature and the other documentation presented with the tender submission and (b) seek any clarifications by requesting the tenderer (the appellant company) to provide the 'statement of complaince'.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

31st May 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 558

CT 2190/2013

Tender for the Supply, Delivery and distribution of Diapers to Scheme B beneficiaries

The tender was published on the 6th November 2012 with a closing date of the 18th December 2012. The estimated value of the Tender was €255,000 (inluding VAT).

Six (6) bidders submitted their offers.

Medic Sante filed an objection on the 19th April 2013 against a decision of the Director General (Contracts) to discard its offer and to recommend the award of the tender to Pharma Cos Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 2nd July 2013 to discuss the appeal.

Present:

Medic Sante

Dr Norval Desira	Legal Representative
Mr Keith Attard	Representative

Pharma Cos Limited

Mr Marcel Mifsud	Representative
Mr Edward Mifsud	Representative
Mr James Borg	Representative

Health Division

Mr Karl Farrugia	Representative
Mr Ray Mamo	Representative
Ms Stephanie Abela	Representative

Evaluation Board

Mr Albert Briffa	Chairman
Mr George Pavia	Member

Department of Contracts

Mr Nicholas Aquilina

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Norval Desira, legal representative of the appellants, explained that their reasons for objection was as stated in the letter of Objection. Directive 2004/18/EU states that contracting authorities shall treat economic operators equally and non-discriminatorily. The principle is also found in the local Procurement Regulations regulation 4 (1). However, a clause in the tender document states that if the bidder does not prove that he supplied one hundred thousand (100,000) diapers within the last two years, he would not qualify. Had these diapers been used on the open market, this would be reasonable, but as these diapers are heavily subsidised by the government, it would not make any economic sense in importing them unless on being awarded this tender. For this reason, appellants contend that the relative clause 6.1.1 in the document is discriminatory, and this clause is incompatible with and goes against the principle of equal treatment of bidders, but is in fact creating a monopoly for those who had already managed to enter the market.

The Chairman asked how the figure of 100,000 was arrived at and the consumption per year.

Mr George Pavia, an evaluation board member explained that consumption last year was 100,000.

Mr Marcel Mifsud, the recommended bidder refuted the allegation made by appellants that there was a sort of monopoly in the market and that you needed to have obtained a similar tender to import these diapers. He explained that his firm normally supply around 300,000 diapers per year on the open market alone.

Mr Albert Briffa stated that the value of the tender is 1,000,000 euro for three years but explained that the government subsidises seven cents per diaper. The government runs two schemes, Scheme A where beneficiaries receive free diapers and scheme B, as in the present case where the government subsidises 7 cents per diaper. Thus although the value of the tender is one million euro, the cost to government is only as stated, 7 cents each diaper which amounts to €255,000.

Dr Norval Desira for the appellants contended that this confirms his arguments because as his clients would have to absorb this amount of 255,000 Euros itself to enter into the market. So his client never had an opportunity to enter the market since he was never on an equal footing with the preferred bidder. He contended further that performance was guaranteed by the performance bond and clause 6.1.1 was superfluous.

Mr Ray Mamo, Assistant Director explained that Diapers are distributed by the government to residents in the Homes for the Elderly and to other beneficiaries under Scheme B. The department had to have safeguard regarding the availability of these diapers at all times, because their users are the most vulnerable. This was the reason for the inclusion of the clause 6.1.1, to ensure that the chosen supplier would be able to have them in stock at all times. This particular tender was for use under Scheme B only. However the clause 6.1.1 referred to all kinds of diapers supplied locally and not only for those that were necessarily supplied under Scheme B or to the government. He contends that appellants should have asked for clarification regarding this point if they had any doubts. Appellants signed a tender form which included a tenderer's declaration form. This means that they agreed with all that was contained in the tender in its entirety.

Mr Nicholas Aquilina for the Director of Contracts said that any one of the bidders could have asked for clarification before submitting his offer. Since each bidder signed a declaration form accepting the tender conditions, appellants cannot now at this stage object after the adjudication, but should have filed a pre-contractual concern before the closing date of the tender.

This latter point was reiterated by Mr Marcel Mifsud, the preferred bidder.

Dr Norval Desira explained that this appeal was intended to create a precedent as otherwise the situation would remain the same and would continue to do so in any future similar tenders.

At this point, the hearing was brought to an end.

This Board,

Having noted the reasoned letter of objection filed by the appellant dated 19th April 2013;

Having noted the appellant's claims as follows:

a) **That contracting Authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way;**

b) **In that a mandatory quantity of 100000 diapers was imposed by the Contracting Party in the Tender document to have been supplied within the two years 2010, 2011, This in itself , created a monopoly as it limited the financial strength of bidders;**

c) **In that the sole award criterion will be the price and the appellant's offer was the cheapest yet compliant with the conditions of the tender document;**

d) **The applicant's bid to revoke the decision of the Director's General (Contracts) of the 19th April 2013;**

Having considered the Contracting Authority's submissions as follows:

a) **The "Quantity Clause" was based on the actual consumption of diapers per annum;**

b) **This clause was imposed in the Tender document to ensure uninterrupted supply. One has to take into consideration the vulnerable state of the users of such diapers;**

c) **The appellant could have asked for clarifications prior to submission of his offer;**

Reached the following conclusion:

1. **The Public Contracts Review Board opines that the Appellant's claim that the "Quantity clause" created a monopoly and barred certain bidders from submitting an offer is not reasonable. In al fact that clause was stipulated in the tender document to:**

    i. **Ensure immediate supply as and when necessary;**
    ii. **Ensure uninterrupted supply.**

Dr. Anthony Cassar Chairman	Dr. Charles Cassar Member	Mr. Richard A. Matrenza Member

25th July 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 559

ETC/IT/Q/01/13
Call for Quotations for the Supply of Energy Efficient Personal Computers

The request for quotations was published on the 11th January 2013 with a closing date of the 18th January 2013. The estimated value of the Quotation was €60,000 (inluding VAT).

Three (3) bidders submitted their offers.

FGL Information Technology Limited filed an objection on the 9th April 2013 against a decision of the Employment & Training Corporation to discard its offer and to recommend the award to Merlin Computers Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a meeting on Tuesday 2nd July 2013 to discuss the appeal.

Present:

FGL Information Technology Limited

Dr David Zahra	Legal Representative
Dr John Gauci	Legal Representative
Mr Adrian Gatt	Representative

Merlin Computers Limited

Mr Sandro Musu`	Representative
Mr Joel Spiteri	Representative

Employment & Training Corporation

Dr Victoria Cuschieri	Legal Representative
Ms Mathea Gauci	Representative
Mr Mario Attard	Representative
Mr Edwin Camilleri	Representative
Mr Stephen Caruana	Representative
Ms Maria Cutajar	Representative

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection

.

Dr David Zahra, legal representative of the appellant company, submitted that appellant company's bid was declared non-compliant on three points:

1. Size of PCs was not according to requested specifications;
2. Contracting Authority was being precluded from maintaining and upgrading the PCs offered without voiding the warranty;
3. The speakers of the offered PCs were not built in as specified in the quotation specifications.

On points one and three, Dr Zahra explained that the same contracting authority had issued an identical tender (ETC/G/14A Supply of classroom equipment and energy efficient desktop computers for the ETC in Gozo) with exactly the same specifications as the present, wherein Clarification Note 1 allowed the submission of PC sizes different from specifications within certain parameters. Dr Zahra contends that these clarifications issued in another tender should have been binding in the present tender which he reiterated was identical to the other tender.

He also contends that according to well known principle of public procurement, specifications should not be interpreted restrictively. That is if your bid satisfies the needs of the contracting authority, your bid should not be rejected. This has been confirmed by the European Court of Justice, (cases 45/87 and C-359/93)

As regards the second point of its rejection, he claimed that it was common knowledge that suppliers of all brands of PCs require that any maintenance or upgrading has to be done by their certified employees and that any tampering with the equipment nullified the warranty.

Dr Zahra thus contends that appellant's bid was compliant and that their bid was substantially cheaper and asks this Board to overrule the contracting authority's decision.

Dr Victoria Cuschieri legal representative of the contracting authority, Employment & Trading Corporation explained that the present call for quotations was issued with urgency and it was clear from the requested specifications that bidders had to stick with these specifications regarding size and built-in speakers because the place where these PCs were to be housed was very limited in area. In fact other bidders complied with the size as requested in the specifications. She also stated that appellant based his appeal on his interpretation of another tender. The Clarifications mentioned by the appellant referred to another distinct tender and not to this one. Thus it was not to be expected that these clarifications would hold true necessarily for the present call for quotations, which as stated required specific sizes and built in speakers.

As regards appellants reference to cases 45/87 and C-359/93, Dr Cuschieri contends that the principles mentioned in these cases do not apply in this quotation because of the constrains of the size of the place where the PCs are to be used, and thus the size of the offered PCs had to be given weight. She confirmed that the awarded bidder was not the cheapest, in fact the award has been queried by the Ministry of Finance. However, after it was explained to the Ministry of Finance, the reason for this, the award was authorised.

Mr Mario Attard, Unit Manager at the contracting authority explained that in the cases quoted by appellants, size of the PCs did not matter, but in the present case size mattered. The Contracting Authority had to house sixty persons in the available hall. He continued that as regards the

warranty of the PCs offered by the appellant, it was a requirement that PCs supplied by the successful bidder had to be maintained and upgraded as necessary by ETC's own trained staff. PCs used by the staff of the Corporation are always maintained in house. Other PCs used by the contracting authority are normally maintained by the suppliers, but in this case the contracting authority needed to do this using its own staff without incurring the penalty of nullity of warranty. Other suppliers have accepted this without any reserve.

Dr Zahra on behalf of the appellant company made it clear that here the difference of dimensions was minimal, a question of a few millimetres.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 9th April 2013 and also through the appellant's verbal submissions during the hearing held on 2nd July 2013, had objected to the decision taken by the pertinent Authority, in that:

a) Size of PC's was not in accordance with the requested specifications.

b) Contracting Authority was precluded from carrying out the maintenance without voiding the warrant.

c) Speakers were not 'Built in 'as specified in the Tender document.

d) With regards to point B) above, the Appellant stated that suppliers of Brands impose upon users of their Brand that any maintenance or upgrading on their equipment, has to be carried out by the Suppliers' qualified employees – otherwise, warranty is nullified.

e) The Appellant's Bid was compliant in all respects and cheaper, hence requests the Board to overrule the decision of the award of the Tender.

Having considered the Contracting Authority's submissions by way of letter dated 23 April 2013 and through the verbal submissions presented by same during the hearing held on 2nd July 2013:

i) The call for application was urgent.

ii) Bidders had to stick to the specifications laid down in the Tender documents.

iii) Appellant based his appeal on interpretation of another tender.

iv) In this particular case, constraint of space had to be given prominence.

v) Although successful bidder was not the cheapest and after the bid was queried by the Ministry of Finance, approval was authorised.

vi) The successful bidder satisfied all technical specifications and conditions laid out in the Tender Document.

Reached the following conclusions:

1. **Size of PC's were of the utmost importance due to constraint space and this was clearly explained and proved by the Contracting Authority**
2. **Since the successful bid allowed for and accepted that Contracting Authority's technical staff to do the necessary maintenance without effecting the warranty issue, the Contracting Authority were correct in awarding the tender to the successful bidder**

In view of the above this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

25 July 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 560

MG 186/2010/Vol I
Tender for the Supply, Delivery, Installation, Commissioning, Operation (Maintenance) and Decommissioning of a Wind Monitoring System in Gozo.

The tender was published on the 5th June 2012 with a closing date of the 17th July 2012. The estimated value of the Tender was €120,000 (exclusive of VAT).

Two (2) bidders submitted their offers.

Gozo Wind Projects Joint Venture filed an objection on the 10th December 2012 against a decision of the Corporate Services Directorate, Ministry for Gozo to discard its offer and to recommend the cancellation of the Tender.
The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a meeting on Tuesday 9th July 2013 to discuss the appeal.

Present:
Gozo Wind Projects Joint Venture

Dr John L. Gauci	Legal Representative
Perit Shirley Buttigieg	Representative

Ministry for Gozo

Mr Anthony Zammit	Director
Dr Tonio Sant	Representative
Dr Mireille Sacco	Legal Representative

Evaluation Board

Eng. Therese Attard	Chaiperson
Mr Roberto Curmi	Member
Mr Anthony Formosa	Member
Ing. Joe Portelli	Mechanical Engineer

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr John L. Gauci, legal representative of the appellants, stated that his clients were disqualified because "the datalogger they offered only records samples every 10 minute interval", while specifications called for recording every minute, 10 minutes and 1 hour. The reasons for the objection were as follows:
That the contracting authority based its decision solely on the technical literature submitted with the bid. The evaluation board should have asked appellants for clarification whereupon it would have been explained that although the technical literature gave the 10 minute interval, this being the recognized standard interval according to the IEC61400 standard, the offered data logger could in fact be set to record at 1 minute, 10 minutes and 1 hour intervals.
The product offered by appellants conforms to the IEC61400 standard as requested in the tender. This standard states that recording should be every 10 minutes. The technical literature submitted by appellants with the bid had to be according to the IEC61400 standard and not for customized settings.
In a similar case, this point was decided upon by the PCRB (Case 469), where the then objector, had filed literature only according to the international standard. Applicants bid in the present tender,

conformed to the requested standard and their bid, appellants declared that they were conforming also with all the other specifications. Thus it follows that the contracting authority was in duty bound to ask for clarification. Dr Gauci also quoted another judgement given by the Court of Appeal of the 10 July 2012 on another case decided by the PCRB, case 365, that once a bidder had offered specifications according to a requested Standard, the matter should never have been resolved by the disqualification of the bidder but by clarification.

Dr Mireille Sacco legal representative, Ministry for Gozo stated that appellants' bid was disqualified because the 1 second, 1 minute, 10 minutes and 1 hour intervals were mandatory. The evaluation board had to stick to mandatory specifications as otherwise it would be biased in favour of the appellants. Nowhere in appellants' bid did the information emerge that the equipment could give the required intervals. The bid states that "on request", could be set to give other results. No clarification was possible because as per 16.1.1 only clarification was possible not rectification, and to change the given 10 minute interval would amount to rectification.

Mr Anthony Zammit for the contracting authority explained the difficulty to differentiate between clarification and rectification. Additional information qualified as rectification. This was even checked by the evaluation board with the Department of Contracts. Appellants' bid had missing information as they did not include the requested time intervals with their bid. To ask them for this missing information would be accepting rectification. It was only here during the present hearing that the possibility of it providing 1 minute and 1 hour interval was given. The contracting authority had every right to ask for additional specifications that suited it best, even when requesting standard compliancy. Appellant could have qualified his bid by including a letter or document that showed that the required interval sampling and recording would be made.

Chairman PCRB this point asked the appellant' representative if in fact their bid mentioned the different intervals. Dr Gauci insisted that his clients had declared they were binding themselves with the specifications and that contracting authority should have asked for clarification.

Mr Anthony Zammit stated that even had appellants provided the information now they submitted with their appeal, in the first instance, with their bid, it would still have not qualified because it states "or" instead of "and" when referring to the intervals of recording. The contracting authority required "and".
Dr John L. Gauci closed his case by reiterating that his clients had submitted only literature that conformed to the accepted standard and they had declared themselves to abide with all the other specifications, and had no need to do anything else. Thus the contracting authority should have asked for clarification.

The hearing was at this point closed.

This Board,

Having noted the reasoned letter of objection filed by the Appellant, dated 9th December 2012.

Having noted the Appellant's claims as follows:-

a) **That the Contracting Authority based its final decision solely on the technical literature submitted with the bid. And that the equipment offered by the Appellant could be set to record also " every 1 hour interval"**

b) **That the equipment offered by the Applicant was in conformity with IEC 61400 Standard.**

c) At no point in time did the Evaluation Board asked the Appellant for any clarifications.

d) That in a similar case decided by the PCRB (Case 469) the Appellant filed literature according to International Standards ".Once a bidder had offered a product according to the required specifications he should have been asked for clarifications".

Having considered the Contracting Authority's submissions as follows:-,

i. That the clause stipulating the " interval periods of every 1 minute, 10 minutes and 1 hour" was mandatory.

ii. That it was not possible for the Contracting Authority to ask or rather enquire for more details as this would result in a "rectification" and not a "clarification",

Reaching the following conclusion,

1. **The Public Contracts Review Board opines the Contracting Authority's Evaluation Board should have asked for any clarifications necessary during the Evaluation Process.**

2. **Clarifications during the Evaluation Process do not entail rectification or addition to a Tender.**

3. **The decision taken in the case No 469 on 29th October 2012 taken by PCRB is hereby upheld.**

In view of the above, this Board finds in favour of the Appellant and recommends that:

a. The deposit paid by the same appellant for the appeal to be lodged should be reimbursed.

b. Furthermore, this Board recommends that the Evaluation Board should take remedial action to ensure that Appellant is integrated in the tendering process.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

29th July 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 561

MTFLC/T/01/12

Tender for the Collection of Mixed Household Waste

The tender was published on the 26th September 2012 with a closing date of the 27th October 2012. The estimated value of the Tender was €34,000 (exclusive of VAT).

Eight (8) bidders submitted their offers.

Northern Cleaning Group Limited filed an objection on the 14th February 2013 against a decision of the Mtarfa Local Council, the contracting authority, to discard its offer and to recommend the award of the tender to Chris Gatt.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 9th July 2013 to discuss the appeal.

Present:

Northern Cleaning Group Limited

Dr Arthur Azzopardi	Legal Representative
Mr Brian Borg	Representative
Dr Mathew Brincat	Legal Representative

Chris Gatt, recommended bidder

Mr Chris Gatt	Representative
Mr George Gatt	Representative
Dr Maria Azzopardi	Legal Representative

Mtarfa Local Council

Ms Josette Micallef	Executive Secretary
Dr Malcolm Mifsud	Legal Representative

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of his objection.

Dr Arthur Azzopardi legal representative of appellant firm referred to the letter of objection and stated that the salient points were as follows. The tender had to be adjudicated on the basis of forty per cent 40% on the financial aspect and the remaining sixty percent 60% on the other factors. On the financial aspect there is no contestation on the working of the points assigned for the financial

bid. In fact his clients were assigned 26 points while the preferred bidder, being the cheapest was assigned the maximum 40 points.
On the remaining sixty percent of the points, it was here that there were several flawed decisions.

Here the allocation of these 60 percent there are standards set out for all local councils and are not fixed by the contracting authority itself.

1. Human Resources: Appellant firm employs ten full time employees. So it should have been assigned more points for this than the preferred bidder.
2. Ownership of vehicles: Appellants have shown in their bid that they own 10 refuse collection trucks. But questions the ownership of vehicles by the preferred bidder. On being asked by the Chairman if he is alleging that the preferred bidder did not have the necessary vehicles, Dr Azzopardi stated that he had asked for a representative from Transport Malta to state if Chris Gatt had any vehicles registered. He contends that this should have been done by the contracting authority itself before adjudicating.
3. References: Appellants produced evidence of four other instances where they had provided service to other councils. Preferred bidder did not have any experience so they should not have been assigned the same points.
4. Default notices: Contends that his clients correctly received the full marks, because they did not have any default notices. However preferred bidder also received full points, but as it is true that he did not have any default notices, he was not exposed to these notices because he was not rendering previous services.

Finally Dr Azzopardi reiterated that unless the preferred bidder had vehicles in his name at the time of the tender closing date, and did not have employees working for him his bid should have been disqualified.

Dr Malcolm Mifsud legal representative of the Mtarfa Local Council stated the evaluation criteria should be that set down in the tender document which binds both the contracting authority and each bidder. There was no specification that bidders had to have ten employees. What is important for this tender was to ensure that bidders had enough manpower to service Mtarfa properly. The number of employees employed with tenderer was not relevant. Evaluation board acted correctly in assigning these points. Preferred bidder satisfied this condition and was given points accordingly.
Regarding vehicles, the contracting authority needed to be satisfied that whoever won the tender would be using Euro 4 Vehicles, so such vehicles were allotted more points.
The preferred bidder in fact had the tender for two other areas - Dingli and Rabat, so it was not true to state that the preferred bidder did not have any experience.
This board has to see that the evaluation board acted correctly when evaluating the offers.

Josette Micallef Executive Secretary Mtarfa Local Council explained that the format used for the tender was issued by the Local Councils Department. The evaluation board examined each bid in detail and checked everything including the log books. Points given on Euro 4 vehicles. Appellants submitted only 1 Euro 4 vehicle, and in fact were offering to serve Mtarfa using a Euro 3 vehicle.

At this point because of allegations made by Dr Azzopardi, that preferred bidder did not possess the necessary vehicles, the Board examined the log books and photos submitted by the preferred

bidder with his tender. It was verified that the vehicles he offered were owned by him and were category Euro 4 vehicles.

At this point the hearing was closed.

This Board,

Having noted the reasoned letter of objection filed by the Appellant dated 14th February 2013,

Having noted the Appellant's claims as follows:

The allocation of points relating to the 60% benchmark was not allotted correctly in that:

a) **Appellant had more employees than the preferred bidder – more points had to be given to the Appellant.**
b) **Appellant was more equipped than the preferred bidder.**
c) **Appellant's experience in this trade is much more than the preferred bidder's.**
d) **Allocation of points with regards to "Default notices" , Appellant claims that points given by the evaluation Board did not reflect the scale of exposure in this line of trading**

Having considered the Contracting Authority's submissions as follows:

a) **That the tender document did not stipulate the number of employees the successful bidder had to employ.**
b) **In fact, the successful bidder had to employ the necessary workforce to ensure a good service as laid out in the tender documents.**
c) **The preferred bidder had enough experience for this assignment.**

Reaching the following conclusions,

1. **The Evaluation Board acted correctly in the allocation of points on deliberation.**
2. **The preferred bidder had enough experience and resources to deliver.**
3. **The accusations made by the appellant were unfounded.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the same Appellant for the appeal to be lodged should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

29th July 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 562

CT 3101/2012
Works Tender for the Design, Building and Installation of a Tensile Membrane Structure for the Zewwieqa Waterfront, Gozo.

The tender was published on the 28th September 2012 with a closing date of the 20th November 2012.
The estimated value of the Tender was €92,746.39 (exclusive of VAT).
Four (4) bidders submitted their offers.
Tolder Carpas Y Toldos S.L., filed an objection on the 11th March 2013 against a decision of the Ministry for Gozo to discard its offer and to recommend the cancellation of the Tender.
The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Richard A. Matrenza and Mr Lawrence Ancillieri as members convened a meeting on Thursday 11th July 2013 to discuss the appeal.

Present:
Tolder Carpas Y Toldos S.L.

Dr Norval Desira	Legal Representative
Ms Veronica Bonavia	Representative

Ministry for Gozo

Dr Mireille Sacco	Legal Representative

Evaluation Board

Mr John Cremona	Chairman Evaluation Board
Mr Philip Mifsud	Secretary
Perit Angelo Portelli	Member
Perit Godwin Sultana	Member
Mr Saviour Tabone	Member

Department of Contracts

Mr Jonathan Barbara	Representative

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Norval Desira on behalf of appellant firm, referred to his letter of objection and stated that his clients had been disqualified because "*warranty submitted not compliant since it covers only the tensile structure and does not cover fully the first five years".* He claimed that this must have been because of a misunderstanding, a wrong interpretation of his clients bid.
This arose through the submission of an internal warranty, given to his clients, by his suppliers of the tensile fabric, "Ferrari" and was not intended to cover the whole project, or relate to the contracting authority.
The required warranty on all the aspects of the project was however in fact provided by his clients at page 84 of their bid. This clearly and unequivocally states that *"The Company (*bidders*) provides a warranty covering the fabric, rods, plates and actual installation ..... Any other damages shall be covered by Tolder Carpas Y Toldos SL for the warranty period of 15 years."* Appellant firm thus provided the all-exhaustive 15 year warranty as was required by the Tender Document, clause 3.3.13. In fact the appellants provide much more than the requested five years warranty.

Dr Mireille Sacco, legal representative of the contracting authority explained that tender document required a five year warranty covering the performance of the structure including the tensile member and support. The title of annexe 3 was General Warranty. The appellants' bid here showed a fabric

warranty of five years, with diminishing cover over the period of five years. No explanation was given to show that this was just an internal arrangement between bidder and his supplier of material.

Mr Joe Cremona, the Chairman of the evaluating board explained that here the need for clarification did not arise since the document submitted by bidder clearly stated that Annexe 3 covered only the fabric for less than five years. Clause 3.3.13 mentioned by Dr Desira deals with after sales services and we did not consider this to be a guarantee. For the evaluation board the warranty was that submitted in annexe 3, which appellants themselves indicated was general warranty.

Dr Desira stated that annexe 3 is self explanatory that the warranty was between his clients and their supplier. The period of warranty clearly starts after the installation so it must form part of the after sales services. Furthermore in this case there would be no rectification had the evaluation board asked for clarification on this point as the bidders filed their warranty with their bid.

At this point, Dr Mireille Sacco explained that even if, for argument's sake, the evaluation board had accepted the warranty given by the appellants under the after sales services, their bid would have been disqualified on other financial constrains. Dr Desira protested that his clients were disqualified on technical non-compliance only, and have filed this objection accordingly. Other reasons for disqualification cannot be raised now at this stage of proceedings.

The hearing was brought to an end.

This Board,
Having noted the Appellant's Company, in terms of reasoned letter of objection dated 11th March 2013 and through the verbal submissions made during the hearing held on 11th July 2013, had objected on the following grounds:-

a) **That the Appellant's offer was found to be "Technically non-compliant" by the Evaluation Board.**
b) **That the Warranty Clause did not cover the warranty requested on the" Tensile fabric" to be used on the actual project being contemplated.**
c) **That the limitation of Warranty period referred only to an internal arrangement between Appellant and Supplier.**
d) **That the Appellant contends that a clear General "warranty" was given by the Appellant and this constitutes a "Warranty" of 15 Years on the whole project covering, the total structure including machines, equipment and installation needed for the project.**
e) **That the decision taken by the Contracting Party was erroneous.**

Having considered the Contracting Authority's submissions as follows:

i) **That the Contracting Authority specifically and clearly stated in the tender document that a warranty of five years was mandatory covering the execution of the installation of structure including the tensile membrane and supporting structure.**
ii) **No clarification was given by the Appellant that the warranty allowed on the Tensile Membrane was an internal accord between Appellant and his supplier.**

Having noted and heard submissions made by the Evaluation Board as follows:
That even if the Board accepted the warranty conditions given by the Appellant, the latter's bid would have been rejected on financial constraints.
Reached the following conclusions,

1. **The public Contracts Review Board opines that the Appellant gave a "General Warranty" and this type of Warranty covered the whole project including material and installation.**

2. **Clarification during the Evaluation process by the Evaluation Board could have easily established the fact that the Appellant was "technically Compliant".**

3. **In view of the above this Board finds in favour of the Appellant Company and recommends that the deposit paid by the latter be reimbursed and that the tender be re-issued.**

Dr. Anthony Cassar	Mr. Lawrence Ancilleri	Mr. Richard A. Matrenza
Chairman	Member	Member

1st August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 563

CT 3080/2011
Service Tender for the Design, Preparation, Management, Implementation and Evaluation of Training Programmes in Information Management.

The tender was published on the 27th September 2011 with a closing date of the 8th November 2011. The estimated value of the Tender was €290,105.36 (including VAT).

Four (4) bidders submitted their offers.

Allied Consultants Limited, filed an objection on the 3rd May 2013 against a decision of the Department of Contracts to discard its offer and to recommend the award of the Tender to Computer Domain Limited for the price of €69,270 including VAT.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Richard A. Matrenza and Mr Lawrence Ancilleri as members convened a meeting on Thursday 11th July 2013 to discuss the appeal.

Present:
Allied Consultants Limited. - Appellants
Dr Victor Axiak Legal Representative

Recommended Tenderer – Computer Domain Limited

Dr Paul Borg Legal Representative
Mr Nick Callus Representative

Contracting Authority – Office of the Prime Minister – Centre for Development Research & Training

Architect Godwin Sultana
Ms Joanna Genovese Project Leader
Mr Jonathan Sciberras Chairman Evaluation Board
Ms Maria Buttigieg Secretary
Ms Olivia Cortis Member
Mr Jesmond Sciberras Member
Ms Marisa Vella Member

Department of Contracts
Mr Jonathan Barbara Representative

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Victor Axiak said that the PCRB should know that there had already been an appeal in this Tender proceedings but the context of the present case is different because the present appellants were the preferred bidders in the first appeal.
The Chairman informed Dr Axiak that if his client did not agree with the Board's first decision, the proper channel to question this was recourse to the courts of justice according to law, and not another appeal before the same board. The present Board cannot overrule a decision taken by the same board.

Dr Axiak said that in the first case, Computer Domain Limited had appealed. The subject matter in the present case is similar, but insists that things have now changed because whereas the first evaluation board had found that the preferred bidder was abnormally low, now it is not finding it abnormally low. The discrepancy between the bids is so great and it is not possible to deliver at that price. The evaluation process should have been carried out again.
Jonathan Sciberras explained that following the decision by the PCRB, where this point of abnormally low values had been already decided, a new evaluation board had been appointed. The evaluation board waited until the time allowed for filing a case before the courts elapsed and then, after also taking legal advice, evaluated the bids again and the process was completed. The evaluation board did not question, and should not question a decision taken by the PCRB, but acted on it. Since the Computer Domain Limited's bid was administratively and technical compliant, and was also the cheapest, it was decided to award the tender to it.
Dr Axiak insisted that the new evaluation board should have gone into the question of abnormally low again.
Jonathan Sciberras stated that that question of low bid, had been decided by the PCRB,and it wa not the remit of the evaluation board to go into it again. Still, the bid of Computer Domain was the cheapest. Their bid had been increased by €18000 but was still the cheapest.
Nick Callus asserted that his firm has been for a number of years providing service and assured those present that all the services required in the tender would be provided by his company.
Finally the Chairman reiterated that the subject matter should have been raised at the proper venue, the courts of justice and not before this board.
The hearing was brought to an end.

This Board,

- Having noted the "Reasoned Letter of Objection" filed by the Appellant dated 30th April 2013 and also through the verbal submissions made by the Appellant during the hearing held on 11th July 2013 had objected to the decision taken by the Department of Contracts.

- Having noted the Appellant's claims as follows:

  a) The tender was originally awarded for award to Allied Consultants Limited by the Evaluation Board of the Contracting Party;

  b) Although the offer made by Computer Domain Limited was "Abnormally Low" and contained arithmetical mistakes through a decision of the Public Contracts Review Board dated 26th October 2012, Computed Domain Limited was integrated in the Evaluation process;

  c) That it was dubious whether the preferred bidder would deliver at such low values.

- Having heard submissions made by the Contracting Authority as follows:

  a) After the decision taken by the Public Contracts Review Board of the 26th October 2012, the Evaluation Board waited until the allowed period by law for an appeal before the Courts of Law elapsed;

  b) After taking Legal Advice, the New Evaluation Board evaluated the bids again and the tender was awarded;

c) The preferred bidder's offer was administratively and technically compliantl

d) The preferred bidder's offer was the cheapest.

- Reached the following conclusions:

1) The Public Contracts Review Board opines the Appellant Company could have chosen to appeal the decision taken by PCRB dated 26th October 2012 through the proper channels i.e Courts of Law;

2) This Board upholds the decision taken on the 26th October 2012, (Case No. 452)

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar Chairman	Mr. Richard A. Matrenza Member	Mr. Lawrence Ancillieri Member

6 August 2013

Errata Corrige
regarding:
Case No. 563
CT 3080/2011 - Service Tender for the Design, Preparation, Management, Implementation and Evaluation of Training Programmes in Information Management.
The Public Contracts Review Board would like to notify that the decision date in respect of tender in caption should read, **29 August 2013** and not as inadvertently stated in PCRB decision Case No. 563, that is, **'6 August 2013'.**
Any inconvenience that might have been caused is regretted.

Dr. Anthony Cassar Chairman	Dr. Charles Cassar Member	Mr. Richard A. Matrenza Member

12 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 564

CT 3113/2012
Service Tender for the Provision of Specialised Training and Certification for Data Protection Officers with the Malta Public Service.

The tender was published on the 20h November 2012 with a closing date of the 15th January 2013. The estimated value of the Tender was €300,692.32 (Exclusive of VAT).

Three (3) bidders submitted their offers.

PricewaterhouseCoopers on the 4th June 2013 filed an objection, followed by a reasoned letter of objection filed on the 11th June 2013 against a decision of the Director General (Contracts) to discard its offer and to recommend the cancellation of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 16th July 2013 to discuss the appeal.

Present:

PricewaterhouseCoopers - Appellants

Dr Steve Decesare	Legal Representative
Mr George Sammut	Representative

Evaluation Board

Mr Bernard Bartolo	Chairman
Ms Moira Pisani	Member
Mr Ian Deguara	Member
Ms Marica Saliba	Member
Mr Jonathan Sciberras	Member

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Steve Decesare, legal representative on behalf of the appellants stated that his clients' bid was declared to be administratively non compliant because they omitted to include the bid price in the Tender Declaration at page 19 of their bid. This was through an oversight caused by the different format of the Tender Declaration form used for this Tender. Point 3 of the Declaration omitted the usual blank spaces wherein one could fill in the price quoted, and the person who filled the tender document did not realise that after the colon, he should have written down the financial bid as well. However this does not mean that no price was quoted for the Tender because their bid was properly entered in the Financial Bid Volume 4 page 59 of the Tender document.

This was not a case where the financial bid was missing but in fact the price was not written in its proper place. There were several cases decided by the PCRB and the European Court of Justice wherein it was decided that evaluation boards should not disqualify bidders on trivial matters.

Mr Bernard Bartolo, Chairman of the Evaluation Board explained that the Scheduling of bids is done by the Contracts Department. Summary of Tenders Received show that only one bidder had properly written down the price, appellant's bid is not shown. It was therefore for this reason that their bid was

disqualified. It is true that the European Court of Justice stated that bidders should not be disqualified for trivial reasons, but the same Court also stated that it was the bidder's responsibility to submit a proper bid.

He also stated that the evaluation report showed another reason for disqualification. This reason was not however included in the Department of Contract's letter to appellants. Appellants could have breached clause 7, which dealt with multiple bids, of the instructions to Tenders because during the evaluation process they took over CC Training Ltd which was another bidder who had submitted tender number 1. At the time of the closing date, appellants had not yet taken over the other bidder. They took them over in April 2013 that is three months after the closing date.

Answering questions by the Chairman PCRB, Mr Bartolo continued that in fact appellants' bid was not the cheapest. The Department of Contracts had insisted with the evaluation board that the appellants' Tender Declaration had incomplete information. Finally he declared that evaluation board had not evaluated the technical compliancy of the appellants' offer since they had been found administratively non-compliant.

The hearing was at this time brought to an end.

This Board,

Having noted the Appellant's objection in terms of 'Reasoned Letter of Objection' dated 10th June 2013, in that:

a) **The Appellant's bid was 'Administrative' non compliant due to the fact that Appellant failed to include the Bid Price in the tender declaration's form at page 19.**

b) **The tender price was properly entered in Volume 4 page 59 of the Tender Document.**

c) **This was not a case of failing to quote a price, but rather putting same in the wrong place.**

d) **This was a trivial matter and the Evaluation Board should not disqualify the bidder on such grounds.**

e) **In fact the bidder's price was quoted.**

Having considered the Contracting Authority' Evaluation Board's submissions as follows:

a) **That the Tenders received indicated that only one bidder had properly stated the price.**

b) **That the Appellant's bid was not shown in the Tender document.**

c) **The European Court of Justice ruled that bidders should not be disqualified for trivial reasons.**

d) **The European Court of Justice also ruled that it was the Bidder's responsibility to submit a proper tender.**

e) **That the Appellant had breached clause 7, which deals with multiple bids.**

f) **That during the Evaluation process, the Appellant took over another bidder to the same tender.**

g) That the appellant's Bid was not the cheapest.

Reached the following conclusions,

1. **The fact that the Appellant failed to include the price in Part 'C' of the Tender form did not constitute omission on the part of the Appellant's bid.**

2. **The Price was in fact quoted by the Appellant on Volume 4 of the Tender under (Global Price Contracts) – Financial Bids.**

3. **The Appellant cannot be excluded on an 'Administrative non Compliant' issue as although not all the sections of the Tender included the price, the price was quoted.**

4. **There was no case of 'Multiple Bids' as at the time of closing date of the Tender Appellants has not as yet taken over the other Bidder.**

5. **Due to these considerations, the Evaluation Board of the Contracting Authority did not evaluate the Appellant's tender on the Technical Compliancy aspect.**

In view of the above, this Board finds in favour of the Appellant and apart from being integrated in the evaluation process, recommends that the deposit paid by the same Appellant for the appeal to be lodged should be reimbursed.

Dr. Anthony Cassar Chairman	Dr. Charles Cassar Member	Mr. Richard A. Matrenza Member

8th August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 565

CT 2136/2012

Tender for the Supply, Delivery, Installation, Testing, Commissioning of Grid-connected Photovoltaic Systems at the Biosciences Building, Chemistry Building and Students House at the University of Malta, Msida.

The tender was published on the 6th July 2012 with a closing date of the 28th August 2012.

The estimated value of the Tender was €296,610.17 (Exclusive of VAT).

Fourteen (14) bidders submitted their offers.

On the 21st January 2013, Solar Solutions Limited filed an objection, followed by a reasoned letter of objection filed on the 28th January 2013 against a decision of the Director General (Department of Contracts) to the of award of tender to Solar Engineering Limited under Option 1 for the sum of €301,899 including VAT.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 16th July 2013 to discuss the appeal.

Present:

Solar Solutions Limited - Appellants

Dr Nicolai Vella Falzon	Legal Representative
Mr Jesmond Farrugia	Representative

Solar Engineering Limited – Recommended Bidder

Dr Mario Scerri	Legal Representative
Mr Anthony Saliba	Representative

University of Malta – Contracting Authority

Dr Oriella Degiovanni	Legal Representative
Mr Tonio Mallia	Chairman Evaluation Board
Mr Karm Saliba	Secretary
Profs. Joseph Micallef	Member Evaluation Board
Dr Edward Gatt	Member Evaluation Board
Dr Ivan Grech	Member Evaluation Board

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Nicolai Vella Falzon on behalf of the appellants stated that appellants have four grievances regarding the way this tender has been adjudicated. These grievances are related to the compliance of the recommended bidder.

1. Experience: Clause 6.1.2 (a) of the tender document at page 6 required that the manufacturer of the panels had at least fourteen (14) years experience in the manufacture of the said panels. Hence the manufacturer of the offered panels, S-Energy should have been manufacturing these panels for fourteen years. Preferred bidders themselves state that S-Energy, who manufactures their panels was set up in 2001, thus could not have the required fourteen years experience. They claimed that S-Energy was a spin-off of Samsung. Samsung however did not transfer its operations but if Samsung is still producing panels so it was not absorbed into S-Energy. A former Chief Executive Officer at Samsung's set up S-Energy. Although he would have had the necessary experience, the company he set up did not. The tender required the 14 years' experience to ensure that any panels acquired through it had been thoroughly tested, keeping in mind that these panels had a guaranteed life-span of twenty to twenty five years. Thus this condition, included in the tender to provide safeguards was not satisfied by the preferred bidders.
2. Optimizer: The second grievance relates to Clause 4.3 at page 50 of the Tender document, also corroborated at page 46 Volume 3. These show how the panels are to be fixed to a single inverter. The recommended tenders' bid refers to a power optimizer, and this goes beyond what was requested and constitutes a variant. Clause 21.1 at page 12 and Clarification letter of the 31st July 2012 both make it clear that no variant solutions would be admissible, and this requirement was mandatory. This optimizer was a variant solution and not additional equipment. Thus another mandatory requirement of the tender was not abided with.
3. Tolerance: Clause 4.1 of the Tender document, at page 48, required that the Power tolerance of the modules to be within +/- 5%, as a minimum, whereas the preferred bidders units have a power tolerance of +/- 3% which is less than 2% less than the required specifications.
4. Clause 4.1 at page 49 also requires that modules shall have an anodized aluminium frame with a coating. However information available to appellants state that the panel frames provided by S-Energy, while being anodized aluminium, do not have the required coating.

Dr Oriella Degiovanni, on behalf of the Contracting Authority dealt only on two legal points. The tender was not awarded because it was the cheapest. And that legally, although spin-off was in 2001, manufacture of the panels had started in 1994 by Samsung. Spin-off means continuance.

Chairman PCRB explained that he sees spin-off as the creation of another company within an established company to conduct part of the business of the main company. And a company that was incorporated in 2001 could only start production as from that date.

Professor Joseph Micallef for the University of Malta claimed that on the internet S-Energy advertises itself as being an internal division of Samsung and that it started operating in 1994 and that production was continuous. Contended that Samsung would have taken legal action if it was not so. He could not state if Samsung was the shareholder of S-Energy.

Dr Mario Scerri for the preferred bidder said that he has a document that shows that Samsung uses S-Energy made panels to market as Samsung. Samsung obtains its photovoltaic panels that are marketed as Samsung, from S-Energy.

Anthony Saliba on behalf of the preferred bidder explained that S-Energy separated from Samsung. Samsung was never the manufacturer of panels but these were manufactured by S-Energy.

Chairman Public Contracts Review Board stated that since company was formed in 2001, it could not have 14 years experience. It is not a case where Directors of a company are using their experience to give evidence of experience of another company. Internet information alone is not an acceptable substitute for legal documentation and the Board would thus require an authenticated certificate which shows the relationship between Samsung and S-Energy.

Professor Joseph Micallef continued explaining and rebutting points 3 and 4 of appellants' grievances. Regarding the tolerance, submits that appellants got it wrong. He explained that +/- 3% tolerance is in fact better than +/- 5% and not worse. Regarding the coating of the frames, he contends that Section 4 states that the frames should be according to EN 612. The product supplied by preferred bidders is mead with thick anodizing and this fact does not need any other coating and was certified by a German firm. On the optimizer he stated that he asked for it as additional equipment to be able to test it. There was no need for this optimizer and bid was compliant without it. It was not a variant solution. It was an additional option for this optimizer. We asked for these options from all the bidders.

Dr Mario Scerri promised that within three weeks he would submit the requested certificate, copying also the appellants, and the hearing was brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 28th January 2013 and also through the Appellant's verbal submissions during the hearing held on 16th July 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Tender document required that the manufacture of the panels have at least 14 years experience in the manufacture of the same product. The Preferred Bidder's supplier was only formed in 2001. Hence, no 14 years experience.**

b) **Re: Tolerances**
The recommended bidder does not fulfil the requirements.

c) **Re: Coating**
The Appellant's bid does not meet the requirements as stipulated in the tender document's technical requirements.

d) **Re: Optimizer**
The recommended bidder goes beyond the requirements as set out in the tender document.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 16th July2013, in that:

a) **Although the Preferred Bidder's Offer was the cheapest, the Evaluation Board of the Contracting Authority emphasized their assessment and evaluation on the technical merits of the offer.**

b) The preferred bidder's suppliers have a direct connection with 'Samsung'. In fact, the panels are marked as 'Samsung' product but manufactured the the preferred bidder's suppliers, ie S-Energy.

c) Re: Tolerances
The Appellant did not understand the interpretation of tolerances. In actual fact the Preferred Bidder's offer quoted a better statistical performance.

d) Re: Coating
The Product offered by the Preferred Bidder does not require any other coating. This fact was certified by a German firm.

e) Re: Optimizer
This represented additional equipment for testing only. In fact the tender would have been compliant without this item.

Reached the following conclusions:

1. **From the verbal submissions by the Contracting Authority, it is evidently clear that the Preferred Bidder's Offer is more 'Technically Compliant' than that of the Appellant.**

2. **From documentation received, after the hearing which was held on 16th July 2013, it transpired that S-Energy does indeed have a direct relationship with 'Samsung'. In fact Samsung has a vested interest in S-Energy representing 14.67% of the Shareholding of S- Energy. This fact also assures that the knowledge and back up experience is to the benefit of the Preferred Bidder's suppliers.**

3. **The Preferred Bidder's Offer was also the cheapest.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar Chairman	Dr. Charles Cassar Member	Mr. Richard A. Matrenza Member

24 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 566

RX 1/10

Tender for the Provision of Local Warden Services.

The tender was published on the 30th November 2010. The closing date was the 21st January 2011.

The estimated value of the Tender was €2,080,000.00 (Exclusive of VAT).

Three (3) bidders submitted their offers.

On the 24th August 2012, Aurelia Enforcement Limited filed an objection, against a decision by the contracting authority, Regjun Xlokk to award the tender to Sterling Security Company Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 18th July 2013 to discuss the appeal.

Present:

Aurelia Enforcement Limited - Appellants

Dr Adrian Delia	Legal Representative
Mr Peter Formosa	Representative

Sterling Security Company Limited – Recommended Bidder

Dr Reuben Farrugia	Legal Representative
Mr Noel Schembri	Representative
Mr David Stubbings	Representative

Regjun Xlokk – Contracting Authority

No representatives from the contracting authority were present when the case was called.

The Chairman informed the parties present that the Contracting Authority, Regjun Xlokk had failed to turn up for the hearing although it had been formally informed of the date and time. It was however the Board's intention to continue with the hearing nonetheless, unless there were any objections raised by the other parties involved.

It was an insulting behaviour on the part of the contracting authority to fail to appear before this Board, having been summoned to do so, and the Board would be taking any appropriate measures as necessary.

Dr Adrian Delia appearing for appellants and Dr Reuben Farrugia appearing for Sterling Security Limited stated that they would not object and that there was nothing in the law that prevented the hearing to continue.

The Chairman invited the appellants to explain the reasons for the objection.

Dr Adrian Delia on behalf of appellants started to make his case. However, at this point, Dr Reuben Farrugia appearing for the preferred bidder brought to the Board's notice that in his letter of reply to the objection, he had explained in detail that the grievances forming the merits of the present objection had already been decided upon by this board, and which decisions had also been confirmed by the Court of Appeal by a judgement given on the 30th October 2012. Hence the Board now cannot go into the same grievances and decide again differently. He insisted that his preliminary plea on this point be decided upon first because it does not help the administration of justice to have the same points decided upon again as it could be an abuse of the system to do so.

The Chairman stated that the Board would go into the matter at a later stage after hearing what the appellant had to say.

Dr Adrian Delia explained that he first would give a brief summary of the tender proceedings so far and if it results that the merits were identical, and then there would be no grounds for altering the decision previously given. But if circumstances had changed then the Board could see if it would change its decision.

Aurelia Enforcement Limited had raised a pre contractual objection as per Article 85 on other matters to those being discussed today. They had brought to the notice of the Director of Contracts the fact that there was no clear difference between the Selection Criteria and the Award Criteria. The five year minimum experience, that should have been award criteria, was being used as selection criteria. This objection had been decided by the Public Contracts Review Board without any hearing. The Public Contacts Review Board had decided that there was no apparent contradiction in the award mechanisms. Following this, the tendering process continued using the three package system.

The three package system is clear in that the first package should contain only the bid bond, the second package the technical bid and the third package should only contain the financial bid. When evaluating this tender, the contracting authority decided to add an administrative compliance column to the evaluation grid.

Here Dr Reuben Farrugia objected because appellants had not raised the administrative compliance grievance in their letter of objection and the Board could only hear matters raised in the original objection.

Dr Adrian Delia continued by explaining the administrative compliance reason given to his clients for being administratively non-compliant. That Aurelia Enforcement Limited did not have the required years of experience. This is not an administrative compliancy, this is a selection criteria. Admittedly this could have been a mandatory condition and it would then mean that non-compliance would have led to disqualification. Award criteria does not entail disqualification, but should be given weight in the evaluation process. The tender should be clear and show all the criteria being used to assess the

strength of the bids. He reiterated that once his clients' bid was technically compliant, he could not have been disqualified through an administrative fault.

When tendering bids, Maltese law requires three years experience, but in the present tender they exceeded this by asking for five years. The contracting authority should explain clearly why this period was chosen. Administrative hurdles should not be used to restrict the number of bidders.

The last point raised by Dr Adrian Delia was that Regjun Xlokk is not a juridical entity and thus would not be in a position to sign any eventual tender agreement.

Dr Reuben Farrugia on behalf of the preferred bidder here filed a copy of a Court of Appeal judgement dated the 30th October 2012, in the case "Aurelia Enforcement Limited vs Dipartiment tal-Kunsilli Lokali, Regjun Xlokk u Bord ta' Revizjoni dwar il-Kuntratti Pubblici". He explained further the time frame which led to today's hearing. Aurelia Enforcement Limited had filed a pre-contractual objection asking for explanations regarding the award and selection criteria. The Board had decided that Aurelia's constraints had no basis and found nothing amiss in the tender documents. Aurelia Enforcement Limited could have filed an appeal against that decision but instead chose to bid in the tender. Subsequently, on being disqualified, Aurelia Enforcement Limited filed another appeal before the Public Contracts Review Board. In that appeal all the submissions made today had already been made during the hearing and decided upon, the Public Contracts Review Board rejecting appellant's claims. Then Aurelia Enforcement Limited appealed before the Court of Appeal which also decided on the same merits being raised again today. The court judgement copy filed today contains both the minutes of the Public Contracts Review Board case and the Public Contracts Review Board decision, which the court of appeal confirmed.

The same questions are being raised again now abusively. The Public Contracts Review Board had already decided that the five year condition was mandatory and entailed disqualification. Yet now three years down the line the Board is being asked to reconsider. This is repetition three times over. The Public Contracts Review Board cannot take over the functions of the evaluation board, nor can it simply overturn previous decisions taken by it and by the Court of Appeal. As regards the administratively non compliance question, it was clear that the requisites of experience and the number of employees had to be satisfied. Both these points have also been decided upon.

Dr Adrian Delia on behalf of the appellants stated that the letter sent to his clients did not give any reason for his disqualification and moreover the contracting authority should have given the price of the award.

Furthermore when the decision was taken in August 2012 his clients satisfied the five year experience.

The Chairman remarked that the experience period had to be satisfied at the time of the closing date and not of the evaluation date.

At this stage the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 20th August 2012 and also through the Appellant's verbal submissions during the hearing held on the 18th July 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant confirmed that if after hearing his case, the same situation arises as that already arisen in the decision taken by PCRB on 4 July 2011 and upheld by the Court of Appeal as per the latter's decision taken on 30th October 2012, then the PCRB could not overturn this decision;**

b) **The Appellant had raised a pre contractual objection to the Contracting Authority in that 'There existed no clear cut distinction between a selection criteria and an award criteria during the evaluation stage of the tender';**

c) **The 'Minimum five year experience' requirement should have been treated as an award criteria and not as a selection criteria;**

d) **When evaluating the tender, the Contracting Authority decided to add an administrative compliance column to the evaluation grid. In this regard, the Appellant was administratively non compliant as he did not have 5 years of experience in the field requested in the tender.**

Having considered the Preferred Bidder's 'Letter of Reply' dated 5th March 2013 and also the verbal submissions during the hearing held on the 18th July 2013, in that:

a) **The Appellant did not mention the 'Administrative Compliance Grieviance' in his letter of objection;**

b) **The PCRB had already decided upon the 'Five year experience' condition;**

c) **It was made clear in the tender requisites that the number of employees was to be taken into account during the evaluation process.**

Reached the following conclusions:

1. **The '5 year experience' clause was mandatory and if this clause is not satisfied by any bidder, then he is administratively not compliant. The Appellant did not satisfy this condition and the Evaluation Board of the Contracting Authority, justifiably, disqualified the Appellant's bid;**

2. **Although the Appellant was aware of the fact that he did not satisfy the ' 5 year experience' condition from the very beginning, he submitted his offer for adjudication which in actual fact represented an acceptance to all the conditions laid out in the tender document , including the '5 year experience' clause;**

3. **The 'Five year experience' clause should have been satisfied by the Appellant at the time of the closing date of the tender and not at the evaluation process date.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed. Furthermore, this Board upholds the previous decision taken by PCRB dated 4 July 2011 and the decision taken by the Court of Appeal dated 30th October 2012.

Dr. Anthony Cassar Chairman	Dr. Charles Cassar Member	Mr. Richard A. Matrenza Member

26 August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 567

MRRA/W/544/2012

Tender for Commissioning of Study to Establish Cost-Optimal Energy Performance Levels in New and Existing Residential Buildings

The tender was published on the 8th February 2013. The closing date was the 22nd February 2013. The estimated value of the Tender was €29,661 (Exclusive of VAT).

Five (5) bidders submitted their offers.

On the 14th May 2013 Mediterranean Technical Services Ltd filed an objection against its exclusion from the tender, giving no reasons for the objection. On the 4th July 2013, Mediterranean Technical Services filed a reasoned letter of objection whereby it listed the grievances against its disqualification.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 23rd July 2013 to discuss the appeal.

Present:

Mediterranean Technical Services Limited - Appellants

Mr Joseph Demanuele	Representative
Mr Jonathan Sammut	Technical Director
Mr Anthony Bartolo	
Mr Bernard Brincat	
Mr Mario Schembri	
Ms Liana Vella	

Casainginiera – Recommended Bidder

Dr Andre Portelli	Legal Representative
Mr Pierre Cassari	Representative
Mr Daniel Azzopardi	Representative

EU Affairs Directorate (Building Regulations Office) – Contracting Authority

Dr Maria Scicluna	Legal Representative
Mr Samuel Attard	Chairman Evaluation Board
Mr Matthew Degiorgio	Member Evaluation Board
Mr Samuel Farrugia	Member Evaluation Board
Mr Stephen Pulis	Member Evaluation Board
Ms Nathalie Pace	Secretary Evaluation Board

After a brief introduction, the Chairman invited the appellants to explain the reasons for the objection.

Liana Vella on behalf of the appellants stated that:

1. the first point of appellants' disqualification was that "*not enough resources are being allocated to this offer. Two team members have relevant specialisations. However there is an insufficient diversity in professions allocated to the project. The application of building energy performance expertise and skills in using related software packages were not demonstrated."* In MTS's bid we presented two persons having the necessary EPRDM qualifications as requested in the tender documents. Our firm works constantly in the building services and has all the necessary experience as requested. In our letter of objection we stated that the tender document does not stipulate clearly the number of resources required for the job. MTS employs 10 warranted engineers and has the necessary resources to complete the job successfully.

2. Methodology: Tender document requested the submission of an Organisation and Methodology document. It did not request any detailed methodology was requested. Appellants firm contained one page giving the rationale to be used, another listed the strategy and a third the experience. Contends that their bid did not have any deficiencies.

3. Innovation: The tender document stipulated the procedure to be used, and our bid stated that we would follow it and comply. Thus we contend that there was no room for any innovation. The remarks about lack of innovations were unjustified.

4. Time plan: Ms Vella contended that the tender document did not specifically request a time-plan to be submitted. It just stipulated a duration period and time frames for the completion of works with deadlines. Had MTS been awarded the tender it would obviously have submitted a time-plan.

5. EPRDM: In evaluating appellants' bid, the evaluation board stated that MTS was using only EPRDM software. The tender document did not request other specific software and as EPRDM is specifically designed for the purpose of the works requested in the tender, MTS decided to use it. This fact should not have been used against MTS.

6. Deliverables: The tender did not request a quality system, yet MTS submitted that it had a quality system in place and the company is certified to ISO9001:2008 requirements. Thus MTS claims that it is unjust to comment that "*no deliverables and measures for ensuring quality were mentioned* in their bid.

Samuel Attard, Chairman, Evaluation Board stated that Mr Stephen Pulis would reply to the objections raised by Ms Liana Vella.

Mr Stephen Pulis, a member on the evaluation board stated that during the evaluation of appellants' bid he became aware that an in depth understanding of the process was lacking. The tender is very technically specialised and is the first time that such tender has been issued. The scope of the tender would affect and influence the building industry in Malta in the future as policy would be based on the results.

Mr Pulis acknowledged that MTS has in house capabilities and resources related to the construction industry. However the tender required expertise and special studies of buildings that are crucial. One of the important things deals with reference buildings. These do not necessarily have to be existing buildings because you have to create a median of buildings. It was apparent from the methodology

used by MTS that there was no in-depth explanation of the different phases. Also the lack of time frames. It is true that MTS submitted some sort of skeleton time frame but it was felt that much more details were needed. The EPRDM certification is acknowledged this means that architects and engineers may certify buildings, however, once again much more was needed. Regarding EPRDM, if one sees the requisites of the European Union it is evident that this tool is not enough. It was felt that MTS's bid did not supply this.

On being asked whether the evaluation board felt the need for clarifications during the process, this being the first time such an important tender was being considered; Mr Pulis said that he felt no need for such clarifications. The tender being Directive given, required a time frame, set by the Maltese authorities. However a time frame as such was not requested in the tender document.

Dr Maria Scicluna for the contracting authority explained that the tender document gave all the necessary guidelines for the proper bidding to be made.

The Chairman suggested that any future such first time highly technical tenders should be preceded by a public meeting where all the intricacies would be explained to any interested bidders.

Mr Mathew Degiorgio for the contracting authority said that at European level there have been several studies made and published and all are easily accessed through internet. In preparing the tender documents we based document on these guidelines as regards methodology to be used. This reference point was included in the tender document.

At this point the hearing was brought to an end.

This Board,

Having noted the letter of objection dated 14th May 2013, giving no reasons for the objection and the Appellant's claim during the hearing heard on 23 July 2013, as follows:

a) **That the Contracting Authority disqualified the Appellant's bid due to lack of Resources.**

b) **That the Appellant's bid did not have any deficiencies in the 'Methodology' required in the tender document.**

c) **That the remarks made by the Contracting Authority about the Appellant's bid as lacking of innovations, were unjustified.**

d) **That no time plan was requested in the tender document.**

e) **That in evaluating the Applicant's bid, the Evaluation Board stated that Appellant was only using EPRDM software and that this was to the detriment of the Appellant's bid.**

f) **That no deliverables and measures for ensuring quality were mentioned in the Appellant's bid.**

g) The Appellant Company is certified ISO 9001:2008.

Having considered the Contracting Authority's submissions as follows:

a) That the Appellant's bid was lacking an in depth understanding of the process.

b) That since this is the first time that such a tender was issued, it was highly important to emphasise on the specialised technical aspect

c) That the award of the tender to the appropriate bidder would influence the future policy of the building industry in Malta.

d) That, although the Appellant had in house capabilities relating to the construction industry, the Appellant was required to prove that he had the expertise and special studies of buildings that are considered as 'Crucial' including 'Reference Buildings'.

e) That the 'Methodology' adopted by the Appellant did not include an in depth explanation of the different phases.

f) That although, the Appellant submitted a skeleton 'Time Frame', it was considered by the Evaluation Board that it was too sketchy.

g) That the software mentioned by the Appellant to be utilised, namely EPRDM is not sufficient in accordance with EU regulations.

Reaching the following conclusions:

1. **That the tender value does not exceed Euros 120,000, and that this objection should have been filed under Regulation 21 (i) of the Public Procurement Regulations;**

2. **That this Regulation clearly states that 'Whoever is aggrieved by the award may within five working days from date of notification, file a letter of objection with reasons for objecting;**

3. **No reason was filed with the objection within the stipulated time.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the same Applicant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

8th August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 568

MRRA/W/544/2012/1

Tender for Commissioning of Study to Establish Cost-Optimal Energy Performance Levels in New and Existing Offices

The tender was published on the 15th February 2013. The closing date was the 1st March 2013. The estimated value of the Tender was €39,830.50 (Exclusive of VAT).

Five (5) bidders submitted their offers.

On the 14th May 2013, Advanced Industrial Systems Limited filed an objection, against a decision by the contracting authority, EU Affairs Directorate to discard its bid, failing however to give the reasons for its grievances. On the 2nd July 2013 Advanced Industrial Systems Limited filed another letter wherein it listed its grievances against its exclusion.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 23rd July 2013 to discuss the appeal.

Present:

Advanced Industrial Systems Limited - Appellants

Ing Mario Schembri	Representative
Ing Anthony Bartolo	Representative
Ing Bernard Brincat	Representative

Casainginiera – Recommended Bidder

Dr Andre Portelli	Legal Representative
Mr Pierre Cassar	Representative
Mr Daniel Azzopardi	Representative

EU Affairs Directorate – Contracting Authority

Dr Maria Scicluna	Legal Representative
Mr Samuel Attard	Chairman Evaluation Board
Ms Nathalie Pace	Secretary Evaluation Board
Mr Matthew Degiorgio	Member Evaluation Board
Mr Samuel Farrugia	Member Evaluation Board
Mr Stephen Pulis	Member Evaluation Board
Mr Twanny Grech	Member Evaluation Board
Mr Samuel Farrugia	Representative

After a brief introduction, the Chairman invited the appellants to explain the reasons for the objection.

Engineer Mario Schembri on behalf of appellants stated that this tender was identical to the previous one but the first dealt with residential dwellings whilst the present one deals with offices. However, surprisingly the conclusions reached by the evaluation board are the same in both cases. He questions if the primary intention of the evaluation board was to have a fair adjudication or that the incumbent company already working on the project be retained. The reason for stating this is that the preferred bidder was the company responsible for holding courses, examinations and certification. This Board should therefore verify the honesty of the tender documents and if the final decision is to re-issue the tender, this would mean giving an advantage to preferred bidder. He stated that it is true that the preferred bidder has the necessary competence but then so has the appellant company.

1. The first reason appellants were given was that they lacked understanding of reference building. But the definition of this was clearly explained in pages 13 and14 of the tender document and thus should have been understood by every one of the bidders.
2. Another point we were accused of is that of not being innovative. Clauses 8.4 and 8.5 of the documents were very clear in what was expected, after all these were the EU standards. Bidders had to abide by the standards so there was no place for innovation.
3. The evaluation report in appellants' bid stated that they did not submit any detailed time frame when the tender clearly states that all the work should be completed within 18 weeks. Bidders had to sign a declaration to this effect and we signed it.
4. The evaluation board accuses appellants of not having specifically mentioned the use of ISBEMint software. At the closing date of the tender the certifications in this software had not yet been issued, the examination had been held on the 20th April 2013.
5. Regarding quality Management System, it has to be stated that AIS Limited has been certified under IS09000:2000 Quality Management System which has been in place since 2005, so it does not make any sense to state that deliveries and measures were not understood by the appellants.

Stephen Pulis member of the adjudication board raised the point that the contracting authority was no aware of the points raised in appellants' objection because the reasoned letter of objection was not served on them. He made it clear that although in this hearing the word "accused" was used earlier, the adjudication board did not "accuse" any bidders, but stated facts as the adjudicators saw them. The board looked at the quality of the methodology proposed by bidders, and the main emphasis was on the understanding required to conduct this study, this being a specialised process. It was there that the evaluators found lack of understanding, for example the explanation of reference buildings showed that the meaning of reference building was not understood.

The points allotted to bidders on the different criteria as follows:

1. Range and depth of previous organisational experience maximum 10
2. Demonstrated understanding and requirements maximum 10
3. Resources to be applied maximum 20
4. Quality of tender and proposed methodology etc. Maximum 20

There was nothing subjective in the allocation of points. The tender documents explained clearly how the points were to be allotted. Clause 5.1 explains this. This is a standard basic principle in this kind of tender.

Mr Matthew Degiorgio explained that experience cited in criterion 2 had to be relevant for the study in question. A company could have had experience in commissioning and installation of systems but less experience in conducting studies. This is a new field.
Mr Samuel Attard, chairman evaluation board stated that from the administrative side, all bidders understood the tender because there were no requests for clarifications. It seems that now, however, at the appeals stage, no one understood anything. This cannot be so.

Mr Mario Schembri confirmed that the tender document was clear and that there was no need for clarifications. It was the evaluation board that raised the matter that bidders did not understand what was required.

Mr Stephen Pulis continued that appellants passed the first criterion because they were allotted 7 marks for experience. Further, bidders had to show that they made studies, appellants did not do so. It was the onus of the bidders to show their worth and that they had the ability to perform the required tasks.

Dr Maria Scicluna the contracting authority's legal representative insisted that appellants did not reach the minimum requirements. The evaluation board had methodology frame work and appellants' bid did not reach the requirements. Everything was well explained in fact appellants themselves declared that they understood.

Mr Mario Schembri stated that his company had in its bid mentioned several energy management projects which they conducted including one for the NSO to evaluate consumption.
Mr Matthew Degiorgio said that the NSO project was examined by the evaluation board but that study did not include software simulation and was not relevant. In their bid appellants did not specify which software they would be using. This was essential and all bidders specified software.
The evaluation board had a matrix and the five members individually assigned points to each bidder under each criterion. The points so given were then averaged.
On being asked by the Chairman if appellants' bid was discarded when giving past experience because no software was specified, he stated that it was one of the reasons.

Mr Mario Schembri brought the attention to page 5 of appellants' bid wherein it is stated that by the 1st March the persons AIS is proposing to use, had attended a course on the software. A 7th May 2013 fax from The Ministry of Transport says that possibly, iSBEM software is to be used. In fact the examination was held on the 20th April 2013.

Mr Pulis stated that appellants did not state they would be using the software, only that persons it proposed to use had attended a course.

Dr Andre Portelli for the preferred bidder stated that the appeal is invalid. He referred to Article 21 (1) of the Procurement Regulations states that the letter of objection should contain the reasons for objection. This appeal is null and void because their letter of objection does not give any reasons.
This tender was as per page 8 considered as a MEAT tender and the methods of evaluation were clearly indicated.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection without giving reasons, against the decision of the Contracting Authority within the specified period, according to EU Affairs Directorate to discard its Bid. On the 2nd July 2013, the Appellant filed its grievances against the Contracting Authority, in that:

a) **The Appellant confirms that it had good and clear understanding of what constitutes a 'Reference Building'.**

b) **The Appellant confirms that AIS has sufficient professionals to deal with the project.**

a) **The Appellant is supported by a team of professional Engineers, well versed in engineering experience.**

c) **The Appellant contended that they were not 'innovatives' and bidders had to abide by the standards laid down.**

d) **The Evaluation Board stated that the Appellant did not submit detailed time frame for completion of the tender works.**

e) **The Appellant was accused of not having mentioned the utilisation of the software, namely ISBEMint.**

f) **AIS Limited has been certified under ISO09000:2000 and in so far as 'Quality Management Systems' is concerned the Appellant Company is fully aware of its responsibilities and ensures that the Appellant will meet the commitments tendered for.**

Having considered the Contracting Authority's submissions as follows:

a) **That the Contracting Authority's Evaluation Board assessed the quality of the methodology proposed by the Bidder.**

b) **That the Contracting Authority expected quality of the methodology for the proposed project.**

c) **That during the evaluation process the Evaluation Board noted 'lack of understanding' of the concept of the tender by the Appellant.**

d) **There was lack of understanding to conduct a study on a 'Reference Buildings' by the Appellant.**

e) **That although this form of Tender relates to a new field, all bidders understood the contents of the tender as there were no requests for clarifications.**

f) This proves that the tender documents were clear.

Reached the following conclusions:

1. **The Contracting Authority gave a clear explanation of how points were allocated to the prospective bidders and in the Board's opinion the system utilised was scientific and just.**
2. **That the preferred bidder was 'administratively and technically compliant'**
3. **This was a new project of its kind, and the preferred bidder had a full detailed method strategy regarding deliverables and measures for ensuring quality of the assignment.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

13th August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 569

CT 2023/2012
Framework contract for the Supply of a Combat Uniform Made with Fabric Compliant with Environmental Criteria to the Armed Forces of Malta

The tender was published on the 27th March 2012. The closing date was the 22nd May 2012.

The estimated value of the Tender was €550,500 (Exclusive of VAT).

Five (5) bidders submitted their offers.

On the 24th April 2013 Yorkie Clothing Limited filed an objection against the award of the tender to Cadet Direct Limited on the basis of the cheapest offer satisfying the administrative and technical criteria.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 25th July 2013 to discuss the appeal.

Present for the hearing:

Yorkie Clothing Limited - Appellant

Mr Jeffrey Calleja Representative

Cadet Direct Limited – Recommended Bidder

No representative was present.

Armed Forces of Malta (AFM) – Contracting Authority

Lieutenant Colonel Andrew Mallia	Chairman
Major Marco Chirchop	Secretary
Assistant Director John Debattista	Member Evaluation Board
Major Robert Bonnici	Member Evaluation Board
Captain Edric Zahra	Member Evaluation Board

The hearing started twenty minutes late and the Chairman explained that the Board would not tolerate further such instances. Then, after a brief introduction, the Chairman invited the appellant to give the reasons for the objection.

Mr Jeffrey Calleja on behalf of appellant and a Director of Yorkie Clothing Limited explained that this tender being a three package tender, all bidders should have submitted a bid bond forming the first package of the tender. However, when the tenders were opened, the recommended bidder's bid did not contain any bid bond. This information was obtained from the publication of the opening of the bids on the internet. He contended that since according to page 10 of the tender document the

submission of a bid bond was mandatory, and failure to submit it would automatically disqualify bidder, he could not understand why Cadet Direct Limited's bid was not discarded immediately, but awarded the tender. He claimed that he asked the Contracts Department in writing to see the bid bond in question and was told that he had no right to do so.

Lieutenant Colonel Andrew Mallia explained that he was not a member of the adjudicating board but the then Chairman, Lieutenant Galea Roberts who has since been posted overseas according to the exigencies of the service. I took over in his absence. Not being personally present during the opening session, when the tenders were opened he gave a brief resume of how he understands things happened. When the tenders were opened, the Department of Contracts who is the contracting authority, which opens the bids, failed to forward to us, the end users, the bid bond relative to tenderer number 4, the preferred bidder. The following day Mr Bernard Bartolo of the General Contracts Committee forwarded to us the bid bond from tenderer 4 and said that it had not forwarded to us. This was on the 24th May 2012. An email from Mr Bernard Bartolo stated that they had received the bid bond in one of the bids in the Uniforms tender yesterday and that he was passing it so that it would be passed to the evaluation board as the Bid bond column for the bidder was marked as "no" since it was not drawn up properly as it was not drawn up to the Director of Contracts. The Board understood that this bid bond was received in time but was not valid.

The evaluation board continued in their evaluation and when they examined the relative bid bond they felt that this was in fact valid. They prepared the evaluation report from where it emerged that all bidders were administratively, technically compliant and tenderer 4 was found to be the cheapest tender. This report was dated 23rd July 2012.

The Chairman referred to an email from Ms Joelle Mifsud Bonnici which stated that "*During the meeting of the General Contracts Committee of the 16th October 2012, the committee concurred to revoke its decision, i.e the recommendation of award of this tender to T4 Cadet Direct Ltd., since Nat West Bank has confirmed that it had provided a valid Bank Guarantee on the 7th June 2012, i.e. after the closing date of this tender. In the circumstances the evaluation committee is kindly requested to nominate the next cheapest tender offer."*

Lieutenant Colonel Andrew Mallia stated that the evaluation committee contested that assertion because the question she made to the bank was not properly worded and could lead to a distorted reply. In fact we entered into discussion with the Contracts Department and had meetings with the General Contracts Committee wherein it was explained that they had no reason to disqualify the bid because there was no evidence that a) it was issued after the closing date and b) it was invalid. The General Contracts Committee concurred with this and they withdrew their objection. He explained that the original bid bond was replaced by another after the closing date, but this is allowed and does not mean that the original was invalid. Nat West affirmed by email of the 26th February 2013 that it would have honoured the original bid bond, had it been asked.

Another point Lieutenant Colonel Mallia raised was that the original award was published on the 31st August 2012 and this award had never been revoked. There was no new evaluation made afterwards. Appellant had 10 days from the original award to file an objection but he did not. He stressed that the original award was never revoked and was still valid and upheld. The evaluation board did not produce any other report. Thus he contended that the appeal was null and void since it was filed too late. He filed several copies of emails that explained what had occurred.

At this stage the hearing was suspended until a representative from the Contracts Department appeared. After waiting for someone from the Contracts Department to make an appearance, the Public Contracts Review Board was informed that Ms Joelle Mifsud Bonnici was no longer there and she had not informed anyone on the matter. The Director General is away and there was no one else who could come. They were however sending Dr Franco Agius to act as Department representative. At this point the hearing was brought to an end.

This Board,

Having noted the Appellant's objection, in terms of 'Reasoned Letter of Objection' dated 19th April 2013 also through the Appellant's verbal submissions during the hearing held on the 25th July 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The recommended Bidder's Offer did not contain the Bid Bond, as was duly necessary.**
b) **The preferred Bidder's offer should have been discarded in the first instance.**
c) **The Appellant's Bid was administratively and technically compliant.**
d) **The Appellant's Bid was the second cheapest.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on the 25th July 2013:

a) **The Bid Bond issued by the preferred bidder was first considered as invalid by the Evaluation Board but after further verifications this decision was reversed by the same Board.**
b) **To this effect, after considering all the aspects of the tender, the Evaluation Board recommended the Bidder who was administratively and technically compliant and the cheapest.**
c) **The Evaluation Board took also into account that the Preferred Bidder could deliver and execute the contract.**

Reached the following conclusions:

1. **The Bid Bond submitted by the Preferred Bidder was confirmed by National Westminster Bank to be valid in all respects.**
2. **The Preferred Bidder's offer was administratively and technically compliant.**
3. **The Preferred Bidder's offer was the cheapest.**

In view of the above, this Board finds against the Appellant Company, however, due to ambiguous circumstances (which could have been avoided by the Contracting Authority), this Board recommends that the deposit paid by the Appellant be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

3 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 570

QMS/U/6/10

Tender for the Supply of Winter Trousers to the Malta Police Department.

The tender was published on the 28th January 2011. The closing date was the 23rd March 2011. The estimated value of the Tender was €67,000 (Exclusive of VAT).

Six (6) bidders submitted their offers.

On the 7th February 2013 Astor Company Limited filed an objection against the award of the tender to Indesign (Malta) Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 25th July 2013 to discuss the appeal.

Present for the hearing:

Astor Co. Limited - Appellant

Mr Jeffrey Calleja	Representative

Indesign (Malta) Limited – Recommended Bidder

Dr Isabel Bharwani Scicluna	Legal representative
Ms Samantha J. Reed	Representative

Malta Police Department – Contracting Authority

Supt. Dr Mario Spiteri	Chairman Evaluation Board
Insp. A. Cassar	Secretary Evaluation Board
P.S. 4 A. Bellia	Member Evaluation Board
Mr Martin Debono	Member Evaluation Board
Mr George Cutajar	Representative

After a brief introduction, the Chairman invited the appellant to give the reasons behind his objection.

Mr Jeffrey Calleja on behalf of the appellants stated that the objection is based on seven points:

1. Validity period of the tender has been exceeded well by the 150 day period, and bidders had not been asked to extend their validity period. Thus he contended that the tender has been rendered null and void and should be cancelled.
2. That since the issue of the tender, government has issued legislation to ensure green procurement. The present tender having been issued before this legislation would, if

awarded have the trousers not being compliant with the new regulations regarding Green Procurement.

3. Claims that while appellants' bid for item two was declared non-compliant when the material was tested in 2011, the preferred bidder's tests on the material to be used for item two was performed more than a year later, therefore using different chemical reagents.
4. Contends that the material used in preferred bidder's bid was not compliant since in his opinion the weave was not as per specifications. There was a refusal on the contracting authority's part to allow appellant to test the weave submitted by the preferred bidder, and no laboratory testing was done on the weave.
5. Claimed that preferred bidder has no experience to supply the required trousers, and it was one of the conditions of the tender to show this experience.

The Chairman at this point asked for Mr Jeffrey Calleja what was his relationship with Yorkie Clothing as it is evident that he has an interest in both companies and both companies have bid for the same tender. This is usually not allowed. Mr Calleja stated that he is a Director and shareholder with Astor Company Limited and he is a Director of Yorkie Clothing Limited. He claimed that the same firm could bid twice in the same tender.

Supt Dr Mario Spiteri stated that:

1. Regarding the first point raised by appellant, that the 150 day period is there for the safeguarding the interests of the bidders themselves. The tender is not rendered null if it is exceeded. In any case, when the tender was going to be awarded to the present appellant, before the first appeal, the same 150 day period had lapsed and appellant had not objected.
2. The samples from Indesign (Malta) Limited could not have been sent at the same time as those from appellants, because Indesign's could only be sent for analysis following its reinstatement through the PCRB's first decision.
3. The contracting authority has to rely on the expert advice given, in this case the MCCA Laboratory. Tender specifications are passed on to the Laboratory and the adjudication board has to stand by the results obtained from the laboratory.
4. It is definitely not done to give third parties samples of material submitted by other bidders.

Mr George Cutajar from the National Laboratory, when asked by the PCRB, explained that samples are tested according to recognised standards, that is, as per BS Standard, EN standard or ISO standard. Samples are registered and then the same procedures and chemicals are used to analyse all the samples. The same methods are used for all samples and it is ensured that the chemicals used are not expired. Samples are assigned numbers and during the tests reference is only made to these numbers. Tests are made under controlled conditions and using controlled reagents. The Laboratory has a quality system in place and the same procedures are used for all samples. Appellant's claim that chemicals used to test his material had been contaminated was definitely refuted. He stated that no tests regarding type of weave were done on the samples.

Mr Martin Debono on behalf of the Police Department explained that when samples are submitted for sampling, the laboratory is not told the provenance of the samples, just the sample number.
Mr Jeffrey Calleja insists that weave tests were not done and that preferred bidder's material was not compliant. Alleges that ten years ago he had done tests and it resulted that there had been some contamination.

Dr Isabel Bharwani-Scicluna on behalf of the preferred bidder submitted a letter of reply to the letter of objection.

Supt Dr Mario Spiteri on behalf of the contracting authority continued that the adjudication board examined and found that Indesign's bid was compliant and that there are safeguards in place to ensure that it is not in default in the delivery of the trousers.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of 'Reasoned Letter of Objection' dated 7th February 2013 and also through the Appellant's verbal submissions during the hearing held on 25th July 2013, had objected to the decision taken by the pertinent Authority in that:

a) Bidders were not asked to extend their bid beyond the '150 day period'.

b) The material being proposed in the preferred tender does not fall in line with the new regulations regarding 'Green Procurement'.

c) Laboratory tests were not carried out at the same period of time.

d) No clinical tests were performed on the actual material being used by bidders.

e) Preferred bidders had no previous experience.

Having considered the Contracting Authority' submissions through the verbal submissions presented by same during the hearing held on 25th July 2013:

i) That the '150 day period' issue does not render the tender 'Null and Void'.

ii) That samples for testing could not be sent at the same time due to the fact that the preferred bidder's offer could only be tested after the latter's reintegration in the tendering process.

iii) That the Contracting Authority (as is normal) had to rely on expert advice.

iv) That the Contracting Authority's adjudication board examined in detail the Preferred Bidder's offer and concluded the offer submitted by Indesign (Malta) Limited to be fully compliant and that enough safeguards were taken to ensure delivery of goods.

Having considered also the verbal submissions made by the National Laboratory during the hearing held on the 25th July 2013:

I) That all tests carried out at the National Laboratory are in accordance with BS standards.

II) That same method of Testing is carried out on all samples.

III) That all tests are carried out under controlled conditions.

IV) That there were no cases of contamination.

Reached the following conclusions:

1. **Reliable tests were carried out by the National Laboratory on the material included in Tender.**
2. **The Preferred Bidder's offer was fully compliant.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

13th August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 571

DH 2458/2012

Tender for the Supply, Installation and Commissioning of a Fire Detection and Alarm System for Wards RW1 and RW4 at the Rehabilitation Hospital Karin Grech.

The tender was published on the 16th November 2012. The closing date was the 12th December 2012.

The estimated value of the Tender was €16,000 (For both wards, including VAT).

Eight (8) bidders submitted their offers.

G4S Security Services Limited filed an objection on the 30th April 2013 against a decision taken by the contracting authority Central Procurement & Supplies Unit to discard their bid and award the tender to Messrs. Alberta fire and Security Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 25th July 2013 to discuss the appeal.

Present:

G4S Security Services Limited - Appellants

Mr Sherwin Bonnici	Representative
Mr Julian Dimech	Representative

Alberta Fire and Security Limited - Recommended Bidder

Mr Silvan Ellul	Representative
Ms Joanna Pecorella	Tenders Manager

Central Procurement and Supplies Unit (Ministry for Health) – Contracting Authority

Dr Adrian Mallia	Legal Representative
Ms Monica Gaglione	Chairperson Evaluation Board
Ms Rita Tirchett	Representative
Ms Mary Grace Balzan	Secretary Evaluation Board
Ing Edith Debono	Member Evaluation Board
Mr Matthew Mangion	Member Evaluation Board

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of his firm's objection.

Mr Julian Dimech, General Manager at G4S Security Services Ltd., the appellants, stated that his firm's bid was declared non-compliant, in spite of being the cheapest, because it was alleged that in their bid, the execution of the works period exceeded the requested three weeks for completion. He claimed that on the contrary, appellants' offer fully complied with this requirement as can be verified by examining page 90 of their bid which showed a chart showing the proposed schedule of completion of works.

Dr Adrian Mallia on behalf of the contracting authority explained the necessity of a short three week time frame for completion of the project. The tender was intended for a hospital and the works were urgently required for security of the wards. The presence of workers installing equipment had to be kept to a minimum. So the Supply, Installation and Commissioning had to be done within three weeks as stipulated in Clause 1.3 page 4.

Dr Adrian Mallia continued that it can be clearly seen from page 90 of the appellants' bid that from step 4, (Installation) to step six (Commissioning) would take longer than three weeks. System handover date was given as the 1st February 2013 which is in excess of three weeks from the start date. The evaluation board was bound to ensure that all bidders are compliant with this clearly stipulated requirement of three weeks and thus appellants' bid was found to be non-compliant.

Mr Julian Bonnici countered this by stating that it was a matter of interpretation of the tender document. The three week period could be understood to refer to the completion of the installation only. He declared that appellants did not request any clarification on this point before making their offer.

At this point the hearing was brought to an end.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned letter of Objection ' dated 30th April 2013 and also through the Appellant's verbal submissions during the hearing held on the 25th July 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's Bid was declared as non compliant;

b) The sole award criteria was the price;

c) The Appellant's Bid contested that the works as specified in the tender document could be executed within the specified period.

Having considered the Contracting Authority's verbal submissions during the hearing held on the 25th July 2013, in that:

a) The works were urgent, due to a specific environment and had to be completed within the specified period laid out in the tender document;

b) The execution of the works had to cause no disruption which could hinder the daily administration of the Contracting Authority's entity;

c) The presence of 'Works in progress' had to be kept without hindrance.

Reached the following conclusions:

1. **In any Public tender, the sole criteria is not the price , but other conditions has to be satisfied;**

2. **The bidder should be 'Administratively and Technically compliant';**

3. **The Bidder should be able, without any doubt, to deliver his assignment, within the specified period in the tender document;**

4. **The 'Three week period' of providing installation and commissioning of the equipment was mandatory and humanely necessary;**

5. **The Appellant did not satisfy the conditions laid out in the tender document.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A.Matrenza
Chairman	Member	Member

28 August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 572

MRRA/M/71/2012

Tender Services of Chairperson Monitoring Board [Malta Embellishment Landscaping Programme].

The tender was published on the 14th December 2012. The closing date was the 28th December 2012.

The estimated value of the Tender was €53,500 (Exclusive of VAT).

Seven (7) bidders submitted their offers.

On the 13th February 2013, Geometric Services filed an objection against the award of the tender to Architect Daniel Cordina Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 30th July 2013 to discuss the appeal.

Present for the hearing:

Geometric Services - Appellant

Mr Michael Mercieca	Representative
Ms Ruth Borg	Representative
Dr Robert Gauci Maistre	Legal representative

Architect Daniel Cordina – Recommended Bidder

Dr Lydia Cordina	Legal representative
Dr Partick Galea	Legal Representative
Dr Anthea Cilia	Representative
Arch Daniel Cordina	Representative

Agriculture Directorate – Contracting Authority

Mr Mario Falzon	Chairman Evaluation Board
Ms Maria Seguna	Secretary Evaluation Board
Mr Dennis Sciberras	Member Evaluation Board
Mr Josef Borg	Member Evaluation Board
Ms Miriam Dowling	Member Evaluation Board
Mr Pio Cardona	Representative

After a brief introduction, the Chairman invited the appellant to give the reasons behind his objection. Michael Mercieca on behalf of appellant Geometric Services stated that the appeal is based on three points. The tender had to be awarded to the cheapest complying bid and in the appellant's opinion,

the preferred bidder Architect Anthony Cordina does not meet the administrative and the technical criteria on three issues and his bid should have been rejected.

1. One of the requirements of the tender is that the chosen person should oversee the works of the quantity surveyor. He contends that whilst appellant is also a quantity surveyor, and used to teach quantity surveying at MCAST, the preferred bidder is an architect and not a quantity surveyor.
2. Specifications required, Article 8.5, states that chosen person should have knowledge of MELP and have qualifications. Stated that for 10 years, appellant had been the chairman of this MELP Board that he had set up himself. Preferred bidder was never involved in the MELP and thus does not have the necessary experience that appellant has, and does not compare to him. Appellant had also formulated the contract with the ELC.
3. The difference between appellant's bid and that of the preferred bidder is only a mere €94.

Mr Mario Falzon the chairman of the evaluation board stated that the board evaluated the bids and found that all the bidders were technically and administratively compliant and had to choose the cheapest offer. There was nothing in the selection criteria that required any form of experience in any particular entity. Preferred bidder is an architect and also has a Masters Degree in road engineering and was compliant. The criteria was generalised and no specific experience was requested. Experience had no weighting in the evaluation process. Submitted Curriculum Vitae were used to assess experience.

Dr Robert Gauci Maistre on behalf of the appellants made reference to Article 8.5 of the tender documents which states that the selected person should ideally have knowledge of the Malta Embellishment Landscaping Programme (MELP), and qualifications related to the MELP. He contended that qualifications could only be measured in terms of experience. He claims that the preferred bidder does not have any such experience.

Mr Mario Falzon replied that Article 8.5 said "ideally" and not must. This meant that it was not a mandatory requirement.

Mr Michael Mercieca explained the role of chairman. The chairman design, landscaping, makes estimates and measures works, does the necessary quantity surveying and needs to have knowledge of the government procurement process. He stated that he had asked for clarifications from the contracting authority, but received no answers. Having had no reply to clarifications, he had perforce to make the tender submissions basing his offer on past experience.

Dr Patrick Galea for the preferred bidder said that first of all Geometric Services Limited was struck off the register and filed four documents from the MFSA. The latest research shows that Mr Michael Mercieca is the present director of GS General Services Limited. Regarding the Price offer he states that appellant's offer to match the price of any other bidder is illegal and cannot be entertained.

Architect Daniel Cordina the preferred bidder referred to Article 8.5 of the tender documents and said there were 5 points stating the requirements for chairman. One of these says that "oversee the quantity surveying process to ensure the best value for money." This is the work done by architects in their normal day to day practice. Appellant has omitted to mention the other requirements in this Article, such as "excellent planning", "negotiation skills" "computer skills" and others. He claims that he has over 11 years experience in overseeing. He was an architect and has a Masters degree.

Appellant explained that Geometric Services was merged with other companies and renamed GS General Services Ltd but the company registration number remained the same.

The hearing was brought to a close.

This Board,

Having noted the Appellant's objection in terms of the 'Reasoned Letter of Objection' dated 12th February 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The preferred Bidder is an Architect and not a Quantity Surveyor;**

b) **The Applicant , who is a Quantity Surveyor , has been the Chairman and founder of the MELP Board for the last 10 years;**

c) **The Preferred Bidder does not have the necessary experience in 'Surveying';**

d) **The Appellant's Bid is only Euros 94 dearest than that of the Preferred Bidder.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 30th July 2013:

a) **That the Preferred Bidder was an Architect who is well versed in monitoring survey projects;**

b) **That the Evaluation Board of the Contracting Authority stated that all Bidders were administrative and technical compliant and in this circumstance the cheapest bidder had to be chosen;**

c) **That the Preferred Bidder does have the necessary experience.**

Reached the following conclusions:

1. **The Preferred Bidder's offer was the cheapest;**

2. **The Preferred Bidder was qualified enough to carry out the assignment as specified in the tender document.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A.Matrenza
Chairman	Member	Member

28 August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 573

06/12

Tender for the Supply & Installation of Playing Field Equipment, Soft Flooring and Fencing in Gnien il-Kunsill Lokali, Gnien Profs. A. Tabone and Gnien Mons. Guzeppi Minuti

The tender was published on the 11th September 2012. The closing date was the 12th October 2012.

The estimated value of the Tender was: €60,000. (Exclusive of VAT).

Seven (7) bids were received for this tender.

On the 9th April 2013 FGL Commercial Sales Limited filed an objection against its exclusion from the tender and the award of the tender to JGC Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 30th July 2013 to discuss the appeal.

Present for the hearing were:

FGL Commercial Sales Limited - Appellants

Mr Tony Bonello	Representative
Mr Gordon dimech	Representative
Dr John Gauci	Legal representative
Dr David Zahra	Legal representative

JGC Limited - Recommended Bidder

Mr Pierre Cuschieri	Representative

Kunsill Lokali Birzebbugia – Contracting Authority

Mr Joseph Farrugia	Mayor
Mr Joseph Baldacchino	Councilor
Mr Carol Muscat	Councilor
Ms Maria Galea	Executive Secretary
Dr Victor Bugeja	Legal representative

After a brief introduction, the Chairman invited the appellants to explain the reasons for the objection.

Dr John Gauci on behalf of appellants explained that the hearing was the third time that this case has been before the Public Contracts Review Board.

At this point the contracting authority was asked by the Chairman to give the reasons why this case is before the board for the third time.

Dr Victor Bugeja, legal representative of the contracting authority explained that when the tender was issued, the appellant had failed to produce all the requested documents. Nevertheless, as the contracting authority was keen in the project, continued with the evaluation of appellant's bid. When all the bids were evaluated it was found that, apart from the fact that appellant's bid was not the best one, the equipment offered by another bidder would in the long term be the most advantageous offer. Thus it was decided to offer this bidder rather than appellant the tender in question. This notwithstanding the fact that appellant had not supplied all the necessary documentation, including the insurance. In its first decision the Public Contracts Review Board decided that this was not the right decision because if the contracting authority had a preference for certain material to be used for the equipment, it should have made the specifications clearer. The Public Contracts Review Board decision was to have a re-evaluation made. This meant that the evaluation process had to start anew. When this was done and the bids were evaluated again, it was discovered that appellant had not produce all the necessary documents. It was therefore decided to exclude his bid.

Dr John Gauci explained that when the appellant was excluded in the first award, an appeal had been filed. The Public Contracts Review Board went through every decision taken by the contracting authority to justify not choosing the cheapest bid, and discarded them. The Public Contracts Review Board decision then ordered the re-integration of appellant's bid into the evaluation process. This should have meant that appellant's offer, being the cheapest, to be accepted and the tender awarded to the appellant. Instead of doing this, however, the contracting authority decided to cancel the tender because they claimed that no funds were available since the government estimates had not been carried out. Appellant saw this decision to cancel as a strategy to dispense with the Board's decision. So a fresh appeal from the decision to cancel was entered, and once again the Contracting Authority's decision was overturned by the Public Contracts Review Board. Now at this stage the matter of non-submission of documents has been raised to discard appellant's bid once again. It is contended that this decision serves to attack the first decision taken by the Board which declared appellant's bid compliant. No details about the lack of documents were given, enabling the appellant to oppose these claims. It is only during the present hearing that the insurance policy was mentioned. This goes against the normal procedure.

Dr Victor Bugeja for the contracting authority said that:

i) The list of employees, that should have been given with the tender was not submitted;
ii) The insurance policy not submitted;
iii) The list of main projects carried out in the last two years, and their value, was not submitted;
iv) The list of machinery and equipment was not submitted, and v) certificates were not submitted. All these documents were required and were not submitted by appellant. Notwithstanding this defective submission, the contracting authority, still considered appellant's bid, because it was interested in obtaining the best offer for the tender. However, the same authority, being a public entity, considered also the long term outlook regarding maintenance cost for the equipment, and it was found that in this aspect, appellant's bid would no longer be the cheapest. The Public Contracts Review Board decided against this and stated that such considerations should have been made when the specifications were being drafted. On being asked by the Public Contracts Review Board Chairman, Dr Victor Bugeja stated that when the first award was made,

the documents were missing. However, the Board in its first decision stated that new matters could not be raised at appeal stage. Since the matter of non production of documents was not stated as a reason for discarding appellant's bid, it could not be raised then during the first appeal. The first Board decision put everything *status quo ante* thus opening the evaluation process anew. The second time the Public Contracts Review Board decided that cancellation because of lack of funds was not justified and once again opened the evaluation process anew.

v) The reasons for today's appeal are not the same, and have not been already decided upon by the Public Contracts Review Board. The tender document gives the power to the contracting authority to reject even the cheapest tender. The evaluation process started again and when it was found that appellant's bid was not compliant because of non-submission of documents, it was discarded. The non production of documents is considered as leading to disqualification.

The Public Contracts Review Board expressed concern that the letter is taking over the spirit of the law in many cases brought before it. This must be generating a great waste of time and resources of public funds.

Dr John Gauci stated that in the first appeal the Board had gone through all the points on which appellant's bid was discarded by the contracting authority, and had rejected all those points. In the appeal appellant had asked for the decision to reject his bid to be revoked and also that the tender be awarded to the appellant. The Public Contracts Review Board's decision in the first appeal found for appellant. This means that the award should have been made to appellant firm. In the first decision the Public Contracts Review Board had also raised the issue of waste of resources, just as it was raised today. He insisted that he was found compliant by the Board and cannot be at this stage be declared as not compliant. The issue of non production of documents should have been raised when the first award was made enabling his client to argue against it then. Architect William Lewis's report during the first appeal only mentioned his preference to plastic equipment over wooden equipment and did not mention any missing documents. Furthermore Dr Gauci contends that clarifications should have been sought from his clients regarding any missing documents. The law has changed and administrative compliancy can now be rectified according to law. Missing documents fall under administrative compliance and so should have been rectified through clarification.

Chairman stated that the matter of non submission of documents was not raised in the first appeal and neither in the second appeal. Why was this matter being raised now during the third appeal?

Dr Victor Bugeja stated that using the letter/spirit of law principle, the contracting authority had to decide within the law and as a *bonus pater familiae*. It decided to go for the plastic equipment because this would be more advantageous in the long term. This reasoning was rejected by the PCRB, but the decision did not go on to award the tender to appellant.

Dr John Gauci for appellant referred to the second appeal where appellant had asked that the Board orders the contracting authority to award the tender to appellant. The Board had found in favour of the appellant and ordered the adjudication process to continue. Any decision against this decision is against the law and goes against the principle of *res judicata*. The contracting authority had every chance to contest the PCRB decisions before the Court of Appeal but did not do so. It could not therefore take any other decision that goes against the two previous judgements.

At this point the hearing was brought to an end.

This Board,

Having noted the Appellant's objection , in terms of ' Reasoned Letter of Objection' dated 9th April 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 30th July 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **This case is being brought before The Public Contracts Review Board for the third time. The previous two hearings and decisions thereof were that the Appellant be reintegrated in the evaluation process.**

b) **After the second decision taken by the Public Contracts Review Board , i.e. to integrate the Appellant in the evaluation process, the Contracting Authority decided to cancel the tender due to lack of funds.**

c) **When the Contracting Authority's decision was again overturned by the Public Contracts Review Board, the Contracting Authority adjudicated the Appellant's bid as being administratively non compliant, due to lack of documents that should have been submitted with the tender , by the Appellant.**

d) **It is only during this hearing that missing documentation is mentioned by the Contracting Authority with regards to the Appellant's bid.**

e) **Clarifications should have been sought by the Evaluation Board of the Contracting Authority.**

f) **In the second appeal made by the Appellant wherein the Public Contracts Review Board found in favour of the Appellant and the latter was recommended to be integrated in the evaluation process, the Contracting Authority had the opportunity to contest the PCRB's decision within the stipulated period.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 30th July 2013, in that:

a) **The Public Contracts Review Board's decisions were that the Appellant's bid be integrated in the evaluation process.**
b) **The Contracting Authority commenced with the evaluation process anew.**
c) **During the evaluation process the Board of the Contracting Authority noted that the Appellant did not submit mandatory documentation as specified in the Tender Document.**
d) **The information not submitted by the Appellant was the following:**

    i) **List of Employees of the Appellant**
    ii) **Insurance Policy as requested in the tender.**
    iii) **List of main projects carried out by the Appellant during the last two years with values.**
    iv) **List of machinery and equipment.**

vi) Other certificates.

e) During the evaluation process, the Evaluation Board took also into account the 'Long Term Outlook' in terms of Maintenance Costs.
f) The tender document conditions give the power to the Contracting Authority to discard even the cheapest bid.
g) The Appellant's bid was not administratively compliant due to failure of submissions of mandatory documentation.

Reached the following conclusions:

1. **This Board is somewhat disappointed as to why, during the evaluation stage, the Evaluation Board did not communicate with the Appellant regarding the missing documentation and as to why.**
2. **This Board is also not aware of the reasons why the Appellant did not submit the requested information as specified in the tender document.**
3. **The tender document lays down the required documentation that should accompany the tender. In this regard, the Appellant was in duty bound to abide by these requirements. In actual fact, he did not for some unknown reason. On the other hand, the Contracting Authority had the power to discard the Appellant's bid as it was not abiding by the requirements of the tender document.**
4. **The 'Long Term Aspect' with regards to maintenance costs, as considered by the Evaluation Board of the Contracting Authority, is to be commended as it may happen that the lowest bid is not the cheapest, in the long run.**
5. **This Board is purely taking into account the above mentioned four considerations in arriving at its decision.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

18 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 574

CPSU/CPU/2375/12
Tender for Sterile Disposable CS Drapes for 3 Years Supply.

The tender was published on the 25th May 2012. The closing date was the 11th June 2012.

The estimated value of the Tender was: €49,650 for three years. (Exclusive of VAT).

Sixteen (16) bids were received for this tender.

On the 22nd May 2013 Trebee Limited filed an objection against its exclusion from the tender because its product was not technically compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 30th July 2013 to discuss the appeal.

Present for the hearing were:

Trebee Company Limited - Appellants

Mr Pierre Buontempo	Representative
Mr Simon Bugeja	Representative
Mr Adnan Kar	Representative

RND Limited - Preferred Bidder

Mr Roderick Abela	Representative

Central Procurement & Supplies Unit – Contracting Authority

Mr George Fenech	Chairperson
Ms Jacqueline Borg	Secretary Evaluation Board
Ms Catherine Bonnici	Member Evaluation Board
Ms Astrid Sammut	Representative

After a brief introduction, the Chairman invited the appellants to explain the reasons for the objection.

Mr Pierre Buontempo on behalf of the appellant explained that appellant's bid was disqualified because of questions of permeability of the product offered. He stated that they supply the same product to the contracting authority and they did not have any problems before. Appellants filed this appeal in order to investigate more about problems being encountered, and even brought over a representative of the manufacturing firm. They wished to know what the problem was.

Mr George Fenech, the chairman of the evaluation board explained that the product in question consists of drapes that are used during operations. They are used to cover patients through the

operation and had thus to be sterile to ensure no infection of the patient occurs. He stated that as from February last year they had encountered problems and informed appellants through several emails of these problems. The suppliers, (appellants) admitted that there was a defect in the manufacturing process and promptly exchanged the defective product. But the problem persisted. It was thought at first that the defective batch was not all returned to suppliers, but this proved to be not so as problems were still encountered with samples from the new batch, bearing the new batch number. Here the PCRB was shown photographs showing the problems.

The present tender is a fresh tender and the present supplier's product had to be evaluated with those from the other bidders. The evaluators in such cases are the end users themselves, the scrub nurses and the surgeon.

On being asked by the Public Contracts Review Board Mr Fenech stated that the preferred bidder was both technically and administratively compliant and had to provide samples for testing. Those bidders who failed to provide samples are disqualified. Appellant, being the present supplier, did not need to provide samples as the hospital had the items in stock and used those. The drapes are supposed to be water-repellent but on occasions, they absorb blood and liquids, become heavy and tear. Sterile Drapes have a shelf-life and also come with an expiry date. It is for this reason that staggered supplies are requested from the contractor.

Mr Pierre Buontempo said that his firm had supplied the same drapes in 2011 and 2012 and it was only in February 2013 that they received any complaint that one item was torn. One drape had its pouch torn. When our suppliers were informed of this we were instructed to exchange the stock with new one without any conditions. We did so and consider the matter as closed. However another complaint was raised on a pouch containing a drape that had not been properly sealed. Yet again the remaining stock was changed and replaced. On the 9th May 2013 we were informed by email that there were no problems. He reiterated that the problem encountered was in a pouch in which the drape is enclosed. The product offered by the appellant is still being used at the hospital today. The boxes of drapes that were replaced were opened at random and not one of these was found to be defective.

Mr George Fenech insisted that the pouch was an integral part of the drape and is used to hold blood and fluids. The replacement of the defective products taken back by appellants in February 2013 was only received in June 2013. This is not acceptable since to continue performing operations they had to use drapes intended for use in other operations, not caesarean, and this could lead to shortages. The appellants had informed Central Procurement & Supplies Unit that there were two batches from two manufacturers, and that the batch which had defects was to be discarded while the other was to be used. The replacements supplied still had defects. He explained the methodology used in determining the compliancy of the samples provided by the preferred bidder. About ten samples are submitted by bidders. These samples are distributed to end users who use them in their daily work. This process takes about three weeks after which the evaluators meet in a meeting that Mr Fenech chairs but has no vote. He had to accept what the end users decided. One consultant who used appellant's product stated that there were problems with it. There were at least another 4 complaints that arose during the evaluation process. But it must be noted that appellants had a drawback in the sense that the evaluation was being made during February 2013 a period when problems with the product were being encountered.

Mr Roderick Abela on behalf of the preferred bidder contended that the appellant's supplier has quality control problems.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection in terms of the 'Reasoned Letter of Objection' dated 22nd May 2013 and also through the verbal submissions by same during the hearing held on 30th July 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's Product was not technically compliant.

b) The Appellant is currently the supplier to the Contracting Authority.

c) There are no current problems as the quality of the product being supplied to the Contracting Authority.

d) Any defective product was replaced to the satisfaction of the Contracting Authority.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on the 30th July 2013, in that:

a) The chosen product under consideration is used exclusively during operations to the effect that, the product under tender had to be 100% sterile to avoid any unnecessary infections on patients.

b) During the submissions of the Evaluation Board of the Contracting Authority, the requirement for a good and reliable product end was explicitly elaborated.

c) The Evaluation Board of the Contracting Authority had, in its obligations, to ensure that the chosen product had to be sterile enough so that infections do not occur after the operation.

d) The Contracting Authority had previously encountered technical problems with the product of the Appellant's bid and such problems were notified in writing by the Contracting Authority to the Appellant.

e) The technical quality of the product of the Appellant still persisted although the Appellant was made aware of this shortcoming by the Contracting Authority.

f) The Preferred Bidder was administratively and technically compliant.

g) The samples and batches supplied by the Appellant, including replacements were of inferior quality, as confirmed by experts in the field.

Reached the following conclusions:

1. **From submissions made during the hearing it was clearly established that the product of the Preferred Bidder was of a superior quality than that of the Appellant.**

2. **At the end of the day it is not always the price which matters, but also great consideration must be given to the purpose for which the product is to be utilised.**

3. **In the long term, although the Preferred Bidder's offer was not the cheapest, cost wise it will reap the required results.**

4. **From the submissions of experts during the hearing, it emerged that the Preferred Bidder's offer was more suitable for the purpose for which the same product is intended.**

In view of the above, This Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

3 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 575

T/08/12
Service Tender for the Provision of Short courses For MCAST Staff.

The tender was published on the 10th June 2012. The closing date was the 27th June 2012.

The estimated value of the Tender was: Lot 1 €5,000; Lot 2 € 22,000 (Exclusive of VAT).

Two (2) bidders submitted their offers.

On the 13th February 2013 Allied Consultants Limited filed an objection against its exclusion from Lot 1 of the tender and the non-award of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 1st August 2013 to discuss the appeal.

Present:

Allied Consultants Limited - Appellants

Mr Lorenzo Mule` Stagno	Representative
Dr Victor Axiak	Legal Representative

Malta College of Arts Science and Technology – Contracting Authority

Dr Peter Fenech	Legal Representative
Dr Helena Sammut	Representative
Mr Oscar Borg	Member Evaluation Board
Ms Veronica Sultana	Member Evaluation Board
Ing Pierre Dalmas	Member Evaluation Board

After a brief introduction, the Chairman invited the appellants to explain the reasons for the objection.

Dr Peter Fenech at this point asked to be allowed to explain a letter of reply filed by his clients earlier on today. He explained that this was a two lot tender and a bidder could be non compliant for one lot but still be compliant for the other lot. The letter by which appellant was informed of the outcome of the tender is admittedly not worded properly and not clear enough, and could be misunderstood. Appellant's bid for one lot was compliant while that for the other lot was not. In fact his bid for the compliant Lot continued in the evaluation process and was found to be compliant both administratively and technically, and passed to the financial evaluation stage. Dr Peter Fenech continued that the funds for this project came from abroad through ES Funds and exhibited a document by the Public Priorities Coordination Department (a Tenderer's Originator Form) that had allotted funds for this project. This form is an internal document and is not published.

Dr Victor Axiak on behalf of the appellants started by asking to hear the testimony of a contracting authority's representative.

Mr Steve Caruana, Purchasing Manager, who was not on the evaluation board, confirmed, on being asked that the bid bond was €350. About the amount set for the bid bond he stated that there is no criterion as such to arrive at the figure, but it is based on the estimated value of the tender. He could not confirm that the amount of €350 was arrived at using the value of €35,000 at 1 percent. On being asked to confirm that to-date, Malta College of Arts, Science and Technology has not yet published the fact that Lot1 of the tender had been cancelled, he stated that the fact that tender was not awarded had been shown in the notice board and on the web site. He produced and filed a notice dated 8 February 2013 which is being marked as Doc 1. On being shown a screen shot of the Authority's web page he said that this shows that the tender is still being adjudicated. He reiterated that the tender was "not awarded", and explained that the web site had not been updated.

Dr Victor Axiak asked to hear the testimony of Mr Pierre Dalmas, a member on the evaluation board. Mr Dalmas stated that since then, a new web site was inaugurated and old data had to be transferred from the old web site to the new one. The service provider has also been changed. The transition period was long and Malta College of Arts, Science and Technology was without web site for two weeks. Replying to a question by Dr Victor Axiak, witness stated that his responsibility as an adjudicator ended when the evaluation board submitted its report. He could not state whether the tender had been cancelled or not but that it was not awarded. He agreed that the choice of wording could have been a lot better, but he personally understood that being over the budget, a bid was financially non-compliant. He understood that appellants were administratively and technical compliant but that their financial offer exceeded the estimated budget. He confirmed that no communication had been made with any of the bidders.

It was agreed that the estimated budget was not published.

Dr Peter Fenech on behalf of Malta College of Arts, Science and Technology replied to a question from the Public Contracts Review Board and confirmed that as page 4 of the evaluation report shows, only appellant's bid for Lot 1 was deemed compliant and continued through to the financial evaluation. It was then however found that this bid was above the allotted budget.

Dr Victor Axiak insisted that his client on the 6th February 2013 was informed that its bid was not fully compliant. The contracting authority had every right to cancel the tender but such decision had to be notified to all the bidders. He contended that if a bid is over the estimate, it does not mean that it was non- compliant.

Chairman Public Contracts Review Board stated that certainly, the wording in the communication with bidders was not the most proper, but the end result was that there were no funds for the project.

Dr Victor Axiak asked that in view of what was said during the hearing; he would no longer insist in his clients being awarded Lot 1 but in the circumstances, asked that the deposit made for the objection will be reimbursed, and that the tender be declared formally cancelled.

The hearing was concluded at this stage.

This Board,

Having noted the Appellant's objection in terms of 'Reasoned Letter of Objection' dated 13th February 2013 and also through the Appellant's verbal submissions during the hearing held on 1st August 2013, in that:

a) **The Appellant insisted that the Contracting Authority failed to make a distinction between Lot 1 and Lot 2 of the tender.**
b) **Although the Appellant confirms that the Evaluation Board of the Contracting Authority's decision was that the Appellant was technically non compliant for Lot 2, the same decision does not apply for Lot 1 of the tender.**
c) **The Applicant's bid for Lot 1 of the tender was technically compliant.**

Having considered the Contracting Authority's submissions by way of a 'Letter of Reply' dated 29th July 2013 and through the verbal submissions presented by same during the hearing held on 1st August.

a) **Appellant was actually informed that his offer for Lot 2 of the tender was not technically compliant.**
b) **The Contracting Authority admitted the omission 'on its part' that it failed to inform the Appellant of the reasons for disqualification for Lot 1.**
c) **The tender issued by the Contracting Authority had to be cancelled due to lack of funds for the execution of the tender works.**

Reached the following conclusions:

1. **The Contracting Authority should have clearly stated the reasons to all bidders for non compliance with regards to Lot 1 and Lot 2 of the tender.**
2. **Since, as explained by the Contracting Authority's legal representative, this tender had a stipulated budget and all tenders 'bids were beyond the available funds, this tender had to be cancelled. However, the Contracting Authority is in duty bound to inform all the bidders to the tender of the cancellation of tender and reasons thereof.**

In view of the above, this Board recommends that the deposit paid by the Appellant be fully reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

3 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 576

RP 67/04/13
Tender for Maintenance of Roads – Patching, Zurrieq.

The tender was published on the 8th March 2013. The closing date was the 15th April 2013.

The estimated value of the Tender was: €50,000 (Exclusive of VAT).

Four (4) bidders submitted their offers for this tender.

On the 27th April 2013 Elle's Urban Services Limited filed an objection against the award of the tender to Polidano Bros Ltd. This was followed by another letter dated 30th July 2013.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 1st August 2013 to discuss the appeal.

Present for the hearing were:

Elle's Urban Services Limited - Appellants

Mr John Fenech	Director
Architect Etienne Magri	Representative
Dr Joseph Zammit	Legal Representative

Polidano Bros. Limited - Preferred Bidder

Dr Franco Galea	Legal Representative
Architect Emanuel Zammit	Representative

Kunsill Lokali Zurrieq – Contracting Authority

Ms Ignatius Farrugia	Mayor Zurrieq Local Council
Ms Josianne Cilia Mumford	Executive Secretary

The Chairman, before inviting the appellants to explain the reasons for the objection, stated that the objection filed on the 27th April 2013 did not give any reasons for the objection. This rendered the said objection null and void because the law stated clearly that any objection should give the reasons for raising the objection. The Board could not continue to hear the appeal.

Dr Joseph Zammit on behalf of the appellant stated that his client was asked by the Local Council, on a request made by the PCRB clerk, to submit by yesterday the reasons for his objection. He contended that this request had restored any deficiency on his client's part when submitting his appeal.

Dr Franco Galea appearing for the preferred bidder asked to be shown the original letter of objection because his client was only informed of the appeal yesterday, when he received the second letter by appellant.

The hearing was brought to a close.

This Board,

Having noted the Appellant's Letter of Objection without reason dated 27th April 2013, had objected to the decision taken by the pertinent Authority.

a) **The Board noted that the letter of objection by the Appellant did not state the reasons;**

b) **The Board also noted that the 'Reasoned letter of Objection' should have been filed within five working days from the date of notification of refusal from the Contracting Authority,**

Reached the following conclusions:

1. **Regulation 21 of the Public Procurement Regulations, states that any bidder who is aggrieved by the award of tender may within five working days from date of notification, file a letter of objection with a deposit, clearly stating the reasons for the objection;**

2. **The Appellant did not abide by the Regulations;**

3. **The Appellant's reasons for the objection were filed with this Board three months later.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

22 August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 577

CPSU/2641/2012

Tender for the Supply of Dressing Pads 20cm x 30cm.

The tender was published on the 20th September 2012. The closing date was the 22nd October 2012.

The estimated value of the Tender was: €55,608 (Exclusive of VAT).

Six (6) bidders submitted their offers for this tender, one of them submitting two different bids.

On the 8th July 2013 Pharmafusion Limited filed an objection against its exclusion from the tender because its product was not technically compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 1st August 2013 to discuss the appeal.

Present for the hearing were:

Pharmafusion Limited - Appellants

Mr Ives Pocock	Representative
Ms Giovanna Pocock	Director Pharmafusion Limited

Krypton Chemists Limited - Preferred Bidder

Ms Lorraine Arrigo	Representative

Central Procurement & Supplies Unit – Contracting Authority

Ms Connie Miceli	Chairperson Evaluation Board
Ms Josanne Debono	Member Evaluation Board
Ms Alicia Vella Lethridge	Member Evaluation Board
Ms Miriam Wubbels	Member Evaluation Board
Ms Astrid Sammut	Representative

After a brief introduction, the Chairman invited the appellants to explain the reasons for the objection.

Mr Ives Pocock for appellants stated that appellants' bid was the cheapest and their product was up to specifications. The same product is being sold in quantities in various European Countries. Specifications only stated that the product should be highly absorbent. This could be a subjective quality while specifications in tender documents should be as detailed as necessary. Specifications should have asked for the dressings to conform to certain standards. Appellants' offer conformed to European Standards. Therefore since the dressings offered by appellants conforms to European

standards and was also the cheapest, it should not have been discarded. He queried what tests were used to verify suitability of the product Pharmafusion offered, and as a result of which its bid was disqualified.
Mr Ives Pocock also complained about the time allotted to him to file this appeal.

Ms Connie Miceli explained that there was only one member of the evaluating board present.

Ms Miriam Wubbels, a member on the evaluation board said that all the samples provided by the bidders in such tenders are tested by being practically used as necessary on patients. It was found that the product offered by appellants leaked, and the wound liquid seeped right through. So it was necessary to use two dressings instead of one to dress wounds. Obviously this meant that appellants' bid would no longer be the cheapest. Furthermore in use, the dressing in question developed lumps causing discomfort to the patients. The lining of the dressing pads is meant to shield the wounds from the absorbent cotton wool, and during testing, the linings of dressing pads submitted by appellants were found to tear. Appellants' offered product was not as good as the other samples.

Mr Ives Pocock insisted that specifications should have been clearer, enabling bidders to submit the right product. He insisted that standards should have been specified and scientific testing done on the samples to see if these complied. He reiterated that the product submitted by appellants was up to standard and was compliant.

Ms Josanne Debono, member on the evaluation board stated that specifications asked that offered dressing pads should be highly absorbent which meant that they are supposed to absorb liquids and retain them. Pharmafusion's dressing pads leaked.

Ms Miriam Wubbels affirmed that the tests were conducted on real wounds on real patients who had wounds that leaked a moderate amount of blood. That dressing pads should absorb the fluids that issued from wounds.

Replying to a question from the Public Contracts Review Board, Ms Connie Miceli explained that in this kind of tender, it is normal for the present suppliers of products being tendered for, to be exempted from submitting any samples. This is for the simple reason that their product is being continually tested through normal usage on a daily basis. The present supplier had to quote the code number of his previous supply and this is checked to ensure that the same product is being offered. Other bidders are requested to submit samples, however, and these are tested in a practical way through use as necessary.

At this point the hearing was concluded.

This Board,

Having noted the Appellant's objection in terms of the 'Reasoned Letter of Objection' dated 8th July 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant's bid was discarded by the Evaluation Board of the Contracting Authority due to the fact that it was considered as technically non compliant.**
b) **In the specifications of the tender document, there were no specific standards which had to be satisfied by the tenderer.**

c) The Appellant's product is used all over Europe and in this regard the Appellant is somewhat surprised as to how same product was considered to be technically non compliant.
d) The Appellant's bid was the cheapest.
e) The Appellant enquired as to what tests were carried out on the product to establish technical compliance.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 1st August 2013, in that:

a) The Evaluation Board of the Contracting Authority did carry out tests on all samples provided. In fact these tests are carried out 'Hands On' ie the efficiency and compliance of the product is tested on real patients.
b) The Appellant's bid was found to be technically non compliant.
c) It was of the utmost importance that the product had to be highly absorbent. It had to absorb liquids and retain same.
d) The product had to ensure the least possible discomfort to the patient.

Reached the following conclusions:

1. **It is of the utmost importance that in evaluating the tendered products, great importance be given to the quality, as this is a precaution against infections.**
2. **It is also important to take into consideration the minimisation of discomfort to the patient. In this regard the Evaluation Board of the Contracting Authority took this issue into account.**
3. **The tests carried out by the Evaluation Board could not have been more practical and in this aspect the Preferred Bidder's product was found to be highly technically compliant.**
4. **Although the Preferred Bidder's offer was the second cheapest, in the long term this offer will prove to be the cheapest due to less consumption of the product itself.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

3 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 578

CT 3115/2012

Tender for the Supply, Delivery and Installation of College (Lecture room, Laboratory, Office, Staffroom, Auditorium) Furniture and Equipment.

The tender was published on the 4th December 2012. The closing date was the 29th January 2013.

The estimated value of the Tender was €2,010,858.07 (Inclusive of VAT).

Eleven Bidders (11) bidders submitted their offers for eight (8) Lots.

Lot 1: Laboratory Furniture

On the 25th June 2013, Flores Valles S.A. filed an objection against the rejection of their bid as being technically non-compliant and the award of the tender to Evolve Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 6th August 2013 to discuss the appeal.

Present for the hearing:

Flores Valles S.A. - Appellant

Mr Paul J Pace	Representative
Mr Noel Delia	Representative
Mr Duarte Gouveia	Representative
Dr Caroline Farrugia	Legal Representative

Evolve Limited – Recommended Bidder for Lot 1

Mr Lawrence Zammit	Sales Executive Manager

Malta College of Arts, Science and Technology – Contracting Authority

Arch Deborah Borg	Chairperson Evaluation board
Arch Karl Cutajar	Member Evaluation Board
Ing Damien Gatt	Member Evaluation Board
Dr Ing. Alex Rizzo	Member Evaluation Board
Mr Emanuel Attard	Representative
Dr Peter Fenech	Legal Representative

The Chairman PCRB remarked that the appellant firm in its appeal did not give any reasons for this appeal.

After a brief introduction, the Chairman invited the appellant to give the reasons behind his objection.

Dr Caroline Farrugia, legal representative on behalf of appellant stated that when the tender was issued, specifications on page 96 stated that laboratory benches should be sliding underneath the laboratory cabinets. Page 62 requires the C-frames to glide to the right or left. The number of cabinets was not stated anywhere in the tender document. Appellants had asked for a clarification on this point. The clarification was given on the 21st January 2013. This clarification changed the tender specifications completely. Instead of sliding under bench cabinet a fixed C-frame system became acceptable. The closing date was the 29th January 2013. Clients had not enough time to make another alternative bid showing both sliding and suspended frames. Appellants were misinformed because the tender had specified gliding systems. The tender had asked for leg room but again this was changed.

Dr Peter Fenech appearing on behalf of the contracting authority here made a formal objection. The contracting authority came prepared to this hearing to deal with appellant's non-compliancy. During this hearing, appellants are changing the appeal parameters, claiming that the tender parameters had been changed. This action is not permissible at law. Appellant's bid was non compliant. The clarification was issued within the legal period because the tender closing date was the 29th January 2013. The clarification did not change any specifications but widened them and admitted new parameters. Had appellant's bid been compliant in the first instance, it would have remained so compliant. But appellant's bid was not compliant because the relevant mandatory items were missing or incorrect. Tender asked for coated brass or stainless steel fittings, for example, while appellant offered galvanized steel.

Engineer Damien Gatt on behalf of the contracting authority stated that the main points in which the appellant was not technically compliant were: 1. Combined shower stand. This had to be either brass or stainless steel. Appellants offered a galvanized product. 2. Cabinets had to occupy the maximum possible space under the work top. Appellants' offer showed a void space larger than the width of a cabinet. Even after we asked them for clarification, the offer remained the same. They offered thirty three cabinets less than required. Their bid should have maximised the number of cabinets, instead they offered more void spaces. This was all reported in the evaluation report. On being cross-examined by Dr Farrugia, Mr Gatt explained that the cabinets had to be easily removed for access in the event of an emergency, and these specifications were not changed.

Dr Caroline Farrugia for appellants affirmed that the fact that there was a clarification issued on the 21st January 2013 goes against Clause 6 of the Procurement Regulations which state that specifications should not change by more than 5%. Contended that when specifications were changed from sliding to fixed this amounted to such a change.

Mr Damien Gatt on being asked by the Board affirmed that there had been no changes to the specifications. There are both gliding and suspended cabinets. If a bidder offered gliding cabinets, he would have still been compliant. An additional option for suspended cabinets was included.

Mr Noel Delia on behalf of appellants, under oath stated 1.1.7 of the tender document states that the C frame should have a rail, slider installed under the work area so that suspended units under the bench can easily glide. This made sense because this slider allowed easy access to the back of the cabinets. He claimed that when this was changed to allow for fixed cabinets, this amounted to change in specifications of more than 50%. The gliding C frame would certainly be more costly. This was not

fair since appellants spent more than a month to formulate their offer, and this change only gave appellants a few days to re-submit another offer.

Winding up, Dr Peter Fenech reiterated that the clarification issued on the 21st January 2013 did not affect appellant's offer in any way. Their offer would still have been compliant. However their bid was disqualified not because of this change, but because what they had offered, in the option they chose, was not technically compliant. Other bidders chose to bid giving both options.

In her winding up, Dr Caroline Farrugia, for appellants insisted that tender was unfair because originally specifications asked for gliding cabinets. These specifications were later changed, allowing suspended cabinets. If her clients knew that such suspended cabinets were admissible they would have offered them. But they did not have the necessary time within which to do so. Regarding the other reason for appellant's disqualification, Dr Farrugia claimed that the tender document did not contain a bill of quantities that showed the number of units, and it was left to the discretion of bidders to state the number of cabinets.

Dr Peter Fenech stated that the contracting authority required the maximum number of cabinets within the available space. It was clearly set down in the tender document that any void space remaining had to be "smaller than the width of the smallest cabinet." This specification was so formulated because the contracting authority did not know the width of the cabinet units stocked by all the bidders and so left it to them to provide the maximum number.

The hearing was here brought to a close.

This Board,

Having noted the Appellant' objection ' in terms of letter (Without giving reasons) dated 21st June 2013 and also through the Appellant's verbal submissions during the hearing held on the 6th August 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant had asked for clarifications, during the evaluation process , from the Contracting Authority.**
b) **The reply from the Contracting Authority was received by the Appellant on the 21st January 2013.**
c) **The Clarifications received by the Appellant involved changes to the specifications in the tender.**
d) **Due to the fact that the closing date of the tender was 29th January 2013, the Appellant did not have enough time to submit the additional and varied specifications.**

Having noted the' letter of Reply' by the Contracting Authority dated 2nd August 2013 and through verbal submissions presented by same during the hearing held on the 6th August 2013, in that :

a) **The Appellant's bid was technically' non compliant.'**
b) **The clarifications did not alter in any way the specifications of the tender.**
c) **The clarifications were issued within the legal period; because the tender's closing date was 29th January 2013.**

Reached the following conclusions:

1. **That the tender document specifically stated the technical reasons for not specifying the quantities in the same document were:**

    i. **That this depended on the size of the cabinets.**
    ii. **That the space available for the products had to be utilised in the most efficient way with enough back space for urgent removal and maintenance of electric appliances at the back of the cabinets.**

2. **That from the submissions made by the Contracting Authority's evaluation board. It was proved that the Appellant's bid was not 'Technically Compliant'.**

3. **That clarifications made or requested during the evaluation state do not constitute either an 'Addition' to specifications or 'Alterations' to the specifications of the tender.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

14 August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 579

CT 3115/2012
Tender for the Supply, Delivery and Installation of College (Lecture room, Laboratory, Office, Staffroom, Auditorium) Furniture and Equipment.

The tender was published on the 4th December 2012. The closing date was the 29th January 2013.

The estimated value of the Tender was €2,010,858.07 (Inclusive of VAT).

Eleven Bidders (11) bidders submitted their offers for eight (8) Lots.

Lot 4 Executive and non executive Furniture
On the 28th June 2013, Inspirations Limited, filed an objection against decision to discard its bid as being administratively non compliant and the award of Lot 4 of the tender to FX Borg Furniture Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 6th August 2013 to discuss the appeal.

Present for the hearing:

Inspirations Limited - Appellant

Mr Alex Camilleri	Representative
Mr Emvin Ebejer	Representative
Dr Stanley Portelli	Legal representative

FX Borg Furniture Limited – Recommended Bidder

Dr Kris Borg	Legal representative
Mr Joe Borg	Representative
Ms Jenny Cassar	Representative

Malta College of Arts, Science and Technology – Contracting Authority

Arch Deborah Borg	Chairperson Evaluation Board
Arch Karl Cutajar	Member Evaluation Board
Ing Damien Gatt	Member Evaluation Board
Dr Ing Alex Rizzo	Member Evaluation Board
Mr Emanuel Attard	Representative
Dr Peter Fenech	Legal Representative

After a brief introduction, the Chairman invited the appellant to give the reasons behind his objection.

Dr Stanley Portelli on behalf of the appellant company stated that the first consideration that should be given when adjudicating a tender is the price and the adherence to tender specifications. Thus when a bidder offers within the specifications and is the cheapest, he should be awarded the tender. Substance should prevail over form. The reason given for the rejection of appellant's offer was that a list of principal deliveries, for two of the past three years, was not submitted. Inspirations Limited did not operate during that period and thus could not give the requested list. This fact is acknowledged by the appellant. However Dr Portelli contends that on seeing that appellant's bid gave a list of deliveries for one year only, the evaluation board should have asked appellant for clarification for this omission. He admits that the law says that this clarification could not be sought. The spirit behind the clause is however, that such clarification could not be sought if the result gave the bidder an advantage over the other bidders. For example such clarification should not be used to change specifications. Such clarification would not have advantaged appellant firm because Inspirations would have explained that it formed part of a Group which contained Home-Mate and Atrium who certainly have the necessary experience. The contracting authority should ensure that the greater number of bids should be kept in consideration, for as long as possible to ensure value for money. Appellant's bid was in fact 25% cheaper than the awarded tender and Dr Portelli finds it difficult to explain why it was rejected. Tender asked for proof of three years' experience, thus excluding new bidders. However, he could not understand why the financial and economical stability of bidders was not demanded, and capability of executing the tender was not safeguarded.

Dr Peter Fenech on behalf of the contracting authority stated that unfortunately, regulations are there to be kept, because once a chink is opened, it becomes the subject to criticism and undue assertions. In this particular case however, appellant had a remedy in hand. The tender document itself contained a clause that allowed bidders to rely on the experience of other entities. Appellant only claimed to rely on such experience here during the hearing, but did not do so in the tender bid. There were no legal barriers for appellant to put down the experience of the other entities Inspirations forms part of, whereupon its bid would have been compliant. The evaluation board could not ask for clarification on this point because the tender document specifically stated that there could be no rectification of submitted information, and that clarification could only be obtained on information already submitted. What appellant company is claiming is not clarification but rectification, because appellant did not submit this information in the first place. As the appellant bid was not administratively compliant, the evaluation of its bid ended there, so his technical compliance was not evaluated.

Emanuel Attard on behalf of the contracting authority stated that additional information after the closing date of the tender is not admissible. In this case appellant did not submit a requisite and thus had a clarification been requested it would have been a rectification.

Dr Stanley Portelli once again insisted that the evaluation board could have asked for a clarification.

Dr Peter Fenech reiterated that it was an error appellant made when drawing up his offer that led to disqualification, because the solution was indicated in the tender document itself. Had the offer been properly drawn it would have included appellant's reliance on other firms for experience, and this would have rendered the bid compliant.

Dr Kris Borg on behalf of the preferred bidder said that the law does not permit rectification. Appellant company was administratively non compliant because it failed to show in the tender bid its

necessary experience. Appellant had all the facility to show other entities experience in the tender document but did not. Contends that his clients should not suffer because the appellant's failures.
The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection ' dated 28th June 2013 and also through the verbal the Appellant's verbal submissions during the hearing held on the 6th August 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The offer submitted by the Appellant was the cheapest, in fact by 25% of the Preferred Bidder's offer.**

b) **The Product proposed by the Appellant is technically compliant.**

c) **The Appellant acknowledges the fact that what was missing in the Appellant's bid was a 'List of principal deliveries for two of the past three years'. Appellant could only submit one year's delivery history since he was not operating during that period.**

d) **The Evaluation Board of the Contracting Authority should have asked for clarifications regarding the missing data requested in the tender document submitted by the Appellant.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on the 6th August 2013 in that:

a) **The Tender document contained a clear clause that allowed bidders to quote past performances of other connected entities.**

b) **The Appellant could have availed himself of this 'Opportunity Clause'.**

c) **No clarification was possible, as clarifications could only be requested by the Evaluation Board on information submitted in the tender document.**

d) **To this effect, the Appellant's bid was not administratively compliant.**

Reached the following conclusions:

1. **The Appellant had the opportunity to utilise the clause which stated that' the bidders can also apply the past three year's performances of other connected entities'. In other words the Appellant could have stated past deliveries of either his suppliers of other connected companies such as subsidiaries or related companies.**

2. **Although this Board fully emphasises that clarifications should be sought during the evaluation stage as much as possible, in this particular instance, since the**

'mandatory information' was missing, the Evaluation Board could not include 'additional information' after the closing date of tender.

3. **The 'onus' was on the Appellant to clarify or rather explain the reason for any missing information when submitting his tender document.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

19th August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 580

CT 3115/2012
Tender for the Supply, Delivery and Installation of College (Lecture room, Laboratory, Office, Staffroom, Auditorium) Furniture and Equipment.

The tender was published on the 4th December 2012. The closing date was the 29th January 2013.

The estimated value of the Tender was €2,010,858.07 (Inclusive of VAT).

Eleven Bidders (11) bidders submitted their offers for eight (8) Lots.

Lot 6 Staffroom workstation Module

On the 27th June 2013, Omni Stat filed an objection against the rejection of its bid as being administratively non compliant and the award of Lot 6 of the tender to FX Borg Furniture Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 6th August 2013 to discuss the appeal.

Present for the hearing:

Omni Stat – Appellant

Prof Ian Refalo	Legal Representative
Dr Mark Refalo	Legal Representative
Dr Mario Camilleri	
Mr Mark Schembri	
Ms Bernice Caruana	

FX Borg Furniture Limited – Recommended Bidder

Dr Kris Borg	Legal Representative
Mr Joe Borg	
Ms Jenny Cassar	

Malta College of Arts, Science and Technology – Contracting Authority

Arch Deborah Borg	Chairperson Evaluation Board
Arch Karl Cutajar	Member Evaluation Board
Ing Damien Gatt	Member Evaluation Board
Ing Alex Rizzo	Member Evaluation board
Mr Emanuel Attard	Representative
Dr Peter Fenech	Legal Representative

After a brief introduction, the Chairman invited the appellant to give the reasons behind his objection.

Dr Mark Refalo on behalf of the appellants stated that first of all that the contracting authority confused selection criteria and award criteria. His clients were excluded because of their being administratively non compliant in the selection criteria. This was immediately after the opening of the tenders. This felt like an award criteria when in reality it was a selection criteria. He contended that there should be clear distinction between award criteria and selection criteria.

On being asked by the Board, Dr Peter Fenech for the contracting authority explained that since this was a one package tender, when it was found that Omni Stat's bid was non compliant, the evaluation process had to continue. Bidders were informed of the results at the end of the adjudication process. Thus it was only after the evaluation report was drawn up that appellants were informed that their bid was administratively non-compliant.

Dr Mark Refalo claimed that the criterion requiring a minimum of €200,000 deliveries per annum is not proportional. In this case there were several lots each with a different value. For Lot 1 the bids were around €400,000, and the criterion of €200,000 per year is acceptable. For Lot 6 however, where the bids ranged from around €60,000 to €140,000. The criterion, of deliveries of €200,000, was thus not proportional.

Dr Peter Fenech stated that appellant firm itself had filed a bid for €430,000 for one lot. The tender had to be issued as one call, divided into lots, to maximise benefits because of European funding. The figure for the required minimum deliveries was arrived at using the mean value of all the lots. In fact appellants themselves totally bid €961,000. This was a condition that was made known to all bidders before they submitted their bids, and if appellants wished to contest this, they could have had recourse to this Board before the closing date of the tender.

Dr Mark Refalo for the appellants stated that there was a general misunderstanding of what clause 6.1.2 requires. There are two distinct requirements, one is that *"has to provide a list of Principal deliveries effected during the last three years 2009,2010 and 2011"* while the other states *"the minimum value of deliveries of a similar nature completed shall not be less than €200,000 per annum"*. Contended that bidders did not understand what was meant by these two requirements. His clients submitted works of 1.2 million euro for a period over six years that amounts to €200,000 per annum.

Chairman pointed out that the condition states €200,000 per annum and not an average.

Professor Ian Refalo for appellants interpreted the condition as an average condition because it is intended to ensure that whoever bids has the necessary competence. Thus it follows that if his clients delivered an amount of over one million over six years, they satisfied the condition. He contended that if an average of deliveries is not accepted, then the decision goes against the provisions of proportionality, citing the recent Court of Appeal decision regarding Ballut Blocks Ltd.

Dr Peter Fenech for contracting authority confirmed that appellants' bid was in fact the cheapest. The quoted court of appeal judgement stated that the best price amongst all those that reach the requirements should be chosen. It was clear from the tender document that what was required was €200,000 per annum. An average of six years value is not acceptable and was not compliant. The contracting authority asked for three years 2009, 2010 and 2011. Omni Stat were found non-compliant because the information they submitted was not clear. In fact the evaluation board asked

them for a clarification on the submitted information. Their reply however included additional information not submitted in the first instance, which is not acceptable. The information was still not clear in spite of the clarification. They were asked to give an average, but this average still did not reach the required threshold of €200,000. Their average came out to €148,000.

Dr Mark Refalo remarked that this figure of €148,000 is in fact greater that the bid submitted by the preferred bidder. This proves that the requirement was not proportional.

Profs. Ian Refalo claimed that the bench mark should have been based on separate lots and not on the whole tender.

Dr Peter Fenech reiterated that it was a funding requirement to issue one tender for the different lots.

The hearing was brought to a close at this stage.

This Board,

Having noted the Appellant's objection in terms of 'Reasoned Letter of Objection' dated 27th June 2013 and also through the Appellant's verbal submissions during the hearing held on the 6th August 2013, had objected to the decision taken by the pertinent Authority in that:

- **a) The Contracting Authority did not make a distinction between a 'Selection Criteria' and an 'Award Criteria'. In this regard a distinction had to be made by the Contracting Authority.**
- **b) The minimum mandatory 'Deliveries Clause' of Euros 200,000 per annum is not in conformity with a 'proportional criteria' procedure.**
- **c) There was a general misunderstanding of what clause 6.1.2 required in that:**
  - **i. The bidders had to provide a list of principal deliveries over the years 2009, 2010 and 2011.**
  - **ii. The Bidders had to prove that the minimum of deliveries shall not be less than Euros 200,000 per annum.**
- **d) The Appellant contested that this condition laid out in the tender document should be considered to mean as an average per annum.**
- **e) The Appellant referred to decision taken by the 'Court of Appeal' whereby it was decided that if the decision for the award of a tender goes against the principle of proportionality, this is not acceptable.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on the 6th August 2013, where in it was stated:

- **a) That this tender was a 'One package' tender due to EU funding procedures. This condition was made known to all bidders.**
- **b) That the Appellant's bid was not administratively compliant.**
- **c) That the required minimum deliveries per annum were arrived at by applying a mean average value for all the lots.**

Reached the following conclusions:

1. **From the Evaluation Board's report it is evidently clear that notwithstanding a request for clarifications, the Appellant failed to provide the requested data.**

2. **In accordance with the Evaluation Board's report, the data supplied by the Appellant upon requesting clarifications, contained various negative variances.**

3. **The Tender document clearly stated the conditions and all Bidders were in duty bound to abide by the laid conditions in the document.**

4. **The mandatory requirement of the 'principal delivery amount' over the last three years is to be construed as the amounts of deliveries in 2009, 2010 and 2011. The Euros 200,000 benchmark is to be considered as a fixed amount per annum and not an average per annum.**

In view of the above, this board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

19th August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 581

DCS/T4/2013

Tender for the Supply and Installation of Electrical Services at Gozo College, Xaghra Primary School.

The tender was published on the 22nd January 2013. The closing date was the 19th February 2013.

The estimated value of the Tender was €61,729.75 (Exclusive of VAT).

Five (5) bidders submitted their offers.

On the 25th July 2013 Mr Noel Borg filed an objection against the award of the tender to Mr Richard Cauchi.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 8th August 2013 to discuss the appeal.

Present for the hearing:

Mr Noel Borg - Appellant

Mr Noel Borg	Representative
Dr Renata Formosa	Legal Representative

Mr Richard Cauchi – Recommended Bidder

Dr Abigail Critien	Legal Representative
Mr Richard Cauchi	Representative

Ministry of Education – Contracting Authority

Eng. Mario Cauchi	Chairman Evaluation Board
Ms Maria Agius	Secretary Evaluation Board
Mr Anthony Cassar	Member Evaluation Board
Ing. Jeffrey Muscat	Member Evaluation Board
Mr George Scicluna	Member Evaluation Board
Mr Renaldo Cini	Sr Principal Ministry of Education
Dr Joseph Bonello	Legal Representative

After a brief introduction, the Chairman invited the appellant to give the reasons behind his objection.

Dr Renata Formosa on behalf of the appellant submitted that her client's appeal was based on the facts that the contracting authority failed to inform him of:

1) The fact that his bid was not chosen.
2) The reasons why his offer was found non-compliant, as it was bound to do by the Regulations.

She contended that appellant's offer was the cheapest, and thus the reason for having it rejected should have been explained, again a requisite of the Procurement Regulations.

Dr Joseph Bonello, appearing for the contracting authority asked for the production of two witnesses who were to explain the contracting authority's point of view on the matters raised by appellant's legal representative. He contended that as the bidders were informed that the award was made to Richard Cauchi, it followed, and the other bidders should have understood that their bids were not chosen. He asserted that in Gozo this was the normal practice. He also questioned the effect the result of this appeal had on the tender. The validity of the tender is not affected by any administrative errors following the adjudication.

Mr Renaldo Cini, a senior principal at the Ministry of Education, Gozo, under oath, explained that the normal procedure in use was followed after the tender was awarded. This is what always happened in Gozo. Thus all bidders were informed that the tender had been awarded and no other details were included in the correspondence.

It was explained to the witness by the PCRB that this procedure was not normal. Procurement Regulations stated otherwise. The same regulations applied to Gozo as well.

Engineer Mario Cauchi, testified that he was the chairperson of the evaluation board. He stated that whilst the preferred bidder's offer was both administratively and technically compliant, appellant's offer was found to be administratively non-compliant because it failed to prove he had the necessary mandatory experience. Article 6.1.2 of the tender, required the bidders to submit evidence of their previous experience. They had to show at least 2 similar projects, as a minimum, in the last 4 years. The value of these projects should not be less than the minimum of €25,000. Appellant's bid, form 5 on page 28, clearly shows that although three projects were listed, only one of these had been completed 100%, and this project's value was €8,000. The other two projects were not completed.

Replying to a question by appellant's legal representative, witness confirmed that appellant's bid was the cheapest. He explained that the evaluation board, when evaluating bids, first checked the administrative compliance of all bidders. Those that were found to be so then proceeded to be checked for technical compliancy. Appellant's offer failed the administrative compliancy stage and was not evaluated further.
Replying to a question by Dr Abigail Critien, preferred bidder's representative, witness reiterated that bidders had to pass the administrative compliance test before their technical offer and financial offer was examined. Those who failed the administrative test, were disqualified and their bids rejected.

The hearing was at this point brought to a close.

This Board,

Having noted the Applicant's objection in terms of 'Reasoned Letter of Objection' dated 22nd July 2013, had objected to the decision taken by the pertinent Contracting Authority, in that:

- **i) The Appellant's bid was the cheapest.**
- **ii) No reason was given by the Contracting Authority for refusal of the Appellant's tender bid.**

Having noted the Contracting Authority's verbal submissions during the hearing held on the 8th of August 2013 and the verbal submissions made by two witnesses presented by the Contracting Authority in that:

- **i) The Appellant's Bid failed to pass the test regarding experience on similar projects. Hence Appellant did not comply on an 'Administrative' basis.**
- **ii) To this effect, the Appellant's bid could not be considered from the technical aspect.**

Reached the following conclusions:

1. **The Contracting Authority was in duty bound to state the reasons for the refusal of the tender of the Appellant. Had it not been that the Appellant was s not 'Adminstratively Compliant', the situation would have been otherwise.**
2. **Since the Preferred Bidder was fully compliant and the second cheapest, the Evaluation Board chose the 'Fully Compliant Bidder'.**

In view of the above, this Board, after taking into consideration the fact that the Contracting Authority failed to inform the Appellant of the reasons for refusal of his bid, finds against the Appellant and recommends that the deposit paid by the Appellant should be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

13th August 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 582

MXLC 02/2013

Tender for Upgrading and Embellishment of Play Area at il-Magħluq Marsaxlokk.

The tender was published on the 8th March 2013. The closing date was the 9th April 2013.

The estimated value of the Tender was €82,000 - €120,000 (Exclusive of VAT).

Four (4) bidders submitted their offers.

On the 30th April 2013, L&S Technical Consulting Limited filed an objection, against a decision by the contracting authority, Marsaxlokk Local Council to award the tender to JGC Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 20th August 2013 to discuss the appeal.

Present:

L&S Technical Consulting Limited - Appellants

Mr Leslie Pavia	Representative
Dr John Bonello	Legal Representative

JGC Limited – Recommended Bidder

Mr Pierre Cuschieri	Representative

Marsaxlokk Local Council – Contracting Authority

Mr Edric Micallef	Mayor
Mr Duncan Hall	Executive Secretary
Dr Luciano Busuttil	Legal Representative
Arch William Lewis	Representative

The Chairman of the Board made a brief introduction and invited the appellant's representative to make his submissions.

Dr John Bonello on behalf of the appellant company stated that the main issues of contention in this tender arose after the adjudication of the tender. During the bidding stage there had been some requests for clarification about which there were some doubts. When the award was published it became evident that this tender had a basic problem that was crucial in Public Procurement. i). Bidders were asked to submit variant solutions in a way that precluded comparison of "like with like".

The way the tender was formulated and the information given by the contracting authority to the bidders allowed them to give variant solutions, so in the adjudication stage it became impossible to compare bids on a level playing field. Tenderers could offer different options. ii). The way the Bills of Quantities were given allowed subjective criteria in the adjudication stage. It is the prerogative of the contracting authority to ask for the equipment it needs, and so it should have been more specific in the specifications. iii). Another issue is that when clarifications were requested, the resulting explanations were not sent to all the bidders, as required by the Regulations. iv). Yet another issue was about the requested quantities. These were greater than what was in fact required. Citing for example the fencing, where more than double the amount required was requested. The offer by bidders was per meter run, but bidders could obtain a more favorable price when purchasing greater quantities, so when delivery of smaller amounts was made they would be out of pocket. Dr Bonello explained that this being a relatively small tender, the smallest difference in price had a more pronounced effect. He insisted that adjudication of the tender was made on subjective issues.

Dr Luciano Busuttil for the contracting authority started by explaining that the clarifications were sent to the appellant and produced copies of the relevant emails.

Dr John Bonello explained that the clarifications to appellant's queries were only sent to appellant and were not sent to all the other bidders as required by Regulations. Clarifications became part of the tender document and so the contracting authority had to inform all the bidders.

Mr Duncan Hall, the Executive Secretary of the Marsaxlokk Local Council confirmed that request for clarification had been received from appellant, but as the law only permits addenda to the document up to seven days before the closing date, and the appellant's request came in late, there was no time to circulate to all bidders, since the seven day period had elapsed. Rather than leaving appellant without reply, it was decided to give him the information requested. This was of minimum importance regarding the Bills of Quantity. It had been made clear in the Bills of Quantity that the measurement and quantities were only given as guidance.

Dr Luciano Busuttil said that the tender gave bidders a template of what was needed and left it up to them to propose solutions. Adjudication had to take into consideration the Local Council's needs and constraints. The Council's Architect studied all the bids tendered and drew up a report. The Council then adjudicated the tender basing this on the Architect's report. He claimed that the deposit made by appellant in this case was not according to regulations and also that the appellant had submitted two Bills of Quantity within the same tender, and this was also not according to the tender document.

Dr John Bonello stated that the submissions made by the contracting authority confirm the assertion the appellant made in the appeal, that the way the tender was formulated did not allow for comparison of like with like. The fact that the contracting authority left it to bidders to propose a playground solution, and had not given specific directions, rendered the tender impossible to adjudicate. He cited an example of one of the bidders who was disqualified because the roundabout he offered was too small. The specifications should have been more specific.

On being asked by the Board Chairman, Mr Duncan Hall explained that the preferred bidder was the only one who was fully compliant. He was administratively compliant and technically compliant and his offer was according to the relative standard.

Dr John Bonello claimed that some items offered by the preferred bidder do not conform to the requested standards as per Clause 2.01.01 of the tender documents. He cited the pavement as an example of this non-conformity.

At this point the Board asked for the presence of the Architect who made the evaluation report so that he could inform the Board of the veracity of this assertion by appellant, and to confirm that the preferred bidder's offer was compliant.

Mr Pierre Cuschieri, for the preferred bidder stated that the flooring offered by appellant was according to standard, EN1176, and thus was as requested in the Bills of Quantity and compliant. He stated also that the tender was clear in asking for one option per tender, and no bidder could submit two options. Appellant gave two options and therefore was not compliant.

Mr Leslie Pavia, appellant stated that he gave two options (Bills of Quantity) and wrote a letter explaining why. One BOQ was according to the request by the contracting authority and the second one was according to what the appellant thought was necessary.

Mr Duncan Hall explained that while tender allowed bidders to file more than one bid but made it clear that this could not be done in the same tender document.

Dr Luciano Busuttil said that rather than disqualify appellant's bid because he gave two BOQs, the Council decided to consider the offer that agreed most with what the contracting authority was requesting.

The hearing was adjourned to the 17th September 2013 in order to hear the testimony of the Local Council's Architect.

MXLC 02/2013

Tender for Upgrading and Embellishment of Play Area at il-Magħluq Marsaxlokk.

The tender was published on the 8th March 2013. The closing date was the 9th April 2013.

The estimated value of the Tender was €82,000 - €120,000 (Exclusive of VAT).

Four (4) bidders submitted their offers.

On the 30th April 2013, L&S Technical Consulting Limited filed an objection, against a decision by the contracting authority, Marsaxlokk Local Council to award the tender to JGC Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members re-convened a hearing on Tuesday 17th September 2013 to hear the testimony of Mr Edward Lewis, the Council's Architect.

Present:

L&S Technical Consulting Limited - Appellants

Mr Leslie Pavia Representative
Dr John Bonello Legal Representative

JGC Limited – Recommended Bidder

Mr Pierre Cuschieri Representative

Marsaxlokk Local Council – Contracting Authority

Mr Edric Micallef Mayor
Mr Duncan Hall Executive Secretary
Dr Luciano Busuttil Legal Representative
Arch. William Lewis Representative

In his introduction, the Chairman made it clear that this hearing was convened just to hear Mr William Lewis testify under oath as all necessary submissions by the parties involved had been heard during the previous hearing.

The Chairman of the Public Contract Review Board asked the witness whether L&S Technical Consultancy Limited, appellants' bid was technically inferior to that of the preferred bidder.

Architect William Lewis, under oath, stated that the tender was based on a "design and build" principle. Although a basic plan had been given in the tender document, a certain leeway had been given to all bidders to make their offers according to what they deemed appropriate, and then the contracting authority would choose whatever it considered best for the people of Marsaxlokk and visitors to that locality. The preferred bidder, for example offered a merry-go-round, multi-purpose structures, swings, four springers, hopscotch and climber. Appellant on the other hand offered a merry-go-round, two springers, multi-purpose structure and swings. Thus appellants offered less equipment. The Council had proposed fifteen lamp-posts for lighting the area. Appellants proposed to reduce the number of lights but failed to provide a plan that showed how this lesser number of lamps would affect the garden. Present standards require that such play areas be enclosed and have gates and barriers for safety. While the preferred bidder's offer included both gates and barriers, no mention of gates or barriers was made in the appellants' offer. Technical specifications required that the proposed equipment had to be clearly sign-posted showing the ages of children who may use it. Again appellants bid did not mention these, while the preferred bidders had included them.

Dr John Bonello on behalf of the appellants, asked Mr Lewis to explain how they adjudicated the tender on a like with like basis as is normally done in Government tenders when, as witness stated, bidders had a free hand in making their proposals.

Mr William Lewis explained that as he had stated before, the contracting authority had issued a basic plan and basic Bills of Quantity. The contracting authority also had a fixed budget and thus the best proposal obtainable within that budget was chosen. Replying to a question by Dr Luciano Busuttil, the contracting authority's representative, witness confirmed that as appellant had filed two quotes, one higher than the other, the evaluation was made based on appellants' lowest offer.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 29th April 2013 and also through the Appellant's verbal submissions during the hearing held on 20th August 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The method by which the tender was issued allowed for freedom of expression of how the project was to be addressed.**
b) **To this effect, there were no parameters to compare the tenders on a 'like with like' basis. So that, adjudication was on a subjective basis.**
c) **Specific specifications should have been established by the Contracting Authority in the tender document to avoid any misinterpretation of the contents in the tenderers' bids.**
d) **When clarifications were requested by bidders, there was no response from the Contracting Authority.**
e) **The requested amenities enlisted in the tender document were by far greater than what was actually required.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 20th August 2013, in that:

a) **The Contracting Authority confirmed that the requested clarifications originated only from the Appellant.**
b) **The regulations permit that additional information can only be given to the tenderer up to seven days before the closing date of the tender. This clarification was given to the Appellant and this referred to the 'Bill of Quantities'**
c) **The Contracting Authority indicated to all tenderers the requirements which were to be bidded for. It also gave an outline and indications of the basic amenities in the tender document itself.**
d) **The Preferred Bidder was administratively and technically compliant in all respects.**
e) **The Contracting Authority also confirmed that the Preferred Bidder's offer was according to the required safety standards.**

This Board requested that a technical expert be brought before the same Board as a witness and during the hearing held on Tuesday 17th September 2013, the technical expert justified in great detail why the Evaluation Committee of the Contracting Authority opted for the Preferred Bidder's offer.

Reached the following conclusions:

1. **After having heard the technical evidence, under oath, the witness of the Contracting Authority, explained clearly and specifically that the objective of the Contracting Authority was to allow for freedom of expressions and ideas from all bidders, yet outlining the basic requirements.**
2. **The requirements in the tender document did not, in any way, limit the scope of competence of the prospective tenderers, in their presentation or proposals of their offers.**

3. **The Preferred Bidder's offer included more equipment, more lighting of the area and more safety precautions. These three attributions should also be considered to fulfil the objectives of the tender.**
4. **The Preferred Bidder's offer was the only bid which was fully compliant.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

1 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 583

MXLC 01/2013

Tender for the Collection of Mixed Household Waste in an Environmentally Friendly Manner.

The tender was published on the 26th February 2013. The closing date was the 2nd April 2013.

The estimated value of the Tender was €61,500 (Exclusive of VAT).

Eight (8) bidders submitted their offers.

On the 30th April 2013, Messrs Mario Borg filed an objection against a decision by the contracting authority, Marsaxlokk Local Council to award the tender to V&A Services Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 20th August 2013 to discuss the appeal.

Present for the hearing:

Messrs Mario Borg - Appellant

Dr Carlos Bugeja	Legal Representative
Mr Mario Borg	Representative

V&A Services Limited – Recommended Bidder

Mr Brian Vella
Mr Ronald Attard

Marsaxlokk Local Council – Contracting Authority

Arch Edric Micallef	Mayor
Mr Duncan Hall	Secretary Evaluation Board
Dr Luciano Busuttil	Legal Representative

The Chairman made a brief introduction and invited appellant to make his submissions.

Dr Carlos Bugeja on behalf of the appellant stated that as his client was not given the necessary information, in terms of tender conditions at Clause 15 (c). He was not given the reason why his offer was discarded. After the tender was awarded, appellant had asked the contracting authority for this information. He was informed however, that the reasons could not be given to him. The contracting authority, following the award of a contract, was bound by Regulations to inform bidders of their right of appeal. This obligation was not adhered to. Thus appellant had to base the letter of objection on information he managed to obtain from unofficial quarters and could not properly rebut any reasons

for his disqualification. Dr Bugeja continued that this action on the part of the contracting authority rendered both the tender itself, and the right to appeal given to bidders by the Public Procurement Regulations, defective.

The tender in question had three requisites, an environmental test, a technical test, and finally the financial test. Regarding the environmental issue, Dr Bugeja stated that while appellant offered Euro III vehicles, those offered by the preferred bidder were Euro II. He could state this because his client at one time was going to purchase the same vehicles now offered by the preferred bidder. His client asserts that the same trucks offered by the preferred bidder were also being used to provide service to other Local Councils. Appellant's vehicles on the other hand were going to be used solely for this tender, and his technical capacities were excellent. Appellant had submitted with his bid, certificates and references from several civil and commercial entities to show his experience. Finally, as regards the financial bid, appellant's offer was far better than that submitted by the preferred bidder. The financial offer represented 40% of the evaluation criteria. Thus, he contended, that appellant's offer surpassed that of the preferred bidder's environmentally, technically and financially. This, combined with the fact that appellant was not given the required information, rendered the tendering process null or defective, requiring further scrutiny.

Dr Luciano Busuttil for the contracting authority stated that the contracting authority is precluded from divulging information about one bidder to any other bidder. The evaluation board prepared an extensive evaluation report showing how the decision to award tender was arrived at. The fact that appellant was not given the reasons for the rejection of his offer does not render the adjudication process null. This tender was a Most Economic and Advantageous Tender furthermore bidders who were not selected for the award were not necessarily non-compliant. The preferred bidder's offer was more advantageous.

Mr Duncan Hall said that the preferred bidder's trucks had been upgraded. A certificate submitted with his bid shows that the trucks in question had been upgraded to Euro IV standard. He continued that following the publication of the award, appellant came personally to his office asking for a copy of the report. This report consists of eleven pages and the minutes of the Council meeting during which adjudication was made contains another ten pages. As the report had not yet been approved, he could not be given a copy, but during his visit which lasted more than one hour, the reason why his bid was not successful was clearly explained to him.

Dr Luciano Busuttil raised a procedural objection to the appeal. Appellant had filed his appeal under Article 84 of the Public Procurement Regulations and should have deposited a minimum of €1200. His deposit was however only €400 and therefore the objection was null. It is either this or his appeal was null because he filed it under the wrong Article of the same Regulations.

Replying to a question by the Chairman, Mr Duncan Hall confirmed that appellant's offer was administratively compliant and technically compliant, but explained that the financial offer had 40% weighing when marks were assigned during adjudication process. Appellant's financial offer was not the cheapest. The cheapest offer was made by another bidder who was not compliant. Appellant claimed to have the necessary experience but he had been employed by the co-operative before starting on his own and filing the tender. This experience could not be assigned to appellant. He was assigned points for experience but not for completed years in a similar contract.

Dr Luciano Busuttil remarked that the tender required bidders to show they had previous experience of completed years in similar contracts.
Dr Carlos Bugeja for appellant filed a letter of reference issued by the San Gwann Local Council in favour of his client.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection , in terms of 'Reasoned Letter of Objection' dated 30th April 2013 and through the verbal submissions presented by same during the hearing held on 20th August 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant was not communicated the reasons by the Contracting Authority as to why the Appellant's bid was disqualified.**

b) **On the award of the tender, the Contracting Authority was in duty bound to inform the Appellant of his rights to appeal to decision taken by the Contracting Authority.**

c) **Due to lack of information coming from the Contracting Authority, Appellant had to rely and base his arguments on those stated in his reasoned letter of objection , the information of which was collated from 'Unofficial Sources'.**

d) **The requisites laid out in the tender document could be met by the Appellant, whilst the same could not be applied to the Preferred Bidder.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 20th August 2013, in that:

a) **The Contracting Authority is precluded from divulging information pertaining to other bidders, to a competing bidder.**
b) **The fact that the Contracting Authority did not give reasons to the Appellant for refusal of the latter's bid does not render the tender process as null.**
c) **The requirements laid out in the tender document were fully met by the preferred bidder whilst those quoted by the Appellant did not satisfy all.**

Reached the following conclusions:

1. **The Contracting Authority was in duty bound to inform the Appellant of the reasons for refusal of his bid.**

2. **At the same time, the Contracting Authority was also in duty bound to inform the Appellant of his rights to appeal against the decision of the Contracting Authority.**

3. **On the other hand, from the verbal submissions made by the Contracting Authority during the hearing of the 20th August 2913, it became evidently clear that the Appellant did not satisfy all the conditions laid out in the tender document.**

4. **The Preferred bidder was administratively and technically compliant. He was also the second cheapest.**

In view of the above, this Board finds against the Appellant, however the same Board recommends that the deposit paid by the Appellant be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

12 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 584

MXLC 01/2013

Tender for the Collection of Mixed Household Waste in an Environmentally Friendly Manner.

The tender was published on the 26th February 2013. The closing date was the 2nd April 2013.

The estimated value of the Tender was €61,500 (Exclusive of VAT).

Eight (8) bidders submitted their offers.

On the 29th April 2013, Messrs Ronald & Christopher Bezzina filed an objection against a decision by the contracting authority, Marsaxlokk Local Council to award the tender to V&A Services Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 20th August 2013 to discuss the appeal.

Present for the hearing:

Ronald & Christopher Bezzina - Appellants

Dr Gianfranco Gauci	Legal Representative
Mr Christopher Bezzina	Representative
Mr Ronald Bezzina	Representative

V&A Services Limited - Recommended Bidder

Mr Brian Vella	Representative
Mr Ronald Attard	Representative

Marsaxlokk Local Council – Contracting Authority

Mr Edric Micallef	Mayor
Mr Duncan Hall	Secretary Evaluation Board
Dr Luciano Busuttil	Legal Representative

After making a brief introduction, the Chairman invited the appellants to make their submissions.

Dr Gianfranco Gauci, on behalf of the appellants explained that the situation is similar to that of the other case heard today, (Case 583) with a difference however, as his clients' bid was the cheapest one. The letter appellants received from the contracting authority did not give any reasons for the adjudication. He claims that his clients are aware that while the Board raised the matter of proper notification to bidders, following the award, the same Board did not take any sanctions against

defaulters. He alleged that the Local Councils Department instructs Local Councils specifically not to give any reasons to un-successful bidders. He claimed that the law is clear that the failure to divulge obligatory information about certain decisions renders the decisions themselves invalid. He asserted that if the law required that the motivation for a decision should be divulged, and this was not done, then the decision itself was null. He continued that his clients, being the lowest bidders discovered that they were not successful without any explanation of why their bid was discarded. He claimed that he should be given a copy of the evaluation report and the minutes of the Local Council meeting, and requested an adjournment in order to enable him to study the case.

Dr Luciano Busuttil stated that the motivation for the adjudication of the tender exists and has been made public on line in the minutes of the Marsaxlokk Local Council. These minutes were published immediately, were public, and contained all necessary reasons.

Here the Chairman made it clear that henceforth, tender process had to be according to law in every detail, thus the contracting authority should abide by regulations and notify all the bidders accordingly.

Mr Duncan Hall said that an explanation why appellants' bid was not successful, had in fact been given verbally, before the appeal was filed, to the appellants' wife, Ms Elaine Bezzina.

Dr Luciano Busuttil explained that appellants' bid was discarded for two reasons. One was because of a default notice issued by the Luqa Local Council, and the other was that after making certain calculations on their bid, it was discovered that after removing the administration fee and the fuel costs, it resulted that only €42.37 remained. This was interpreted as not being enough for the payment of three employees, as required by the contracting authority, and therefore meant precarious employment. Another reason for discarding appellants' bid was that the Council was not satisfied with the Road Cleaning service they provided. Their bid was thus not administratively compliant.

Dr Gianfranco Gauci questioned the costs of the preferred bidder, as these were excessive when compared to appellants.

Mr Duncan Hall explained that the amount shown in the preferred bidder's offer was on a daily basis, as requested in the tender document. Appellants, on the other hand quoted an annual figure. Their bid could have been disqualified at that stage, but a clarification was sought from them and it was then that the daily costs of €50 were arrived at.

The hearing was brought to a close at this stage.

This Board,

Having noted the Appellant's objection, in terms of the 'Letter of Objection' dated 29th April 2013 and also through the Appellant's verbal submissions during the hearing held on 20th August 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant's bid was the cheapest.**
b) **The Appellant was not notified of the reasons for refusal of his tender bid, by the Contracting Authority.**

c) Since the Contracting Authority was obliged by law to give the reasons for refusal and in this Applicant's case, this was not done by the Contracting Authority, the award of the tender should be declared null and void.

Having Considered the Contracting Authority's verbal submissions presented by same during the hearing held on 20th August 2013, in that:

a) The reasons for refusal of the Appellant's bid were documented in the minutes of the Contracting Authority. The Appellant could have asked for a copy of these minutes.
b) The same reasons were explained verbally to the Appellant's wife which were as follows:

i) The Appellant's bid was administratively non compliant, as it did not provide for the cost of three employees as was required in the tender documents.
ii) A default notice was issued to the Appellant by another Local Council, namely Luqa Local Council.

Reached the following conclusions:

1. **The Contracting Authority was in duty bound to communicate in writing to the Appellant the reasons for non acceptance of the latter's bid. At the same time this Board does not accept the reason for non submission of same as given verbally by the Contracting Authority during the hearing held on 20th August 2013.**

2. **On the other hand, the Appellant's bid was non compliant. This Board also took into consideration the fact that the Appellant's bid price could not sustane the cost of wages for three employees, which was a requisite in the tender document.**

3. **The fact that a default notice was issued to the Appellant, did not augur favourably during the evaluation stage of any tender.**

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

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

18 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 585

WSC/T/80/2012

Tender for the Provision of Cesspit Emptying Services.

The tender was published on the 18th September 2012. The closing date was the 17th October 2012.

The estimated value of the Tender was €80,853 (Exclusive of VAT).

Five (5) bidders had submitted their offers.

On the 4th March 2013, Messrs Jason Mangion filed an objection against a decision by the contracting authority, Water Services Corporation, to award the tender to Messrs William Bugeja.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 3rd September 2013 to discuss the appeal.

Present for the hearing:

Messrs Jason Mangion – Appellant

Mr Jason Mangion	Representative
Dr Bernard Grech	Legal Representative

Messrs William Bugeja – Recommended Bidder

Dr Victor Scerri	Legal Representative

Water Services Corporation – Contracting Authority

Mr Anthony Camilleri	Secretary Evaluation Board
Ing Charles Camilleri	Member Evaluation Board
Mr Jonathan Scerri	Representative

After making a brief introduction, the Chairman invited the appellant to make his submissions.

Dr Bernard Grech on behalf of the appellant stated that according to Clause 19.1 of the tender document, this tender had to be awarded to the cheapest bidder. Appellant's bid was discarded because *"Your offer was not the cheapest bid"*. There were no other reasons given for the rejection of his bid. The price for the consideration of this tender was to be that shown in the schedule.

When filling in his tender offer, appellant made a multiplication error when compiling the total of his bid, and this led to his bid showing a greater amount in the total. Appellant is aware that this fact was

brought to the knowledge of the evaluation board chose differently. However the evaluation board was not in order when deciding to do this because Clause 17.2 of the tender document states clearly that in case of inconsistency between the unit price and the total, the unit price of the bid should prevail. The wording is clear in that it specifies "shall," therefore this was not an optional choice for the evaluation board but a mandatory one. He contended that appellant's unit rate bid was the cheapest, so therefore the tender should have been awarded to him.

The Chairman, at this point said that it was obvious that a mathematical error had been made. One just had to multiply the unit rate with the volume in cubic meters to obtain the amount, and asked the contracting authority if this fact was discussed by the evaluation board. The contracting authority was also asked if any reply was given to the appellant, following his email dated the 18th October 2012, wherein he explained the mathematical error.

Mr Anthony Camilleri, Secretary to the Evaluation board did not reply to the first question and to the second one he replied that just an acknowledgement had been sent. He also stated that appellant's offer was technically compliant.

At this stage, the hearing was brought to a close.

This Board,

Having noted the Appellant's objection in terms of 'Reasoned Letter of Objection' dated 4th March 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's bid was rejected by the Contracting Authority for not being the cheapest.

b) The Appellant's bid had a very simple and clear mathematical error in multiplying the Unit price by the quantity. In fact the Unit price quoted by the Appellant was the cheapest.

c) The Evaluation Board of the Contracting Authority was made aware of this mistake and informed accordingly by the Appellant.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on the 3rd September 2013, in that:

a) The Contracting Authority confirmed that the Evaluation Board was notified of this error by the Appellant.

b) The Contracting Authority confirmed that no reply was sent to the Appellant except for an acknowledgement.

c) The Contracting Authority could not confirm that, whether during the Evaluation stage the Board took notice of the error.

d) The Contracting Authority confirmed that the Appellant's bid was technically compliant.

Reached the following conclusions:

1. **It was obvious that a clear mathematical mistake was made by the Appellant. Although the Evaluation Board could have easily noticed that an error in multiplying the Unit Price with the quantity.**

2. **The Evaluation Board were notified of the error in the Appellant's bid and no action was taken by the Board.**

3. **The Unit price quoted by the Appellant was the cheapest.**

4. **The Appellant's bid was administratively and technically compliant.**

In view of the above, this Board finds in favour of the Appellant and recommends that the tender be awarded to the Appellant and also recommends that the deposit paid by the Appellant should be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

12 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 586

SLC/T/608/2012

Tender for the Collection of Mixed Household Waste.

The tender was published on the 2nd October 2012. The closing date was the 15th February 2013.

The estimated value of the Tender was €355,932 (Exclusive of VAT).

Three (3) bidders had submitted their offers.

On the 2nd May 2013, Mr Saviour Mifsud filed an objection against a decision by the Contracting Authority, The Sliema Local Council, to award the tender to SRF & Veladrians Joint Venture.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 3rd September 2013 to discuss the appeal.

Present for the hearing**:**

Mr Saviour Mifsud - Appellant

Mr Saviour Mifsud	Representative
Dr Luciano Busuttil	Legal Representative

SRF & Veladrians Joint Venture – Recommended Bidder

Dr John Gauci	Legal Representative
Mr Steve Farrugia	Representative
Mr Mario Vella	Representative

Sliema Local Council – Contracting Authority

Dr Franco Vassallo	Legal Representative
Dr Joseph Camilleri	Legal Representative
Mr Christian Vella	Accountant
Mr Anthony Chircop	Mayor, Sliema Local Council
Mr Kris Busietta	Vice-Mayor Sliema local Council
Mr Mathew Dimech	Executive Secretary Sliema Local Council

After making a brief introduction, the Chairman invited the appellant to make his submissions.

Before Dr Luciano Busuttil, on behalf of the appellant could start his submissions, Dr Franco Vassallo on behalf of the contracting authority stated that he would like to raise a preliminary plea, and he preferred to raise this before the appellant made his submissions, and he asked for permission to do so. Dr Franco Vassallo was given permission to proceed.

Dr Franco Vassallo, legal representative of the contracting authority stated that one requisite for a valid tender bid was the production of a bank guarantee, a bid bond. This bank guarantee must remain in force throughout the whole period of the adjudication process. Earlier on today it was discovered that appellant's bid bond had lapsed and had not been renewed. Thus it follows that the appellant does not have any further interest in this tender.

Dr Luciano Busuttil for the appellant stated that the appeal was filed after the adjudication procedure had been concluded. The renewal of the bid bond does not feature anywhere in the Public Procurement Regulations. There is no regulation that states that the non-renewal of the bid bond rendered the appeal null. He contended that this Board has not got the remit to decide on the matter. This Board's remit is to ascertain that the decision taken in adjudication was in order. Admitted that in case the Board eventually finds for his client, it would not be possible to award him the tender, but the Board might decide for example to cancel the proceedings. In this latter case the non-renewal of the bid bond would have no effect on the outcome.
Saviour Mifsud the appellant claims that when he was filing the appeal no one asked him to renew the bid bond, neither did the Sliema Local Council advise him to renew the bid bond.

Dr Franco Vassallo stated that Article 2.2 of the tender requires a valid bid bond that must remain valid for one hundred and fifty days from the closing date of the tender. While the present appeal proceedings suspend the tender proceedings, the requirement of a valid bid bond still exists. The letter of objection asked that the award to the preferred bidder be cancelled, and that the tender be awarded to appellant instead. This demand cannot be acceded to because the appellant's bid bond has lapsed. Contended that the Board cannot find in appellant's favour, because his bid bond has lapsed and his offer is no longer covered by a valid bid bond.

Dr Luciano Busuttil, for appellant said that when the appeal was filed, the bid bond was valid. In fact when the tender was adjudicated his offer was still valid and had not been eliminated because of the lapse of the bid bond. The requirement of one hundred and fifty days from the closing date of the tender was adhered to, and this could not be affected by the length of time in which the appeal is heard. The tender document does not mention that the bid bond should remain valid throughout the appeal period.

Appellant Saviour Mifsud stated that the bank guarantee he filed with his offer was returned to him while it was still valid on the 24th April 2013.

Dr Franco Vassallo explained that the reason behind the asking for bid bonds in tender procedures was to safeguard the contracting authority, in case the tenderer withdrew from his offer before the expiration period, or failed to provide the performance bond.

The Chairman here remarked that the Bid Bond remained valid up to the 13 August 2013, and from that date onward was no longer valid.

Dr Franco Vassallo reiterated that the tender was a Most Economic and Advantageous Tender and was awarded following the regulations to the letter and in complete transparency. It is common knowledge, that, even in cases before the Courts of Justice, the Bank Guarantees issued as safeguards, must always be the original. Copies are not acceptable. That was the reason behind the contracting authority sending the bid bond back to appellant after the adjudication, in case he wished to renew it. He reiterated that the contracting authority contends that appellant's claim, as set down in his letter of objection cannot be acceded to.

At this stage, the hearing was suspended for a few minutes until the Board Members deliberated the issue of the preliminary plea raised by the Sliema Local Council.

When the hearing continued, the Chairman asked the contracting authority whether the other bidders had renewed their bid bonds.

Dr Franco Vassallo said of the three original bidders, one had not appealed, the preferred bidder, had renewed his bid bond while the appellant did not.

The hearing was brought to a close.

This Board,

Having noted the Appellant's objection , in terms of the reasoned 'Letter of Objection' dated 2nd May 2013 and also through the Appellant's verbal submissions during the hearing held on 3rd September 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Lack of renewal of the bid bond by the Appellant does not render the Appeal null and Void.**

b) **The Appellant was not advised by the Contracting Authority to renew the bid bond.**

c) **The Appellant was not disqualified by the Evaluation Board due to the lapse of the bid bond.**

d) **The Appellant was not given the information as to how points or percentages were awarded to the other bidders.**

e) **There was no established methodology of how points were awarded to bidders. The method was purely subjective.**

Having Considered the Contracting Authority's verbal submissions presented by same during the hearing held on 3rd September 2013, in that:

a) **The Contracting Authority presented a preliminary plea in that 'one of the requisites for a valid tender under these conditions was the production of a bid bond'.**

b) **The same bid bond must remain valid throughout the full adjudication process.**

c) The Bid Bond in the tender procedure was required to provide a safeguard to the Contracting Authority in case the Bidder withdrew from his offer prior to the expiration period of the tender.

d) The Appellant's claim that same was not given the information requested as stated in Paragraph 1 of the Appellant's 'Letter of Objection' dated 2nd May 2013, was incorrect.

Reached the following conclusions:

1. **This Board noted that the Appellant had requested sensitive information from the Contracting Authority, regarding the Preferred Bidder's offer prior to the appeal procedure. It is only during the appeal process that such information can be revealed, discussed and questioned upon.**

2. **This Board examined in detail the methodology applied by the Evaluation Board of the Contracting Authority used in allocating percentage ratings on the various attributes regarding the administrative and technical compliance of each tender. In this regard, no subjective elements in the system were found.**

3. **The method of allocation of points/ percentages applied by the Evaluation Board of the Contracting Authority was fair and just.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

10 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 587

TD/T/3088/2012

Tender for the Supply of New Transformer Oil.

The tender was published on the 5th April 2013. The closing date was the 15th May 2013. The estimated value of the Tender was €67063.3 (Exclusive of VAT).

Five (5) bidders had submitted their offers on line.

On the 26th July 2013, Uniking International filed an objection against a decision by the Contracting Authority, Enemalta Corporation, wherein no reasons for the objection were given. This was followed by another letter explaining his objection for the award of the tender to Ragonesi & Company Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 3rd September 2013 to discuss the appeal.

Present for the hearing:

Uniking International - Appellant

Mr Malcolm Caruana	Representative
Dr Michael Tanti Dougall	Legal Representative

Ragonesi &Company Limited – Recommended Bidder

Mr Roberto Ragonesi	Representative

Enemalta Corporation – Contracting Authority

Ing Ivan Bonello	Chairman Evaluation Board
Ing David Azzopardi	Member Evaluation Board
Ing. Silvan Mugliett	Member Evaluation Board
Ing. Karl Xerri	Member Evaluation Board
Dr Paul Micallef Grimaud	Legal Representative

After making a brief introduction, the Chairman invited the appellant to make his submissions.

Mr Malcolm Caruana, for appellant stated that they quoted two separate prices in their tender bid. One price was valid for three months, and another price valid for the next three months. They had filed several tenders in this way. The reason was that suppliers would not bind themselves on a fixed price for six months.

Mr Ivan Bonello, the Chairman, Evaluation Board stated that all the other bidders abided by what was requested and offered one price, valid for six months.

Dr Paul Micallef Grimaud, for Enemalta confirmed that appellants' first offer was the cheapest but was valid only for three months. Their second offer was higher and not the cheapest, although it was for the next three months, in fact it was higher than that offered by the preferred bidder. He explained that this was an e tender, where bids were received on line, and the system allows input of one price. Thus the first quote by appellant, and the cheapest bid was accepted and shown. It is the contracting authority's prerogative, to make any orders and purchases throughout the length of the validity period. For this reason appellants' bid could not be averaged, because the date when the actual order would be made was not known. This shows the importance of the specifications asking for a fixed price for six months duration. Otherwise evaluation of bids could not be made on an equal footing.

Dr Michael Tanti Dougall for appellants explained that suppliers normally bound themselves to supply this kind of oil only for one month at a fixed price. Appellants being regular customers managed to obtain a quote for three months. To arrive at the price appellants quoted for the second three months, they had to make projections and take certain commercial decisions. Appellants have supplied Enemalta before with this kind of oil before, and there were never any problems. He claimed that the criteria used in the evaluation were subjective.

Dr Micallef Grimaud said that it seems that the criteria used to evaluate the tenders are now being questioned. This appeal should not be used to question the award criteria. The appeal was not based on these, and could not be so based because the criteria were published before the closing date, and there were other means to raise objections to them. Once the tender was filed, the criteria were accepted. Appellants bid was not rejected because of the price, but because a required criterion was not followed. The preferred bidder offered what was required and requested in the tender document, and there are inbuilt safeguards to ensure that he delivers what he promised. The certainty of pricing has to be ensured, and the preferred bidder is bound by his offer for the whole of the six months. That is why this requisite was insisted upon.

Dr Michael Tanti Dougall stated that the question is one of price only. It was not a question of technical compliance. Thus not awarding the cheapest offer was the result of a purely subjective decision, and the principle behind it was defective, because the evaluation board should have worked out an average of appellants' offers. He claimed also that there were other instances in previous tenders, where bidders had split their offers, just as the appellants did in this one, and were successful.

Dr Micallef Grimaud for the contracting authority said that appellants made two bids and not one. They did not bind themselves to provide oil for six months. Appellants' bid was thus administratively non-compliant. Clause 7.3 and Clause 8.1 required the prices to remain fixed for a period of one hundred and fifty days. This was an administrative criterion because whenever the contacting authority issued an order for the purchase of the oil, it had to be certain of the price.

Dr Roberto Ragonesi on behalf of the preferred bidder stated that no comparisons with previous tenders should be made. This was an e tender and conditions are not the same. All tenderers, including appellants, signed a declaration where they accepted all the conditions of the tender documents. Contends that the tender had to be valid for six months and to make an offer for three months was not permissible.

Dr Micallef Grimaud on behalf of contracting authority said that the tender was for a single bulk order, within a six month window. He explained that ranking of bids would be impossible if multiple bids for different periods were to be accepted. That is the reason why the contracting authority specifically asked for one fixed price for a period of six months, to obtain a level playing field. That was the precise reason why this was an administrative requirement. He also admitted that in the past, a tender was awarded to someone who made two bids, like today's case. In that case however, both prices bid by the tenderer in question had been the cheapest, enabling the ranking of offers to be made.

The Chairman asked the contracting authority, if the bulk purchase had to be made at the appellants' second offer, how would this offer have ranked in the pricing. Mr Ivan Bonello replied that it would have ranked in the third place.

Dr Tanti Dougall stated that the contracting authority could have decided to order the oil supply during the first three months and so obtaining it at the cheapest price. It had enough storage facilities to do so. It would have been an administrative decision to order at the cheapest bid.

Replying to a question by the Chairman, Mr Ivan Bonello explained that the evaluation and approval process of a tender is not carried out by any single person. It was a process that entailed several sub committees and approvals. There was never a guarantee that the process would be completed within three months. These three months start from the closing date of the tender. In fact when, in the present tender, the permission of the DCC was obtained, and the objection filed, the first three months had already elapsed. He reiterated that that was the reason why a six month period was insisted upon.

Dr Tanti Dougall claimed that three months was enough and cited tender DT/T 48/2009 where the closing date was the 9th September 2009 while adjudication was made on the 17th September 2009, just eight days after the closing date. This shows that the contracting authority could be efficient when it chose to be.

Mr Roberto Ragonesi the preferred bidder reiterated that the present tender was an e tender and conditions differ from the usual previous tenders. One such condition was that the price offered had to be fixed for six months. It goes against this condition for anyone to offer two prices. Should the appellant be awarded the tender it would discriminate against all the other bidders who followed the regulations.

Mr Ivan Bonello here explained that the present form of e tender does not allow the offer of two prices from the same bidder. Bidders had to put in one price and tick "agreed" to any condition therein contained. Thus the only price the system accepted from appellants was the cheapest one he offered, but this was for just three months. Enemalta had to operate within the framework of the Procurement Regulations.

Dr Micallef Grimaud stated that the Regulations have to be adhered to. The decision making process within the regulations, has to follow a set administrative procedure. Before accepting a tender, it has to be ensured that the price would be known. Answering a hypothetical question by the Board, Dr Grimaud stated that appellants bid as of today would not be the cheapest.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection in terms of the 'Letter of objection without reason' dated 26th July 2013 and thereafter followed by another 'But reasoned letter of Objection' dated 30th July 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 3rd September 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant contended that suppliers for this type of product usually bind themselves for a fixed and stable price of the product in question for only one month due to the fluctuating economic situation of the global markets. However, Appellant managed to obtain a fixed price for a period of three months.**

b) **The Appellant had to forecast the price for the following three months, taking into account the vulnerable situations of movement in prices of this particular product.**

c) **Applicant was a provider for the same Contracting Authority and never encountered problems with regards to pricing and deliveries. In the past, the Appellant had always quoted two prices for two periods within a six month span.**

d) **The Appellant was aware of the fact that previously, bidders did split their tender offer with regards to tendered prices over a period and were unsuccessful.**

e) **If the Contracting Authority decided to order the procurement of the product from the Appellant within the first three months, then the cost of the product for the Contracting Authority would have been not only compliant in all respects but also the cheapest.**

f) **There was enough time for the Contracting Authority to take advantage of the Appellant's bid offer, which was the cheapest rate, for the first three months.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 3rd September 2013, in that:

a) **All bidders had to quote just one price, for a period of six months.**

b) **The Appellant's was not rejected because of bid price, but because certain conditions were not adhered to in accordance with the tender conditions laid out in the tender document.**

c) **The preferred Bidder was administratively and Technically Compliant and fulfilled all the requirements laid out in the tender document.**

d) **The tender was purposely intended for a single bulk order of the product during a six month duration. So that the tenderer had to cater for any fluctuation in the global price of the product during the six months period.**

e) **The Tender document requested one price for a duration period of six months.**

Reached the following conclusions:

1. **This Board noted the fact that had the Contracting Authority decided to apply the most advantageous bid within the a period of three months, the Contracting Authority would have obtained substantial savings.The Fact that the procedural system of award of a tender is too bureaucratic and in this Board's opinion is inefficient, the Appellant did not abide by the requirement of the tender conditions.**

2. **This Board also took into consideration that although, in the past, two quoted prices were quoted and were acceptable by the Contracting Authority, this particular tender is to be regarded as a separate issue with different requirements and conditions as laid out in the tender document. To this effect, no comparison should be made between past and present conditions.**

3. **This Board also feels that since all other tenderers quoted one price as stipulated in the tender document, it would be unfair and unethical if a decision is taken to reintegrate the Appellant's bid in the evaluation process.**

In view of the above, this Board finds against the Appellant, however due to defective administrative procedures, this same Board recommends that the deposit paid by the Appellant be reimbursed.

Dr. Anthony Cassar Chairman	Dr. Charles Cassar Member	Mr. Richard A. Matrenza Member

24 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 588

CPSU/CPU/14/2012

Tender for the Hire of Transportation Services to the Central Procurement and Supplies Unit.

The tender was published on the 16th October 2012. The closing date was the 14th November 2012.

The estimated value of the Tender was: €120,000. (Exclusive of VAT).

One (1) bid was received for this tender.

On the 8th May 2013 Ranger Limited filed an objection against the decision to cancel the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 17th September 2013 to discuss the appeal.

Present for the hearing were:

Ranger Limited - Appellants

Mr Natalino Caruana De Brincat	Representative
Mr Godwin Mifsud	Representative
Dr Martin Fenech	Legal representative

Central Procurement & Supplies Unit – Contracting Authority

Mr William Alfred Grech	Member evaluation board
Ms Stephanie Abela	Member evaluation board
Mr Emanuel Gatt	Representative
Ing. Karl Farrugia	Chief Executive Officer

After a brief introduction, the Chairman invited the appellant to explain the reasons for the objection.

Dr Martin Fenech on behalf of the appellant explained that his client's bid was rejected on two points, that:

a) The payload capacity of offered vehicle B, that was 4000kg instead of 5000 kg, as requested;

b) The non production of insurance certification.

As regards the first reason, Dr Fenech submitted that a certificate issued by an Engineer in May 2013 shows that the vehicle in question was certified to accept payloads of 5000kgs. He claims that this certificate was issued to correct a previous certification that erroneously had shown the capacity as 4000kgs. The second reason for disqualification was about the insurance certificate and Dr Fenech

referred to a certificate of insurance, which he exhibited, that shows that the vehicle is in fact covered by a valid insurance. Thus he contended that any difficulties which might have existed with his client's offer were solved.

The Chairman asked the contracting authority if there was agreement about the capacity of the vehicle offered by appellant.

Ms Stephanie Abela, on behalf of the contracting authority said according to the documents submitted by appellant with his tender offer, there was not. The evaluation board had to base its adjudication on the submitted documents which stated that the vehicle had 4000kgs capacity. The corrected certification was filed with the letter of objection and was not available to the evaluation board, and the board could not find the offer technically compliant. As regards the insurance certification, Ms Abela stated that the document submitted with the offer was not printed with a header and did not show who issued the document. She affirmed that the evaluation board could not ask for clarification on this point because it would have been rectification. In fact the evaluation board asked appellant for clarification but in reply, received new documents that could not be considered as this meant additional documents, and that is not allowed by the Regulations.

Karl Farrugia Chief Executive Officer agreed with the Public Contracts Review Board and supports its views that more communication with the bidders was necessary during the evaluation process. But as things stood they have to obtain permission of higher authorities to communicate and unfortunately this was leading to many cancellations and higher prices.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection in terms of the 'Reasoned Letter of Objection' dated 8th May 2013 and also through the Appellant's verbal submissions during the hearing held on 17th September 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's bid was refused by the Contracting Authority on the following grounds:

i) The payload capacity of vehicle B did not meet the requirements of the tender.
ii) The Appellant did not produce the insurance certificate as was required in the tender document.

b) The Appellant did produce the insurance certificate.

c) The Appellant, during this hearing, produced an Engineer's certificate certifying that the vehicle B was in conformity with the requirements of the tender conditions.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 17th September 2013, in that:

a) The Evaluation Board had to rely on the documents submitted by the Appellant.

b) From documentation submitted, during the evaluation process, the Appellant was not technically compliant.

c) The Evaluation Board did ask for clarifications and instead received new documentation which the Board considered this information as 'Additional' and which is not allowed by the Regulations.

Reached the following conclusions:

1. **During the Evaluation stage, the Board had every opportunity to clarify the compliance issue. In this Board's opinion, this in no way is to be regarded as 'Additional Information' or 'Additional Documentation'.**

2. **The Evaluation Board of any Contracting Authority should not be hindered from applying common sense by illogical decisions taken by higher quarters.**

3. **This appeal could have easily been avoided through more communications between the Appellant and the Evaluation Board of the Contracting Authority.**

4. **The Appellant has produced enough evidence during this hearing to prove that he is technically compliant.**

In view of the above, this Board finds in favour of the Appellant and recommends the following:

i) The tender be awarded to the Appellant.
ii) The deposit paid by the Appellant be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

24 September 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 589

DH 1641/2013

Provision of Transportation Services for CPSU

The tender was published on the 10th May 2013. The closing date was the 12th June 2013.

The estimated value of the Tender was €141,600 Including VAT (period contract).

Three (3) bidders submitted their offers.

S. Curmi & Sons filed an objection on the 14th August 2013 against a decision taken by the contracting authority Central Procurement & Supplies Unit to discard their bid and award the tender to Ranger Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 17th September 2013 to discuss the appeal.

Present:

S. Curmi & Sons - Appellants

Mr Sergio Curmi	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

Ranger Limited – Recommended Bidder

Mr Godwin Mifsud	Managing Director
Ms Natalino Caruana De Brincat	Representative
Dr Martin Fenech	Legal representative

Central Procurement and Supplies Unit – Contracting Authority

Ing Karl Farrugia	Chief Executive Officer
Mr Pierre Sammut	Chairperson Evaluation Board
Mr Emanuel Gatt	Member Evaluation Board
Ms Stephanie Abela	Secretary Evaluation Board
Mr William Alfred Grech	Member Evaluation Board
Mr Mark Spiteri	Member Evaluation Board

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of his firm's objection.

Dr Stefan Zrinzo Azzopardi on behalf of the appellants stated that in their letter of objection they tackled several points which were behind the reason why their tender was disqualified. It was understood that the preferred bidder was the only remaining bidder who was compliant after the disqualification of the other bidders. It was for this reason that the preferred bidder was awarded the tender. He would be going through the list of reasons the adjudication board gave for the disqualification of his clients' offer.

1. List of similar projects effected during the last three years was not submitted. Contends that his clients bid included a list of files issued by the contracting authority, where appellant was providing services to the same contracting authority for more than three years. Direct reference was made in the tender documents to these services, and the same trading licence was used. He stated that he found it strange that the evaluation board was not cognizant with the fact that appellant had provided service to the same authority, and instead declare that this documentation was not submitted.
2. Requisites of vehicle V and C do not comply with clause 3.13 of the terms of reference, as these had been on the road for more than five (5) years. Dr. Zrinzo Azzopardi contends that the vehicles so found to be non-compliant are the same vehicles which appellant was using for previous contracts with the same authority. He queried the reason why the same vehicles being used today, for the same service, now suddenly being found non-compliant for the present tender.
3. Regards the non submission of the log book of vehicle A. Dr Zrinzo Azzopardi affirms that the log book was in fact submitted with the tender. However this referred to a vehicle which was still owned by third parties, but which was going to be acquired by the appellants. This vehicle was going to be an addition just for the present tender but was already available.
4. And both deal with the payload capacity of vehicles B and C, and the evaluation board claimed that these vehicles were non compliant because their payload capacities of the rear double wheels was not 5000kgs as requested in the tender. Dr Zrinzo Azzopardi asserts that both these vehicles were compliant and his clients had submitted the relative log books to show that they were.

Thus he reiterated that the tender was awarded through the exclusion of appellants' bid. Such award however had to be according to the present policies of the government. It was thus being claimed that the award would go against one of the policies that the government wishes to enforce. The preferred bidder offered rates that breach the government policy in force about the rates of pay to employees. Preferred bidder offered the service of personnel at an hourly rate of €5.50, inclusive of VAT. The relevant authority and the unions agree that to cover the minimum wage, the hourly rate of an employee had to be €5.53 excluding VAT. Thus the offer of €5.50 made by preferred bidder is not enough to cover the minimum wage and the award of the tender to preferred bidder breaches current government policy, which policy was issued in a Government Circular and was circulated to all government departments. This circular was issued on the 1st July 2013 while the adjudication of the tender was made on the 8th August 2013.

Pierre Sammut, Chairman Evaluation Board, stated that first of all the members of the evaluation board did not necessarily come from the department that issued the tender. Also personally known information could not be used in the adjudication but this had to be done solely on the submitted documentation. In the present case, what was submitted with the appellants' bid was a number of questionnaires sent by the appellant to employees of the contracting authority wherein these declared to be satisfied with the services offered by Ranger Limited. This was not what was asked for by the tender document and it was not considered enough to replace what was requested. The log books filed with the tender showed that the proposed vehicles were registered more than five years ago. The

fact that the same vehicles were currently being used was considered to be irrelevant for the evaluation process; the evaluation board had to consider compliancy with tender request. While tender document asked for the production of all log books, the evaluation board could only find two log books submitted by appellants when they proposed three vehicles. One of the log books was not submitted. The payload capacities as shown by the certificates submitted with the tender by appellants showed that this was 4000kgs. and not 5000kgs. as requested in the tender. On being pointed out by the Board that in fact three log books were available, Mr Sammut stated that one of these was a provisional log book, and could not be considered for evaluation.

Mr Sergio Curmi, appellant explained that the provisional log book referred to a vehicle that he intended to purchase if and when he was awarded the tender. He would not purchase this special vehicle if he did not obtain the award.

Mr Pierre Sammut continued that there was a Clause in the tender that the service would have to start with immediate effect and a vehicle that had yet to be purchased could not be immediately used as requested. He was sure that it was not the evaluation board's remit to make inspections of the submitted vehicles; the board had just to base its findings on the documents submitted by the bidders. Regarding the employees' wages, although the tender had been issued before the Circular mentioned by the appellants, the evaluation board felt the need, and obtained the permission to ask for clarification from the compliant bidder, wherein he was asked to declare that he would abide by the requirements of the Government Circular. The preferred bidder declared that he would abide. Furthermore the evaluation board ascertained that the rate offered by the preferred bidder was in fact more than the minimum wage. As long as this was so, it was felt that it was a commercial decision left to the bidder to quote this low, as long as the minimum wage was covered.

Dr Martin Fenech on behalf of the preferred bidder remarked that the prerequisite of submission of vehicles less than five years old was mandatory, and any bidder who was not compliant with the condition should not have tendered. If he did file his bid it should have been disqualified. Regarding the 5000kg condition, appellants' engineer himself certified that the vehicles were 4000kgs. Dr Fenech continued that his clients' bid was for €4.80 excluding VAT, and this was above the minimum wage. Furthermore, in a clarification, we declared that we would be abiding by the Circular and paying our employees, who incidentally are all full time, the rate of €5.50.

On being asked by the Board, Mr Pierre Sammut stated that the requested capacity of the vehicles was: Vehicle A 1600kg; vehicle B 5000kg; vehicle C 5000kg.
Appellants offered: vehicle A 1000kg; vehicle B 4000kg and vehicle C 4000kg.

At this point the hearing was brought to an end.

This Board,

Having noted the Appellant's objection in terms of the 'Reasoned Letter of Objection' dated 14th August 2013 and also through the Appellant's verbal submission during the hearing held on the 17th September 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant explained the reason why not all documentation was submitted as requested in the tender document. The Appellant was presently rendering service to the

Contracting Authority and the information requested by the Evaluation Board could be easily accessed from the Contracting Authority's records.

b) The vehicles are already in use with the Contracting Authority. In this regard, the Appellant fails to understand how, under the new tender, the conditions of the same vehicles failed the required conditions.

c) Log book of the vehicles were actually submitted.

d) The payload capacity of vehicles B and C is in fact 5000kg as can be verified by a technical inspection.

e) The labour rates being quoted by the Preferred Bidder are in breach of Government Regulations.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 17th September 2013, in that:

a) The fact that the Evaluation Board of the Contracting authority received replies to a number of questionnaires sent by the Appellant to employees of the Contacting Authority does not in any way represent or substitute the information requested in the tender document.

b) The Log books submitted to the Evaluation Board exceeded the 'Five Year Period' condition.

c) The Fact that the same vehicles were currently being used does not present a comparison to the new tender conditions.

d) The payload capacity certification submitted by the Appellant showed clearly that the vehicles had a payload capacity of 4000 kgs.

e) A clause in the tender document specifically stated that the service under this is to commence with immediate effect of the award of the tender. In this regard, the Appellant could not meet this requirement as one of the vehicles to be utilised pertained to third parties.

f) The labour rates applied by the Preferred Bidder were higher than the minimum wage. In addition, the evaluation Board received assurances from the Preferred Bidder that same will abide by the recent Government Regulations.

Reached the following conclusions:

1. **The Documentation requested in the tender document are essential features in the evaluation process, so that they did form part of the actual tender.**

2. **The fact that the Appellant is presently providing the service to the Contracting Authority does not absolve the Appellant from submitting the required information as stated in the tender document.**

3. **The Preferred Bidder submitted the requested information.**

4. **The Preferred Bidder's offer was fully compliant and the cheapest.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

31 October 201

PUBLIC CONTRACTS REVIEW BOARD

Case No. 590

DH 3282/12

Supply of a Capsule Endoscopy System and Patency Capsule Lot 1.

The tender was published on the 7th September 2012. The closing date was the 10th October 2012.

The estimated value of the Tender was €100,000.

Three (3) bidders submitted their offers.

Technoline Limited filed an objection on the 3rd June 2013 against a decision taken by the contracting authority Central Procurement & Supplies Unit to award the tender to Messrs. Evolve Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 17th September 2013 to discuss the appeal.

Present:

Technoline Limited - Appellants

Mr Ivan Vassallo	Representative
Ms Damaris Lofaro	Representative

Evolve Limited – Recommended Bidder

Mr Christopher Busuttil	Representative
Mr Adrian Balghy	Representative

Central Procurement and Supplies Unit – Contracting Authority

Ms Ruth Spiteri	Chairperson Evaluation Board
Ms Lorna Zahra	Secretary Evaluation Board
Mr Ian Mark Attard	Member Evaluation Board
Mr Marnol Sultana	Representative
Dr Adrian Mallia	Legal Representative

The Chairman opened the hearing by asking that the Board be given more information about the equipment for which this tender was issued.

Mr Ivan Vassallo on behalf of the appellants explained that the Capsule Endoscopy System and the Patency Capsule were recently introduced method of examination of the digestive tract in patients.

The patency capsule consisted of a small pill that contained a camera which took a number of pictures and transmitted them to the Endoscopy System. These capsules are given to patients to swallow and going through the patient's tract would transmit pictures of the insides of the tract, enabling the medical practitioner to examine the condition of the patient's digestive tract.

The Chairman then made a brief introduction and the appellant company's representative was invited to explain the motives of his firm's objection.

Mr Ivan Vassallo on behalf of the appellant said that they objected to the decision to award the tender to the preferred bidder on two points, i) that the tender document at page 13 stated that the tender will be awarded to the cheapest tender that complied with the specifications, and ii) that "no variations to these specifications will be considered. The specifications asked for a 'dual camera system with light source', 'compact micro dual camera system' and 'each capsule shall include a dual camera system. The preferred bidder's offer did not keep to these specifications.

The Chairman remarked that the Board found it strange that there could be such great differences between the prices submitted by the bidders.
Dr Adrian Mallia on behalf of the contracting authority agreed with appellant that the specifications, were as quoted by the appellants, but however the appellants missed out the clarifications issued on the 2 October 2012, whereby the specifications were changed, allowing single cameras. The tender document itself, in the instructions to tenderers , Clause 11.2 allowed such clarifications, including changes to specifications. These clarifications then formed an integral part of the tender document. One of the bidders had asked if it was acceptable to offer a single camera, and the reply given in the clarification was that yes, it was acceptable provided that the single camera could capture the same number of images. This clarification had been sent to all bidders. Furthermore the same bidder who made the enquiry had also brought to the attention of the contracting authority, that if they insisted on a dual camera system, there was only one supplier who would be able to bid. This could have been taken into consideration when the clarification was issued.

Ian Attard, Operations Manager and member of the evaluation board, under oath stated that the specifications required that the camera shall be capable to capture two or more images per second. The preferred bidders' offer indicated that the camera offered was capable of this, in the literature submitted it is stated that "video images at two frames per second during passage through the tract. Evaluation at that stage did not consider price, but was more on the technical side of seeing offers were according to specifications and clarifications. This is a new technology and will probably eventually replace endoscopy. The tender bid of the preferred bidder included a number of images taken by the camera offered. These images were examined by the medical practitioner on the evaluation board and deemed to be acceptable.

Dr Mallia explained that the tender was for the supply of fixed equipment, which was used again and again as needed, and for the capsules that were consumables. These capsules were for one off use and were disposed of during use. Consumption of these capsules depended on demand. Purchasing of these capsules would be on a demand basis, with the contractor supplying them as the need arises.

Mr Marnol Sultana on behalf of the contracting authority said that estimate consumption of this capsule is around fifty (50) capsules per annum.

Mr Ivan Vassallo for the appellants explained that during its passage through the small intestine the camera kept its direction because the width of the intestine walls did not allow it to tumble. However, when passing through the colon, that is wider, the camera was prone to tumble and change position. Thus a single camera capsule could miss important lesions when passing through the colon. Appellants therefore decided to submit a dual camera to obviate this. The appellants' dual camera capsule was capable of taking 4 to 35 frames per second. Mr Vassallo claimed that the chosen capsule cannot be used to examine the colon. Specifications stated that receivers shall have the facility to play back all the frames at any stage of the procedure. The receiver offered by the appellants was equipped with a screen that enabled viewing the images being taken at all stages. The chosen receiver is not equipped with a screen, the images the camera captures have to be viewed on a computer. Contended that preferred bidders' offer was not according to specifications.

Mr Ian Attard for the contracting authority stated that the specifications nowhere stated that the receiver had to have a monitor but that it was capable of receiving images all the time. At any rate the images have to be viewed by the medical practitioner and not by the patient. Reiterated that the evaluation board examined the products technically and the doctor, who formed part of the board, had examined the product and accepted it as satisfactory. He had the necessary qualification to do this.

Mr Ivan Vassallo for the appellants reiterated that the equipment submitted by the preferred bidder cannot be used for colon examination. Appellants submitted voluminous literature with their bid that showed this.

Replying to a question by the Board, Mr Chris Busuttil Managing Director on behalf of the preferred bidder said that yes, Evolve's offer contained all the necessary literature. The direction the capsule was facing when going through the colon is immaterial. What mattered is that it takes images of all the length of the tract. We submitted samples of images taken by our capsules and technical advice. The capsule complies with the specifications. Lastly Mr Busuttil confirmed that the equipment was being provided free of charge.

At this point the hearing was brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 3rd June 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Tender document specified that the cheapest bid will be awarded the tender. This condition also laid out that the Bid had to meet the necessary technical specifications laid out in the tender document.**
b) **The Original specification in the tender document required the implementation of a 'Dual Camera system with light source'.**
c) **The Preferred Bidder's system did not comply with such specifications.**
d) **The Appellant contends that the equipment and product offered by the preferred Bidder cannot meet the requirement for colon examination.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 17th September 2013, in that:

a) Although the Appellant adhered to the original specifications laid out in the tender document, the same Appellant did not concur to the clarifications required by the Evaluation Board of the Contracting Authority, issued by same , on 2nd October 2012, which same clarifications were communicated to all bidders.

b) The Clarifications sent to all bidders, allowed specifications to be simulated to a 'Single Camera 'which will fulfil the requirements of the tender.

c) The tender was for the procurement of a permanent equipment and for capsules that are regarded as consumables.

d) The Contracting Authority, through the verbal submissions, held during the hearing on 17th September 2013, confirmed that the average consumptions of these capsules are 50 in number per annum.

e) The Contracting Authority also confirmed that the product offered by the Preferred Bidder was fully compliant with the technical requirements of the tender.

Reached the following conclusions:

1. **The product of the Preferred Bidder does indeed meet the compliance of all the specifications as laid out in the tender document and also through clarifications sought later by the Evaluation Board of the Contracting Authority.**
2. **After having heard the Expert's opinion on the quality of the product being offered by the Preferred Bidder, this Board opines that the product in question does satisfy the requirements of the tender specifications.**
3. **During the hearing held on 17th September 2013, this Board was informed that the equipment which the Preferred Bidder was offering was being donated, ie free of charge to the Contracting Authority.**
4. **This Board also noted that the Preferred Bidder's offer was the cheapest.**

In view of the above this Board, finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

2 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 591

SLC/T/606/2013

Road Cleaning Services for Sliema Local Council.

The tender was published on the 2nd April 2013 with a closing date of the 2nd May 2013.
The estimated value of the Tender was €525,000 (exclusive of VAT).

Seven (7) bidders submitted their offers.

Cleanmasters Company Limited filed an objection on the 6th June 2013 against a decision of The Sliema Local Council finding their bid as administratively non-compliant, and the award of the tender to SRF & Veladrians Joint Venture for the price of €525,000 exclusive of VAT.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a meeting on Thursday 19th September 2013 to discuss the appeal.

Present:

Cleanmasters Company Limited - Appellants

Dr Victor Axiak	Legal representative
Mr Ramon Fenech	Representative
Mr Ray Fenech	Representative

SRF & Veladrians Joint Venture - Preferred Bidders

Mr Steve Farrugia	Representative
Mr Mario Vella	Representative
Dr John Gauci	Legal Representative

Contracting Authority - Sliema Local Council

Mr Matthew Dimech	Executive Secretary
Dr Franco Vassallo	Legal Representative

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Franco Vassallo on behalf of the Sliema Local Council, the contracting authority stated that he wanted to raise a preliminary plea that had to be decided before the merits of the case are heard. He contended that the deposit paid by appellant to file the objection was not according to law. To file a valid objection, an aggrieved bidder was obliged to deposit a sum equivalent to .75% of the estimated contract value of the tender. This requirement is according to Article 84 (1) of the Procurement Regulations. The present tender was for street cleaning for a period of three years. Appellant's bid was €117,000 per annum and it follows that the deposit should have been worked on this amount times three, and .75% of this resulting amount is much more than the €1200 amount deposited by the appellant to file the objection. Therefore, Dr Vassallo contended that the objection is null, and there was no need to go into the merits of the objection.
Dr John Gauci on behalf of the recommended bidder agreed with the arguments brought by the contracting authority, in fact the recommended bidder had raised this plea in his letter of reply. There

have been several previous decisions by the Public Contracts Review Board which dealt with the same matter, and these decisions have consistently been to reject the objections when the deposit was not enough according to law. The law states that the amount, on which the deposit is worked, has to be the maximum. When the contract is for a period of three years, the deposit should be based on the amount payable for three years.

Dr Victor Axiak for the appellant company stated that the wording in the tender document states "...valid for a period of up to three years", and not "for a period of three years". He contends that this is a slight distinction, but is important. He said that the present tender was issued on the basis of Legal Notice 296/2010 and if Article 84 of this legal notice does not mention the value of the whole tender but states that the deposit should be one percent of the value submitted by the tenderer. Clause 19 of the tender document refers to LN 296/2010, and not to LN 296/2010 as subsequently amended. Furthermore he contended that his client based his deposit, when filing the letter of objection, on the Schedule of Prices on the contracting authority's notice board, where it was evident that the yearly amounts of bids was shown. The global value of the bids for the three years was not shown in this schedule. Dr Axiak contended that according to Clause 4 of the tender specific conditions, "the contractor had to provide the service for the global sum shown in annex 5". Thus his client filed a deposit based on one percent of his bid.

Dr Franco Vassallo for the contracting authority said that it was clear in the tender document that the contract was for three years. Bid had to show annual value for three years. He argued that if appellant's reasoning held true, then this would have meant that appellant was ready to provide the service for three years receiving only €117,000.

Dr John Gauci for the preferred bidder said that the Public Procurement Regulations had clear rules on how the estimated value of the tender had to be calculated. According to Article 16 of the said regulations, the estimated value of a contract for three years, even if these three years included renewals, should be the annual amount times three.

The Chairman remarked that the notice sent by the contracting authority to appellant should have included his right to object and the amount of deposit. The letter sent to appellant however, did not provide such information.

Dr Franco Vassallo on behalf of the contracting authority said that the said authority did not raise another preliminary plea, that the letter of objection was filed outside the legal time limit, because the contracting authority was aware that the letter to failed bidders should have provided more information.

The hearing was brought to an end at this point.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 6th June 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 19th September 2013, had objected to the decision taken by the Pertinent Authority, in that:

a) **In accordance with the tender document, the duration of the Tender was for a period of three years.**
b) **The Tender document did not request the total bid for three years but rather a financial bid per annum.**

c) **The appellant based the amount of deposit to be paid on appeal, on the annual bid price. In fact the global value for three years was not indicated in clause 4 of the tender conditions**
d) **So that the Appellant paid 1% of the annual tendered price.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 19th September 2013, in that:

a) **The Contracting Authority raised a preliminary plea prior to the discussion of the merits of the case in question.**
a) **The tender was for a period of three years. To this effect, the deposit should have been based on the total amount of the tender i.e. the amount quoted per annum times three.**
b) **In actual fact the Appellant paid 1% on the annual value of the tendered bid.**
c) **The Letter of Objection was filed outside the limited period.**

Reached the following conclusions:

1. **This Board noted that, Had the Contracting Authority, when issuing the letter of refusal to the Appellant, stated clearly the amount to be deposited on appeal, then the Appellant would have been informed of the proper amount of the deposit.**
2. **On the other hand, the Appellant was fully aware that the tender was for a period of three years.**
3. **The total amount of deposit should have been to represent .75% of the annual bid price times three.**

In view of the above this Board finds against the Appellant Company, however, due to administrative failure of information to the Appellant, this same Board recommends the deposit paid by the Appellant be fully reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

8 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 592

WSM 372/12

Period Contract for the Loading and Export of Asbestos Waste from Civic Amenity Sites found in Malta and Gozo.

The tender was published on the 23rd November 2012 with a closing date of the 1st February 2013. The estimated value of the Tender was €119,560 (exclusive of VAT).

Three (3) bidders submitted their offers.

PT Matic Environmental Services Limited filed an objection on the 3rd July 2013 against a decision of WasteServ Malta Limited to recommend the award of the Tender to ISTS Limited For the price of €80,839.22, exclusive of VAT.

Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a meeting on Thursday 19th September 2013 to discuss the appeal.

Present:

PT Matic Environmental Services Limited – Appellants

Dr Katya Mercieca	Legal Representative
Mr Derek Broadley	Representative
Ing. Oliver Fenech	Representative

ISTS Limited - Recommended Tenderer

No representative

WasteServ Malta - Contracting Authority

Dr Victor Scerri	Legal Representative
Ms Daniela Grech	Chairperson Evaluation Board

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Katya Mercieca on behalf of the appellant said that there were three main grounds on which this appeal was based:

1. It was a tender requirement that vehicles used in this tender had to be Euro IV compliant, vide addendum WSM 101/2012 dated 12th December 2012. The vehicle offered by the preferred bidder, GBF 396, was registered in March 1996 and therefore was not Euro IV compliant. Thus the preferred bidder's offer was not as per specifications and not compliant.
2. Mr Derek Broadley on behalf of appellant stated that it was also a requirement of the tender document that the specific vehicles to be used had to be covered by a waste-carriage permit, that was specific to the vehicle. The preferred bidder could not submit proof and are not in a

position to provide proof that their vehicle carried a waste-carriage permit and their bid was thus non-compliant.

3. The tender document specified that the successful tenderer should provide the service within one week from the issue of the order to start work. Appellants have it from MEPA records that the preferred bidder does not have a current live notification for the export of ACM, as they did not pay the relevant fees. Appellants contend that from the date of application for such a MEPA notification to the issue of authorisation requires a process that takes about sixteen weeks. In this case the preferred bidder would not be able to provide the service within one week as demanded in the tender.

Daniela Grech, Chairperson of the evaluation board, on behalf of the contracting authority stated that bidders could declare, as the preferred bidder did, that he would obtain the export permit within three months. The one week term mentioned in the tender document would start to count from the date when the permit was obtained. Regarding the first point raised by appellant she stated that the preferred bidder was going to use a third party vehicle. He is going to sub-contract this process and the vehicle the evaluation board compared during evaluation was a different one from that mentioned by the appellant. This other vehicle was manufactured in 2006. A clarification from preferred bidder confirmed that the vehicle to be used was Euro IV compliant. The evaluation board did not check directly with the competent authority but relied on the confirmation supplied by the preferred bidder. The log book of this vehicle was submitted with the tender.

The Chairman said that ideally, the evaluation board should check with the authorities themselves and not to rely on clarifications submitted by bidders.

Dr Victor Scerri, for the contracting authority stated that the officer in charge would check, later on when the service was being provided, that the awarded contractor's vehicle was Euro IV compliant, and if it were not, take the necessary remedial action.

DR Katya Mercieca for appellants said that the other vehicle for which the log book has been provided, LHQ 068 is not covered by a permit to transport waste and contends that the tender should have insisted on the submission of relevant certification regarding the Euro IV compliancy, and not rely on clarifications from bidders.

Dr Victor Scerri for the contracting authority stated that the contract has to be carried out using a Euro IV vehicle. Any such vehicle and not a specific one as long as the vehicle used is Euro IV. The contractor may obtain other vehicles during the term of the contract, provided that these were Euro IV compliant. Otherwise, a contractor whose vehicle became unusable during the contract term would lose the contract.

The Chairman, Public Contracts Review Board asked the contracting authority if any checking was made whether the vehicles were Euro IV compliant.

Ms Daniela Grech, chairperson of the evaluation board explained that the evaluation board just checked the date of manufacture of the submitted vehicle which as stated earlier was 2006.

Dr Katya Mercieca on behalf of the appellant said that Article 7.5.1 of the tender document stated that all vehicles used in the tender have to be Euro IV compliant, and proof of this was to be submitted with the tender offer.

Ms Daniela Grech for the contracting authority said that the evaluation board had received a log book for a vehicle and a waste-carriage permit, but this permit was issued for another different vehicle. Replying to a question by the Chairman, Ms Grech affirmed that appellant's bid was both administratively and technically compliant. The waste carrier permit could be checked with MEPA while Euro Grading could be checked with Transport Malta.

The hearing was brought to an end at this point.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 3rd July 2013 and also through the Appellant's verbal submissions during the hearing held on 19th September 2013, had objected to the decision taken by the Pertinent Authority, in that:

a) **The Tender document included a mandatory requirement in that the vehicles to be used by the tenderer had to be EUR O (iv) compliant.**
b) **There was also a mandatory requirement in the tender document, that the vehicles to be used by the tenderer in the execution of the tender itself had to have a 'Waste Carriage Permit'.**
c) **Another condition in the tender document was that the successful bidder was to provide the required services within one week from the issue of 'commencement of Works' by the Contracting Authority.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 19th September 2013, in that:

a) **Bidders were allowed to declare that the export permit would be obtained within three months.**
b) **The Preferred Bidder stated that he was going to use a third party vehicle.**
c) **The Contracting Authority would later on check that the vehicle to be utilised for the services required in the tender document that these are classified as EURO (iv) compliant.**
d) **The Evaluation Board of the Contracting Authority referred to a log book and a 'waste carriage permit) which referred to a different vehicle.**

Reached the following conclusions:

1. **This Board noted the sensitive type of waste. Asbestos has long been proved to create health hazards. In this regard, the chosen bidder must have all the necessary experience and precautions in handling this type of waste.**
2. **It was of the utmost importance that the Evaluation Board of the Contracting Authority carries out all all possible verifications with regards to the classification of vehicles to be used . This had to be done by confirmation from the Compitent Authority.**
3. **This Board also notes that the Evaluation Board did not carry out due diligence and necessary confirmations regarding:**

i) The Classification of the vehicles – whether same conforms to EURO(v) requirement.

ii) Whether the vehicles to be utilised had the necessary permit to transfer such waste.

4. The Appellant's Bid was administratively and technically compliant.

In view of the above, this Board finds in favour of the Appellant Company and recommends the following:

i) The Appellant should be reintegrated in the Evaluation process.

ii) The deposit paid by the Appellant to be fully reimbursed.

iii) On the other hand, the Contracting Authority's Evaluation Board should verify from direct sources that the Preferred Bidder would have all the necessary experience and permits as laid out in the tender document.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

8 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 593

WSM 079/13

Period Contract for the Security Services and Security Duties to be performed at the Sant'Antnin Waste Treatment Plant in Marsascala.

The tender was published on the 9th April 2013 with a closing date of the 30th April 2013.
The estimated value of the Tender was €120,000 (exclusive of VAT).

Four (4) bidders submitted their offers.

Signal 8 Security Services Malta Limited filed an objection on the 9th July 2013 against a decision of WasteServ Malta Limited to find their bid as administratively non-compliant and the award of the tender to JF Security & Consultancy Services Ltd for the price of €120,000 exclusive of VAT.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a meeting on Thursday 19th September 2013 to discuss the appeal.

Present**:**

Signal 8 Security Services Limited - Appellants

Mr Joseph John Grech	Representative

JF Security & Consultancy Services Limited - Recommended Tenderer

Mr Matthew Formosa	Representative
Dr William Cuschieri	Legal Representative

WasteServ Malta - Contracting Authority

Dr Victor Scerri	Legal Representative
Ms Agatha Galea	Member Evaluation Board

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.
Mr Joseph John Grech on behalf of the appellants first raised the matter that his legal representative could not be present because he was sick. It was explained to him that the hearing would go on nonetheless.
He claimed that appellants' bid was discarded on false means because they had submitted all the necessary documents. Furthermore, he claimed that during the appeal procedure, the contracting authority had issued a call for quotations covering the same services being requested in this tender.
On being asked by the Chairman, Dr Victor Scerri stated that the preferred bidder was the cheapest and compliant bidder. The contracting authority had asked for the production of certain documents, including a conduct certificate for employees issued no more than six months before the closing date. Appellants' bid did contain conduct certificates, but some of them were no longer valid, being issued more than six months before. Thus these could not be taken into consideration by the evaluation board. The contracting authority also asked for ECDL certificates for module 2, 3 and 4 in respect of six persons. These were not submitted by the appellants. This was the reason behind the rejection of their offer.

Mr Joseph John Grech for appellants submitted that appellants produced seven conduct certificates.
Ms Agatha Galea for the contracting authority went through the list of conduct certificates submitted by the appellants:

Kenneth Ward	compliant
Joseph Micallef	compliant
Paul Mallia	compliant
George Mercieca	dated 24 October 2012 expired
Dorothea Schembri	dated 12 June 2012 expired
Conrad Camilleri	compliant
Manuel Aquilina	dated 24 October 2012expired
Charmaine Ebejer	compliant.
Godwin Sayan	dated 9 August 2012 expired

The closing date of the tender was the 30th April 2013 so the conduct certificates issued on the 24 October 2012 were expired at the time of the closing date. Conduct certificates are only valid for six months even for the police.

Mr Joseph John Grech contends that the validity of the certificates should have been on the opening date of the tender and not on the closing date.

The Chairman asked the contracting authority to confirm that the preferred bidder had the cheapest offer and Dr Victor Scerri confirmed this.

Dr William Cuschieri on behalf of the preferred bidder submits that the contracting authority wanted ECDL certification and it should have obtained these from all bidders. In appellants' objection another point was raised that has not been mentioned in this hearing yet; the question of the price offer. It was alleged that the contract would lead to precarious employment. He filed a document that was a copy from the newspapers that contained a declaration by the General Workers Union wherein this states that the Security Guard costs €5.66 an hour. The preferred bidders' offer was higher than €5.66 it is not understood how the letter of objection claims precarious employment. He also made reference to another case decided by this Board, Case 416/12 wherein the Board had decided that if a tenderer undertook to abide with the labour regulations in the payment to its employees then, the tenderer was compliant. Thus his clients' offer was compliant.

Dr Victor Scerri reiterated that appellants' offer did not include all the six employees' ECDL certificates. He stressed that the conduct certificates had to be issued within six months prior to the date of the submission of the offer. Appellants' tender was filed on the 30th April 2013 so their previous argument regarding the date when the tender was issued does not hold. Appellants did not file their bid before the closing date, but on the date.

Mr Richard A. Matrenza pointed out that the document filed earlier by the preferred bidder does not apply to this case. It refers to what Mr Cory Greenland said were calculations made by the union on what the minimum wage should be. He contends that wages should be guided by the Circular issued by the head of the Civil Service. What Mr Greenland stated does not affect the content of the Circular.
Mr Joseph John Grech for appellants said that the same Mr Greenland said that if the wages are less than €6.00 an hour, the job could be considered as precarious. That was the reason why appellants' offer was for €6.00. He alleged that the ECDL requirement was tailor made to favour the preferred bidder. These were after all minimum wage earners and do not need the ECDL. Four of the persons indicated in appellants' offer had the ECDL certification while the other two had an equivalent certification by the ETC, yet appellants' offer was rejected.

The hearing was brought to an end at this point.

This Board,

Having noted the Appellant's objection, in terms of the'Reasoned Letter of Objection' dated 9th July 2013 and also through the Appellant's verbal submissions during the hearing held on 19th September 2013, had objected to the decision taken by the Pertinent Authority, in that:

a) **The Appellant's bid was declared administratively non compliant by the Evaluation Board of the Contracting Authority, for failure to submit valid Police Conduct Certificates.**
b) **The Appellant's Bid was declared administratively non compliant by the Evaluation Board for failure to submit 6 ECDL certifications in Module 2,3 and 4. In fact only four were submitted.**
c) **The Recommended Bidder's offer did not comply with recent instructions regarding precarious labour conditions. In this respect, the rates quoted by Appellant could not afford the minimum requirements to abide by these guidelines.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 19th September 2013, in that:

a) **The Preferred Bidder was the cheapest and fully compliant.**
b) **The required conduct certificates had to be valid by the closing date of the tender.**
c) **The ECDL 2, 3 and 4 in respect of 6 persons were not fully submitted.**

Reached the following conclusions:

1. **When the Contracting Authority issues a tender, the same pertinent Authority lays down specific conditions and required documentation which must accompany the tender document.**
2. **In this particular case, certification regarding conduct and module's requirements were specifically mandatory requirements. In this regard it is futile to present conduct certificates which according to law expires the period of validity of same.**
3. **The Preferred Bidder's offer was fully compliant and the cheapest.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

8 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 594

MLC/001/2013

Tender for the Services of a Perit.

The tender was published on the 11th January 2013. The closing date was the 18th February 2013.

The estimated value of the Tender was under €120,000 (Exclusive of VAT).

Eleven (11) bidders submitted their offers.

On the 18th June 2013, Architect Anthony Bezzina filed an objection against a decision taken by the contracting authority, Msida Local Council to award the tender to Architects William Lewis and Architect Daniel Micallef.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 24th September 2013 to discuss the appeal.

Present for the hearing:

Architect Anthony Bezzina - Appellant

Architect Anthony Bezzina	Representative
Mr Clayton D'Amato	Representative
Dr Beppe Fenech Adami	Legal representative

Architects William Lewis and Daniel Micallef - Preferred Bidder

Architect William Lewis	Representative
Architect Daniel Micallef	Representative
Dr Benjamin Valenzia	Legal representative
Dr Stefan Zrinzo Aazzopardi	Legal representative

Msida Local Council - Contracting Authority

Dr Alex Sciberras	Vice Mayor Msida Local Council
Ms Marita Portelli	Executive Secretary

Following a brief introduction by the Chairman, Public Contracts Review Board, the appellant's representative was asked to make his submissions on the objection to the award.

Dr Beppe Fenech Adami, on behalf of the appellant stated that his client's offer was compliant with the tender conditions, as was the preferred bidders' offer. Therefore the adjudication committee had to base its assessment on the bidders' qualifications, the set up and finally the pricing. There is no doubt

that appellant was in fact an architect; that appellant was competent; that appellant had years of experience with several other local councils; and that appellant provided the same service to the Msida Local Council for a number of years. During these years there never arose difficulties about his capacities and capabilities and the service provided. Appellant provided this service under several Mayors in the locality. The price factor thus remains. Dr Fenech Adami contended that in the tender's seven categories, his client's offer was the cheapest in all but one. It can be seen that there was no motivation behind the evaluation committee's decision to award the tender to the preferred bidder. There are no minutes or documents that show the motivation, on how the decision was taken.

Dr Alex Sciberras, Vice Mayor, Msida Local Council on behalf of the contracting authority, replying to questions by the Chairman Public Contracts Review Board stated that the appellant was totally compliant. Appellant's bid was the cheaper in five out of seven categories, but if all categories are taken globally, his offer was the cheapest. There was another bidder, tenderer number eight who had the lowest hourly rates. The offers were for rates for services, and when these are examined, the appellant's rates were cheapest. The appellant's hourly rates however were not the cheapest.
Dr Sciberras continued that it is apparent from the letter of objection that the appellant did not agree with the decision taken by the evaluation committee. However, Dr Sciberras stated, that the Public contracts Review Board could not question the discretion of the evaluation committee. The PCRB had to see that the committee had observed the principles of transparency and procedures. The discretion of the evaluation committee could not be substituted by that of the PCRB. He cited jurisprudence and referred to the case 'Cassar et vs Minister for the Development of Infrastructure' decided on the 27th November 1992 wherin the court made it clear that discretion given to the evaluation board could not be overruled. The award criteria of the tender were not the lowest price, but the tender was MEAT. It was the most favourable tender that had to be chosen. All compliant bidders were then examined under three criteria: Experience; Price and Organization Capability. Fifty percent (50%) marking was assigned to experience, thirty per cent (30%) to price, and twenty percent (20%) for Organization Capability. The Executive Secretary had prepared summaries of all the tenders received, and these summaries were examined by the evaluators during adjudication. Members of the evaluation board then individually assigned marks to the bidders, and the bidder who obtained most marks was recommended for the award. The cheapest bidder thus obtained 30% of the pricing marks. The preferred bidder had vast experience with several local councils and had submitted several references for works performed. Overall marks of the preferred bidder were the highest. The preferred bidder was bidder number 11 and it can be seen from the mark sheets that this bidder obtained higher marks from all the members of the evaluation board. The evaluation committee treated each bidder the same.

The Chairman asked where appellant lost most points, because the mark sheet is not clear enough.

Dr Alex Sciberras stated that it was not a question of losing points but rather of the preferred bidder gaining more points. Clearly what carried most weight in points was the experience. Preferred bidder had more points had vast experience with local councils, he showed that he had more experience in that type of work. The preferred bidder produced seven letters of reference.

Ms Marita Portelli said that evaluation board members assigned markings individually and then each of them worked out the average. This average was then incorporated into the document that was later accepted by the Council. The individual markings were kept by the evaluation board members themselves and were not filed. The evaluating committee prepared the minutes of the meeting for the adjudication and the minutes are then brought before the Council which either approves them or not. In this case the minutes were approved.

The Chairman remarked that the schedule that was shown was not clear. The Board would like to know how the total percentage was arrived at for each bidder was arrived at. While the column headed Price 30% was filled in for each bidder, the other two columns headed respectively Organizational Structure 20% and Experience 50% are blank. It is not clear how many marks percentagewise, were given to each bidder for organization and experience.

On being asked by the Board if there were any parameters that were used to assess the experience and the organizational structure of the bidders, Dr Alex Sciberras referred to a decision by the European Courts of Justice which states that *"while the requirement to state the relative weighting for each of the award criteria at the stage of publication of the tender as now profiled under article 53.2 of the directive meets the requirement of principle of compliance of equal treatment and transparency, it cannot be argued that the scope of that principle stands in the absence of a specific provision to that effect in the directive to require that the relative weighting of criteria used by the contracting authority to be notified in advance to bidders prior to their submitting their bids."* He insists that the fact that these criteria are not shown in the tender does not mean that there is a breach of article 53. He continued to explain that what garnered more marks was bidder's experience as an architect, especially experience in works for the Local Council. These Councils have to submit applications for funding and an architect with such experience would be favoured. After analysing the offers it was felt that the preferred bidder had more experience. Both appellant and the preferred bidder had experience, but the latter had more.

The Chairman wanted to know the points obtained for experience by the appellant and the preferred bidder. It was not necessary to give the individual markings given by each member of the evaluation committee, but the total percentage given for the appellant and preferred bidder for experience.

Dr Alex Sciberras said that this information was not available but promised that he would submit it later on. The work sheet of each adjudicator remained in his possession and is not available. At the end of the adjudication meeting the average markings were published. This information exists and the Council has it. He promised to submit the information later on.

The Chairman insisted that the Board must have the information regarding the percentages given for organization and for experience, at least to the appellant and to the preferred bidder. Remarked that the Council ought to have these workings, and the Board wanted to see them.

Dr Fenech Adami stated that his client has vast experience as architect with the Msida Local Council of nine years. He also has had experience with several other Councils, Sliema, Balzan, Safi, Zurrieq, Qrendi, Mqabba, Kirkop, St Venera and Pieta`. He said that when this experience is compared to that acquired by the preferred bidder, it is evident that appellant's experience with Local Councils is greater. As regarding the set-up, Dr Fenech Adami, continued, his client the appellant had a more organizational set-up than that of the preferred bidder.

Dr Alex Sciberras insisted that the discretion on evaluation the merits of the bidders, lies not with the Public Contracts Review Board, but with the evaluation board. Review should be limited to ensure compliance, transparency and that there were no errors. The evaluation committee created a basis for adjudication of the tender and followed it. Each evaluator then chose the preferred bidder, which in itself is indicative that the preferred bidder was the best choice.

Dr Zrinzo on behalf of the preferred bidder said that his client's offer shows that Architect William Lewis, who also has a master's degree, has thirteen years experience. In this offer he is joined by the team headed by Architect Daniel Micallef, who also provide service to several Local Councils, and the set-up is therefore wider and more organized, with full time employees. On examining the curriculum vitae of the two architects one can see that they have vast experience.

At this point the hearing was closed.

By an email sent on the 12th October 2013, the Msida Local Council provided the following data regarding the preferred bidder, shown as tenderer 11, and appellant, shown as tenderer 7. This information was requested by the Board during the hearing.

Tenderer Price Experience/Structural organization.

		Member 1	member 2	member 3	member 4	member 5
Tenderer 7	29%	44%	25%	30%	52%	12%
Tenderer 11	26%	54%	45%	52%	55%	67%

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 18th June 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 24th September 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant's bid was fully compliant, so that the determining factors for the award of the tender were the qualifications, the set up of the organisation and obviously the price.**

b) **The Appellant had the required experience in the field, and in fact the same experience exceeded that of the Preferred bidder.**

c) **The Appellant claimed to have a better organisation set up than that of the Preferred bidder.**

d) **There was no logical motivation behind the Evaluation Board's decision to award the tender to the Preferred bidder.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 24th September 2013, in that:

a) **The Contracting Authority admitted that the Appellant's bid was fully compliant.**

b) Although the Appellant's bid was the cheapest in five out of seven categories, same was not the cheapest overall.

c) The Contracting Authority stated that the PCRB could not question the discretions taken by the Evaluation Board of the Contracting Authority.

d) The Evaluation Board evaluated the tenders on a scientific basis. The same Board awarded points relating to experience, qualification and price to each Bidder in a methodical system.

e) The preferred Bidder achieved the highest score in so far as experience was concerned.

Reached the following conclusions:

1. **This Board does not agree with the comments made by the Contracting Authority wherein it was stated that the PCRB has no discretion on the evaluation merits of the Bidders. This Board has all the authority to evaluate the procedure adopted by the Evaluation Board in the selection of the Preferred Bidder.**

2. **From submissions presented by both the Appellant and the Contracting Authority , this Board opines that it is evidently clear that:**

   i) The Appellant's bid was not the overall cheapest offer.

   ii) The Preferred Bidder's offer was fully compliant and same scored the highest percentage during the evaluation stage of the tender.

In view of the above, the Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

7 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 595

CT 4042/2010

Tender for the Excavation of an Underground Tunnel from St Andrew's to Maghtab.

The tender was published on the 25th January 2011. The closing date was the 17th March 2011.

The estimated value of the Tender was €14,915.254 (Exclusive of VAT).

Six Bidders (6) had submitted an offer.

This case has been appointed for hearing following a decision given by the Court of Appeal, Appell Civili Numru 43/2011, on the 29th November 2012

On the 23rd January 2013, Messrs. Rockcut Limited, filed an objection against the rejection of their bid as being administratively non-compliant..

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 24th September 2013 to discuss the appeal.

Present for the hearing:

Rockcut Limited - Appellant

Mr Rhys Buttigieg	Representative
Architect Cleaven Maniscalco	Representative
Architect Emmanuel Zammit	Representative
Dr Albert Libreri	Legal Representative

Polidano Bros Limited - Preferred Bidder

Mr Noel Vella	Representatve
Dr Franco Galea	Legal Representative
Dr Jean Paul Sammut	Legal Representative

Enemalta Corporation - Contracting Authority

Engineer Ivan Bonello	Chairman Evaluation Board
Engineer Mark Sciberras	Member Evaluation Board
Architect Mario Scicluna	Member Evaluation Board
Architect Gail Woods	Member Evaluation Board
Dr Steven Decesare	Legal Representative

Department of Contracts

Mr Nicholas Aquilina Procurement Manager

The Chairman made a brief introduction and explained that this case was sent back by the Court of Appeal following the declaration by the Public Contracts Review Board had found that the letter of objection was filed after the lapse of the legal time. He continued that as far as the Board was aware, the tender in question had been awarder and the contract concluded. The appellant's representative was then asked to make his submissions on the objection.

Dr Albert Libreri on behalf of the appellant company explained that the Court of Appeal decided that the legal time would start from the time the second notice of disqualification was sent to the appellant, and not from the first notice, as the Public Contracts Review Board had decided. The law precludes appellant from having recourse to a warrant of prohibitional injunction against the Director of Contracts to keep him from signing a contract because there are remedial damages. He insisted that the Board should now decide the merits of the objection notwithstanding the fact that the tender has been awarded. He claimed that appellant's bid was cheaper.

Dr Steven Decesare on behalf of the Contracting Authority said that Enemalta does not know what appellant's financial offer was. This was a three package tender and the appellant's bid had been disqualified as non-compliant at the first, the administrative, stage. Appellant's financial package was not opened. Appellant's offer was not compliant because the satisfactory execution certificates, as requested, were not submitted. In the letter of objection, this omission was admitted by the appellant.

Dr Franco Galea on behalf of the recommended bidder stated that the present Board had to decide if the appellant was right in filing the objection or not. To see if the evaluation board were correct when disqualifying appellant's bid. The law allows the tender procedure to continue immediately after the decision of the PCRB. The remedy available to appellant would then be to seek damages.

Dr Albert Libreri stated that Enemalta had issued a clarification note, on the 18th February 2011, whereby the former Clause 6 of the tender document was replaced by Clauses 6.1, 6.11, and 6.12. This sub-clause 6.12 is further divided into five sub-clauses and in the third of these, (c) states that " *.....evidence of relevant experience in execution of works of a similar nature over the past 5 years (Form 4.10), including the nature and value of the relevant contracts".....*. When the tender document is examined, however it can be seen that this Form 4.10 has nothing to do with experience, instead Form 4.10 deals exclusively with personnel information. This shows that the Clarification contained erroneous information. Appellants, on receiving the clarification noticed that the only form in the tender documents that resembled it was Form 4.9. This form 4.9 that was completed by appellant, shows a column for experience as contractor, another to show the value of the contract; the date and the place and stage of completion of the works; the name of the contractor and satisfaction of completion. Dr Libreri contends that this form therefore supplied the information requested in the Clarification. It can be seen from appellant's filled in form 4.9, that in four cases it cited in the form were for works contracted by the contracting authority in the present tender, that is Enemalta. The contracting authority had also reserved the right, by the clarification, to contact any of the bidder's clients with a view to obtain from them an opinion on the works provided to them by the tenderer. Seeing that Enemalta itself was the client of appellant firm it could easily have supplied the information whether the previous works were satisfactory or not. To recapitulate, Dr Libreri said that the Form 4.10 mentioned in the Clarification was erroneous, and that appellant filled in and submitted

Form 4.9 which provided the required information, and thus appellant's bid was administratively compliant. Furthermore if the evaluation board did not fully understand the submitted Form 4.9, it should have asked for a clarification. This would not have been rectification but a clarification, and is allowed.

Dr Albert Libreri continued that nine days after the submission of the present tender, appellant had filed another bid for another identical tender with the same contracting authority, Enemalta, wherein the same mistake in mixing Form 4.9 and form 4.10 had been repeated. However in that tender, Enemalta had sought clarification from the present appellant, and asked for certificates. His client, the present appellant had been awarded that tender. He contended that the error in form 4.10 rendered the tender ambiguous, and his client's bid should not have been discarded.

Dr Steven Decesare on behalf of the contracting authority said that a Clarification was issued in this tender, and part of the clarification relevant to this case was 6.1.2 (c). There were three requisites arising from this sub-clause. The first was that bidder was to provide evidence of experience, this was provided by appellant and there are no problems. The second one was to provide certificates that works were carried out in a satisfactory manner. The third required that the value of the works to amount €3,000,000. Appellant's bid satisfied the first and the third requirement, but the second requirement did not. The bid did not include any certification from bidder's clients as requested. The evaluation board has to adjudicate on the submitted documents. The fact that the same contracting authority was listed by appellant in his submission has no relevance, as members of the evaluation board do not necessarily form part of Enemalta. The reference made to another tender is also irrelevant to this case. The fact remains that appellant failed to submit the required certificates, and this is admitted by the appellant firm itself in the letter of objection. Dr Decesare continued that Clause 10.3 of the instructions to tenderers states that all the requested documents must be submitted, and all such documents must comply explicitly with these provisions. This point has been accepted by the Public Contracts Review Board several times before and he mentioned several instances where this was done. He specifically referred to Case 238 where the merit was exactly the same as the present. Mandatory documents that were not submitted could not be requested through clarification as this would amount to rectification.

Dr Albert Libreri explained that appellants thought that once Form 4.9 was submitted, their offer provided all the requisites and was compliant. The missing information was after all just for references, and it was taken for granted that the contracting authority would check with the list of clients submitted in form 4.9, itself. This was not an omission that entailed disqualification as it would not be proportional to do so. He cited a European Court of Justice decision wherein it held that where there is an obvious error in a bid, it was disproportionate and unlawful not to seek clarification, and permit a correction. To fail to provide a certificate issued from the contracting authority itself was totally not proportional action in a €8,000,000 tender. After all, the works provided to Enemalta by the appellant before had all been completed to the satisfaction of the contracting authority.

Dr Franco Galea on behalf of the preferred bidder said that tender conditions were there for all, and the same for each bidder. The conditions clearly required the submission of the certificates in question. A bidder could not decide to ignore these conditions and fail to submit them. Any request from the evaluation board would not have been a clarification but a rectification. Appellant failed to submit any certificates not just those from the contracting authority itself. He explained that the clarification stated that the contracting authority reserved the right ask for satisfaction by the bidders' clients and not certification.

Dr Steven Decesare for the contracting authority said that it is not true that once form 4.9 was filled, the tender conditions were adhered to. All conditions had to be satisfied. The Tideland case regarded a form filled up with a typing error, where it could be clearly seen that such an error was made. In this case all the other bidders filled in the correct form and provided the requested certificates. This Board had previously decided that where there was an admission of an omission by the objector, was enough to disqualify his bid. The fact that Enemalta reserved the right to contact bidders' clients did not mean that it was going to ask them to provide the certificates itself, and it was a right that was reserved and not an obligation. There is an EU directive that states that you cannot ask for non submitted documents.

Dr Albert Libreri reiterated that another tender, issued nine days after the present one, and having the same evaluation board, is relevant and not irrelevant. One questions why the same evaluation board chose to ask for clarifications in one case and not in the present one.

The hearing was here brought to a close.

This Board,

Having taken into consideration the Court of Appeals ruling dated 29th November 2012 and also through the Appellant's verbal submission during the hearing held on the 24th September 2013.

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 23rd January 2013, had objected to the decision taken by the pertinent authority, in that:

a) The Appellant contends that the Public Contracts Review Board should now decide on the merits of the case, although the tender in question has already been awarded.

b) The Appellant's bid was cheaper than that of the awarded bidder.

c) The missing information, being claimed as such by the contracting Authority, was in fact submitted by the Appellant via form 4.9 of the tender document.

d) The Appellant confirmed that the only missing documentation was the certification of works carried out over the last 5 years.

e) Since the information was given by the Appellant relating to previous experience and satisfactorily completion of same, the Contracting Authority had every opportunity to verify such required experience of the Appellant's performance over the required period.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 24th September 2013, in that:

a) Since this tender was a 'Three package tender', the Evaluation Board could not be aware of the Appellant's bid price.

b) The mandatory requirement of the 'Satisfactory Execution of Previous Contracts Certification' of works carried out had not been submitted by the Appellant.

c) The Appellant's bid satisfied only the first and third requisite of sub clause 6.1.2(c).

d) The fact that the Appellant submitted a list of a previous works carried out which included the Contacting Authority itself does not justify the failure for non submission of the relevant certifications as required in the conditions of the tender document.

Reached the following conclusions:

1. **This Board opines that the certifications required in the tender document were mandatory requirements.**

2. **The Appellant was aware of the requirement to submit all documentation as specified in the tender document.**

3. **It was the onus of the tenderer to submit all relevant information as requested in the tender document and not for the Evaluation Board to seek confirmation of the listed contract of works carried out by the Appellant.**

4. **The Evaluation Board's duties are to:**

   I. **Ensure that all documentation is received and is in accordance with the specified requirements as stipulated in the conditions of the tender document.**

   II. **Confirm that the documentation is administratively compliant. In this case, this Board opines that the decision taken by the Evaluation Board to deem the Appellant's offer as being 'Administratively non compliant' was justified.**

   III. **The Evaluation Board should not act as Auditors but as Evaluators. In this regard, the same Board were not in duty bound to seek additional information which was missing from the tender documentation and which was mandatory obligation on the Appellant's part to submit.**

5. **This Board noted that it was not the first time that the Appellant tendered for such projects and the Appellant was fully aware that all requested documentation in a tender document should be submitted. Especially when one takes into account the magnitude of the tender under appeal.**

In view of the above, this Board finds against the Appellant Company however, this same Board recommends that the deposit paid by the Appellant should be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

5 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 596

KCM/M 313/03

Tender for the Supply of Paving Material at Gnien il-Familja, Ta' Kercem.

The tender was published on the 25th January 2013. The closing date was the 22nd March 2013.

The estimated value of the Tender was €25,423.73 (Exclusive of VAT).

Two Bidders (2) bidder submitted an offer.

On the 19th July 2013, AF Ellis (Home Décor) Limited filed an objection against the rejection of their bid as being administratively non-compliant and the decision to award the tender to Rapa Showroom Co Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 24th September 2013 to discuss the appeal.

Present for the hearing:

A.F. Ellis (Home Decor) Limited - Appellant

Dr Joseph Ellis	Legal representative

Rapa Showroom Company Limited - Preferred Bidder

Mr Joe Paul Rapa	Representative
Dr Joanne Vella Cuschieri	Legal representative

Ta' Kercem Local Council - Contracting Authority

Mr Mario Azzopardi	Chairman Evaluation board
Ms Marianne Sagona	Secretary Evaluation board
Arch William Lewis	Member Evaluation board
Arch Alex Bigeni	Member Evaluation board
Dr Joshua Grech	Member Evaluation board
Dr Larry Formosa	Legal Representative

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

Dr Joseph Ellis, on behalf of the appellant company A.F. Ellis (Home Decor) Limited said that his client was disqualified because it failed to fill in Volume I, Section 2 of the Tender form subsection C, Clauses 1, 2, and 3, Tenderer's Declaration, and failed to give date and amount of tender. These items

are found at page 18 of the tender document. Clause 1 states that bidder had examined the tender document including clarification notes, and that the bidder accepted the conditions in their entirety without reserve or restriction. He could not see what had to be filled in here. Clause 2 states that tenderer offers to execute, in accordance to the terms of the tender document and conditions, and time limits laid down, without reserve or restrictions, the following works. This was not filled in by appellant. Clause 3 deals with the price offer of the tender and was also omitted. Dr Ellis contends that these three clauses were through an oversight not filled in. He said that the notice sent by the contracting authority was not according to the regulations as it did not contain all the necessary details as required by Clause 34.3. It should have stated the preferred bidder, and the amount offered by the said bidder, but did not. He also stated that the notice was sent to appellant through the ordinary post and not as required by the Regulations that said that such notice had to be sent either by fax or by electronic mail. He cited the recent Court of Appeal in the case of Gatt Brothers vs the Victoria Local Council which dealt with the notice sent to bidders.

Dr Joseph Ellis stated that the information that was not submitted by appellant had been included in other sections of the appellant's tender bid. Page 51 Volume 4 of appellant's offer contained the necessary information, including the Bills of Quantities, rates the name of the tenderer and other relevant information. He said that the information omitted by appellant through an oversight in Volume I, Section 2 subsection C were in fact included in Volume 4. The appellants offer should not have thus been discarded, much more so as it was the most advantageous offer. He contended that the decision to disqualify appellant's offer was too harsh when considering also the fact that the evaluation board should have asked for a clarification from appellant in terms of Volume I Section 1 Article 29.1 of the tender document. Finally Dr Ellis pointed out that there was nowhere indicated in the tender document that failure to fill any of the Clauses 1, 2, and 3 of Section C Volume I would entail disqualification.

Dr Joshua Grech for the contracting authority said that the first grievance advanced by appellant company was frivolous as appellant had enough information enable it to file a letter of objection which in fact it did. Appellant admitted the omission of Clauses 1, 2, and 3 through an oversight, but this being an oversight does not mean the omission can be rectified. The fact that appellant failed to fill in these clauses went against the requirements of the tender documents. The tender form had to be filled and signed. Paragraph 16, note 3 states that no rectification shall be allowed, only clarifications on submitted information is allowed, and the evaluation board could not ask appellant to rectify its oversight. Furthermore Section C included also the tender declaration form where bidder had to declare that he accepted all the conditions of the tender document. Even this declaration was omitted by appellant.

The evaluation board first examines the administratively compliance of bids, then the technical compliance and finally the financial aspect of the bids. Appellant's offer failed at the administrative stage and its technical and financial bid did not be examined. Therefore the evaluation board could not proceed to view Volume 4 of appellant's offer, to view the missing information, as is being claimed by the appellant.

Section C is the operative section of the tender. If appellant was awarded tender and difficulties arose later, the contracting authority would not be able to take necessary action against the appellant, because the tender declaration had not been signed. The decision of the evaluation board was not too harsh. After all there were other bidders who complied wholly with the tender documents and filled in all the forms. These should not be prejudiced by ignoring omissions. Replying to a question by the Board, Dr Grech confirmed that the preferred bidder's offer was the second cheapest, and the tender was fully compliant.

Dr Larry Formosa on behalf of the contracting authority explained that the evaluation board had sought direction on this matter from the Department of Contracts, but as a reply they were directed, by a letter of the 30th May 2013 to a recent decision by this Public Contract Review Board, whereby the omission of the signing of the Tender Declaration by a bidder was termed to mean non-compliance of the said bidder.

Dr Joanne Vella Cuschieri for the preferred bidder stated that the letter from the Contracting Authority had to state that a right of appeal was available and the time within which this was to be filed. In the present case, this procedure was adhered to by the contracting authority. The form consisted of three pages, but one of these pages was not filled. The missing information contained in this un-filled page was necessary for the validity of the offer. Article 16 clearly states that it 'must' be filled.

Dr Ellis for the appellant said that this was not a three package tender and all the volumes had to be available to the evaluation board.

Dr Joshua Grech for the contracting authority explained that evaluation board had to follow procedures. Appellant's bid failed at step 2 and could not be evaluated for the next steps. The single envelope procedure required six criteria or steps that had to be evaluated. The bid bond that was not required, proof of purchase, conditions of employment, financial standing, experience as contractor the technical offer and the financial offer, bills of quantity. Dr Grech reiterated that this was covered by note 3 that allowed no rectification. As soon as the offer was non-compliant, the remaining steps would not be evaluated, so the evaluation board did not go into appellant's financial offer. Appellant's bid was defective while the other tender had done everything required.

Dr Joseph Ellis closed by stating that the evaluation board should have asked the advice of the General Contracts Committee and not of the Director of Contracts.

The hearing was here brought to a close.

This Board,

Having noted the Appellant's objection in terms of the ' Reasoned Letter of Objection' dated 18th July 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 24th September 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant refers to the letter dated 8th July 2013, sent to the Appellant by the Contracting Authority, whereby:

i) In the tender document, referring to clause 34.2 of Volume 1, there was no indication of the requisites that the Contracting Authority are insisting, the Appellant failed to submit.

ii) The Contracting Authority failed to abide by clause 34.3 wherein, it is requested that the communication is to be remitted to the Appellant by electronic mail.

b) The decision taken by the Evaluation Board to eliminate the Appellant's bid on the grounds that the latter failed to include details in the appropriate form of the tender document, was too harsh.

c) The information requested in the tender document was in fact submitted but due to oversight it was not listed in the appropriate section in the tender.

d) The Evaluation Board should have asked the Appellant for clarifications since Appellant's bid was the cheapest.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 24th September 2013, in that:

a) The Appellant admitted the omissions and failed to fill in details which were mandatory.

b) The tender document states that no retifications will be allowed and in this respect the Evaluation Board had to abide by these regulations. To this effect, the Appellant's bid failed the 'Administrative Compliance' test and the offer could not be evaluated further.

c) Other bidders complied in all respect with regards to detail and information requested in the tender document.

Reached the following conclusions:

1. **The tender document is the formal contract between the Contracting Authority and the tenderer. The same document, like any other contract, imposes the duty and obligation on the tenderer to abide strictly by the conditions laid out in the tender document.**

2. **The Appellant failed to give the complete information as stipulated in the tender document.**

3. **The Evaluation Board could only request for clarifications on information submitted and contained in the tender document. The same Board cannot ask for clarifications on information missing from the tender document.**

4. **Although the Appellant's Bid would have been the cheapest, it was the Appellant's onus and duty to check and verify that the tender document was fully complete prior to submission of same to the Contracting Authority.**

In view of the above, this Board finds against the Appellant Company, however, this same Board recommends that the deposit paid by the Appellant be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

31 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 597

CPSU 2753/2012

Tender: Hydrocellular Foam Sacral Shaped Dressings.

The tender was published on the 16th November 2012. The closing date was the 17th December 2012.

The estimated value of the Tender was €18,536 (Exclusive of VAT).

Six Bidders (6) bidder submitted an offer.

On the 19th July 2013, Krypton Chemists Limited filed an objection against the rejection of their bid as being administratively non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 26th September 2013 to discuss the appeal.

Present for the hearing:

Krypton Chemists Limited - Appellants

Ms. Patricia Engerer	Representative

Cherubino Limited - Preferred Bidder

Mr Francis Cherubino	Representative
Mr Tommy Cherubino	Representative

Central Procurement and Supplies Unit - Contracting Authority

Mr George Fenech	Chairperson Evaluation Board
Ms Josette Camilleri	Secretary Evaluation Board
Ms Connie Miceli	Representative
Ms Miriam Wubbles	Member Evaluation Board

The Chairman made a brief introduction and asked the appellants' representative to make her submissions on the objection.

Ms Patricia Engerer, marketing manager, Krypton Chemists Ltd. for appellants said that the reason why their bid was disqualified was because they did not submit any registration certificate.

Mr George Fenech chairman of the evaluation board stated that one of the criteria was the submission of certification and that products have to be marked CE. This was a requirement from each bidder. Appellants stated in their letter of objection that this requirement does not feature anywhere in the

tender document. Page 36 of the tender document, Clause 24.7.3 states that all non medical products for pharmaceutical purposes must comply with respective standard, and be accompanied by a detailed quality control analysis report by a certified body. Contractor must also provide any relevant support and documentation necessary for the responsible person to ensure the safe use of the product. Appellants although they ticked the relevant box showing that product was EC certified, failed to submit the necessary certificate. The product appellants offered was produced in Egypt, and that is not in the European Union, and thus the requested certification was needed. More so, the required power of attorney from the manufacturer was also not submitted. This was required in case there arose problems with the product and the contracting authority would not be able to proceed against manufacturer without this power of attorney. Malta Standards Authority insisted on products having the said certification. The price factor was never taken into consideration because appellants' offer was administratively non-compliant. Appellants did not submit anything, no literature and no certification were made available to the evaluation board. The preferred bidder included everything, certification and literature.

Ms Engerer claimed that registration certification and EU certification were not the same and that the tender required certification only for medicinal products. She continued that, as the appellants had supplied products to the hospital for more than twelve years, could not the evaluation board have asked for a clarification?

Mr George Fenech said that the evaluation board were precluded from contacting any of the bidders during the evaluation process. This product is not being used for the first time. It is relatively new but it was tested before the issuing of the tender. Samples were obtained through a quotation and the product was tested. This was a generic test and not just one specific brand was tested.

Ms Miriam Wubbles explained that the product served to protect the area around the lower back. It serves both as a kind of cushion as well as for absorbing any liquid that is generated by lower back wounds and lesions. If the product is not of quality it could cause discomfort to patients and cause allergies.

The hearing was here brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the ' Reasoned Letter of Objection' dated 19th July 2013 and also through the Appellant's verbal submissions during the hearing held on 26th August 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant's bid was considered by the Evaluation Board of the Contracting Authority as being 'Administratively non compliant' for failure to submit the required certifications. Yet these requirements were not stated in the tender document.**

b) **The tenders that required the certifications were for medicinal products only and in this particular tender the product is non medicinal. Hence, the certifications were not required in this case.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 26th August 2013, in that:

a) **The Appellant did not submit the required certifications as stated in the tender document.**

b) **The Evaluation Board were not in a position to contact the Appellant during the evaluation stage for missing information as required in the tender document.**

c) **The product had to be of high quality and fully certified as requested in the tender document. One had to take into consideration that the product had to be applied on patients without causing any allergies and other discomforts to same.**

Reached the following conclusions:

1. **This Board noted that the Appellant's bid for similar and related products was not the first one to be submitted by the latter. In this regard this Board feels that the Appellant should have been aware of the certifications needed.**

2. **This Board also feels that if the Appellant was not clear as to what type of certification was required, he could have sought clarifications from the Contracting Authority prior to submission of the tender document.**

3. **The certifications required by the Contracting Authority were of great importance to ensure that the product is of high quality for the benefit of patients.**

4. **The Preferred Bidder's offer was fully compliant.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed. Deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

4 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 598

CT 3120/2012

Services Tender for the Design, Preparation, Implementation, Delivery and Evaluation of Training Courses related to the Film Servicing Industry.

The tender was published on the 12th February 2013. The closing date was the 9th April 2013.

The estimated value of the Tender was €156,893.98 (Inclusive of VAT).

One Bidder (1) bidder submitted an offer.

On the 12th July 2013, Malta Film Academy joint venture filed an objection against the rejection of their bid as being administratively non-compliant and the decision to cancel the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 26th September 2013 to discuss the appeal.

Present for the hearing:

Malta Film Academy joint venture -	**Appellants**
Mrs. Phyllis Muscat	Representative
Dr Aron Mifsud Bonnici	Legal Representative

Malta Film Commission - Contracting Authority

Mr Claude Cuschieri	Chairperson Evaluation Board
Ms Susan Ronald	Secretary Evaluation Board
Mr Bjorn Callus	Member Evaluation Board
Ms Helen Sciberras Brownrich	Member Evaluation Board
Ms Audrey Callus Randich	Member Evaluation Board
Ms Martha Criado	Project Co-ordinator

The Chairman made a brief introduction and asked the appellants' representative to make his submissions on the objection.

Dr Aaron Mifsud Bonnici on behalf of the appellants stated that his clients wanted to air two grievances in their objection, one regarding their disqualification, and the other regarding the cancellation of the tender. These two grievances arise from the principle that any interaction between two parties has to be done in bona fede. His clients were disqualified because it was stated that their offer was administratively non-compliant because they failed to submit a signed copy of a protocol between them and the Malta Qualifications Framework. When his clients had contacted the relevant authority, who had to sign this protocol, it resulted that this was not possible at that stage. The signing could only be done following the establishment of certain criteria that the contracting

authority itself had to set together with the contractor who was awarded the tender. As the contracting authority itself had not yet established the parameters on which the certifying authority would eventually issue certificates, appellants found it impossible to abide by this requirement. It is clear that if and when the tender was awarded, the contractor would then have to finalize in detail the course requirements with the contracting authority and then apply for the signing of the protocol.
Clients, whose course was based on the City of Glasgow College course, had communicated with the said College and made them aware of the situation. The College had confirmed that the course was recognized and certified by the corresponding authority in the United Kingdom. Being certified by a member state of the European Union meant that clients could have produced this certification. However any customisation that would be made to the course would subsequently have to be certified by the MQA as well. The fact that clients' bid was deemed administratively non compliant because of something that was impossible to provide really means that it was the contracting authority itself that was administratively non-compliant to other parties who were acting in bona fede. Clients submitted all the above with their bid to the contracting authority.
He then continued that the contracting authority cancelled the tender referring to Article 33.3 (a) which states that a tender may be cancelled when there were no bids that were qualitatively or financially not worthwhile. It is being assumed that this was in reference to clients bid. It is not justified to say that there were no bids. Neither can it be stated that clients' bid was qualitatively not worthwhile, nor that it was financially not worthwhile. Thus tender should not have been cancelled. This cancellation is prejudicial to appellants since should the Board decide favourably the objection, the cancellation would remain.

Mr Claude Cuschieri, Chairman Evaluation Board, for the contracting authority stated that when the evaluation board met to adjudicate the tender the normal procedure was followed. When the criteria were checked it was discovered that seven out of eight submissions of the appellants' bid were correct. However one criterion out of seven was not abided with. The signed copy of the protocol, that had to be submitted with the tender, was missing. At this stage therefore, the evaluation of the bid had to stop because the bid was then administratively non compliant. The evaluation process had to be carried out on the available, submitted documentation, and could not thus be continued. The evaluation board had received no communication about any correspondence between appellants and the Malta Qualifications Framework. The board was not informed that the signed protocol would be produced later. The evaluation board was aware that this would result in wasted resources, and wished to award the tender, but had no other option but to discard appellants' offer. It transpired later that the contracting authority had contacted the Department of Contracts on the matter on the 7th May 2013 seeking clarification on this missing document. However on the 23rd May 2013 the Department of Contracts said that although the appellants were asked to rectify the matter, up to that date no reply was received from the same appellants. It was then, on the 4th June 2013 that the evaluation board had to decide to formally find appellants non-compliant.

Replying to a question by the Board, Mr Cuschieri stated that as far as he was aware, there had been some contact between the appellants and the Department of Contracts, but the rectification requested by the latter was not produced by the appellants.

Dr Aaron Mifsud Bonnici, replying to a Board question stated that the Contracting Authority wanted a signed agreement between appellants and the certification local authority. Appellants were informed that such an agreement could not be signed before the details and requirements of the course were known, and these details could not be established until the tender is awarded. There could not be any signed agreement on a hypothetical course. The tender document did not provide enough information

on which the protocol could be signed. It was for this reason that appellants produced the next best solution, certification for the City of Glasgow College, certification by a European Member State that would be considered as equivalent. These facts were submitted to the Department of Contracts and not to the evaluation board. The only reply appellants received was the notice informing them that their bid was disqualified.

Ms Susan Ronald, secretary evaluation board stated that the tender obliged bidders to establish course content and have it recognized by the relevant authority. The bidder had to propose the course curriculum himself, and again have it recognized by the Qualifications Authorities.

Dr Aaron Mifsud Bonnici stated that he wished to file a letter which unfortunately he did not have at the moment and asked that the appellants be allowed to submit it later on. Appellants had no issue with the evaluation board. Dr Mifsud Bonnici promised to produce correspondence with Glasgow, letter and email exchanges from appellants to Department of Contract and appellants' correspondence with the certification authority.

The hearing was here brought to a close.

Second Hearing

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members reconvened a hearing on Tuesday 22nd October 2013 to continue hearing the appeal.

Present for the hearing:

Malta Film Academy joint venture - Appellants

Mrs. Phyllis Muscat	Representative
Dr Aron Mifsud Bonnici	Legal Representative

Malta Film Commission - Contracting Authority

Ms Susan Ronald	Secretary Evaluation Board
Mr Bjorn Callus	Member evaluation board
Ms Helen Sciberras Brownrich	Member evaluation board
Ms Martha Criado	Project Co-ordinator

Department of Contracts

Mr Jonathan Barbara

Witnesses:

Dr Philip von Brockdorff	Former NCHFE Representative
Mr Peter Busuttil	Commissioner, Malta Film Commission

The Chairman explained that this additional hearing was required because the Board wished to hear the evidence of Dr Philip von Brockdorff as the appellant's bid was disqualified because a signed protocol was not submitted with the offer. In the Board's opinion, such a protocol entailed detailed discussions, during which, the points where the protocol would be adopted be identified. Thus to ask bidders to submit such a protocol within a short time is deemed unfeasible.

Dr Philip von Brockdorff under oath stated that when the tender was being processed, he was the Chief Executive of the National Commission for Further and Higher Education. This is the regulatory body that issues licences to institutions that offer tertiary and advanced levels of education. The Commission also regulates new programmes accredited to it under a legal framework that came into force last year. He defined protocol as a process where the Commission, always according to the Malta Qualifications Framework, evaluates programmes and issues their evaluation. There are several levels for example level 5 is equivalent to a diploma. After this, certificates are issued by the accredited entity, according to the level. Thus a certificate for a course held by the accredited entity becomes recognized both in Malta and the European Union. Thus protocol means a process of accreditation following evaluation according to the Qualifications Framework.

On being asked by the Chairman about the length of the process, Dr von Brockdorff said that the Commission had the services of a lawyer to examine the process according to a legal framework, but this was a lengthy process because the evaluators had to examine the application in great detail. Learning outcomes have to be gone into with great detail. Furthermore the Commission uses evaluators who are specialists in the specific subjects, and these evaluators are difficult to find. It is because of this that a length of time is required. However this process has to be conducted very carefully because a course certified by the Commission would be recognized in any European Union country.

On being asked by Dr Aaron Mifsud Bonnici, witness stated that he is aware that there were communications between the appellant and the Commission about the protocol. He agreed that this was the first course of the kind. This was not a run of the mill course and specialist evaluators had to be engaged, some of these from overseas. A normal run of the mill protocol needs around two months to be concluded. In the present case, meetings were held between Commission official and the entity proposing the course, who filed the application. It was important for the presentation to be good, and in the present case there were no problems encountered. However there was the need for the specialists to examine the programme and outcomes. As a programme, appellants' protocol was acceptable and compliant. In fact the protocol was eventually approved. It was given priority.

Dr Aaron Mifsud Bonnici asked witness if he agreed that there was the possibility that, after the tender was awarded, the contents of the course could be changed. He said that if there was a need to change anything, the Commission was ready to re-evaluate the programme, following a request by the provider. A programme that has been accepted is always liable to be changed, it is not cast in stone, Dr von Brockdorff continued.

Dr Philip von Brockdorff said that when a protocol is recognized by the NCHFE, then automatically it becomes recognized in other European Union States. If an accreditation issued by the Scottish Authority is submitted, the Commission contacts its counterpart in the other country, and after verification, the accreditation is issued.

Replying to a question by the Chairman, Dr Aaron Mifsud Bonnici said that the original tender bid contained the information that the course was developed in Glasgow. Appellants were also in communication with the National Commission for Further and Higher Education and informed them that this process was ongoing. In fact the accreditation was issued during the appeal period. He insisted that the deadline was too short to provide the protocol. Appellants continued to pursue the signing of the protocol even after having been disqualified. In fact the protocol has now been obtained. Appellants are now in position to provide the service requested by the tender, and Dr Aaron Mifsud Bonnici therefore asked that this Board revokes the decision taken by the contracting authority to disqualify their bid.

The hearing was brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 12th July 2013 and also through the verbal submissions presented by same during the hearing held on 26th August 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's bid was disqualified on the 'Non Administratively Compliance' basis, due to the fact that Appellant failed to submit a signed copy of a protocol within the stipulated period of time.

b) The signed protocol could only be submitted to the Contracting Authority, once all criterias to be included in the same protocol were established.

c) The Contracting Authority itself did not identify the basis and parameters of the required protocol. Nor did the same Authority give an indication of such parameters.

d) The Evaluation Board of the Contracting Authority was made aware of this deficiency.

e) In Fact, the Appellant submitted all the information as requested in the tender document. To this effect the Appellant strongly feels that the cancellation of the tender was unjust.

f) The Appellant did in fact inform the Evaluation Board that such a protocol could not be provided unless and until the specific details and requirements were identified

g) In fact, the Appellant produced an equivalent documentation wherein it was stated that the 'City of Glasgow College' will produce a European Certification by a Member state that should suffice this requirement. This documentation was in fact submitted to the Contracting Authority.

h) On the other hand, the Appellant pledged to produce the required correspondence to attest that there was ongoing correspondence regarding certification.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 26th August2013, in that:

a) **The Appellant did follow the normal procedure and in fact he met seven out of eight of the requirements as stipulated in the tender document. The missing requirement was the submission of the signed protocol.**

b) **At this stage, the Evaluation Board could not proceed as the Appellant's Bid was deemed as 'Administratively non Compliant).**

c) **The Evaluation Board of the Contracting Authority was not aware that the required protocol would be signed and could be presented later on. Thus, the same Board had no other option but to discard the Appellant's bid.**

d) **The fact that The Evaluation Board did not have any information from the Appellant regarding the missing information, the Appellant's bid was considered as 'Administrative non Compliant'.**

e) **The Bidders were obliged to establish the network of the courses themselves and same were to be recognised by a relevant Authority.**

This Board opted that more technical evidence was necessary, in order to ensure a fair hearing.

The second hearing was held on 22nd October 2013 wherein the main witness was questioned both by the Appellant and the Chairman of the Public Contracts ReviewBoard in that the following facts were revealed:

a) **Under oath, the expert, summoned by the Appellant, explained in detail his role in the Commission for Further and Higher Education.**

b) **The witness also explained in detail what a protocol represent.**

c) **The same witness confirmed that the process of establishing a protocol was a lengthy one. In fact, in this particular case, it would usually take from 2 to 3 months to finalise a protocol, all things being equal.**

Reached the following conclusions:

1. **After having heard and examined all the submissions of the Appellant, the Contracting Authority and the witness, this Board finds that the Appellant,s failure to submit a signed protocol within the stipulated time was not only unreasonable but really impossible.**

2. **From the evidence presented during the hearing held on 22nd October 2013 and also through the verbal submissions presented by the witness, it was evidently clear that:**

    i) **The requirement stipulated by the Evaluation Board was not possible.**

    ii) **The Appellant's Bid was fully compliant as confirmed by the witness who is an expert in this field.**

In View of the above, This Board finds in favour of the Appellant and recommends the following:

a) **The Appellant be immediately integrated in the next evaluation process of the tender.**

b) **The deposit paid by the Appellant is to be reimbursed.**

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

29 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 599

CPSU/CPU 2742/12

Tender for the Supply of Mercury Free Thermometers.

The tender was published on the 9th November 2012. The closing date was the 10th December 2012.

The estimated value of the Tender was: €113,202 (Exclusive of VAT).

Six (6) bidders submitted offers for this tender.

On the 1st July 2013 Pharmafusion Limited filed an objection against the decision to discard its offer and the award to Alphaplus Medical Supplies.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 26th September 2013 to discuss the appeal.

Present for the hearing were:

Pharmafusion Limited - Appellant

Ms Giovanna Pocock	Representative
Mr Ives Pocock	Representative

Alphaplus Medical Supplies - Preferred Bidder

Mr Lino Busuttil	Representative

Central Procurement and Supplies Unit - Contracting Authority

Mr George Fenech	Chairperson Evaluation Board
Mr Joe Darmanin	Member Evaluation Board
Ms Rose Aquilina	Senior Pharmacy Technician
Ms Connie Miceli	Representative

After the Chairman's brief introduction, the representative for the appellant was asked to submit his reasons for the objection.

Mr Ives Pocock for the appellant firm stated that its offer although being the cheapest, had been discarded because of an allegedly technical non-compliance. The product his firm offered was CE certified and was sold all over Europe. The product was also presently being supplied to the contracting authority through a previous contract. Appellant firm was the present contractor and there had been no complaints or problems with the product. In fact appellant had no need to submit samples

to be tested, as these were taken from the supply the appellant had already supplied, but the appellant still submitted fresh samples. The previous contract was still in force.

Mr George Fenech, Chairman of the Evaluation Board, on behalf of the contracting authority stated that the letter of objection listed two grievances, one that the offer was the cheapest and the other that the previous contract was still in force and an amount of thermometers from that contract had not been ordered, yet a new tender was issued. The contract was going to lapse thus a fresh tender had to be issued in order to ensure that a constant supply was available. In the previous tender there had been no condition that the contracting authority had to take up all the supplies before issuing another tender. He reminded the Board that his position was Chairman of the evaluation board and was not an evaluator himself. When the tender for mercury free thermometers was issued the first time, there probably had been few suppliers who bid for the tender. In the present tender there were more bidders and the choice available to the evaluation board allowed the said board to raise issues that as users, they considered were important. The evaluation board was of the opinion that appellant product's reading of temperatures was inferior and that it took longer to return to base line temperature after obtaining a reading. Appellant Pharmafusion was the present supplier up to July, when the contract lapsed.

Mr Joe Darmanin, a nursing officer and member of the evaluation board under oath stated that the thermometers in question are only used whenever clinical thermometers are not available. The temperature reading of the thermometers offered by the preferred bidder was clearer, and the return to the normal temperature was faster. The estimated annual consumption of these mercury free thermometers is around 20,000. The evaluation board did not look at the price of the samples that were tested.

Mr Ives Pocock for appellant said that the contracting authority failed to exercise the right to extend the present contract. Furthermore the product we offered was engraved with the DH mark while others had a label stuck on the side.

Me Giovanna Pocock said that the same specifications used for the previous contract were used for the tender under examination. The tender was awarded one month before the lapse of the previous contract, in which appellant was the contractor. She stated that she could not understand how the evaluation board now found the thermometers supplied by appellant to be unreadable.

Mr George Fenech for the contracting authority said that the contracting authority had to seek the patients' needs first and foremost. The contracting authority was seeking an efficient product. The evaluation board did not say that the product offered by the appellant was not good; the board said that they could obtain a better product. The competition had increased.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 1st July 2013, and also through the Appellant's verbal submissions during the hearing held on 26th September 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant stated that his offer was the cheapest.**

b) The Appellant's bid was discarded as being 'technically non compliant'.

c) The Appellant has been the supplier for the same product to the same Contracting Authority and no complaints were made by same for the duration of the present contract.

d) The Preferred Bidder was awarded the contract one month prior to the expiry period of the present contract.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 26th September 2013, in that:

a) The Tender had to be issued before the lapse of the previous contractual tender, as otherwise the supply of this medical product would not be available.

b) Under the previous marketing conditions, there was a limited number of bidders, but now the same market has provided more advanced competitive similar products.

c) The Preferred Bidder's Product was more clear to read and more practical in usage.

d) The Contracting Authority had to choose the most efficient product which will adapt to the patient's needs.

Reached the following conclusions:

1. **The product chosen by the Evaluation Board of the Contracting Authority was the most suitable for the benefit of the patient.**
2. **The Evaluation Board of the Contracting Authority was very diligently aware that shortages of the product would not occur at Mater Dei.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

31 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 600

CT2096/2011

Framework Agreement for the Supply of National and European Union (EU) Flags.

The tender was published on the 2nd August 2011. The closing date was the 30th August 2011.

The estimated value of the Tender was €17,797 (Exclusive of VAT).

Five (5) bidders had submitted an offer.

On the 30th April 2013, Astor Company Limited filed an objection against the rejection of their bid for Option 1 as being technically non-compliant, and against the cancellation of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 1st October 2013 to discuss the appeal.

Present for the hearing:

Astor Company Limited - Appellant

Mr Jeffrey Calleja	Representative

Deprtment of Contracts - Contracting Authority

Mr Oreste Cassar	Chairman Evaluation Board
Mr Sandro Drago	Member Evaluation Board
Ms Jane Mifsud	Member Evaluation Board
Ms Marisa Gauci	Member Evaluation Board

Following a brief introduction by the Chairperson, the appellant's representative was asked to make his submissions on the relative objection.

Mr Jeffrey Calleja on behalf of the appellant Astor Company Limited explained that appellant had submitted three options for the tender. Its offer for Option 1 was disqualified as being technically non compliant and the other two options were disqualified because they exceeded the available budget. However appellant's Option 2 exceeded the previous awarded tender, that awarded in 2009, just by 11%. This increase just covers the cost of living increases given over the intervening years. Contends that whoever worked out the estimates for the present tender reached a too low figure. He further contended that appellant's offer for items 1 and 3 were cheaper than that of 2009. Mr Calleja contends that the appellant could have been awarded one option. He insists that the global price exceeds the previous tender by just €1146.

Oreste Cassar, Chairman of the evaluation board, on behalf of the contracting authority, said that the estimate for the tender is calculated after obtaining from the user departments the number of flags they would be using. The Evaluation committee had a commitment of €21,000 for these flags, including VAT. There were two bidders that were within this budget, and these were asked to submit samples that were then tested at the MCCAA Laboratories. These tests are costly and cost around €600 per test. It resulted that these two bids that were within the budget turned out to be technically non-compliant. Thus at that stage, it was decided to stop the evaluation because of the budget restrictions. The appellant's two other options were not tested because, being over the estimate it was felt that testing them would be paying the test costs for nothing. He explained that all the offers that were clearly over the estimate were not considered any further.

Mr Jeffrey Calleja insisted that there must have been a mistake when the estimated budget was being prepared, because the quantity of required items had increased.

Mr Oreste Cassar reiterated that the end users are consulted before assessing the estimated value of the tender, it could be that the demand for these flags was lower than in the previous tender. In fact there were two bidders who were within the estimate, but their bids were not technically compliant.

The hearing was here brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 30th April 2013 and also through the verbal submissions during the hearing held on 1st October 2013, had objected to the decision taken by the pertinent Authority , in that:

a) **The Appellant's bid for Option 1 was not technically compliant and to this effect the Appellant's offer was disqualified from the next stage of the evaluation process.**

b) **The Appellant insisted that his bid for Option No 2 only exceeded the previous tender value by 11%. This increase in Bid price reflected the increases in cost of living allowances over the years. To this effect, the Appellant's bid for Option 2 was also discarded by the Evaluation Board as the Appellant's bid price failed to fall within the Budget allotted for this tender.**

c) **The Appellant's bid price for Option 1 and Option 3 were in fact cheaper than the price quoted for the same product in the previous tender issued in 2009.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 1st October 2013, in that:

a) **The Contracting Authority estimates the value of the tender based on the demand requested by the user departments.**

b) **All submitted offers were technically non compliant.**

c) **In view of b) above the Contracting Authority decided to cancel the tender process.**

Reached the following conclusions:

1. **The Appellant cannot and should not compare the estimated value of the present tender with that of a previous issued tender. Each tender has its own requisites and quantities and in this regard, this Board feels that such comparison is not logical.**

2. **It is a known established fact that a budget is formulated by the Contracting Authority, based on information or rather anticipated requirements of the user departments. In this regard the Evaluation Board acted diligently in cancelling the tender as all submitted offers exceeded the allotted value for this tender.**

3. **This Board also points out that all bidders were technically non compliant.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

5 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 601

CT 2170/12

Tender for the Finishing of Ten (10) Apartments at 56 Argotti Street, Floriana.

The tender was published on the 9th November 2012. The closing date was the 20th December 2012.

The estimated value of the Tender was: €160,941.60 (Inclusive of VAT).

Nine (9) bidders had submitted offers for this tender.

On the 24th May 2013 KDF Limited filed an objection against the decision to discard its offer as being technically non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 1st October 2013 to discuss the appeal.

Present for the hearing:

KDF Limited - Appellant

Mr Karl De Flavia	Representative
Dr Adrian Delia	Legal Representative
Dr Matthew Paris	Legal Representative

CP Projects Joint Venture - Recommended Bidder

Mr Dmitry Pechenckin	Representative
Ms Veronica Zammit	Representative
Dr Mark Refalo	Legal Representative

Housing Authority - Contracting Authority

Perit Andre Pizzuto	Chairman Evaluation Board
Ms Graziella Calleja	Secretary Evaluation Board
Perit Anthony Camilleri	Member Evaluation Board
Perit Felix Sciberras	Member Evaluation Board
Perit Melanie Spiteri	Member Evaluation Board
Ms Romina Fenech	Representative

Department of Contracts

Mr Nicholas Aquilina	Procurement Manager

Following a brief introduction by the Chairman, the appellant's representative was invited to put forward his submissions on the objection.

Dr Adrian Delia on behalf of the appellant KDF Ltd stated that his client was given three grounds for the disqualification of its offer. He reminded the Board that this was a 'Price Only' tender, where his client had the cheapest offer.
The first reason for disqualification was "**Volume 1 Section 2 – Tender form:** *VAT Number not submitted."* He claimed that this was strange, as his client not only had not failed to submit this number, but had enclosed an authenticated copy of the VAT certificate with the tender bid.
The second reason given for disqualification was "**Form 7 – Personnel to be employed on this contract:** *Form incomplete. Names of H&S Representative and First Aider requested were not submitted."* Again, this is not understood because appellant had enclosed CVs and certificates for the two persons therein indicated and shown by their names. That is H&S Representative and First Aider, respectively Victor Vella and Karl de Flavia are named and their Ids, Addresses, Telephone numbers, mobile phone numbers and certificates were enclosed with the tender.
The third reason for disqualification was "**Form 9 – Work plan and Programme of Works:** *Work plan was not signed*." Dr Delia stated that his clients filled in correctly a detailed tender form and was disqualified by the evaluation board for omitting to sign just one form. He queried under which European Union decisions, and under which section of the local Public Procurement Laws is it stated that if a bidder, who was easily identified, has this particular signature been made mandatory, to disqualify him if he omits to sign?. This was not for example, a guarantee, which it is normally accepted, that has to be formally signed. The contracting authority is saying that the work plan was not signed.

Dr Delia continued by agreeing in part with the reasoned letter of reply filed by the recommended bidder, that no rectification should be allowed. Here, Dr Delia continued is not a case for rectification since his client had submitted the items in question in the original offer. If anything, appellant had increased formality, where a VAT number was requested, appellant submitted a VAT certificate. Regarding the other submissions made in the letter of reply, Dr Delia stated that these are true in fact and at law, but are not applicable for the present case. Where certain documents are requested in the tender, where it is clear that these form a formal and substantive part, then formality is applicable. If on the other hand the evaluators are trying to find fault through formalities, when it is evident that the information is already submitted, both local and overseas jurisprudence says that not only substance has to override form, but a clear and transparent effort should be made by the contracting authority to remove any doubts, opening up the evaluation procedures to as many bidders as possible, on condition that this is not prejudicial to third party interests.

The Chairman, Public Contracts Review Board asked the contracting authority if the information mentioned by the appellant above was in fact included in the tender document.

Perit Andre Pizzuto on behalf of the contracting authority stated that the tender document should be filled in its entirety. The VAT number in the tender form was missing. The evaluation board goes through tenders and sees that what was requested was given. A VAT certificate was not requested. The tender asked for completed forms. Additional enclosures were not assessed.

The Chairman remarked that if a bidder submitted a certificate which contains the VAT number and which is signed by the VAT commissioner, could it be said that the bidder did not submit the information?

Perit Andre Pizzuto affirmed that bidders' obligation, according to Clause 16.1 to provide the duly completed documents. Among these is the tender form. This was not duly completed by appellant. The tender form is a critical form and cannot be rectified. There were other bidders who were disqualified for omissions.

The Chairman here remarked that the form had the VAT number missing.

Perit Andre Pizzuto reiterated several times that the form was not duly completed. He could not state if the certificate was enclosed or not.

Mr Karl de Flavia, Director of the appellant company said under oath that the VAT certificate was submitted with the tender document. It was included in another separate folder attached to the tender. This folder was inserted with the tender in the envelope.

The Chairman wanted to ascertain that the certificate was enclosed with the tender, but this could not be found.

Perit Andre Pizzuto continued that if anything in the tender form had something missing, then it cannot be rectified, and if it cannot be rectified then it means that the tender bid is administratively non compliant. Since the form was not duly completed, at this stage no consideration was given to the financial offer and so he could not say if the appellant's offer was the cheapest or not. Page 21 of the appellant's bid was not filled-in with the VAT number. The second submission made by appellant regarded form 7. This form had to be filled. Page 30 of the tender, required a list of names, nationality experience and so on of employees. In appellant's bid this was not completed. The CVs mentioned by Dr Delia were not found in the tender, either. The evaluation board were not present when the tenders were opened as this was done by the contracts department. The offers were later given to the evaluation board. Mr Pizzuto himself was not an evaluator. In spite of the declaration that "see enclosed document" there were no other documents in the box of documents handed to the evaluation board by the Department of Contracts.

The Board asked the Chairman, Evaluation Board, Perit Andre Pizzuto if he as Chairman, had done any investigation regarding the fact that there was written "see enclosed documents" on the forms in question.

Perit Andre Pizzuto replied that when handed over the offers, the evaluation board were given to understand that they were given all the documents submitted by the bidders. No documents were missed by the evaluation board. It was ensured that the box containing the bids were empty. If it results that the department of contracts failed to provide the evaluation board with all the documents, then the evaluation has to be made again. Perit Andre Pizzuto continued that however, the signing of the work plan was demanded from all bidders. Bidders had to endorse their plans by signing the declaration, which specifically stated that failure to do so would result in the bid being discarded. By signing this, bidders accepted the tender conditions.

Dr Adrian Delia for the appellant stated that when a bidder signs the tender form it means that he is accepting all the conditions of the tender, even if a clarification is subsequently issued, he is accepting that as well. He continued to state that if it is confirmed that the required information is not there, then the appeal would be withdrawn. He contended that the information was submitted, as otherwise appellant would not have objected.

Dr Mark Refalo on behalf of the preferred bidder said that according to Regulation 84, paragraph 4, the objection shall only be valid if accompanied by a deposit of .75% of the value of the tender, but this shall not be less than €1,200.00. Appellant's deposit with the letter of objection was €1,023 and therefore the objection was not valid. Appellant may have been misinformed of the amount by the Department of Contracts but the law allows no discretion on this point of the deposit. The appellant should also not have expected the evaluation committee to examine documents submitted in lieu of the proper forms. He also referred to the CV filed by appellant with the letter of objection and remarked that it did not show the number of years experience as requested by Form 7. Neither did the appellant fill in the value of the projects delivered.

At this point the hearing was brought to a close, and adjourned to the 3rd October 2013 for the opening of the copy of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members re-convened a hearing on Thursday 3rd October 2013 to view the copy of the tender.

Present for the hearing:

KDF Limited - Appellant

Mr Karl De Flavia	Representative
Dr Adrian Delia	Legal Representative

CP Projects Joint Venture	**Recommended Bidder**

No one was present

Housing Authority	**Contracting Authority**
Perit Andre Pizzuto	Chairman Evaluation Board
Ms Graziella Calleja	Secretary Evaluation Board
Perit Anthony Camilleri	Member Evaluation Board
Perit Felix Sciberras	Member Evaluation Board
Perit Melanie Spiteri	Member Evaluation Board

Department of Contracts

Mr Nicholas Aquilina	Procurement Manager

The Chairman explained that this second hearing was reconvened so that the extra copy of the tender that was submitted with the tender be opened and examined to see if the missing documents were contained in the copy.

Mr Nicholas Aquilina, procurement manager, Department of Contracts opened the sealed box containing the copies of the tenders submitted, and shown the Chairman the copy of appellant's tender.

The VAT certificate was found. The Memorandum and Articles document was found. Technical capacity and reference letters from Floriana Local Council, Qormi Local Council, Zabbar Local Council and Sta Lucia Local Council. The CVs of Victor Vella and Karl De Flavia were also found in the copies. All the document copies were loose leaf however and were not bound into a folder. Mr De Flavia was the First Aider and Mr Vella was the Health and Safety Officer.

The Chairman pointed out that all the documents were found in the copy of the tender.

Perit Andre Pizzuto on behalf of the contracting authority stated that appellant's technical bid had not been assessed because his bid had been deemed administratively non-compliant. He referred to Clause 30 of the Instructions to Tender explained the procedure to be used when adjudication. Evaluation will check the compliance of tenders with the instructions given in particular any documentation submitted under clause 16. This clause states that bidders have to present "duly completed" documents. The evaluation board shall also request rectifications in respect of incomplete or non submitted information under Clause 16.1 a, b and c. Items d) Technical capacity; e) Evaluation criteria/Technical specifications; and f) Tender Form/Bill of Quantities fall under note 3 and under this note no rectification shall be allowed, only clarifications on submitted information may be requested. Thus appellant's work plan was not signed and this cannot be rectified. The tender form was not completed and thus cannot be rectified. Form 7 is incomplete and also cannot be rectified.

Appellant's bid had the following defects. The VAT number on the tender form was not submitted therefore the tender was not administratively compliant. In Form 7 the names of the employees and their nationality were not submitted and therefore incomplete. The CVs shown in the copy of the tender was not available to the evaluation committee.

Perit Melanie Spiteri a member of the evaluation board stated that if this is accepted it would create a precedent.

Perit Andre Pizzuto stated that Form 9 was not signed.

Dr Delia rebutted that Form 9 was part of the tender document and the tender form was signed and accepted by the appellant. The tender declaration when signed by the bidders is binding on the bidders. Form 9 is just a Gantt chart.

Perit Felix Sciberras, member of the evaluation board stated that the evaluation board followed procedure, and did not do anything wrong.

Perit Anthony Camilleri, another member of the evaluation board said that when the department of contracts compiled the formulation of the tender it had a reason for designing the forms. If these

formats were not used by the bidders, then evaluators would find it difficult of comparing like with like.

Mr Nicholas Aquilina, on behalf of the Department of Contracts, stated that he feels that the Department is being criticised and made a scapegoat. According to law once the threshold of €120,000 is passed, the Department of Contracts acts on behalf of the contracting authority and that is why the opening of the tenders is done at the department. When it comes to evaluation, this is the sole responsibility of the evaluation board. When the evaluation board submits the report this is then vetted by the department.

The Chairman explained that the whole question arose because apparently, the folder enclosed with the appellant's bid, containing documents, was not forwarded to the evaluation board.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 24th May 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 1st October 2013, had objected to the decision taken by the Pertinent Authority, in that:

a) **The Appellant's bid was regarded as 'Administratively non Compliant', due to the fact that the VAT number was missing. In actual fact, the Appellant did submit the required information by way of a copy of the VAT certificate.**

b) **The Evaluation Board claimed that the Appellant did not submit the information as stipulated in Form 7 of the tender document. The Appellant contends that all the information was in fact submitted by an addendum to the tender document.**

c) **The Evaluation Board considered that Form 9 incorporated in the tender document was incomplete due to the Appellant's missing signature.**

d) **Appellant claims that this Form 9 did not represent any type of guarantee, so that a missing signature on a particular form in the tender document does not render the Appellant's bid as 'Administrative non Compliant'.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 1st October 2013, in that:

a) **The Evaluation Board confirmed that Forms 7 and 9 of the Appellant's Bid were incomplete.**

b) **That the Evaluation Board assessed the bids on information/documentation passed on by the Contracting Authority.**

c) **The Evaluation Board insisted that the separate documentation which the Appellant claimed to have been submitted were not available during the evaluation process.**

d) The Evaluation Board stated that the evaluation procedure adopted was in accordance with the current regulations.

Reached the following conclusions:

1. **First of all this Board considers that the fact that there were other bidders who were disqualified for omissions does not in any logical way have a bearing on this appeal. During the second hearing held on 3rd October 2013, it was evidently proved that the Appellant did submit the required information, but as an addendum to the tender document. So that there was no omissions on the Appellant's part.**

2. **During the second hearing, this Board also noted and exhibited to all parties concerned that the information submitted by the Appellant in the form of an addendum were actually included with all the documentation of the tenders. In this regard, this Board considers the Appellant's bid to be 'Administratively compliant'.**

3. **The fact that, the documentation submitted by the Appellant through an addendum, was not passed on to the Evaluation Board should not penalise the Appellant's bid and same be considered as not' administratively compliant'.**

4. **This Board considers that, after having carried out the necessary verification, the submitted documentation by way of an addendum, same contained the necessary information as that required in the forms of the tender document.**

5. **This Board also noted that the Appellant's Bid was the cheapest.**

In view of the above, this Board finds in favour of the Appellant Company and recommends:

i) That the deposit paid by the Appellant be reimbursed.
ii) That the Appellant's Bid be integrated in the next stage of the evaluation process.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

12 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 603

WSD/4/2013/18

Cottonera Dock No. 1 Project: Tender for the Supply and Delivery of Various Types of Ready Mix Concrete.

The tender was published on the 17th May 2013. The closing date was the 31st May 2013.

The estimated value of the Tender was €56,796.61 (Excluding VAT)

Six (6) bids were submitted for this tender.

On the 4th July 2013, Rockcut Limited filed an objection against the rejection of its bid as being administratively non compliant and the award of the tender to Mangion Bros Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 3rd October 2013 to discuss the appeal.

Present for the hearing:

Rockcut Limited - Appellant

Mr Rhys Buttigieg	Representative

Works and Services Department - Contracting Authority

Mr Anton Camilleri	Chairman Evaluation Board
Mr Oliver Debono	Member Evaluation Board

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

Mr Rhys Buttigieg on behalf of the appellant stated that appellant's bid was the cheapest but was disqualified on two administrative criteria, Clause 8.3.2a not submitted and Clause 8.3.2c. Regards the first point he explained that the contracting authority had asked for certificate for the source of supply of the concrete. This was something new, no such certificates were demanded in previous tenders. In its bid the appellant filled in Document A which identified the appellant as the bidder; document B which declared that this was not a joint venture; and Document C, which asked if bidder was making any sub-contracting which was not applicable. All these three documents were signed and produced with the offer. Mr Buttigieg asked that if the intention behind the production of the

certificate was the source, was this not explained in the tender bid itself? It was obvious that the bidder could not issue a certificate in its own name.
The Chairman explained that if a tender document asked for a certificate, then this had to be produced. Otherwise, if in doubt, the bidders could ask for clarification.

Mr Ryhs Buttigieg continued on the second criterion. The contracting authority had asked for two additives, and wanted certification that these two separate additives did not react adversely with each other. The contracting authority claimed that we offered a combined additive. However in the tender document only a small box indicated that the contracting authority wanted two separate additives

Architect Anton Camilleri, Chairman Evaluation Board said that the certificate in question was just to identify the source of the concrete to be provided by the bidder. If appellant was going to use concrete which it mixed itself, it just had to state this in the tender document. However the appellant's offer did not state this fact, no information as to the source of the concrete was given. This information is requested so that the contracting authority could verify and check. It is a known fact that Rockcut uses its own concrete mixes, but unless this was specifically stated, Rockcut could obtain supplies from other producers. In case of difficulties, then it would not be possible to act against the company if and when things go wrong. It is assumed that since appellant filed an objection that his bid was better than that of the preferred bidder but the evaluation board did not go into the appellant's financial offer because the bid had been disqualified as being administratively non compliant.
Architect Anton Camilleri continued to explain that certain additives are added to concrete for several reasons. These could be retardants, slowing down the curing process; accelerators to hasten the process and others. One of these additives is the plasticizer. This ensures that the mix is more liquid, and cannot be substituted by adding water instead. There is another product, the retardant that enables the concrete to take longer to cure. The contracting authority wanted these two additives to be separate allowing the use of one without the other and vice versa according to the specific needs of the job being tackled. However, when both are used in the same mix the contracting authority wanted to ensure that the mixing of the two additives together would not cause a reaction between them. This was the documentation that was required. The contracting authority must have the faculty of choosing whether to use one or the other additive or both together when necessary. Appellant offered a mix with both plasticizer and retardant. The tender was specific in that the additives had to be separate.

Mr Rhys Buttigieg stated that there was nowhere in the tender documents that asked for separate additives. Contended that the product he offered is better because the plasticizer makes the mix better.

Architect Anton Camilleri for the contracting authority reiterated that the contracting authority wanted quotes for both admixtures, but it wanted them separately. The mixture containing both additives was not necessarily better. That was why the tender asked for two products separately. Unfortunately the present system does not allow for the direct communication between the evaluators and the bidders.

At this stage, the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 4th July 2013 and also through the Appellant's verbal submissions during the hearing held on 3rd October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant's Bid was the cheapest.**

b) **The Contracting Authority requested a certificate confirming the source of supply. In this regard the Appellant is claiming that this requisite was never asked before in previous tenders.**

c) **The Contracting Authority claimed that the Appellant's Bid offered a combined additive and not a separate c component of concrete additive.**

d) **There was nowhere in the tender document that specified the requirement for separate additives.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 3rd October 2013, in that:

a) **The certificate required by the Evaluation Board had a very valid purpose and that was to identify the source from where the concrete was being obtained by the bidder.**

b) **There were valid technical reasons why the Evaluation Board asked for separate specifications details of the additives to be applied.**

c) **A mixture of both additives does not permit the Evaluation Board to assess the validity of the tender specifications.**

Reached the following conclusions:

From submissions made by the Technical Experts of the Evaluation Board, it is evidently clear that the technical information required by the Evaluation Board regarding the components of the additives contained in the concrete of the supply by the bidder , was of the most technically aspect of the tender.

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

29 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 604

CT 2023/2011

Tender for the Supply of Surgical Adhesive Drapes Used at Mater Dei Hospital.

The tender was published on the 21st October 2011. The closing date was the 15th December 2011.

The estimated value of the Tender was €570,000

Twenty one (21) bids were submitted for this tender.

On the 19th August 2013, Trebee Company Limited filed an objection against the rejection of its bid as being administratively non compliant and the award of the tender to Associated Equipment Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 3rd October 2013 to discuss the appeal.

Present for the hearing:

Trebee Company Limited - Appellant

Mr Simon Bugeja	Operations Manager
Mr Pierre Buontempo	Administrator

Associated Equipment Company Limited - Recommended Bidder

Mr Solomon Khazmi	Sales Executive
Mr Raymond Teuma	Director
Dr Geoffrey Mifsud Farrugia	Legal Representative
Dr Julienne Portelli Demajo	Legal Representative

Central Procurement and Supplies Unit - Contracting Authority

Ms Connie Miceli	Chairperson Evaluation Board
Ms Marthese Bonello	Secretary Evaluation Board
Mr George Fenech	Representative

Department of Contracts

Mr Nicholas Aquilina	Procurement manager
Mr Anthony Cachia	Director

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

Mr Pierre Buontempo, on behalf of the appellant company Trebee Ltd said that its offer was rejected as being administratively non compliant because it was alleged that it did not submit the required samples. Yet, appellant had provided the samples and he was filing a copy of the receipt that the contracting authority had issued on the delivery of the same.

Ms Connie Miceli Chairperson Evaluation Board, on behalf of the contracting authority said the tender was originally issued by the Mater Dei Hospital and the Unit took it over when proceedings had started. The samples provided by the bidders were very large, palette size, and for logistic purposes these had to be delivered to the hospital. She agreed that the receipt mentioned by Mr Buontempo was issued, but was never inserted in the file. She confirmed that the required samples had in fact been supplied by the appellant. She explained that the appellant was the previous supplier and thus did not have to supply all the items as samples. Those items that were already being supplied by the appellant were exempt from the need to provide samples. Thus when the evaluators were evaluating, they did not find all the samples. This explains the wording on the letter informing appellant of the rejection of bid, *"did not submit samples for all the items."* This was an unfortunate incident caused through lack of communication. When the mistake was discovered, for the sake of transparency, it was not deemed fair to decide on the matter without the presence of the preferred bidder.

Dr Geoffrey Mifsud Farrugia, on behalf of the recommended bidder stated that apart from the mistake already mentioned, it can be seen from the delivery note/receipt that the amounts supplied as samples was very inferior to the required according to the tender document. The contracting authority requested twenty samples of each item, yet the appellant did not supply twenty of each. He stated that failure to submit the samples within five days should have resulted in the rejection of the bid.

The Chairman explained that the items five, six, seven and eight had been supplied before as appellant was the present supplier and did not need to re-submit the samples for these item.

At this stage, the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 19th August 2013 and also through the Appellant's verbal submissions during the hearing held on 3rd October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's bid was disqualified as being 'Administratively non Compliant'. The reason, as stated by the Contracting Authority, was that the Appellant did not submit the samples as required in the tender document.

b) The samples were in actual fact submitted by the Appellant and a receipt for such submission was issued by the Contracting Authority.

Having considered the Contracting Authority's verbal submissions during the hearing held on 3rd October 2013, in that:

a) **The Contracting Authority, quite prudently admitted the fact that the Appellant did submit the required samples.**

b) **The unfortunate incident occurred through lack of communication from the Contracting Authority's end.**

Reached the following conclusions:

1. **The Appellant did in fact deliver the samples as has been established and confirmed by the Contracting Authority itself.**

2. **In this regard, the Appellant's offer was 'Administratively Compliant'.**

In view of the above, this Board finds in favour of the Appellant and recommends that:

i) **The deposit paid by the Appellant Company be reimbursed.**

ii) **The Appellant's offer be reintegrated in the evaluation process.**

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

13 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 605

DOI 99/07

Service Contract for a Cameraperson to Cover Government Initiatives in Gozo.

The tender was published on the 21st May 2013. The closing date was the 14th June 2013.

The estimated value of the Tender was €16,500 Inclusive of VAT (or €100 per assignment).

Two (2) bids were submitted for this tender.

On the 31st July 2013, Citadel Video Communications Limited filed an objection against the rejection of its bid as being administratively non compliant and the award of the tender to Motion Blur.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 3rd October 2013 to discuss the appeal.

Present for the hearing:

Citadel Video Communications Limited - Appellant

Mr George Scicluna	Representative
Dr John Gauci	Legal Representative

Motion Blur - Preferred Bidder

Ms Shirley Spiteri	Representative
Mr Stanely Agius	Representative

Department of Information - Contracting Authority

Mr Saviour Grech	Chairman Evaluation Board
Ms Charmaine Bonnici	Member Evaluation Board
Mr Matthew Carbone	Member Evaluation Board
Mr Paul Azzopardi	Representative

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

Dr John Gauci on behalf of the appellant stated that his client's bid was disqualified because a form at Volume 3 Section 2 was not filled in. This form required that the tenderer declares his capacity of performing bidder's obligations, and a list showing the equipment the bidder would be using. Instead

of filling in this form, appellant submitted a detailed four page document; called "Organization and Methodology" wherein appellant included all that was requested in the said form. The document also included a declaration that at no time will appellant firm be short of the necessary equipment to fulfil its obligations. This document included also a list of all the equipment that would be used to provide the service. Apart from this, the document explained appellant's technical capacity in great detail. It is absurd that the appellant gave more details than the form required and yet was excluded because the said form was not filled. The document he submitted was signed and formed part of appellant's offer. Dr Gauci continued that this point of 'substance over form' had been decided by this Board several times before. In this case, substance meant that the required information had been given. A bid cannot be disqualified for giving the required information in another form, yet the reason for appellant's disqualification was that "the information was not in the required format". Appellant had reproduced the form in his bid, but added more details.

The Chairman asked the contracting authority if it was the case that appellant's bid had been discarded because he failed to fill in the form in the required format. He asked if in fact the detailed report submitted by appellant was examined by the evaluation board or not.

Mr Matthew Carbone, a member of the evaluation board replied that what was required was a signed declaration where the bidder assumes responsibility for, and declares to have the necessary technical capacities to provide the service. Appellant, while listing the capacities of the company, failed to sign the document. This form did not allow for any rectifications.

The Chairman asked that if a bidder did not have enough space in the form would it have been acceptable to add another sheet.

Mr Matthew Carbone replied that if this had been duly signed, it would have been acceptable, but insisted that appellant did not sign the declaration. No exceptions were allowed, declarations had to be signed.

DR John Gauci insisted that all the required information including the declaration was included in appellant's submission marked Organization and Methodology, and this submission was signed by the appellant.

At this stage, the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 31st July 2013 and also through the Appellant's verbal submissions during the hearing dated 3rd October 2013, had objected to the decision taken by the pertinent Authority , in that:

a) **The Appellant's Bid was discarded by the Evaluation Board due to the failure, on the Appellant's part to fill in the declaration form as was required under Volume 3 , Section 2 of the tender document.**

b) **The Appellant contends that the required information under Volume 3, section 2 of the tender document was in fact submitted through an annexed document with the tender.**

c) The required declaration was also included in the said annexed document.

d) The Annexed document was also signed by the Appellant.

Having considered the Contracting Authority's verbal submissions during the hearing held on 3rd October 2013, in that:

a) The Evaluation Board insisted that unless the declaration as specified in the appropriate form in the tender document was signed, the same Board could not accept the Appellant's bid as being compliant.

b) The declaration which was required under Volume 3 , section 2 of the tender , was that the Appellant would have the necessary resources and equipment for same to carry out the duties as specified in the tender without interruptions.

Reached the following conclusions:

1. **From submissions and documentation presented during the hearing of this appeal , this Board opines that the annexed document submitted by the Appellant with the tender did in fact give all the required information as specified in Volume 3 , section 2 of the tender document.**

2. **The fact that all annexed documentation was signed by the Appellant , same is therefore declaring and abiding by the conditions as stated in Volume 3 , section 2 of the tender document.**

In view of the above, this Board finds in favour of the Appellant Company and recommends that:

i) The Deposit paid by the Appellant should be reimbursed.
ii) The Appellant's bid should be reintegrated in the evaluation process.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

26 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 606

UM 1721

Tender for the Supply, Delivery and Installation of Lecture Room Furniture and Office Furniture Produced with Environmental Friendly Materials and Processes for the Corporate Research and Innovation Building, University of Malta.

The tender was published on the 6th June 2013. The closing date was the 26th June 2013.

The estimated value of the Tender was €90,438.14, Exclusive of VAT.

Six (6) bidders submitted offers for this tender.

On the 9th September 2013, Vivendo Projects Limited filed an objection against the rejection of its bid as being technically non-compliant and the award of the tender to FXB Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 8th October 2013 to discuss the appeal.

Present for the hearing:

Vivendo Projects Limited – Appellant

Ms Emma Fenech Cefai	Representative
Mr Christopher Gauci	Representative
Dr William Cuschieri	Legal Representative

FXB Limited - Recommended Bidder

Ms Jenny Cassar	Representative
Mr Patrick Spiteri	Representative

University of Malta - Contracting Authority

Mr Tonio Mallia	Chairman Evaluation Board
Mr Johann Calamatta	Secretary Evaluationboard
Architect Christopher Spiteri	Member Evaluation Board
Mr Elton Baldacchino	Representative
Mr Renzo Borg Grech	Representative
Dr Oriella De Giovanni	Legal Representative

The Chairman, Public Contracts Review Board made a brief introduction and invited the appellant's representative to make his submissions on the objection.
Dr William Cuschieri on behalf of the appellant stated that first of all he would like to point out that although the preferred bidder's offer was €127,971, FXB is being awarded the tender for the amount of €110,271. This meant that a bidder was offered the tender with a cheaper price than that the bidder offered. Contends that this vitiates the whole tendering process and creates a precedent. This goes against Public Procurement Regulations. Client's second grievance was that bid was disqualified because it offered stainless steel and aluminium lockers instead of wood as requested in the specifications. He here read from the literature submitted by appellant with the offer. "Doors are made of 8mm stratified HPL and are equipped with rubber gaskets". Appellant abided with specifications. However the hinges and the legs were made of stainless steel. Hinges cannot be made from wood, and legs are better if made from aluminium.
Regarding the first grievance Dr Cuschieri stated that his client's bid was disqualified because the offer was for chipboard covered with melamine instead of high pressure laminate.

Mr Christopher Gauci on behalf of the appellant showed the Board two samples, one of laminate, and the other of a piece of wood covered by high pressure laminate. He stated that appellant presented certificates and guarantees with the tender. Appellants offered high pressure laminate as requested.

Mr Tonio Mallia for the contracting authority stated that regarding the first issue raised by appellant, he explained that the contracting authority chose to remove an item, number 19 from the tender and the price being paid to the preferred bidder is the same as offered in the tender minus the cost of item 19.

Dr Oriella DeGiovanni on behalf of the Contracting Authority explained that there are two types of laminate, the low pressure laminate and the high pressure laminate. From basic research done, it is clear that melamine is supplied only as low pressure laminate. Appellant offered melamine which is a low pressure laminate. The lockers submitted in appellant's offer was not what the contracting authority wanted, the lockers offered by appellant had stainless steel and aluminium structure and not of wood as requested.

Architect Christopher Spiteri, member on the evaluation board under oath stated that the difference between melamine and high pressure laminate is so clear that they cannot be mistaken for one another. The contracting authority wanted a high pressure laminate and the appellant offered melamine, which is a low pressure laminate. Melamine is a thin laminate and comes in rolls and is made with low to medium pressure. High pressure laminates come in sheets stuck under high pressure. There is a difference in thickness and coating and the manufacturing process for the two. There is nowhere in the appellant's tender bid where it is clearly stated that the furniture offered would be constructed with high pressure laminate. Melamine and high pressure laminate refer to the outer coating of the wood. When a section of wood covered with high pressure laminate and another covered with melamine, the difference in thickness can easily be seen. High pressure laminates has a greater durability than low pressure laminates.

Dr William Cuschieri showed a sample to witness. Mr Spiteri said that the sample was high pressure laminate but that it was not what was offered by appellant who offered melamine.

Mr Chris Gauci on behalf of the appellant said the sample was melamine with a resin additive to enable it to withstand high pressure lamination. He contended that the melamine the witness was referring to was called paper laminate.

Architect Christopher Spiteri reiterated that the evaluation board, when making the technical evaluation, found reference to melamine, and there was nowhere explained that what was being offered was a high pressure laminate. Insisted that the sample he was shown was not melamine but a high pressure laminate, and was not what was offered.

The Chairman explained that when a bidder signs the tender bid, he is signing for what he has offered and written down in it.

Dr William Cuschieri finally submitted his client's offer was better and cheaper, and it was admitted that the sample shown was high pressure laminate, but was excluded just because the bid did not state that a high pressure laminate was being offered. He contended that therefore the technical evaluation was flawed.

At this stage, the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 9th September 2013 and also through the appellant's verbal submissions presented by same during the hearing held on 8th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Preferred Bidder' Offer was cheaper. That is a fact.

b) The Appellant's Bid was disqualified due to the fact that the Appellant' product was of an inferior quality to that requested in the technical specifications in the tender document.

c) The Appellant exhibited samples of the product for which it tendered.

d) The Evaluation Board of the Contracting Authority were mislead regarding the quality of the material being tendered for by the Appellant.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 8th October 2013, in that:

a) There are two types of laminate, the low pressured laminate and the high pressured laminate.

b) The Appellant's Bid's material consisted of a low pressured laminate.

c) The Samples of the material were different from those described in the tender documents.

Reached the following conclusions:

1. **This Board noted that the wood material that had to be included the tender specification had to be of a durable nature and had to last for as many years as possible.**

2. **Although the Appellant's bid was the cheapest, it did not meet the required specifications for the purpose the tender was issued.**

3. **From information acquired from technical experts, during the hearing held on 8th October 2013, this Board has been made aware that the Appellant' Bid was not compliant with the technical requirements of the tender in question.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

4 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 607

UM 1716

Tender for the Supply, Delivery and Installation of Office Furniture Produced with Environmental Friendly Materials and Processes, for the Institute of Digital Games Offices at the University of Malta.

The tender was published on the 11th June 2013. The closing date was the 3rd July 2013.

The estimated value of the Tender was €19,847.46, Exclusive of VAT.

Six (6) bidders submitted eight offers for this tender.

On the 20th August 2013, Vivendo Projects Limited filed an objection against the rejection of its bid as being technically non-compliant and the award of the tender to FXB Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 8th October 2013 to discuss the appeal.

Present for the hearing:

Vivendo Projects Limited - Appellant

Ms Emma Fenech Cefai	Representative
Mr Christopher Gauci	Representative
Dr William Cuschieri	Legal Representative

FXB Limited - Recommended Bidder

Ms Jenny Cassar	Representative
Mr Patrick Spiteri	Representative

University of Malta - Contracting Authority

Mr Tonio Mallia	Chairman Evaluation Board
Mr Johann Calamatta	Secretary Evaluationboard
Architect Christopher Spiteri	Member Evaluation Board
Mr Elton Baldacchino	Representative
Mr Renzo Borg Grech	Representative
Dr Oriella De Giovanni	Legal Representative

The Chairman, Public Contracts Review Board made a brief introduction and invited the appellant's representative to make his submissions on the objection.
Dr William Cuschieri, on behalf of Vivendo Projects Ltd, the appellant said that his client's offer was disqualified because it offered the laminate of the wood components in melamine instead of the requested high pressure laminate. Contended that the sample shown to the witness in the previous case, (Case 606, UM 1721) was accepted by the witness to be high pressure laminate, and therefore he would need to examine the witness again. This was because the witness gave the impression that melamine was only supplied in low pressure lamination.

Architect Christopher Spiteri, a member of the evaluation board, on oath, on being questioned by appellant's representative, stated that yes, melamine is only a low pressure laminate.

Dr William Cuschieri stated that it was the process of making the laminate that distinguishes between a high pressure laminate from a low pressure laminate. He contends that melamine could be processed to form part of a high pressure laminate.

Architect Christopher Spiteri continued that according to http:\\block.cross.com.au, "direct pressure laminate, otherwise known as low pressure laminate is what is commonly referred to as melamine" The processes of making high pressure melamine is completely different. When appellant's offer mentioned melamine, the conclusion was that this was low pressure laminate. Appellant could have specifically stated in the offer that it would be providing high pressure laminate. Insists that melamine is not high pressure laminate. High pressure laminate comes in sheets. Appellant's offer was not clear and did not state that a high pressure laminate was being offered, just melamine.

Mr Christopher Gauci for appellant contends that high pressure laminate contains melamine. Both low pressure laminates and high pressure laminates contain melamine. It is only the manufacturing process that is different.

Architect Christopher Spiteri said that the evaluation board went through all the submitted certificates in detail and from them deduced that the offer was for melamine.

At this stage, the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 20th the hearing held on 8th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant stated that his bid was wrongly disqualified as same was deemed to be technically non compliant by the Evaluation Board.**

b) **The Appellant insisted that the material quoted in his bid had indeed the required material components as specified in the tender document.**

c) The Appellant's bid remained the cheapest among the remaining 'fully compliant 'bidders.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 8th October 2013, in that:

a) The material presented in the Appellant's bid consisted of a 'low pressure' laminate. The requirement in the tender document's specifications necessitated a material component consisting of a 'high pressure' laminate.

b) There is a great difference between a 'Low Pressure' laminate and a 'High Pressure' one.

c) The material offered by the Appellant was described by same as being 'melamine' which in technical terms classifies the material components as 'Low Pressure' laminates.

Reached the following conclusions:

Needless to mention, this Board has to rely on the logical explanation of the technical experts when it comes to technicality. From the submissions made by the technical expert in the field of the product in question, this Board heard a clear and vivid explanation of the type of material components that were mandatorily requested to conform with the technical specifications in the tender document. In this regard, this Board finds that the Appellant's material components were not of the required specifications.

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

4 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 608

CPSU/CPU/2763/2012

Tender for the Supply of Self Adhesive Fabric Sheets 20x10cms.

The tender was published on the 16th November 2012. The closing date was the 17th December 2012.

The estimated value of the Tender was: €24,215.38 (Exclusive of VAT).

Five (5) bids were received for this tender.

On the 19th July 2013 Krypton Chemists Limited filed an objection against the decision to discard their offer and to award the tender to Messrs. Cherubino Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 8th October 2013 to discuss the appeal.

Present for the hearing were:

Krypton Chemists Limited - Appellant

Ms Lorraine Arrigo	Representative
Ms Patricia Engerer	Representative

Cherubino Limited - Prederred Bidder

Mr Tommy Dimech	Representative
Dr Francis Cherubino	Legal Representative

Central Procurement and Supplies Unit - Contracting Authority

Mr George Fenech	Chairman Evaluation Board
Ms Josette Camilleri	Senior Pharmacy Technician
Ms Connie Miceli	Representative

After a brief introduction by the Chairman, the appellant's representative was asked to produce the reasons for the objection.

Ms Lorraine Arrigo on behalf of the appellant said that the reasons why the offer was discarded could not be understood. Appellant firm had offered bids for the same items in three different sizes; the only difference between these tenders was the size of the Self-Adhesive Sheets. Yet, while this tender was deemed non-compliant, the other two were successful and the appellant was awarded the tenders. She contended that a Registration Certificate was only applicable in cases for bids for medicinal.

Mr George Fenech on behalf of the contracting authority said that appellant's tender did not state anywhere that the appellant firm was the previous supplier of the items. The adhesive sheets offered by appellant originated in Egypt, which is not a member of the European Union, and thus the relevant certificates were required. Each evaluation board is composed of different persons, who may not know of the previous supplies made by the bidders. He contended that appellant should have clearly indicated that it had supplied the items previously and thus was a previous supplier.

Ms Lorraine Arrigo explained that the tender form contained a form wherein bidders were asked to indicate if they were previous suppliers, and the appellant's tender shows that the "yes" box was ticked. The same form goes on to ask those who ticked "no", then, the bidder had to complete the list. Since appellant's bid had ticked "yes" then, the rest was left un-filled. Furthermore bidders were to state whether their products were CE marked. Appellant clearly indicated that the items offered carried the CE markings.

Mr George Fenech insisted that the tender form clearly indicated that all non medicine products should be accompanied by certification that a detailed quality and control analysis of the product had been done, and literature. This was compulsory for all bidders, and reiterated that appellants should have stated that the company was a previous supplier. Evaluation boards have to make their assessments on what was provided to them by the bidders.

Ms Connie Miceli on behalf of the contracting authority explained that the form ticked by the appellant was for statistical purposes only. Bidders had to declare if they had previously supplied similar items to the same contracting authority. She contended that the form stated 'similar items' and not 'identical items'.

Ms Lorraine Arrigo stated that the appellant had supplied samples and it could be seen that the items were marked CE, and that appellant was awarded other contracts without producing certificates in the past

The Chairman remarked that mandatory certificates had to be submitted as otherwise the evaluation of the offer was held up at the administratively compliant stage and would not be processed further.

Mr George Fenech stated that appellant's bid did not contain any CE certification, and no power of attorney which, since product was not produced in a European Union country, was mandatory. The tender document, page 36, Clause 24.7.3, states that *"All non-medicine products are required for pharmaceutical purposes. Where applicable, they must comply with the respective standards listed in Ph.Eur. /B.P. /B.P.C. / U.S.P., and be accompanied by a complete and detailed quality control analysis report by a certified body. The contractor must also provide any relevant support and documentation, as necessary, for the Responsible Person CPSU to ensure the safe use of the non-medicinal products."* The Malta Government accepts CE certification and B. P. The European Union accepted only CE certification.

Ms Miceli said that pharmaceutical products have to be registered, and have a registration certificate. Non medical products required certification of conformity by an authorised body; this was the certificate that was not submitted by appellant. The letter of the letter of disqualification was not exact because it stated 'registration certificate', but the product offered by appellant was still not acceptable.

Ms Lorraine Arrigo stated that if this was made clear from the start, the appellant would not have filed a letter of objection.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned letter of Objection' dated 19th July 2013 and also through the Appellant's verbal submissions during the hearing held on 8th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant contended that nowhere in the tender document was indicated that the registration certificate is to be submitted.**

b) **The Appellant contends that the registration certificate was only applicable to medicinal products.**

c) **The tender document included a form where the bidders were asked whether same were previous suppliers, the Appellant in this respect marked the 'Yes' box and hence he was not obliged to give further information as required in the tender document.**

d) **The Appellant was a regular supplier to the same Contracting Authority and in this respect he felt that he did not require to submit the necessary certificates.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 8th October 2013, in that:

a) **The Appellant should have stated in the tender document that he was he was a previous supplier, which he failed in doing so.**

b) **The mandatory requirement in the tender document clearly specified that all bidders had to provide a certification that a detailed quality analysis together with the necessary literature had to be submitted.**

c) **The Evaluation Board needed to assess and evaluates the tender bids on the submissions provided by the tenderers.**

e) **The Contracting Authority contends that although the notification of disqualification of the Appellant's bid was not quoted in the correct context, still the product of the Appellant was not compliant.**

Reached the following conclusions:

1. **The Evaluation Board of any Contracting Authority has to assess the validation of any tender on the information submitted by the tenderer. In this regard, the Appellant failed to submit the registration certificate which was a requisite in the tender document.**

2. **The tender document clearly stated that all non medicinal products had to be accompanied by the requested certification.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

26 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 609

CPSU/CPU/2288/12

Tender for the Supply of Technetium Generators.

The tender was published on the 27th April 2012. The closing date was the 14th May 2012.

The estimated value of the Tender was: €74,981.92 (Exclusive of VAT).

Two (2) bids were received for this tender.

On the 26th July 2013 Pharma-Cos Limited filed an objection against the decision to discard their offer and to cancel the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 10th October 2013 to discuss the appeal.

Present for the hearing were:

Pharma-Cos Limited - Appellant

Mr Elton Mamo	Pharma Business Manager
Mr Marcel Mifsud	Director

Central Procurement and Supplies Unit - Contracting Authority

Ms Bernardette Borg	Secretary Evaluation Board
Ms Sharon Zerafa	Member Evaluation Board
Ms Astrid Sammut	Representative
Ms Connie Miceli	Representative

Following a brief introduction, the Chairman Public Contracts Review Board, invited the appellant's representative to make his submissions on the objection.
Mr Elton Mamo on behalf of the appellant stated that appellant's offer was discarded, and the tender recommended for cancellation because the delivery period was not specified in the offer. However certain anomalies in the tender document preclude a bidder from being according to specifications as well as according to conditions regarding the delivery period.
Connie Miceli on behalf of the contracting authority admitted that there was a discrepancy in the tender document. There was requested a delivery period, while in another part of the tender there was reference to a weekly delivery period. This could be misleading to bidders and the evaluation board considered that the best option would be to recommend cancellation of the tender. The evaluation board members were also aware that there were other specifications in the tender document as issued

that had to be corrected, and the best outcome would be the cancellation. In fact a new tender was issue with the corrected specifications and minus the above mentioned discrepancy. The appellant company also submitted an offer for the new tender, and was successful. Appellant was awarded the new tender.
At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 26th July 2013 and also through the Appellant's verbal submissions during the hearing held on 10th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's Bid was discarded due to the fact that the 'delivery period' was not clear in the tender document.

Having noted the Contracting Authority's admission that the details regarding the 'delivery period' were somewhat misleading, the same Contracting Authority decided to issue another tender.

Reached the following conclusions:

1. **This Board wishes to commend the Contracting Authority's representatives for being professional and responsible.**

2. **This Board confirms the decision taken by the Evaluation Board to issue a fresh tender.**

In view of the above, this Board finds in favour of the Appellant Company and recommends that the deposit paid by the Appellant should be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

28 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 610

TSE/1/2012

Tender for the Service of a Structural Engineer (building diagnosis).

The tender was published on the 23rd October 2012. The closing date was the 13th November 2012.

The estimated value of the Tender was: €50,000 (Exclusive of VAT).

Thirteen (13) bids were received for this tender.

On the 9th August 2013 EMDP Limited filed an objection against the decision to discard its offer as being technically non-compliant and against the award of the tender to Perit Ivan Buttigieg.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 10th October 2013 to discuss the appeal.

Present for the Hearing:

EMDP Limited - Appellant

Arch Mariello Spiteri	Representative
Arch Vanessa Pisani	Representative
Dr Franco Galea	Legal Representative

Architect Ivan Buttigieg - Preferred Bidder

Arch Ivan Buttigieg	Representative
Dr Mark Refalo	Legal Representative

Housing Authority - Contracting Authority

Arch Andre Pizzuto	Chairman Evaluation Board
Ms Graziella Calleja	Secretary Evaluation Board
Mr Aldo Ellul	Member Evaluation Board
Arch Alison Attard	Member Evaluation Board

The Chairman made a brief introduction and appellant's representative was invited to make his submissions on the objection.

Dr Franco Galea on behalf of the appellant said that the requisites of this tender were either the architect has ten years experience as a structural engineer or he has to have five years experience plus post graduate qualification level 7 or 8. Appellant had been asked for a clarification and had answered

as required. From the documents appellant submitted with clarification it is clear that Perit Barbara was qualified under the two options. Furthermore, Perit Barbara was not the only architect listed by appellant in the tender offer. There were other architects employed with appellant. Dr Galea contended that the required thresholds were achieved by appellant's bid.

Arch. Andre Pizzuto on behalf of the contracting authority replied to a question by the Board that the preferred bidder had the ten years necessary experience and was the cheapest compliant bidder. Appellant's offer was not technically compliant and his financial offer was not taken into consideration. When the evaluation committee was examining appellant's bid, it was noted that Perit Joe Barbara's CV, submitted with the tender did not show that he had a master's degree in structural engineering; therefore to be compliant he had to have ten years experience. His CV showed that he possessed a Diploma in Bridge Engineering. The evaluation committee felt the need to ask appellant if Perit Barbara had the MQF 7 and so a clarification was issued to appellant about this. Instead of a clarification, appellant submitted a rectification of its bid. The CV was changed and certificates were produced. The new CV submitted with the clarification showed that Perit Barbara possessed a Master's degree. But this was not acceptable since this was a rectification. It should have been submitted in the first place. The CV was not something that was not submitted but was changed after the clarification. In the CV originally submitted with the tender it was stated that Perit Barbara "was reading for a master's in bridge and structural engineering at the University of Surrey." With the clarification this was changed and a new CV was submitted. Instead of replying to the clarification request by the evaluation committee to state whether the diploma was MQF 7, appellant submitted a new CV containing new data that was not in the original. Appellant also submitted a certificate that was not enclosed with the original bid. Original submissions cannot be changed after the closing date of the tender.

Dr Franco Galea for the appellant stated that the original certificate showed that Perit Barbara qualified for his master's degree in September 2011. This certificate was submitted with the clarification. In any case, Perit Joseph Barbara also qualified just the same because he had experience as a structural engineer. In his CVs, both originally submitted and the later one, Perit Barbara has shown that he had passed the threshold. This was not a rectification, because rectification was when the bid is changed. Perit Barbara was in possession of a master's degree, and appellant replied to the clarification to explain this. The master's degree was not obtained after the closing dated of the tender.

Perit Joseph Barbara affirmed that his master's degree was obtained in September 2011.

Arch. Mariello Spiteri said that when the tender was submitted, perit Barbara was already in possession of master's degree but an older version of his CV was inadvertently submitted with the tender.

Arch. Andre Pizzuto said that Perit Barbara did not qualify on the basis of ten years experience because one cannot practice as a structural engineer unless warranted. The experience he acquired before he received the warrant cannot be counted for the experience needed. Contended that when the CV was changed it means that appellant's bid was changed. The certificates had not been submitted with the bid. It was only following the clarification that these certificates had been produced. This was new information and thus is considered as rectification. The evaluation board had asked the DCC and was informed that clarification could not include any new information.

Dr Charles Cassar, member of the Board remarked that probably, an old version of the CV had been submitted. In the clarification, appellant had been asked to state whether Perit Barbara'a diploma was MQF 7. Appellant did not need to refer to the MQF at that stage as Perit Barbara had a master's degree. And so the new CV was submitted in reply to the clarification.

Arch Mariello Spiteri on behalf of appellant explained that in the first CV, Perit Barbara already had a post-graduate diploma that is level 7, from the University of Surrey. It can be clearly seen from the MQRIC website that a post graduate diploma is level 7. Thus Perit Barbara conformed to the requisites of the tender document. This diploma was enclosed with the original tender.

Dr Franco Galea said that the tender document makes a distinction between qualification and experience. There was what is called a grandfather clause. You had either to graduate or if you are not already a graduate, you could show that you have experience. This experience does not only mean after the graduation and warrant because otherwise it makes no sense.

Dr Mark Refalo on behalf of the preferred bidder contended that the value of the tender is less than €12,000 and therefore according to the Regulations the objection is null. Regarding the matter of the master's degree, the clarification asked appellant to state whether the diploma was level 7 or not. Instead of replying, appellant produced other certificates. He also contended that the tender required experience as a structural engineer and this meant that after a warrant was obtained.

Arch Andre Pizzuto explained that the contracting authority did not ask for a diploma, it asked for a master degree. Appellant was asked to state whether Perit Barbara's diploma reached level 7, as an alternative but appellant submitted a new certificate and CV.

Arch Mariello Spiteri stated that MQRIC does not issue certificates within 2 days. MQRIC in its website also shows that a diploma from Surrey University is equivalent to level 7.

Arch. Andre Pizzuto reiterated that the qualifications were submitted only at the clarification stage. This meant that to accept them would be rectification and the evaluation board was advised in writing that this was not allowed.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 9th August 2013 and also through the Appellant's submissions during the hearing held on 10th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The requisites of the tender stated that " the Architect had to have either a minimum of ten years experience in structural engineering or a minimum of 5 years together with a Masters Degree at level 7 or 8".

b) The Appellant was asked for clarifications by the Evaluation Board to which Appellant complied. In this regard, Appellant contends both optional requisites were met.

c) From documentation submitted to the Evaluation Board (upon being requested), there exists enough proof that the Appellant satisfied the qualification and experience criteria of the tender.

d) Inadvertently, an old version of the Appellant's CV was submitted with the tender. However, upon being asked for clarifications, the Appellant did submit a copy of the Masters Degree.

e) The experience obtained prior to the attainment of the Masters Degree should also be considered as valid experience.

Having considered the Contracting Authority's verbal submissions during the hearing held on 10th October 2013, in that:

a) During the evaluation process, the Evaluation Board noted that the Appellant did not comply with the mandatory 10 years experience criteria, as stipulated in the tender document.

b) Upon being asked for clarification by the Evaluation Board, the Appellant submitted a rectification of the Appellant's qualifications. The rectified qualification should have been submitted with the tender, in the first place.

c) The rectified submission was not admissible in accordance with the prevailing regulations.

d) The Appellant could not qualify with regards to experience as the requirement in this regard was 'experience after having obtained the Post Graduate qualification'.

Reached the following conclusions:

1. **This Board considers that the experience obtained by the Appellant does in fact count, however the mandatory condition of experience obtained after obtaining the Masters degree has to be respected. Mandatory conditions in a Tender document should be strictly abided by. In this regard the Appellant was technically non compliant.**

2. **The Preferred Bidder's offer was fully compliant and the cheapest.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

13 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 611

WSC/323/11

Tender for the Supply of Microsoft Office Licences.

The tender was published on the 19th October 2012. The closing date was the 12th November 2012.

The estimated value of the Tender was: €59,322 (Exclusive of VAT).

Seven (7) bids were received for this tender.

On the 29th August 2013 eWorld Limited filed an objection against the decision to discard its offer and to award the tender to Computer Solutions Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 10th October 2013 to discuss the appeal.

Present for the hearing:

eWorld Limited - Appellant

Mr Wayne Hewitt	Representative
Mr Raphael Micallef Trigona	Representative

Computer Solutions Limited - Preferred Bidder

Mr Edward Cauchi	Representative

Water Services Corporation - Contracting Authority

Engineer Antoine Psaila	Chairman Evaluation Board
Mr Jonathan Scerri	Secretary Evaluation Board
Mr Alex Attard	Member Evaluation Board
Mr Anthony Camilleri	Representative
Engineer Mark Perez	Representative

Following a brief introduction by the Chairman, the appellant's representative was invited to make his submissions on the objection.

Mr Raphael Micallef Trigona on behalf of the appellant said that its bid was discarded because in Option 1, Office 2010 was offered whilst tender requested Office 2013, and that Option 2 was not the lowest offer. Regarding Option 1, Mr Micallef Trigona explained that since the tender was asking for Open Licences, this meant that whoever sold such licence was bound to supply always the latest version of Office, in this case the 2013 version, and this is attested by Microsoft themselves in an

email that Mr Micallef Trigona produced. The tender was published in October 2012 and there was a clarification issued in the first week of November, while the closing date was the 12th November 2012. He explained that the original tender asked for Office 2010. He claimed that Microsoft Office 2013 was not yet available commercially at the closing date of the tender, as it only was commercially available on the 1st December 2013. Appellant did not ask for clarification on this point because as the tender request was for Open Licence Product, the onus of understanding how an OLP worked was with the contracting authority. He further explained that when an Open Licence is sold, the seller is not permitted to provide older versions of the software, but has always to provide the latest version. As Office 2013 was going to be issued on the 1st December 2013 the fact that appellant offered Office 2010 meant that de facto, appellant was offering Office 2013.
Mr Raphael Micallef Trigona continued that in July 2013, appellant was asked to extend the validity of the bid bond up to 15th September 2013 as the adjudication process was in the final stages. He contended that this bound appellant to supply the requested Office 2013 at the same price he submitted with his tender. His offer for Option 1 was the cheapest.

Mr Antoine Psaila on behalf of the contracting authority said that during the evaluation process, it was seen that appellant eWorld had submitted two Options. In its option 1, in the financial bid, it is clear that what is being offered is Office 2010. Option 2 was also originally offering Office 2010 but enclosed with the offer was a declaration that since in December 2012, a new version of Office 2013 was being issued, therefore appellant would be offering this latest version of the software. This offer for option 2 was acceptable but was not the cheapest offer. However, notwithstanding that through a clarification the contracting authority had asked for Office 2013, appellant did not state that eWorld would be supplying the new 2013 version of the software, and left its offer for Office 2010. Other bidders had complied. It was only following the July 2013 letter asking for the renewal of the validity of the bid bond, that appellant sent an email offering Office 2013 and a reduction in the price offer. Thus appellant was changing both the product and the price of the original offer. The evaluation board followed the procurement regulations.

Mr Raphael Micallef Trigona said that the price reduction offer was not the reason for appellant's disqualification. The objection is that by the request of Office Open Licence, bidders were bound to supply always the latest version of the software. The contracting authority specifically asked for Microsoft Office Open Licence. Thus appellant's option 1 meant that if the tender was awarded after the 1st December 2012, then appellant would have had to provide the 2013 version. Replying to a question by the Chairman, Mr Micallef Trigona confirmed that appellant had offered to reduce the bid for option 1, but no reply from the contracting authority was received.

Mr Wayne Hewitt on behalf of the appellant stated that in July 2013 appellant was asked to re-confirm its bid and renew the bid bond. Since this was an Open Licence appellant stated that the latest 2013 version would be supplied. The contracting authority never asked appellant to explain how Open Licence works and it was assumed that the contracting authority was aware. Open Licence means that a seller cannot sell an older version of the software, but must always supply the latest version.

Mr Alex Attard, a member of the evaluation board confirmed that an open licence meant that the newest version be supplied, but stated that on the 5th November 2012, a clarification was issued asking that bidders change the product code of the their bids to show that the product offered was Office 2013 and not Office 2010. All the other bidders complied with this but the appellant did not. Appellant's bid for option 1 was administratively compliant but was not technically compliant because of the version of software offered.

Mr Mark Perez, procurement officer at the Water Services Corporation stated that the corporation was obliged to obtain the cheapest offers but always according to the regulations of Public Procurement. He explained that his first reaction was to accept this offer. But if this was done the contracting authority would be going against the Regulations. A tender bid to be valid had to be made on the Financial Schedule of the tender. Appellant's bid was not submitted on the financial schedule of the tender. The original financial schedule was amended. Appellant's bid was made on the superseded financial schedule and this meant that the offer was not administratively compliant. Appellant's offer was the cheapest but was not administratively compliant.

Mr Alex Attard finally said that from research with Microsoft, revealed that Office 2013 would be launched in the first quarter of the year. But customers purchasing Office after the 19th October 2012 from the local retailers would receive the new Office for free according to availability. Thus appellant should have done as all the other bidders, and submitted its offer for Office 2013. He stressed that this automatic upgrade would only be available if purchased after 19 October 2013.

Mr Wayne Hewitt stressed that appellant was bound to sell the latest version.

Mr Mark Perez asked the reason why appellant's option 2 offered Office 2013 while Option 1 offered Office 2010 if it was bound to sell only the latest version?

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 29th August 2013 and also through the Appellant's verbal submissions during the hearing held on 10th October 2013, had objected to the decision taken by the pertinent Authority , in that:

a) **The Appellant insisted that since the tender was for an 'Open Licence', the tenderer must always supply the latest version of the software.**

b) **The reason why the Appellant quoted version 2010 was due to the fact that the latest version, ie. version 2013, would be available on the market after the closing date of the tender.**

c) **It is a known fact that an 'Open Licence' must include the latest version of software and in this regard the Evaluation Board should have known this.**

d) **On the other hand, the Appellant was not aware that the Evaluation Board was not knowledgeable on this matter. In this regard, the Evaluation Board should have asked for clarifications from Appellant who would have gladly complied.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 10th October 2013, in that:

a) The Appellant did not declare that he would be supplying the latest version of software but quoted version 2010 in his offer. Other bidders did conform to this requirement.

b) Through an E mail sent by the Appellant, the latter altered the bid price by way of a reduction in price quoted originally in the tender document.

c) The Evaluation Board followed the correct procedures in accordance with the regulations of the Public Procurement.

d) The Evaluation Board did confirm that an 'Open Licence' required that the latest version of the software had to be supplied.

Reached the following conclusions:

1. **It is the Appellant's obligation to seek clarifications from the Contracting Authority, if in doubt, and not vice versa. However, this Board opines that such present rigid regulations relating to Public Procurement ought to be amended to allow more space for the Evaluation Board to use its discretion in clarifying certain details in the tender bids without having to justify whether it is a clarification or a rectification of specific details.**

2. **From the submissions made by both the Appellant and the Contracting Authority, this Board establishes the fact that an 'Open Licence' automatically necessitates the most recent software.**

3. **The Evaluation Board of the Contracting Authority could not entertain the fact that an adjusted reduced bid price be submitted as this would lead to a rectification to the submitted original bid.**

4. **This Board strongly feel, that prior to submission of the tender document, the Bidder, for his own benefit and advantage, is in duty bound to abide by all the conditions stipulated in the tender document. The Bidder is also advised to give any additional information which is deemed necessary to avoid any misunderstanding.**

Important to avoid unnecessary implications/misunderstandings which will eventually hinder the Evaluation process and which in fact result to the detriment of the bidder.

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

13 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 612

FTS/10/13

Tender for Timber Doors for the Primary School C, Ghaxaq.

The tender was published on the 21st May 2013. The closing date was the 13th June 2013.

The estimated value of the Tender was €25,550.85 (Exclusive of VAT).

Seven (7) bidders had submitted an offer.

On the 23rd September 2013, Desira Woodworks Limited filed an objection against the rejection of their bid as not being the cheapest offer, and against the decision award the tender to RJ Company Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancillieri as members convened a hearing on Tuesday 15th October 2013 to discuss the appeal.

Present for the hearing:

Desira Woodworks Limited - Appellant

Dr Michael Grech	Representative
Mr Stephen Desira	Representative

R J Company Limited - Preferred Bidder

Mr Raymond Camilleri	Representative

Foundation for Tomorrow's Schools - Contracting Authority

Mr Christopher Pullicino	Chairman Evaluation Board
Mr Andrew Ellul	Member Evaluation Board
Mr Ivan Zammit	Member Evaluation Board

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

Dr Michael Grech on behalf of the appellant said that the sole award criterion for this tender was the lowest priced bid that satisfied the administrative and the technical criteria. His client, the appellant submitted the lowest bid at €19,990.00 and his bid was both administratively and technically compliant. After the closing date of the tender, the contracting authority had sought clarification from appellant where Desira Woodworks were asked to confirm that their offer was €19,990.00, and that this offer covered all the works and services requested in the tender. Appellant replied that the offer

submitted covered all the requisites of the tender. It was only by the notice of award to the preferred bidder that appellant got to know that his bid was adjusted upwards to €37,090.00. Appellant's grievance is thus that its offer was the cheapest compliant bid and it should therefore have been awarded the tender. Dr Grech contended that the tender was awarded in contravention of the award criterion, which was the cheapest compliant offer. He insists that his client's offer has still to date not been corrected since, the relative schedule, that is on line, still shows appellant's bid as being €19,990.00. He insisted that the tender was based on the total price and not on the unit price. The cheapest priced offer meant the cheapest total offer. Clause 17.1 asked bidders to submit a total price. On page 17 of the tender; required bidders to fill in the total price of their bid. Even Article 2.09 of the conditions of contract dealing with cases of variances of 5%, always mentions the total price.

He reiterated that appellant was asked twice to confirm that its bid included all the items in the Bills of Quantities for the price of €19,990.00 and appellant confirmed this twice. Appellant was never asked to explain the discrepancy between the total price and the unit prices of the offer. Dr Grech contends that the appellant's offer was never adjusted because this was not brought to the attention of the appellant as required by Article 31.1. According to this Article any correction should have been notified to appellant and the appellant had the right to either agree with the correction or not. Since this was not done, he contended that the correction was not made.

Finally Dr Grech contended that the appellant should be awarded the tender since its bid was the lowest, but if this is not acceded to, then the tender proceedings should be declared null and cancelled because the contracting authority did not abide by the conditions of the said Article 31.1 of the tender document.

Mr Andrew Ellul on behalf of the contracting authority said this case is based on the Bills of Quantities submitted by the appellant. Here were several items are listed in one column, the unit price in the next column and the total price in another column. It was clear that appellant's bid contained an arithmetical error when the unit price was multiplied by the number of items. Regulations clearly state that in such cases of discrepancy, the unit price shown in the Bills of Quantities shall prevail over the total price. It was for this reason that the adjudication board adjusted arithmetically appellant's bid at the first stage of adjudication, before the clarifications about the price were sought from appellant, but appellant was however not informed of this.

The Chairman said that the Board feels that appellant should have been informed that his bid was arithmetically corrected, and should have been asked to declare if the correction was accepted by the appellant or not. Yet appellant was asked twice to confirm the original bid without any indication of why this was being asked. It should have been explained that what was being asked was because the total bid did not tally with the unit price.

Ivan Zammit on behalf of the Contracting Authority stated that the evaluation board is not authorised to contact the bidders. An evaluation report was presented on the 18th June, but the Departmental Contracts Committee did not accept the evaluation board's interpretation of Article 31.1 and insisted that appellant should be asked to confirm the bid using the exact wording as dictated by the Departmental Contracts Committee, that is, if appellant was ready to provide the works at the price of €19,990.00. He said that the evaluation board had consulted the Director of Contracts, who agreed with the board, and had had meetings with the Departmental Contracts Committee. It was finally decided to stand by the original evaluation report.

Mr Andrew Ellul explained that Article 31.1 was there to safeguard the interests of the bidders, because sometimes the arithmetical errors are such that the offers would result greatly diminished, and it was for this reason that it was required to get the bidders in question to agree with the corrections or not.

Dr Michael Grech for the appellant said that the approval given by the DCC for the letter asking clarification from his client is proof enough that the appellant's bid was in fact for €19,990. Rather than following procedures, the evaluation board went against the same procedures because it did not follow the requirements of Clause 31.2, that there had to be the prior approval of the DCC, which was not given, and of the bidder whenever his bid was corrected arithmetically. This was also not done.

Mr Ivan Zammit finally stated that the DCC eventually accepted the decision taken by the evaluation board.

The hearing was here brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 23rd September 2013 and also through Appellant's submissions during the hearing held on 15th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant's bid was the cheapest.**

b) **The Appellant's bid price was incorrectly amended by the Evaluation Board of the Contracting Authority.**

c) **The Appellant was requested twice to confirm that the price of Euros 19,990 as stated in the tender document did include all the items requested in the Bills of Quantities. And in this regard the Appellant complied with the request in both instances.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 15th October 2013, in that:

a) **It was evidently clear that there was a multiplication error in the Bills of Quantities as submitted by the Appellant.**

b) **The Evaluation Board adjusted the mathematical error without informing the Appellant due to the fact that the Evaluation Board is not allowed to contact bidders during this stage of evaluation.**

Reached the following conclusions:

1. **The glaring arithmetical error related to a very simple item (Door Stopper). This Board feels that any member of the Evaluation Board could have deduced that a door stopper does not cost Euros 800. This was clearly an inadvertent, genuine mistake which resulted in the quoted rate placed in the wrong column by the Appellant.**

2. **This Board opines that in such instances, the Evaluation Board should exercise its discretion when faced with such situations.**

3. **The Evaluation Board should have informed the Appellant of the adjustment of the quoted rate for the door stopper.**

4. **The total of the quoted bid does count in the evaluation of a tender. The fact that the Appellant doubly confirmed that the price includes all items as specified in the Appellants bid does in fact establish that although there existed an arithmetical error the price is indeed Euros 19,990.**

In view of the above, This Board finds in favour of the Appellant Company and recommends that:

i) The Deposit paid by the Appellant be reimbursed.

ii) The Appellant's offer be reintegrated in the evaluation process.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

20 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 613

FTS/45/13

Tender for the Supply and Installation of Extra Low Voltage Systems at the Child Care Centre at Gzira.

The tender was published on the 23rd July 2013. The closing date was the 12th August 2013.

The estimated value of the Tender was €21,758.47 (Exclusive of VAT).

Two (2) bidders had submitted an offer.

On the 28th August 2013, Alberta Fire & Security Equipment Limited filed an objection against the rejection of their bid as being administratively non-compliant, and against the decision to cancel the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 15th October 2013 to discuss the appeal.

Present for the hearing:

Alberta Fire & Security Equipment Limited - Appellant

Mr Silvan Ellul	Representative
Dr Damian Degiorgio	Legal Representative

Foundation for Tomorrow's Schools - Contracting Authority

Mr Christopher Pullicino	Chairman Evaluation Board
Mr Andrew Ellul	Member Evaluation Board
Engineer Vincent Rapa	Member Evaluation Board
Mr Ivan Zammit	Member Evaluation Board
Mr Albert Ellul	Representative

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

Dr Damian Degiorgio on behalf of the appellant said that his client's bid was discarded as being administratively no compliant for two reasons. The first reason was that appellant's bid, in a covering letter, went against the requirement of the tender document Bill of Quantity that bids should be inclusive of VAT. He contended that since the column headers of the Bill of Quantity there is clearly indicated that "Inclusive of VAT" therefore there is no conflict with what was written in appellant's covering letter. This letter stated that unless specified, VAT is not applicable. The second reason for disqualification stated that the appellant's offer made some reservation about the rates quoted, reserving the right to change the rates. Dr Damian Degiorgio affirmed that the rates quoted are fixed,

and will not be changed unless the quantities are altered. The tender itself allows for variations and definition of these variations is "any increase or decrease in the quantities of works". Therefore the bid will vary according to the quantity of works. The value of the works will alter, not the rates, if the quantities are altered.

Mr Ivan Zammit on behalf of the Contracting Authority said that in public procurement tenders it is not acceptable for bidders to make conditions regarding their offers. In appellant's bid, for example at page four (4) of the letter enclosed with the tender, it is stated that "price is subject to import duties fluctuations", this is clearly a conditioned bid.

Dr Degiorgio explained that in the present case, as all the items would be obtained from the European Union, there would be no import duty.

The Chairman remarked that evaluation boards have to adjudicate bids on what the tenderers themselves submit and could not see why this condition about import duties was included.

Mr Christopher Pullicino on behalf of the Contracting Authority stated that were several other conditions made in appellant's bid. Tender was issued as inclusive of all charges. But appellant's offer excluded several items that were excluded from the offer. He particularly referred to page 5 of the appellant's offer, which includes a list of items were excluded from the bid.

Mr Silvan Ellul stated that these items were not considered necessary for the work appellant tendered for.

The Chairman remarked that some items on the list were considered necessary for the project citing for example a generator for electrical back-up. Appellant seems to consider that if such a generator had to be used, then the contracting authority had to pay extra for it. Thus it appears that bid was asking for additional expenses not included in the offer. Appellant had sufficient expertise to know what equipment would be required to carry out the works.

The hearing was here brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 28th August 2013 and also through the Appellant's verbal submissions during the hearing held on 15th October 2013 had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's offer was considered by the Evaluation Board as being 'administratively non compliant' due to the fact that the Bid price was not stated as inclusive of VAT. In this regard the Appellant also stated that" unless specified VAT is not applicable".

b) The Appellant's Bid allowed for variations in that the quoted rates were fixed h however the tender value depended on the quantity of units of works to be carried out.

Having considered the Contracting Authority's verbal submissions during the hearing held on 15th October 2013, in that:

a) **The Appellant's offer was specifically conditional in that the Bid price was not all inclusive.**

b) **In Fact the Appellant listed down the charges that may be incurred and charged to the Contracting Authority apart from the tendered price.**

Reached the following conclusions:

1. **From submissions heard, this Board established that:**

   i) **The price quoted by the Appellant was somewhat confusing in that, all tendered prices had to be VAT inclusive. The Covering letter sent by the Appellant clearly stated that "unless specified, VAT is not applicable". Obviously, this declaration in itself confuses the interpretation of the quoted bid price.**

   ii) **The Appellant's offer was not all inclusive. It did not cater for contingencies, such as hiring of other equipment or apparatus in case of emergency situations, so that the works as specified in the tender can proceed as programmed in the tender conditions.**

2. **The Evaluation Board of any Contracting Authority adjudicates offers, bids and tenders on information submitted in the tender document. In this respect, the Evaluation Board were correct in assessing the Appellant's offer as being 'administratively non compliant'.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

20 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 614

QLC/CBR/19/97

Tender for the Collection of Bulky Refuse.

The tender was published on the 6th August 2013. The closing date was the 16th August 2013.

The estimated value of the Tender was €44,280 (Exclusive of VAT).

Five (5) bidders had submitted an offer.

On the 3rd September 2013, Dimbros Limited filed an objection against the decision to award the tender to Ronald Debono obo R&A Waste Services Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 15th October 2013 to discuss the appeal.

Present for the Hearing:

Dimbros Limited - Appellant

Mr Malcolm Dimech	Representative
Dr Sabrina Micallef	Legal Representative

R & A Waste Services Limited - Recommended Bidder

Mr Ronald Debono	Representative
Dr Leonard Caruana	Legal Representative

Qormi Local Council - Contracting Authority

Ms Rosianne Cutajar	Mayor
Mr Kenneth Brincat	Executive Secretary
Mr Bjorn Azzopardi	Councillor
Mr Charles Farrugia	Councillor
Mr Sean Meli	Councillor
Mr Ralph Puli	Councillor
Dr Stefan Zrinzo Azzopardi	Legal Representative

Following a brief introduction, the Chairman invited appellant's representative to make submissions on the objection to the award.

Dr Sabrina Micallef on behalf of appellant Dimbros Ltd stated that certain requisites that the tender had, had not been satisfied by the preferred bidder. She mentioned as an example that the tender required certificates that the submitted vehicles were Euro 4. While appellant submitted the required certificate with the tender, the preferred bidder only submitted a declaration that the vehicle used by him was Euro 4 and did not submit a certificate. The preferred bidder also declared that he had the necessary experience, whereas appellant has information that the preferred bidder did not perform any similar service during the last twelve years. His last contract was with Iklin Local Council and that tender had been terminated prematurely because of a default.
Dr Sabrina Micallef continued that she wanted to ask the Executive Secretary if there were any directives issued to phone some bidders in the period between the publishing and the adjudication of the tender, because she claimed that appellant had information that a certain Councillor had phoned a bidder.
The Chairman here stopped Dr Micallef and said that she was making allegations that could not and would not be entered into by this Board.

Mr Kenneth Brincat, the Executive Secretary of the Qormi Local Council, called to testify by the appellant, under oath stated that the Council's policy regarding award of contracts is that first an evaluation board is appointed. The board first examines the bids for administrative compliance then the board interviews all the bidders, the same procedure used by all the other local councils. Mr Brincat, replying to a question by Dr Micallef said that experience was not a requisite of the present tender. Although it was not a requisite, the board also asked the bidders about their experience, but did not need to verify the information given by the bidders regarding their experience. Other requisites had been verified in detail, including the Euro 4 registration of the vehicles submitted. At this point the Public Contracts Review Board was shown the Logbook submitted by the preferred bidder that shows that his vehicle is Euro 4 compliant.

Replying to another question by Dr Micallef, witness testified that the preferred bidder had experience in refuse collection. In fact he also served the Qormi Local Council in the refuse collection field. He confirmed that the preferred bidder had all the qualifications necessary for the tender. Since the preferred bidder did not have experience in bulky refuse, the evaluation board did not feel the need to check his experience, which was not a requisite.

Dr Sabrina Micallef wanted to call to the witness stand Mr Bjorn Azzopardi to ask him about the allegations she had previously made. But the Chairman once again reminded her that the Board would not go into these allegations. Appellants had other venues to raise the matter of the allegations, but not this Board. It was clear that the allegations could be of a criminal nature and definitely would not be heard by the Board.

Dr Stefan Zrinzo Azzopardi on behalf of the contracting authority said that the requisites of the tender had been supplied by the preferred bidder. The documents produced by the preferred bidder were sufficient and his offer was fully compliant. Since his offer was clearly the cheapest and most advantageous offer. Experience was not a requisite therefore it stands to reason that he was awarded the tender.

Dr Leonard Caruana on behalf of the preferred bidder said that the Board has to stand by facts and not by allegations. He submitted that experience was not a requisite in the present tender.

The hearing was here brought to a close.

This board,

Having noted the Appellant's objection, in terms of the ' Reasoned Letter of Objection' dated 3rd September 2013 and also through the Appellant's verbal submissions during the hearing held on 15th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant stated certain allegations regarding 'Preference' instituted by the Evaluation Board towards certain bidders.**

b) **The Preferred Bidder submitted only a declaration that the vehicle to be employed in the activity of this tender requirement was a Euro 4 classification. In this regard, no certification of this attestation was submitted.**

c) **The Preferred Bidder did not have the necessary experience to carry out the activity as specified in the tender document.**

Having noted the Contracting Authority's verbal submissions during the hearing held on 15th October 2013, in that:

a) **The Evaluation Board of the Contracting Authority followed the same evaluation procedure as that adopted by all Local Councils.**

b) **The Evaluation Board stated that the experience factor in the same field of activity related to in the tender was not a requisite.**

c) **All information submitted by tenderers were checked and verified by the Evaluation Board.**

d) **The Preferred Bidder's offer was fully compliant and most advantageous**

Reached the following conclusions:

1. **This Board noted that the Appellant made allegations and this same Board declares that it has no competent authority by law to discuss this issue.**

2. **From the verbal submissions made by both parties during the hearing held on 15th October 2013, it was evidently clear that the preferred bidder's vehicle that was to be employed on the specific activity of the tender , did in fact have a Euro 4 classification.**

3. **The Preferred Bidder submitted all the required documentation as specified in the tender document.**

4. **The experience issue was not a mandatory factor in the evaluation process.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

20 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 615

CT 3058/2013

Tender for the Supply of Ultra Filtration and Reverse Osmosis Modular Units for Water Reclamation Use.

The tender was published on the 21st June 2013. The closing date was the 20th August 2013.

The estimated value of the Tender was €7,548,631.10 (Inclusive of VAT).

Three (3) bidders had submitted an offer.

On the 7th October 2013, Messrs. Guillaumier Limited, as representative in Malta of Beijing Grant Membrane Separation Equipment Co. Ltd, filed an objection against the rejection of their bid as being technically non-compliant, and against the proposed award to Protecno Srl.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Monday 21st October 2013 to discuss the appeal.

Present for the hearing:

Beijing Grant Membrane Separation Equipment Limited - Appellant

Ing. Marco Cremona	Representative
Dr Jonathan Thompson	Legal Representative
Dr Ingrid Cini	Legal Representative

Protecno Srl. - Preferred Bidder

Mr Sergio Sangervasi	Representative
Mario Callus	Representative

Water Services Corporation - Contracting Authority

Ing. Mark Perez	Secretary, Evaluation Board
Ing Robert Schembri	Member Evaluation Board
Ing David Sacco	Member Evaluation Board
Ing Noel Formosa	Member Evaluation Board
Mr Jonathan Scerri	Representative
Dr Aaron Mifsud Bonnici	Legal Representative
Dr Matthew Grech	Legal Representative

Department of Contracts

Mr Jonathan Barbara	Representative

Ms Marisa Gauci Representative

Following a brief introduction, the Chairman invited the appellant's representative to make his submissions on the objection.

Dr Jonathan Thompson, on behalf of appellant company, Beijing Grant Membrane Separation Equipment Limited said that appellant's objection is based on two grounds, the first on the unjust disqualification of appellant's bid and the other is based on the recommendation based on the best price offers. From the letter received on the 6th September 2013 it is clear that the appellant's offer was discarded because of two grounds, appellant's experience as contractor and the minimum number of treatment plants submitted. Dr Thompson contends that appellant was unjustly disqualified as the company's offer contained all the necessary documentation, and if there was anything that was not clear, then the evaluation board should have asked appellant for clarification. The tender documents required that bidders show that they had experience by listing projects that were valued at over €15,000,000 in total. With the tender submission, appellant had submitted a list containing four pages of various programmes carried out by it. In pages one and two, the amount of work value is written down. It is admitted that the value of the works was omitted for the projects listed in the next two pages. The projects however had value attributed to them and therefore, should the contracting authority have had any doubts about these amounting to €15,000,000, it should have asked for clarification. And appellant would have shown, as has been shown after the tender award, that the listed projects did exceed €15,000,000. It can also be seen from the financial offer made by appellant that works carried out by appellant exceeded €15,000,000.

Regarding the second reason for disqualification, Dr Thompson continued, that it seems that the contracting authority failed to take into consideration a number of plants submitted by appellant that gave the capacity of the said plants in cubic metres per hour instead of cubic metres per day. A simple multiplication could easily have cleared the matter. Section 4 of the tender specifications in fact stated that equivalent standards would be acceptable. Even here a simple clarification would have removed any doubts and avoided client's disqualification.

Finally, Dr Thompson said that appellant also contested the recommendation of the award of the best price offer because the offer indicated by the preferred bidder was around €8,000,000 whilst that made by appellant is €6,000,000 which is about €2,000,000 cheaper. Thus contends that since his client's bid should not have been disqualified, then the tender should have been awarded to appellant whose offer was cheaper.

Engineer Mark Perez on behalf of the contracting authority remarked that the present tender, being a three package tender, the offers are first tested administratively, then for the technical compliance and lastly the financial offers are examined. In this tender, the stage reached is the financial stage, but the present objection is about the technical compliance stage. The contracting authority's interpretation of the Regulations for Public Procurement is that the period allowed to bidders to file an objection on the technical compliance has lapsed and the appellant failed to submit an objection within that legal time-frame. He contended that the present objection was filed outside the legal time-frame.

Each tender was evaluated for the technical capacities first. A tender requisite was that bidders had to have carried out works amounting to more than €15,000,000 during 2010, 2011 and 2012. However from the documents submitted with the appellant's bid, it can be seen that the works performed by appellant amounted to around €9,000,000. Furthermore appellant submitted a list of plants supplied by it in the proper form, but no value of the works was given. Appellant submitted also another list that was not the proper form, which showed other plants. But again no value of the works was written down. The prescribed form only listed plants amounting to €9,000,000. The other projects were not

on the prescribed form and did not indicate the value of the projects. Contrary to what was said in the letter of objection, the applicable note is not number two (2) as alleged, but note three (3). Note three does not allow any rectification but only clarification, and the evaluation board could not thus ask the appellant to provide the missing values, as this would have been rectification.

Dr Aaron Mifsud Bonnici on behalf of the contracting authority explained that part of the works were listed on the prescribed form while other works were listed in a separate list, but this list did not show any values for the projects. The appellant listed the plants that had the required information on the prescribed form and the plants not showing the value in another list that was not on the prescribed form. The applicable note for Clause 7.1 is note three which allows no rectification. In the objection the wrong note is cited when it was claimed that the evaluation committee should have asked for a clarification on this point. The evaluation board assumed that appellant could have had some reason for not showing the values in the list submitted.

Engineer Mark Perez then explained the second reason why the appellant's bid was disqualified. Tender requested that bidders had to show they had provided at least two treatment plants that treated effluent via UFs and RO. The capacity rate of appellant's submitted plant list was not the reason for disqualification as alleged in the letter of objection. The reason for this disqualification was purely technical because form the list submitted by appellant, the evaluation board could not identify which.

Engineer David Sacco on behalf of the contracting authority said that the evaluation board could only identify one of the plants submitted by appellant as being an urban treatment plant that treated the effluent waste water. Other plants were listed but these were not considered relevant as they were not plants that treated waste water.

Dr Aaron Mifsud Bonnici explained that appellant had submitted a detailed list of plants it supplied, but there was only one of these that treated effluent as required by this tender, the other plants treated something else and could not be taken into consideration.

Engineer Mark Perez continued that the appellant's financial offer was not the cheapest, as was claimed in the letter of objection. The instructions to tenderers show the award criteria, and these criteria take into consideration not only the capital cost of the offers, but also the running costs. The tender explains in detail how the costings are to be worked out, so that all bidders would be on an equal footing. Appellant if fact worked out these costings according to the award criteria. Basically the offers had to be assessed for the cost of treating each cubic metre of water. Appellant worked out this cost at between €0.6 and €0.53, while that of the recommended bidder amounts to €0.45 per cubic metre of treated water. Thus appellant's offer was the cheapest on capital expenditure, but dearer for running costs.

Dr Aaron Misfud Bonnici reiterated that appellant's financial offer was more expensive, and that appellant had filed an appeal under Article 84 when the tender was a three package tender and falls under Article 83. Dr Mifsud Bonnici contends that therefore, the appeal should have been filed within 10 days from the letter disqualifying appellant. Since this was not done then the appeal was not valid. Although the hearing heard submissions regarding the technical capacity of appellant, the Board should not have gone into these, as the appeal was not valid. And it is this point that will have to be decided first by the Public Contracts Review Board, if there is a valid objection or not.

Dr Jonathan Thompson insisted that Article 84 of the Public Procurement Regulations does not prohibit and appeal at this stage for three package tenders. In fact Article 83 even allows an objection to be filed again under Article 84 by any person who had filed an appeal under Article 83 and which appeal had already been rejected by the PCRB. As regards the note qualifying Clause 7.1 of the tender document, he insisted that the note which follows the paragraph in question is in fact note 2. Therefore since note 2 allows both clarifications and rectification, then this should have been applied. The onus on the contracting authority was therefore to ask for clarification. Under note 3, clarification could also have been requested. Had this been done, the contracting authority would have been referred to the appellant's financial statement, which indicated that the works carried out by it exceeded €15,000,000.

Tender document specifies that the waste treatment plants had to be capable of treating waste water effluent via UF and RO. From the presentation submitted with the letter of objection, it can be seen that the treatment plants there indicated show that these are UF and RO treatment plants, and here again, a clarification would easily have explained the matter.

Regarding the reason that the financial evaluation had to consider running costs as well, Dr Thompson alleged that since his client's bid was discarded at the second, technical evaluation stage, then the appellant's financial bid, the third stage, should not have been available for the evaluation board, and the board could not assess the running costs of appellant's offer. The present objection was based on the capital price submitted by appellant. The running costs were not shown on the notice board. Appellant's third envelope was not opened, so he could not see how the appellant's running costs were evaluated.

Engineer Mark Perez explained that at the technical evaluation stage, appellant's offer regarding the financial running costs was already available to the evaluation board. This had been made available by the appellant company itself, Beijing Grant. In fact this goes against the regulations and the evaluation board could have disqualified the relative offer immediately for divulging information from the 3rd package beforehand. Appellant company itself submitted the costings with the technical offer. This fact was in fact confirmed in the letter of objection.

Dr Thompson for the appellant stated that the letter of objection was based on the information given by the contracting authority, and this did not include any information about the running costs reason. The running costs do not form a part of the objection. This was new information given now during the hearing. It was a surprise for his client that although its capital price offer was twenty five percent lower than that of the preferred bidder, it was considered to be more expensive.

The Chairman remarked that this Board was here to see that things were done properly, and in this case, and in his opinion they were. The evaluation board acted with diligence when the maintenance costs of appellant were also considered.

Engineer David Sacco on behalf of the contracting authority explained that capital costs would have to be amortized over the number of years the equipment would be estimated to last. Thus the difference of around two million would have to be divided by around fifteen years, while the running costs would be multiplied by the same number of years.

The Board, at the request of the Chairman was shown the workings of the running costs for both the appellant and the preferred bidder.

Dr Thompson for appellant stated that his client, being excluded, risked being harmed as envisaged in Regulation 84, and so had a right to appeal under the same regulation.

Mr Mario Callus on behalf of the preferred bidder referred to Clauses 33 and 34 of the tender document explained that any objection had to be filed under Regulation 83, this being a three package tender so the procedure used by appellant objection under Regulation 84 was not correct.

Dr Aaron Mifsud Bonnici finally explained that this tender will be using European Union funds that could be lost if not finished on time, and therefore asked for the case to be treated with urgency.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 7th October 2013 and also through the verbal submissions presented by same during the hearing held on 21st October 2013, in that:

a) The Appellant claimed that his offer's disqualification was unjustified.

b) The Appellant's Bid was the cheapest.

c) The Evaluation Board of the Contracting Authority should have asked for clarifications on the missing information in the Appellant's Tender document.

d) Article 84 of the Public Procurement Regulations does not prohibit any appeal at this stage for the three package tender.

e) The specifications in the tender document required that the waste treatment plants had to be effluent via UF and RO systems. In this regard, the plants indicated by the Appellant in the tender document did conform to such specifications.

f) The Appellant also objected to the fact that the Appellant's bid price was already known to the Evaluation Board prior to the third stage of the evaluation process.

g) The Tender document did not include any indication of the running costs of the plant.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 21st October 2013, in that:

a) The Appellant failed to object within the legal time frame.

b) All bidders were obliged to provide proof that during the years 2010, 2011 and 2012, they had carried out projects the grand total of which exceeded Euros 15,000,000. In the Appellant's case this amounted to Euros 9,000,000.

c) The list of plants which the Appellant was required to submit with the tender document was not accompanied with the values of each plant as was mandatorily requested in the tender document.

d) The Tenderers were mandatorily required to list and identify at least two such treatment plants supplied by same. However in the Appellant's bid, only one plant could be identified to satisfy the requirements of the tender conditions.

e) The Evaluation Board of the Contracting Authority took also into account the running costs apart from the original capital outlay the plant itself.

f) When the overall costs are taken into account over the amortisation period of the capital outlay, the Appellant's bid did not turn out to be the cheapest.

Reached the following conclusions:

1. **This Board, having considered the fact that there was a substantial price difference between the Appellant's offer and that of other Bidders , felt the duty to indulge further into the technical aspect of the Appellant's bid and in this respect this Board decided to carry on with the hearing.**

2. **In fact, it was through the verbal submissions made by both the Appellant and the Contracting Authority that the following conclusions could be deduced:**

    i) **It became apparent that the Appellant did not submit all the information as laid out in the Tender Document.**
    ii) **The Appellant's Bid failed on technical grounds in so far as proof of values of plants installed during the 2010, 2011 and 2012.**
    iii) **The Appellant's bid did not conform with the mandatory condition that the tenderer had to provide proof and location of at least two similar plants provided by same.**

3. **Although the original capital outlay of the Appellant's offer was much cheaper than those of other Bidders, The Evaluation Board of the Contracting Authority, quite diligently, took also into account the maintenance costs of the plant over the amortisation period of the Plant.**

4. **In any Public expenditure, where heavy capital outlays are involved, it is most essential that the capital outlay is amortised. It is also of the utmost importance that all maintenance costs are allocated over the amortisation life of the relevant equipment. It is through this economic principle that any Evaluation Board can assess who is the cheapest.**

5. **The Board also noted that the running costs of the Appellant's tender were submitted by the manufactures of the same plant themselves.**

6. **When taking all factors into account, apart from the technical aspect, it can be easily assessed that the Appellant's bid was not the cheapest.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

29 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 616

TM 001/2013

Tender: Consultancy Services for a Traffic Impact Statement on the Kappara Junction Project.

The tender was published on the 26th February 2013. The closing date was the 26th March 2013.

The estimated value of the Tender was €13,500 (Exclusive of VAT).

Two (2) bidders had submitted an offer.

On the 16th September 2013, Transporta JV filed an objection against the cancellation of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 22nd October 2013 to discuss the appeal.

Present for the Hearing:

Transporta JV - Appellants

Perit Mariello Spiteri	Representative
Perit Vanessa Pisani	Representative
Dr Franco Galea	Legal Representative

Transport Malta - Contracting Authority

Mr Ronald Attard Pullicino	Chairman Evaluation Board
Mr Godwin Grima	Member Evaluation Board
Mr Ray Stafrace	Representative
Mr Clinton Ellul	Representative
Dr Joseph Camilleri	Legal Representative

The Chairman made a brief introduction and invited the appellants' representative to make his submissions on the objection.

Dr Franco Galea on behalf of the appellants stated that the present tender was cancelled because all the bids exceeded the allocated budget. Appellants objection is that in the tender document there was no indication anywhere of the budget allowed for this project. There were two bids with a difference

between them of around €40,000. This tender was very complicated and required long hours of work in its compilation, and at a cost to the bidders. It is not fair therefore to cancel this tender.

Dr Joseph Camilleri on behalf of the contracting authority stated that the authority for the issue of this tender was obtained before it was published. The Ministry's Permanent Secretary gave the necessary authorization and the amount to be spent on this tender was fixed at €13,500. Dr Camilleri filed a copy of this authorization where the amount of €13,500 can be verified. The facts are not contested, Dr Camilleri stated. There were two bids for this tender, one for around €70,000 and the other for around €30,000. Both offers were technically compliant. The real problem was the budget allocated for the project.

Dr Camilleri referred to the tender's 'Instructions to Tenders', in Article 33 it is clearly stated that the contracting authority has the right to stop the tender procedure. It states that the publishing of the tender does not commit the authority to implement the project. Article 33.3 goes further and cites examples of when the tender process can be halted. One of these instances is when all the bidders are compliant but their offers exceed the financial estimates. Although the appellants' claim about expenses, made earlier, may seem just, this does not mean that the tender has to be awarded. If the appellants are claiming damages, this is not the right forum to demand them. In any case the letter of objection is asking that the appellants be awarded the tender. This cannot be demanded.

Dr Franco Galea for the appellants said that even when the tender is cancelled, bidders have the right of appeal. The internal document produced today is just an internal document. There was no indication afforded to bidders in the tender document that the price was limited. No bid bond was necessary, but this would have helped prospective bidders to assess the approximate value of the tender. He contended that the contracting authority withheld information about the financial resources.

Dr Franco Galea referred to another tender issued by Heritage Malta that had also been cancelled because there were no funds available. If bidders were not informed at the tender stage that the amount allotted for the project was limited, then they could not be excluded because this amount was exceeded. He contended that the tender should not have been cancelled because this cancellation was made on the basis of an internal document not available to bidders. He contended that this could lead to abuse, and asked if the financial situation was still the same as it was in January 2013.

The Chairman explained that if the budget was exceeded, then this was exceeded. There were no funds.

Dr Joseph Camilleri on behalf of the contracting authority stated that when the evaluation board took the decision, they did not rely only on the letter from the permanent secretary. This letter was produced just to show the Public Contracts Review Board that the budgetary constraint existed even before the tender was issued. The matter was not just raised to exclude appellants. The contracting authority, when issuing tenders, uses templates supplied by the Department of Contracts, and the Department of Contracts insists that the estimate values of the tenders are not divulged before the publication of the tender.

The Chairman said that in his opinion this is the wrong position and does not agree with it. Bidders should know approximately what they are bidding for. Thus they would be able to assess if it was worthwhile submitting an offer or not.

Dr Franco Galea for the appellants asked if the project itself was also cancelled as well.

Mr Ray Stafrace on behalf of the contracting authority said that in the present case when comparing benefits with costs, it was found that the project was not worth the costs. The information requested by this tender was already available to Transport Malta and therefore the tender is not going to be re-issued.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection in terms of the 'Reasoned Letter of Objection' dated 14th September 2013 and also through the Appellant's verbal submissions during the Hearing held on 22nd October 2013, in that:

a) The Appellant felt aggrieved due to the fact that the tender was cancelled after having dedicated long hours and expense in compiling all the information as requested in the tender document.

b) The tenderers were not made aware of the indicative budget allotted for this tender.

c) The Appellant's tender bid was both 'Administratively and Technically' compliant.

Having considered the Contracting Authority's verbal submissions during the hearing held on 22nd October 2013, in that:

a) The Contracting Authority confirmed that all bids received were 'Administratively and Technically' compliant.

b) The Contracting Authority cancelled the tender after noting that the tenderers' bid prices by far exceeded the budget allotted for this same tender.

c) The Contracting Authority does not feel the need to re-issue this tender.

Reached the following conclusions:

1. **First of all, this Board opines that the Contracting Authority had a right to cancel the tender as per Article 33, of the 'Instructions to Tenderers' of the tender document.**

2. **This Board feels that any Contracting Authority should indicate the budget allotted for the particular tender, so that the prospective tenderer would know the bid price parameters prior to the submission of the tender document.**

3. **On the other hand, in this particular case, it would have been futile to carry on the tendering process, knowing that there is lack of funds to pay to the preferred bidder.**

4. **This Board also feels that the Evaluation Board carried out its duties in a most diligent manner.**

In view of the above, this Board finds against the Appellant, however due to this Board's opinion and remarks as stated in conclusion 2 above, it recommends that the deposit paid by the Appellant should be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

16 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 617

FTS 45/13

Tender for the Supply and Installation of Extra Low Voltage Systems at the Child Care Centre at Gzira.

The tender was published on the 23rd July 2013. The closing date was the 12th August 2013. The estimated value of the Tender was €21,758.47 (Exclusive of VAT).

Two (2) bidders had submitted an offer.

On the 29th August 2013, ELV Engineering Ltd, filed an objection against the rejection of its offer as being administratively and technically non compliant and against the cancellation of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 22nd October 2013 to discuss the appeal.

Present for the Hearing:

ELV Engineering Services Limited -	**Appellant**
Mr Anthony Buttigieg	Managing Director
Mr Mark Agius Fernandez	Representative
Dr Carlos Bugeja	Legal Representative
Foundation for Tomorrow's Schools	**- Contracting Authority**
Mr Christopher Pullicino	Chairman Evaluation Board
Ing. Vincent Rapa	Member Evaluation Board
Mr Ivan Zammit	Member Evaluation Board
Ing. Albert Ellul	Representative

Following a brief introduction by the Chairman, Public Contracts Review Board, appellant's representative was invited to make his submissions on the objection.

Dr Carlos Bugeja on behalf of the appellant stated that his client's tender offer was found to be administratively non compliant because the first page of the tender form was missing. Dr Bugeja explained that appellant made some changes to the format of the first page of the tender, but all the details were included. All the information that had to be filled in page one as requested in the original form, was included in the new format. It was just a cosmetic change. Clause 16.1, cited in the letter of refusal, claiming that no rectification was allowed, does not apply to this case as all information had been submitted.

The appellant's bid was also disqualified because it was allegedly technically non-compliant as the appellant failed to submit required datasheets in connection with three items. Dr Bugeja contended that the tender document did not ask for the submission of any datasheets.
Since no datasheets were requested in the tender document it is contended that appellant's bid could not be rejected because of the non-submission of these datasheets. There was no need to submit detailed specifications. Appellant with the tender duly submitted all the necessary certifications.

Mr Anthony Buttigieg for appellant explained that:

i. The first item whose datasheets were allegedly not submitted, was the "Cable for the Fire Alarm System." In appellant's offer it was stated that what was to be supplied conformed to British Standard BS 5839 as requested. This cable that appellant offered was up to standard as it is illegal not to use this standard cable for fitting fire alarms.
ii. The Cat 5e cable and the cable for the CCTV system can be considered together because they are the same type of cable. As the cameras requested are IP cameras, the cable used is network cable. According to the tender conditions, once this cable is installed it has to be tested therefore appellant could never have chosen to install an inferior cable because it would fail the test.

Dr Carlos Bugeja stated that appellant's bid was certainly not 'administratively non-compliant' and one has to take into consideration that appellant's bid was the most advantageous offer.

Mr Ivan Zammit on behalf of the contracting authority said that appellant's tender was not disqualified of page one that was changed because that is just the cover page of the tender document. Appellant's bid was specifically disqualified because of the tender form. This tender form comprises pages 16, 17 and 18 of the tender document and these were not filled in by the appellant. These pages contained essential information about the bidder and about the offer such as sub-contracting and is missing from appellant's bid. The appellant's contact person is also missing. This was the person who would have legal ties with the contracting authority. Article 16.1 states that the tender must comprise the following duly completed documents. Sub section f) is qualified by note 3 and according to note 3 no rectification shall be allowed. The missing information could not be rectified because the evaluation board was precluded from asking appellant to rectify by producing the missing information. Article 30.3 Eligibility and Selection Compliance, states that tenders that are administratively compliant shall be technically evaluated, but in the evaluation board's opinion appellant's bid was not administratively compliant since no tender form was submitted.

The datasheets requested in page 19 of the tender documents refer to the technical literature of the bid. When the tender requested the datasheets of the fire alarm system it referred to all the components of

the fire alarm system that is the alarm, cables and all components. The same could be said of the other items for which no datasheets were submitted. The contracting authority needed to know what each bidder was offering exactly.

Dr Carlos Bugeja stated that the appellant's tender included all the necessary information that it is being alleged was missing.

Here the Board went through appellant's bid and it was ascertained that page 16 did not exist; pages started from page 17.

Mr Anthony Buttigieg for appellant said that it is illegal to import a fire alarm cable from China. In the offer, all the items of the fire alarm system were included in the Bills of Quantity. This Bill of Quantity was filled in with great detail, every component of the alarm system.

Ing Albert Ellul for the contracting authority said that there was no information about the cables in appellant's offer. Cables are essential for the proper running of the systems. The evaluation board had to be careful as there were cases of previous tenders where all the cables failed the tests and had to be changed. It was discovered that the cables supplied had not been certified. In the present tender it was made a requirement that cables had to be certified.

Mr Anthony Buttigieg insisted that all installations were tested and if they failed it was the contractor who had to replace them. Appellant would not supply defective cable.

Mr Ivan Zammit on behalf of the contracting authority said that although the evaluation board made the technical evaluation of appellant's offer, the board did not need to do so. The price is the final item to be examined. There were no details regarding the cable.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 29th August 2013 and also through the Appellant's verbal submissions during the hearing held on 22nd October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) Appellant's bid was discarded as 'Administratively non compliant' due to a different presentation in format of the first page of the tender document.

b) All the requested information in the tender document was submitted by the Appellant.

c) Appellant's Bid was not technically compliant as the Appellant did not submit the literature and data sheets of the products to be supplied, as specified in the tender document.

d) The Appellant's bid was the cheapest.

Having considered the Contracting Authority's verbal submissions during the hearing held on 22nd October 2013, in that:

a) **The Appellant's bid was disqualified due to the simple fact that the essential pages of the tender document which had to contain vital technical details were missing.**

b) **The data sheets requested in the tender document were of utmost importance to the Evaluation Board to establish the quality of the product being offered by the Appellant.**

c) **The Evaluation Board, through experience, reaffirmed the importance of the requested information with regards to the cables being used in the system as offered by the Appellant. This was missing.**

Reached the following conclusions:

1. **From the submissions made by both the Appellant and the Contracting Authority, this Board feels that the information and data not submitted by the Appellant was most important for the evaluation of the Appellant's bid. Due to the fact that this was missing the Evaluation Board was not in a position to assess the Appellant's offer from the technical point of view.**

2. **Although the Appellant's bid was the cheapest, the same offer lacked the necessary technical data that was mandatorily required in the tender document.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

20 November 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 618

WSD 4/2013/33

Tender for the Cleaning, Reinstatement and Restoration Works to Historical Dock Head, Cottonera Dock No1 Project.

The tender was published on the16th July 2013. The closing date was the 30th July 2013.

The estimated value of the Tender was €79,026.57 (Exclusive of VAT).

Four (4) bidders had submitted an offer.

On the 20th September 2013, MaCri Joint Venture, filed an objection against the cancellation of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 22nd October 2013 to discuss the appeal.

Present for the hearing:

MaCri Joint Venture - Appellant

Mr Marzio Capece Minutolo del Sasso	Representative
Ms Josephine Casabene	Representative

Works and Services Department - Contracting Authority

Mr Anton Camilleri	Chairman Evaluation Board
Vincent Centorino	Member Evaluation Board

After making a brief introduction the appellant's representative was invited to make submissions about the objection.

Ms Josephine Casabene on behalf of the appellant Joint Venture stated that appellant was not in fact informed of the outcome of the tender procedure as the letter was not sent to appellant but to another firm, CM Costruzioni Srl., this was just a partner in the Joint Venture and not the bidder. Contended that appellant Joint Venture was not informed that the tender had been cancelled. However appellants were informed by CM Costruzioni Srl and filed the letter of objection.

Ms Casabene continued that appellant had participated in the tender with two options, one, Option A, was discarded as being technically non-compliant. Appellant agreed with this decision and was not contesting it. The other Option B on the other hand was compliant but was discarded because the offer exceeded the financial resourses available, was beyond the budget. Appellant's Option B was fully compliant.

The Chairman explained that the appellant's offer for Option B was much higher than the budgeted amount. The budget for the project was half the amount stated in appellant's offer.

Ms Josephine Casabene stated that therefore there could be bases for negotiations since in its offer appellant included many items that were not in the Bill of Quantitiy. For example she cited that around €14,000 were for day works and could be excluded from the final price.

Mr Marzio Capece Minutolo del Sasso on behalf of the appellant asked if there was any way to reach a negotiated agreement on the price.

Architect Anton Camilleri on behalf of appellant said that negotiated procedures are only possible with Department of Contract tenders. He suggested that when the tender is re-issued,
appellant can keep the present one in mind before submitting offers for the new tender.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 20th September 2013 and also through the verbal submissions presented by same during the hearing held on 22nd October 2013, in that:

a) **The Appellant was not made aware of the outcome of the tender as the Contracting Authority's relevant correspondence was sent to a third party.**

b) **The Appellant's bid under option B was fully compliant.**

c) **The Appellant through a third party was informed that his bid was well over the budgeted funds allocated for this particular tender.**

d) **The Appellant also enquired whether at this stage, the Appellant's Bid price can be negotiated.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 22nd October 2013, in that:

a) **Although the Appellant's bid under option B was fully compliant, the bid price by far exceeded the budgeted allocated amount.**

b) **The Contracting Authority was in duty bound to abide by the budgeted value of the Tender's financial parameters.**

c) **The Appellant's bid was 80% higher than the allocated funds.**

Reached the following conclusions:

1. **Since the variance in price between the Appellant's bid and the allocated funds was well beyond a reasonable proportion, the Contracting Authority, diligently, followed the correct procedure in advocating a re issue of the tender.**

2. **This Board also recommends that some form of indicative budgeted figures be made available to prospective tenderers. So that the prospective tenderer is made aware of the magnitude of the tender prior to submission of same.**

In view of the above, This Board finds against the Appellant, however due to circumstances this same Board recommends that the deposit paid by the Appellant be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

29 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 619

PARK 20/2013/1

Tender for the Design, Supply, Installation, Testing, Commissioning and Certification of a Grid-Connection Photovoltaic System at the Oenology & Viticulture Research Centre, Buskett.

The tender was published on the 3rd September 2013. The closing date was the 13th September 2013. The estimated value of the Tender was €45,305 (Exclusive of VAT).

Six (6) bidders had submitted an offer.

On the 7th October 2013, Clinton Electrical & Mechanical Installations filed an objection against the rejection of its bid and the award of the tender to ECO Group Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday 24th October 2013 to discuss the appeal.

Present for the hearing:

Clinton Electrical & Mechanical Installations – Appellant

Mr Clinton Zammit	Representative
Dr Victor Refalo	Legal Representative

ECO Group Limited - Recommended Bidder

Mr Louis Borg	Representative

PARK Department - Contracting Authority

Mr Herman Galea	Chairman, Evaluation Board
Ms Therese Zammit	Secretary
Mr Emanuel Board	Member, Evaluation Board
Ms Charmaine Debono Fenech	Member, Evaluation Board
Mr Eman Portelli	Member, Evaluation Board
Mr Redeemer Axisa	Representative
Dr Abigail Caruana	Legal Representative

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

Dr Victor Refalo on behalf of the appellant referred to the letter of objection for the reasons of the objection and wanted to clear some points. Following the submission of the tender by his client, the contracting authority asked the appellant twice for clarifications. The first one on the 17th September was regularly sent, and gave appellant two days within which to reply. Appellant complied and submitted the requested documents. On the 20th September, his client received another notice which contained another request asking him to submit documents in terms of Clause 8.5.4.10.1 of the tender document. The tender document specified which documents were to be submitted and these latter requested documents were not included. He contended that if these documents were relevant they should have been requested under Clause 1.2.8 or in Clause 8.3. Clause 8.3 refers bidders to Clause 1.2.8 when asking which documents to enclose. Clause 4.4.1 stated that the evaluation board shall upon payment of a fine, request rectification within two working days from notification. However in the present case his client was only given a few hours to reply because the 21st September was a public holiday and the following day was a Sunday. The relevant email was received by client on Friday, the 20th September 2013 at 18.00, that is, the close of business of the week. Furthermore, Dr Refalo continued, the appellant's offer was, as explained in the letter of objection, fully compliant. The requested schematics were had already been submitted, while the declaration signed by a structural engineer, had already been explained by appellant in his bid. That all the equipment eventually supplied by appellant would be certified by the overseas manufacturer. Had appellant been given sufficient time, probably he would have complied and produced the requested certification.

Dr Abigail Caruana on behalf of the contracting authority said that the evaluation board asked appellant to rectify his bid in the first communication. Tender document required, Clause 1.2 certain documentation that was to be submitted with the tender. During evaluation, it was discovered that appellant had not submitted all the necessary documents. He did not provide 1. a signed and approved structural plan for the three separate arrays, and 2, the single line electrical diagram including safety equipment. Since Clause 2.1.5 allowed for rectification, appellant was asked to rectify his omission. Appellant complied and submitted the requested documents within the two days, and was thus compliant up to a point. However appellant was not totally compliant because according to Clause 1.2.8 the documents had to contain certain information. Submitted documents did not contain a signed and approved structural plan. According to tender general conditions Clause 8.5.4.10.1 stated that *"bidders shall submit signed drawings together with a declaration from a warranted structural engineer that the designs for the three separate structures together with their respective fixation and ballast shall withstand without any damage a wind of 200 km/hr (55m/s) or Force 12."*, contends therefore that the submission had to be certified by a structural engineer. The second document, that is, the electrical single line diagram, including safety equipment according to tender document, had to have *" surge protection shall be provided for both DC and AC circuits....data should be provided, as proof of such protection and clearly indicated in the electrical schematic."* This schematic is the single line diagram. The documents submitted by the appellant following the rectification did not contain these requisites. A structural diagram was submitted but this, although it carried a signature, did not specify that this signature was of a warranted structural engineer.

The Chairman remarked that when one is compiling a tender one should be careful in following to the letter what is asked. If any doubts arise, then the bidder is to ask for clarification. The tender document clearly specified that there had to be the signature of an engineer.

Dr Abigail Caruana stressed that appellant had signed the tenderer's declaration whereby he accepted without any reservations the contents of the tender document. Therefore he was aware that document should have been signed by a qualified structural engineer.

On being asked by the Chairman why his client did not submit these documents, Dr Victor Refalo replied that with the original bid, client submitted specification sheets from the manufacturer. Appellant thought that those had been sufficient for the case.

Dr Abigail Caruana explained that bidders had to submit a plan signed by an engineer, who, after the tender was awarded would be required to certify the completed structure. The appellant's bid also failed to produce the required guarantee.

Dr Victor Refalo stated that if this certification and signature was so important this should have been requested in the first clarification notice.

Dr Abigail Caruana stated that rectification could only be asked for under 1.2.8 only as was in fact done. It was up to bidder to see what the request made by the evaluation board meant. It was explained clearly to him and the information was requested in the tender document itself. The appellant was even asked to state whose signature appeared on his submitted plans.

The Chairman stated that tenderers have an obligation to fill tenders correctly and if problems are encountered, to ask for clarification.

Dr Victor Refalo finally contended that the wording of the tender document stated that the plans had to be signed and approved. The plans submitted by appellant were in fact approved by the manufacturer and signed by the appellant.

At this point, the hearing was brought to a close.

This Board,

Having noted the Appellant's objection by way of the 'Reasoned Letter of Objection' dated 7th October 2013 and also through the verbal submissions presented by same during the hearing held on 24th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant received a request for clarifications from the Contracting Authority on the 17th September 2013 and this was complied with, by the Appellant. However on the 20th September 2013, the Appellant received another request for clarifications giving a deadline of two days for a reply. Due to the fact that the two day period included a public holiday, Appellant could not provide the necessary clarification.**
b) **The clarifications requested by the Evaluation Board in the second correspondence could have easily been included in the first request for clarifications.**

c) **The Appellant's offer was fully compliant.**

d) **The Appellant insisted that the equipment supplied by same would have been certificated by the manufacturers of the same equipment and this would have been sufficient.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 24th October 2013, in that:

a) **Appellant did not submit the required information as specified in the tender document.**

b) **There had to be a certification by a structural engineer certifying the technical capabilities of the product being offered by the Bidder. And this was a mandatory condition.**

c) **The Appellant was aware that the mandatory documentation requested in the tender document was to be submitted.**

d) **The documentation not submitted by the Appellant in the tender document was highly pivotal during the evaluation stage of the tender.**

Reached the following conclusions:

1. **The fact that for the second request by the Evaluation Board of the Contracting Authority had to abide by the time limit for which a reply to same had to be made does not rule out the responsibility on the Appellant to have given the requested clarified information when submitting the tender document in the first place.**

2. **The appellant failed to submit the required complete information as specified in the tender document.**

3. **If , on the other hand, the Appellant had any doubts regarding the submissions of additional schedules, clarifications and necessary certifications, he was in duty bound to ask for clarifications with the Contracting Authority , prior to submission of the tender document.**

In view of the above, This Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

29 October 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 620

WSC T/106/2012

Tender: Repair Clamps for Metric Ductile Iron and Imperial Cast Iron Pipes.

The tender was published on the 28th December 2012. The closing date was the 30th January 2013.

The estimated value of the Tender was €20,312.00 (Inclusive of VAT).

Eight (8) bidders had submitted an offer.

On the 6th June 2013, Ragonesi & Company Limited filed an objection against the rejection of its bid and against the cancellation of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday 24th October 2013 to discuss the appeal.

Present for the hearing:

Ragonesi & Company Limited - Appellant

Mr Roberto Ragonesi	Managing Director
Dr Joseph Camilleri	Legal Representative

Water Services Corporation - Contracting Authority

Mr Stefan Vella	Secretary Evaluation Board
Engineer Nigel Ellul	Member Evaluation Board
Engineer Ronald Pace	Member Evaluation Board
Mr Anthony Camilleri	Representative

The Chairman made a brief introduction and invited appellant's representative to make his submissions on the objection.

Dr Joseph Camilleri on behalf of the appellant stated that his client's offer was discarded because the clamp body offered by him was manufactured in stainless steel and not in spheroidal cast iron as specified in Clause 5 of the tender's Technical Specifications. This fact is not being contested. He contended that appellant provided an identical product to that requested and provided the same functions, reached the required specifications, but was made in stainless steel. This fact of being in stainless steel did not change any of the technical capacities of the product, but if anything, being made of stainless steel it was stronger, and had a longer life. With the letter of objection, appellant has produced a declaration from the supplier that confirms the above in more technical detail. Appellant understood that if a product was demanded in a tender, then bidders should offer to provide that

product. But, Dr Camilleri contended, that if there was no particular reason for asking this particular type of product, then bidders could offer to provide an equivalent product. He continued that he still has to be shown why the item proposed by the appellant was not good enough for the contracting authority.

Mr Nigel Ellul, a member of the evaluation board, on behalf of the contracting authority said that the repair clamps in question are used to repair leakages and bursts in pipes. Some leaks are small while others result from circumferential breaks. Experience has shown that cast iron clamps are much better at repairing leaks than clamps made from other material. This was true especially whenever circumferential breaks have to be repaired. When using stainless steel to repair circumferential breaks difficulties were experienced and under pressure, the repairs leaked again. Here Mr Ellul produced two samples of clamps, one in stainless steel and the other in cast iron and these were shown to the Board. He stated that the cast iron one allowed for slightly misaligned pipes to be repaired, while stainless steel required perfect alignment of the pipes, and this could not be provided in all cases. The contracting authority wanted a product that would fit all kind of leaks. Furthermore, cast iron clamps can be bored and tapped allowing another outlet to be fitted. This cannot be done when using stainless steel clamps. This was not set down as a reason for disqualification.

Dr Joseph Camilleri remarked that certain factors emerged during the hearing, that were not mentioned in the tender. If the contracting authority wanted particular items, then it should make the specifications clearer from the start. Dr Camilleri stated that the tender was reissued but some additional items were added. The tender was re-issued during the present tender appeal. Dr Camilleri contended that the re-issue of the tender should have been left till after the decision of the present objection.

At this point, the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 6th June 2013 and also through the Appellant's verbal submissions during the hearing held on 24th October 2013, in that:

a) **Appellant contends that the quality of the product offered by same was of a superior quality than that required in the tender specifications. In this regard, the Appellant had produced evidence to confirm this declaration.**

b) **The Appellant could not understand why the material of the product offered in his tender was considered as inferior by the Evaluation Board.**

c) **The Contracting Authority issued additional clarification notes previous to the Appeal hearing of this same tender.**

Having noted the Contracting Authority's verbal submissions during the hearing held on 24th October 2013, in that:

a) The Evaluation Board's technical experts demonstrated in great details as to why the Appellant's bid was discarded for technical reasons.

b) The technical experts of the Evaluation Board contended that it is of vital importance that the material of the product be made of cast iron for easier maintenance in case of repairs of leaks.

Reached the following conclusions:

1. **From the submissions made by the technical experts of the Contracting Authority it clearly emerged that, in assessing the evaluation of the tender bids, the Evaluation Board of the Contracting Authority acted in a most responsible and diligent manner.**

2. **The Evaluation Board were prudent to cancel the tender process and re-issue same.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

4 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 621

WSC 840/2012

Tender for the Supply of Turbidity Instruments.

The tender was published on the 22nd January 2013. The closing date was the 22nd February 2013.

The estimated value of the Tender was €28,000 (Exclusive of VAT).

Eight (8) bidders had submitted an offer.

On the 24th September 2013, AFS Limited filed an objection against the rejection of its bid and the award of the tender to Messrs. U.E.O srl.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday 24th October 2013 to discuss the appeal.

Present for the hearing:

Messrs AFS Limited - Appellant

Engineer Paul Refalo	Representative
Mr Joseph P. Attard	Representative

Water Services Corporation - Contracting Authority

Engineer Noel Formosa	Chairman Evaluation Board
Mr Stefan Vella	Secretary Evaluation Board
Engineer Antoine Psaila	Member Evaluation Board
Mr Anthony Camilleri	Representative

The Chairman made a brief introduction and invited appellant's representative to make his submissions on the objection.

Mr Joseph P. Attard, Managing Director AFS Limited on behalf of the appellant, made reference to Clause 1.1 of the tender document, where the technical specifications asked for an instrument to measure turbidities in the range from 0.001 to 0.999. However the same Clause also required the instrument to be able to read accurately up to 9.999 NTU. Thus it speaks of accuracy and of scale. This was the basis of appellant's objection. He contended that the contracting authority wanted a meter to read up to three decimal places from 0 to 1, as well as to read accurately up to 10. Appellant offered a meter that read to three decimal places from 0 to 4, but keeping the same accuracy, could read up to 40. Thus while the contracting authority was asking for readings from 0 to 10, appellant offered 0 to 40. The whole difficulty was therefore on the third decimal place. Mr Attard stated that

he would continue his submissions after hearing the contracting authority stating where the meter in question would be used, and what range it would be required to read.

Mr Noel Formosa, Chairman Evaluation Board on behalf of the contracting authority stated that specifications asked for a resolution of 0.001. The reason why appellant's offer was disqualified was because of the resolution of the meter it submitted was inferior to specifications. Appellant's bid offered a meter that read 0 to 4 and 0 to 40. Resolution equals .05% of the scale. Thus if appellant's lower scale is taken, that is 0 to 4, then .05% of 4 equals .002, this is not what was required and requested, resolution of .001. Not one of the scales offered by appellant reached this resolution of .001. Appellant's bid was therefore not according to specifications and was disqualified. It was very important that resolution of .001 was reached because the meter was going to be used for sea water that would be used on the membranes that were both very costly and had strategic importance. An increased level of turbidity must thus be noticed immediately, and accuracy was essential.

Mr Joseph P. Attard said that he wanted to clear the difference between accuracy and resolution. He contended that for a scale of between 0 to 4, the resolution to three decimal places is reached with an accuracy of 2%. This is accuracy of +- 2%. Accuracy and resolution cannot be mixed together. It is not understood why three decimal places from .001 to .999 and also up to 9.999 was asked for. He asked what range the instrument would be reading, from 0 to1, 2 to 6, 8 to 10? Would the membranes mentioned earlier be affected by readings from 0 to 1 or over 1?

Replying to a question by the Chairman Public Contracts Review Board, Mr Noel Formosa said that the instrument offered by appellant was compliant regarding accuracy. The accuracy of the instrument submitted by appellant was never in doubt. He stated that in the letter of objection, appellant mixed up resolution and accuracy. .01 is the resolution and not accuracy.
The range of use is normally from 0 to 1 but the contracting authority wanted flexibility. In the case of an accident, say an oil spill, this would increase the turbidity, and this was the reason why a range of 0 to 10 was also requested.

At this point, the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 24th September 2013 and also through the Appellant's verbal submissions during the hearing heard on 24th October 2013 , had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant contends that the product being offered in his bid does in fact conform to the specifications as laid out in the tender document.**

b) **The Appellant questions the criteria adopted by the Evaluation Board in determining the 'technical' non compliance' decision with regards to the Appellant's bid.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 24th October 2013, in that:

a) **The technical reason why the Evaluation Board discarded the Appellant's bid , on the technicality point of view ,was due to the simple fact that the 'Resolution' element of the product offered by the Appellant in his tender, was not up to the specifications as laid out in the tender document.**

b) **The Contracting Authority, through its technical Evaluators explained in great detail why the Appellant's bid did not meet the technical 'Resolution' aspect of the specifications as required in the tender document.**

Reached the following conclusions:

1. **Although the Appellant's bid was 'technically compliant' in relation to the 'accuracy' of the equipment being provided, same equipment was not 'technically compliant' with regards to the 'Resolution' aspect.**

2. **Through the submissions and technical explanations made by the technical Evaluators of the Evaluation Board, this Board opines that the decision taken to discard the Appellant's bid was justified on technical grounds.**

3. **The Adjudicating Board acted in a diligent manner in evaluating the Appellant's bid.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

4 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 622

WSM/68/2013

Period Contract for the Supply and Delivery of Heating Gas Oil.

The tender was published on the 3rd September 2013. The closing date was the 24th September 2013.

The estimated value of the Tender was €120,000 (Exclusive of VAT).

Two (2) bidders had submitted an offer.

On the 3rd October 2013, Cassar Petroleum Services Limited filed an objection against the award of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 29th October 2013 to discuss the appeal.

Present for the hearing were:

Cassar Petroleum Services Limited - Appellant

Mr Darren Marmara	Representative
Dr Matthew Brincat	Legal Representative

San Lucian Oil Company Limited - Preferred Bidder

Mr Joseph Falzon	Representative
Dr Yvanka Vella	Legal Representative

WasteServ Malta Limited - Contracting Authority

Ms Mary Grace Micallef	Member Evaluation board
Dr Victor Scerri	Legal Representative

The Chairman made a brief introduction and invited appellant's representative to make his submissions on the objection.

Mr Darren Marmara on behalf of the appellant stated that last April the Department of Contracts had issued another tender for the supply of Gas Oil for the two terminals operated by WasteServ. That tender was to have run for a period of three years and appellant firm had tendered and it resulted that its offer was the cheapest offer. However that tender was still being adjudicated.

WasteServ had in the meantime issued another two tenders for the same commodity. One of these is the present tender under objection, and is for a period of six months. Appellant participated in the present tender under protest because it is felt that the new tender should not have been issued during the period when the previous tender was still being adjudicated. Appellant queried the procedure that would apply in case a bidder won the present tender, which runs for six months, while another bidder was awarded the first tender that runs for three years. Where would the contracting authority obtain its supply? The two tenders were identical; the only difference is the validity period and the terminal for which the supply was intended for.

Mr Marmara stated that in fact the tender issued in April has been awarded to appellant for a three year contract period on the 18th October 2013.

Dr Matthew Brincat on behalf of the appellant queried the sense in the decision of issuing another tender for six months just because the process of evaluation another tender for a three year period was taking too long to evaluate, but this was done by the contracting authority. Dr Brincat remarked that while the first tender took several months to adjudicate, the present tender was issued and adjudicated in just one month.

Dr Victor Scerri on behalf of the contracting authority said that the objection raised by appellant was not relevant to the present award. The objection does not refer to any procedures related to the present tender; it does not question these procedures and adjudication. He continued to explain the reason why the present tender had to be issued. Since the April tender was for a period of three years, the value would have been much greater, and the procedures used in evaluating such tenders tended to be lengthy and time consuming. Therefore it was decided to issue another short term tender in order to ensure that a continuous supply of the commodity was available. Any objection on the award of the present tender should be limited to the procedures followed by the contracting authority during adjudication.

Dr Matthew Brincat for the appellant explained that when a bidder participates in a three year tender, a certain commercial risk is taken on the price offer. When the same bidder participates in a six month tender for the same commodity, the risk is much less. Therefore it is unfair to issue another tender covering the first six months from the three year contract.

Dr Victor Scerri for the contracting authority said that the three year contract is issued "*for a period of thirty six months on an if and when required basis."* The contract starts when the order is given to start supply. Therefore when the three year tender is adjudicated and the order for supply is issued the receipt of supplies from the six month contract is stopped. WasteServ needed to ensure that it had constant supply without the need of direct orders.

Dr Brincat on behalf of the appellant, replying to a query by the Chairman said that it is not a question of supplies, because the contract does not bind the contracting authority to take a specified quantity of fuel, but an amount as required. He contended that having two overlapping tenders, one for three years and the other for six months, if the price offered for the six month tender is cheaper than it the contracting authority would choose to get supplies from the six month contract. He reiterated that the present tender should never have been issued.

Dr Victor Scerri remarked that the present tender states that it was for a period of six months or until the contract value is reached. If the amount is used within one month then no more fuel could be

purchased from the contractor. The original tender was still being evaluated and was taking a long time. It was deemed that a six month tender would be faster, ensuring constant supplies.

Ms Mary Grace Micallef for the contracting authority said that most of the commodity was being used for the generator. On average 45,000 litres of fuel per month are used and these cannot be purchased through a Local Purchase Order but needed to issue a departmental tender which is faster. As a stop gap fuel needs were purchased direct from Enemalta.

The Chairman remarked that it is clear that the two six-month tenders had been issued as stop-gap measures to ensure continuous supply, until the three year tender was finalized.

Dr Victor Scerri reiterated that this hearing had to deal with the present tender only.

Here the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 3rd October 2013 and also through the Appellant's verbal submissions during the hearing held on 29th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant had an awarded running tender with the same Authority for the same product, the contract of which has not yet expired.**

b) **The Appellant feels aggrieved that while same is providing supplies in accordance with the tender, the Contracting Authority issued a tender for the same product being provided by the Appellant for a period of six months. The Appellant's present tender's duration has not as yet expired.**

c) **Due to the fact that the newly issued tender was for the short term of six months, whilst the current Appellant's tender was for a much longer period, the Appellant feels that he is at a discriminatory disadvantage with regards to quoted price in both tenders.**

d) **The short term tender for six months should never have been issued by the Contracting Authority.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 29thOctober 2013, in that:

a) **The reason why this 'short term tender' was issued was simply that, due to the fact that the reissue of the same tender on a long term, was a lengthy process and at the same time the Contracting Authority had to ensure continuous supplies of the product until the new tender on a longer term basis is issued.**

b) **The Contracting Authority was in duty bound to issue an overlapping 'short term ' tender so that while the process of issuing a longer term tender, there will be a buffer supply to the Contracting Authority.**

Reached the following conclusions:

1. **From the submissions made by both the Appellant Company and the Contracting Authority during the hearing held on 29th October 2013, this Board opines that the decision taken by the Contracting Authority to issue a 'short term tender' was justified and pertinent.**

2. **The Contracting Authority acted diligently as same was in duty bound to ensure continuous flow of supplies of the product being provided by the present tenderer.**

3. **The fact that the Contracting Authority issued a 'short term' tender does not in any way prejudice the Appellant's commitments in carrying out his obligations in the existing tender.**

In view of the above, the Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

4 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 624

P 4584/2011

Tender for the Supply and Installation of CCTV Surveillance Equipment at the Malta Police Department.

The tender was published on the 13th November 2012. The closing date was the 3rd January 2013.

The estimated value of the Tender was €90,000 (Inclusive of VAT).

Five (5) bidders had submitted an offer.

On the 6th September 2013, Firetech Limited filed an objection against the rejection of its offer as being non compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 29th October 2013 to discuss the appeal.

Present for the Hearing:

Firetech Limited - Appellant

Mr Simon Camilleri	Representative
Mr Eder Catania	Representative
Dr Victor Axiak	Legal Representative

Alberta Limited - Preferred Bidder

Mr Duncan Barbaro Sant	Representative
Mr Karim Cassar	Representative

Malta Police Department - Contracting Authority

Inspector Pierre Minuti	Chairman Evaluation Board
Supt. Silvio Valletta	Secretary Evaluation Board
Mr Claudio Baldacchino	Member Evaluation Board
Mr Martin Debono	Member Evaluation Board
Mr Ismael Vassallo	Member Evaluation Board

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

Dr Victor Axiak on behalf of appellant Firetech Limited stated that appellant was mainly objecting to Clause 6.1.2 because this limited bidder's experience to three years, and to at least one per year. Appellant in fact made one delivery in 2010 and this was shown in the tender. In 2011 appellant made two deliveries. In 2009 appellant firm also made deliveries, but these were for some reason not submitted in the tender. However it must also be said that the appellant firm has vast experience in the field that it is unjust to base the evaluation of its offer on the three years 2009, 2010 and 2011. This decision moreover goes against the interests of the contracting authority itself. The contracting authority should examine if the bidders in fact have any experience in what the tender asks for and then should go for the cheapest offer.

Mr Martin Debono on behalf of the contracting authority said that the tender asked for a list of deliveries for the years 2009, 2010 and 2011. Appellant's bid submitted deliveries only for the years 2010 and 2011. Since the submission of three years' deliveries was mandatory appellant's bid was considered to be administratively non-compliant. The technical capacities of the appellant could thus not be assessed.

Mr Simon Camilleri Chief Executive at Firetech Limited the appellant said that his firm has been in this field since 1991 that is for twenty one years. He said that admittedly, the appellant's tender bid contained a mistake. The person compiling the tender misunderstood the specifications and thought that the deliveries had to be of specific installations. And for some reason considered that other types of installations the firm made in 2009 could not be submitted. Deliveries had been in fact made during 2009 but these were erroneously not submitted with the tender. It is not understood why adjudication was made solely on those three years when his firm has such vast experience.

Dr Victor Axiak for the appellant said that during the last three years, appellant had made three deliveries because it made one in 2010 and two during 2011. The contracting authority asked for at least three deliveries, but these had to have been made one a year.

The Chairman requested the Contracting authority to confirm that appellant's bid contained the information that three deliveries had been made during those three years.

Inspector Pierre Minute, the chairman of the evaluation board said that page 8 of the tender document stated in bold that *"the minimum value of deliveries of similar nature of not less than €30,000 per annum for the years 2009, 2010 and 2011".* In appellant's bid the value shown for the year 2010 was €31,000 and 2011 showed two deliveries that together amounted to over €30,000 and where thus considered acceptable. However there was no submission for the year 2009. The total amount submitted for the years 2010 and 2011 in totals €65,000. The requirement according to the tender was over €90,000.

Mr Martin Debono who was a member of the evaluation board for the contracting authority remarked that even if appellant wanted to rectify after submitting the tender and submit the figures for 2009, this could not be allowed, because this falls under note 3 which does not allow any rectification. The specifications did not ask for a total of deliveries to be in excess of €90,000 but that deliveries should be of €30,000 per year.

Mr Simon Camilleri said the specific items asked for in this tender were introduced at the end of 2009/beginning of 2010. This caused the problem in the person compiling the tender. The appellant made deliveries during 2009 but these were not of a similar nature. Appellant have a list of deliveries made during 2009.

Mr Martin Debono on behalf of the contracting authority, replying to a question by the Chairman, whether the other bidders were compliant in this requirement, replied that yes they were. Otherwise they would have been disqualified. The specifications required deliveries of a '*similar scope/nature'*.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 6th September 2013 and also through Appellant's verbal submissions during the hearing held on 29th October 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant's bid was discarded as 'Administrative non Compliant' by the Evaluation Board due to lack of experience of similar works carried out in the years 2009, 2010 and 2011.**

b) **The Appellant felt unjustly regarded by the Contracting Authority due to the fact that, although he did not reach the minimum similar works required during the specified years in the tender document, the same Appellant had more than the specified experience since 1991.**

c) **In Actual fact, in compiling the requested information of the tender document, the Appellant made a genuine mistake in not listing deliveries effected by the Appellant in 2009.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 29th October 2013, in that:

a) **The Appellant failed to submit the requested information regarding the deliveries effected by same in 2009.**

b) **All other bidders were compliant to this mandatory requirement.**

Reached the following conclusions:

1. **This Board opines that the conditions regarding experience laid out by the Contracting Authority should not limit the parameter of same condition in terms of minimum per annum, but rather in total over the number of years as requested by the same Contacting Authority. At the same time, the same Board feels that the experience clause in any tender document should not create a closed shop to other bidders who could carry out the same contracting works which could in actual fact, save public funds from being exploited.**
2. **As the 'Public Procurement Regulations' stand, the Appellant did not submit the required information as stipulated in the tender document and in this regard the Evaluation Board acted diligently in discarding the Appellant's Bid as being 'Non Administratively Compliant'.**

In view of the above, this Board finds against the Appellant Company, however due to ambiguous circumstances, it recommends that the deposit paid by the Appellant should be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

16 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 625

MRRA/A/1/2013/1

Tender for the Purchase of Water Purification System for the Plant Tissue Culture Lab.

The tender was published on the 21st June 2013. The closing date was the 12th July 2013.
The estimated value of the Tender was: €46,000 (Exclusive of VAT).

Three (3) bidders had submitted offers for this tender.

On the 15th October 2013 Reactilab Limited filed an objection against the decision to discard its offer as being administratively non- compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 31st October 2013 to discuss the appeal.

Present for the hearing were:

Reactilab Limited - Appellant

Mr Stephen Debono	Representative
Mr Johann Mifsud	Representative
Dr John Gauci	Legal Representative

Evolve Limited - Preferred Bidder

Mr Lawrence Zammit	Representative

Plant Health Directorate - Contracting Authority

Ms Maureen Delia	Chairperson Evaluation Board
Mr Matthew Tabone	Member Evaluation Board
Mr Chris Leone Ganado	Member Evaluation Board
Mr Michael Sciberras	Member Evaluation Board
Ms Marika Gatt	Head of Contracting Authority
Dr Abigail Caruana	Legal Representative

The Chairman made a brief introduction and the appellant's representative was invited to make his submissions.

Dr John Gauci on behalf of the appellant said that his client was declared to be administratively non compliant because the evaluation board said that the documents requested in Clauses 1.2.8 and 8.3 of the tender were not submitted. Dr Gauci insisted that his client had submitted all the necessary documents. While the letter of rejection mentioned the said Clauses, strangely it was not explained to appellant what documents were not submitted. Dr Gauci contended that his client's bid had no

missing documents. Clause 1.2.8 states that the tenderers are to submit a) detailed technical specifications, which were submitted; b) user manual, with full instructions that was also submitted; c) certificate of local company representation, does not apply but was still submitted; and d) guarantee for parts and after sales services, that was also supplied according to the template provided. The evaluation board should have indicated which documents were missing. Clause 8.3 .1 is practically a reflection of Clause 1.2.8 and there was no need to repeat what is stated above.

Dr Abigail Caruana on behalf of the contracting authority stated that Clause 1.2.8 explained which documents had to be submitted and specified that failure to comply will render the offer null. In appellant's case, the user manual was missing. Dr Caruana explained that only a part of the manual had been submitted. The user manual had to be submitted with full instructions. The required system could be made up of several components that together comprised the purification system. Appellant provided the user manual of only one component of the system proposed. The system submitted by appellant was composed of three units were the Select Analyst, Select Neptune and the Select Pump and Tank, but the manual submitted was for the Select Tank and Pump only. No manual for the Analyst and Neptune were submitted. The contracting authority required the user manuals for the whole system and therefore appellant's bid did not comply with Clause 1.2.8 and was null.

The Chairman inquired why no clarification had been requested.

Dr Abigail Caruana said according to Clause 2.1.3 the evaluation board could have asked for rectification but this could not be done for Clause 1.2.8. Rectification was admissible only under Clauses 1.2.3, 1.2.5, 1.2.6, and 1.2.7. Clause 1.2.8 allowed no rectification.

Dr Gauci remarked that therefore it was not a document that was missing but part of a document. Not as the letter of rejection claimed. It was a case of incomplete documentation but not of missing documentation. He contended that Clause 2.1 at page 16 of the tender speaks of contractor and not bidder and thus refers to actions after the award of the tender. It was intended that whoever was awarded the tender would have to submit the listed literature with the equipment. So it is a case where the cheapest bidder was disqualified because of a part of a document when, if awarded the tender, the appellant was obliged to provide the missing documents with the equipment. It was clear that the tender was referring to contractor because the tenderers do not provide the equipment unless awarded the tender. Dr Gauci contended that special conditions overruled general conditions.

The Chairman remarked that the fact remains that appellant's bid failed to include important documents required by the contracting authority.

Dr Gauci reiterated that he was only given the reason for disqualification now. It is evident now that his client's bid was only disqualified because of the user manual and not a set of documents as stated in the letter of rejection. He referred to a recent decision handed out by this Board in the tender TWD 03/2012 which dealt with the wind monitoring system in Gozo where the submitted technical literature was erroneous. But this Board decided a clarification should have been issued.

Dr Abigail Caruana rebutted what was stated by the appellant's representative because all bidders when submitting an offer accept the tender conditions and are bound by them. Clause 2.1.1 states that bidders accept the tender in full and abide by it. Clause 2.1.11 states that tenderers, 'shall provide all the documents required by the provisions of the tender without exception'. Page 18 of the tender document is a declaration that bidders accept all the conditions and obligations of the tender. The

letter of rejection just cited the Clause relative to the non-compliancy of the tender bid. Stating the specific reason would have not changed anything of substance.

Ms Maureen Delia, Senior Pharmacist, and Chairperson of the evaluation board under oath stated that the relative clause asking for manuals is used in all the tenders, because the evaluation board wanted to inspect in detail the workings. The equipment submitted by the appellant consisted of three components. The only user manual submitted was for the pump and tank. All the other technical literature was submitted. The reason for exclusion was the missing user manual. The evaluation board had asked for the advice of the ministry's procurement officer if the user manual could be asked for in a clarification. There were other bidders that were disqualified because of the same non submission of the user manual. The technical specifications of the appellant's bid were not evaluated because it was administratively non compliant. Replying to a question by the Chairman Ms Delia replied that the preferred bidder's user manual was examined in detail by the evaluation board. The least important part of the equipment was the pump and tank yet the user manual was supplied only for this part. No manual for the other important components were submitted.

Dr Abigail Caruana finally referred to page 15 of the tender document the hardware specifications of the system. Point 1.5 states that it must be safe and easy to use. To evaluate this you needed a user manual.

Mr Lawrence Zammit on behalf of the preferred bidder agreed that the user manual should have been submitted.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection ,in terms of the 'Reasoned Letter of Objection' dated 14th October 2013 and also through the Appellant's verbal submissions during the hearing held on 31st October 2013, had objected to the decision taken by the pertinent Authority, in that :

a) **The Appellant's bid was declared 'administratively non compliant' for the alleged failure to submit all documentation required in the tender document. In this regard, the Contracting Authority failed to inform the Appellant of the missing documentation.**
b) **The Appellant was only made aware during the hearing as to what was missing in the Appellant's bid. The missing document is now being established as being the User Manual of part of the system being offered by the Appellant.**

Having considered the Contracting Authority's submissions during the hearing held on 31st October 2013, in that:

a) **The Appellant failed to submit the User manual of a section of system.**

b) **The Evaluation Board insists that under Clause 1.2.8., no rectification is allowed.**

c) **The tender document clearly stated and identified the documentation that had to be submitted by the tenderer. In fact, it was stated that unless all documentation as requested is submitted, a tender will be considered as null and void.**

Reached the following conclusions:

1. **From the submissions made by both the Appellant and the Contracting Authority, it is evidently clear that the User Manual which was not submitted by the Appellant was of great importance for the Evaluation Board to assess the Appellant's bid from the technical side.**

2. **The Appellant was aware of the documentation which had to be submitted.**

3. **The Appellant was also advised that if a tender document is not accompanied by all the required information, the tender will be declared null and void.**

In view of the above, This Board finds against the Appellant Company, however due to circumstances, it recommends that the deposit paid by the Appellant should be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

4 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 627

WSM 048/2013

Tender: Period Contract for the Procurement of LPG for the Qortin Gas Treatment Facility in Gozo.

The tender was published on the 26th February 2013. The closing date was the 22nd March 2013.

The estimated value of the Tender was: €34,800 (Exclusive of VAT).

Two (2) bidders had submitted offers for this tender.

On the 4th October 2013 EasyGas Malta Limited filed an objection against the decision to discard its offer as being administratively non- compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 5th November 2013 to discuss the appeal.

Present for the Hearing:

EasyGas Malta Limited - Appellant

Mr Johan Brincat	Representative
Mr Ruben Farrugia	Representative

Liquigas Malta Limited - Preferred Bidder

Mr Jesmar Mifsud	Representative

WasteServ Malta - Contracting Authority

Ing. Stephen Dimech	Chairman Evaluation Board
Ms Henriette Putzulu Caruana	Representative
Dr Victor Scerri	Legal Representative

The Chairman, Public Contracts Review Board stated that this Board is conducting research on changes that it feels may be necessary, both on the part of the Department of Contracts, as well on the Public Contracts Review Board to improve procedures. He therefore invited those present, especially the legal representatives to feel free to give any informal comments that they think would be useful. After a brief introduction, the appellant's representative was invited to make his submissions on the objection. It was remarked that the letter of objection failed to give any reasons for the objection.

Mr Johan Brincat, Financial Controller with the appellant firm, stated that the LPG in question is imported into Malta by appellant from Italy. Therefore the certification that came with the product was in Italian and the appellant bid was disqualified for this reason.

The Chairman remarked that the tender document was clear that any certificate had to be either in the English language or, if it was in another language, that a translation had to be filed with the offer. He asked appellant's representative the reason why this condition was not complied with.

Mr Ruben Farrugia on behalf of the appellant stated that appellants could not translate a certificate from an Italian refinery into English. The certificate was enclosed with the bid as it was received from the Italian refinery. He contended that in his opinion one could not translate a technical certificate. He also stated that in previous tender, appellant followed the same procedure and was not disqualified. He reiterated that appellant's employees could not be asked to translate the document.

Dr Victor Scerri explained that with the tender, the only certificate submitted was in Italian, no English translation was enclosed. It was only when the letter of objection was filed that a translation into English was enclosed with the same objection. Dr Scerri continued that the tender did not even ask for an authenticated translation into English, but an ordinary translation in order to help the evaluation board to assess the tender. Although Italian is understood by many Maltese, the certificate could have been in another language that is not so commonly understood. This was the reason for the mandatory requirement for certificates in English or translations.

Ing Stephen Dimech, Chairman of the evaluation board said that since the appellant's tender was deemed administratively non-compliant, the evaluation board did not evaluate his bid for technical compliance.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection, in terms of a 'Letter' dated 2nd October 2013 (without giving reasons) and also through the Appellant's verbal submissions during the hearing held on 5th November 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant was unfairly classified by the Evaluation Board as being 'Administratively non Compliant'.**

b) **The Appellant did in fact submit the required certification but in the Italian language.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 5th November 2013, in that:

a) **The Appellant did not submit the requested certification in English as was required in the tender document.**

b) **This requisite was a mandatory condition in the tender document.**

c) **The Contracting Authority's condition was that same requested an ordinary translation and not an authenticated one.**

Reached the following conclusions:

1. **When a specific condition is laid out in any tender document by any Contracting Authority, it is made for a specific purpose. In this regard, quite rightly, the**

Contracting Authority requested certifications, if not in English, in a loyal normal translated version of same. In this regard, the Appellant did not abide by this condition which was clearly laid out in the tender document.

2. **The Evaluation Board of the Contracting Authority acted in a diligent manner in discarding the Appellant's Bid as the latter's bid was in fact 'Administratively' non compliant.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

16 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 630

eCT 3051/2013

Tender for Concrete Works and Finishes at St Paul's Link and Knights' Promenade – Dock One – Cospicua.

The tender was published on the 14th June 2013. The closing date was the 25th July 2013.

The estimated value of the Tender was €467,280 (Inclusive of VAT).

Three (3) bidders had submitted an offer.

On the 21st October 2013, Avantegarde Projects Limited filed an objection against the decision taken to disqualify its offer.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 12th November 2013 to discuss the appeal.

Present for the hearing were:

Avantegarde Projects Limited - Appellant

Mr Joe Vella	Representative
Perit Joe Bugeja	Representative
Ms Yanika Vidal	Representative
Dr Marion Camilleri	Legal Representative

C&F Building Contractors Limited - Preferred Bidder

Mr Johann Farrugia	Representative
Mr Benjamin Muscat	Representative
Dr Gabrielle Scicluna	Legal Representative
Dr John Refalo	Legal Representative

Ministry for Transport - Contracting Authority

Mr Hector Chetcuti	Chairman Evaluation Board
Ms Katya Saliba	Secretary
Perit Mario Bonello	Member Evaluation Board
Mr Stephen Bonello	Member Evaluation Board
Ms Henriette Calleja	Member Evaluation Board
Dr Franca Giordmaina	Legal Representative

Department of Contracts

Mr Sandro Drago	Representative

The Chairman made an introduction and invited appellant's representative to make her submissions.

Dr Marion Camilleri on behalf of the appellant referred to her client's letter of objection and contended that appellant does not agree with the reasons given by the evaluation board to discard appellant's offer. One reason for appellant's bid being considered administratively non-compliant was that appellant had submitted two projects carried out during the years between 2010 and 2012 instead of the required three. Dr Camilleri contended that this requisite was discriminatory because it did not allow new firms to participate in the tender. Appellant did in fact have the necessary experience but this was performed outside the requested period. Some of the projects were done on behalf of the same Ministry. This was why the appellant is contesting the decision to disqualify its bid. Dr Camilleri also pointed out that the relevant article quoted by the evaluation board, Article 7.1 (B) (ii) 1, does not exist. It is not found in the tender document.

The second reason for disqualifying appellant's bid, Dr Camilleri continued was that appellant had failed to assign a Key Expert for the post of Structural Engineer, and when requested by the evaluation board for clarification on this point, appellant did not confirm that Perit Joe Bugeja was the Key Expert. Dr Camilleri asked Perit Joe Bugeja to explain this point.

Perit Joe Bugeja on behalf of the appellant said that when appellant listed him as the Structural Engineer it was in order because he had a vast structural back ground. The works requested in the tender comprise also works that are not structural and well within his competence.

Mr Joe Vella on behalf of the appellant stated that in the tender in question, appellant had submitted four projects and not three, as proof of experience. Three of these were provided to the same Ministry, and one of these was not yet completed because of the client. This project had to be completed in 2012 and had it been so, the appellant would have been compliant in the present tender. The tender asked for three projects carried out during 2010, 2011 and 2012 and appellant had submitted four projects carried out during 2012 and 2013. He also said that the structural element of the present tender was minimal and so asking for structural works experience for three years is not proportional and does not make sense.

Dr Franca Giordmaina on behalf of the contracting authority started by saying that the letter of objection failed to give any reason for the grievances on which the objection was based. The evaluation report gave two fundamental reasons for the rejection of appellant's bid. One was the issue of lack of experience of the appellant in structural works. Concrete works in the current tender amounted to 40% of the project and are not therefore minimal as alleged by the appellant. In its bid, Avantegarde submitted its experience in tile laying. The evaluation board felt that appellant lacked experience in concrete works. The other issue was that of the site engineer. Albeit appellant indicated Perit Joe Bugeja, who undoubtedly has great experience in the field, a request for clarification issued by the evaluation board asking for the identification of the person responsible for the structural works, no clear reply was given by appellant that identified the key expert. Perit Joe Bugeja was identified as being the site engineer but not as the Key Expert, the structural engineer. The submission of the Key Expert was mandatory and one of the selection criteria.
Regarding Article 7.1, Dr Franca Giordmaina continued, that the evaluation board, although the Article was clear in itself, had asked for clarification from appellant but the appellant had still not complied.

Mr Hector Chetcuti, the Chairman Evaluation Board, on behalf of the contracting authority said that when the evaluation board had examined the four projects submitted by appellant to prove experience, it was found that these were outside the limits requested in the tender. But these were examined just the same. The evaluation board issued a clarification to the appellant wherein appellant was asked to identify which of these four projects included structural works, and which were for finishes. Appellant was also asked to quantify the values and to submit references. No reply was received from the appellant. The tender had a clause that the contracting authority had the right to contact bidders' clients about the works that had been performed for them by the bidders. Using this clause, the

evaluation board contacted appellant's clients for the four projects submitted. One of these clients was FTS at tal-Handaq and the project was for tiling and marble works at St Ignatius College. Two other projects were for the Works Department and it resulted that the works in question were for paving. The last project submitted by appellant was for the paving of Paolino Vassallo Square Cospicua. Thus the evaluation board had no projects involving concrete structures to assess. As regard the site engineer, there were four mandatory requisites. The key experts had to have certain qualifications and in the list submitted by the appellant there were three instead of four. The bid contained CVs and the declaration of exclusivity. This declaration of exclusivity however referred to another tender, 3057/2013 and not to the present one. All these points induced the evaluation board to decide that appellant's bid was not administratively compliant.

The Chairman asked for the reason why the appellant did not reply to the clarification request made by the evaluation board.

Mr Joe Vella on behalf of the appellant here submitted a screen shot from his computer showing the date and time when it was sent. This showed that appellant had in fact replied to the clarification.

Mr Hector Chetcuti remarked and pointed out that the screen shot submitted by Mr Joe Vella in fact was in connection with another tender, CT 3057/2013 and not in connection with the present tender. This was not was received by the evaluation board. Any correspondence sent electronically was entered on line and downloaded by the evaluation board.

Dr Franca Giordmaina explained that the declarations in question, whilst referring to tender CT 3057/2013 were in fact attached to the present tender CT 3051/2013 and had nothing to do with this latter tender. The evaluation board did not examine these since they referred to another tender.

Mr Joe Vella explained that there were three tenders that closed on the same date, 3051, 3056 and 3057. Appellant had submitted bids for all three tenders. Tenders 3056 and 3057 were not awarded to appellant, but the evaluation board had requested clarifications also in those two other tenders. In tender 3051 the only clarification appellant received was about the structure. Mr Vella reiterated that there were no structural works involve.

Replying to a question of the Board whether the documents in question would have satisfied the requisites, had these been made available to the evaluation board, Dr Franca Giordmaina said that these satisfied only one point in that the structural engineer was identified. The other point regarding the experience in structural works has remained not satisfied. She reaffirmed that the structure element of the tender was 39%.

Perit Mario Bonello under oath for the contracting authority said that the structural works in the tender were for: i) repairs of existing structures that had been considered not up to standard. Here the works involved the laying of fair-faced concrete which had been badly done by the previous contractor; ii) the completion of other structures from the start to finish. These included stairways, lift structure and platforms, all having fair-faced finishing. These needed expert workmanship. In fact the tender comprised two elements of work, the finishing and the structural, that could have been issued as two separate tenders. This was however avoided because in the past experience has shown that it would be difficult to co-ordinate the works, and it was decided to incorporate the two tenders. The structural works component has been identified at 39% of the project.

Dr John Refalo on behalf of the recommended bidder remarked that the PCRB had to examine whether the evaluation process adhered to the regulations. He brought the attention of the Board that the letter of objection failed to give any reasons for the objection. The preferred bidder was therefore denied the possibility of preparing adequately for the hearing. Dr Refalo continued that the letter of rejection of the 10th October 2013 clearly stated the reasons for appellant's rejection. One was because of lack of necessary experience and the other because of non-identification of the Key Expert.

The reply given by appellant to the clarification was in fact sent, but the reply quoted another tender reference and not the present tender.

Dr Giordmaina finally pointed out that the appellant after all could have had another solution if its experience was not enough for the tender requisites. The tender allowed for sub-contracting and appellant could have sub-contracted and profited by the experience of the sub-contractor. But this solution was not resorted to. The evaluation board in this case was flexible, and had tried to remedy by the clarification, but this was not forthcoming and the evaluation board had no option but to disqualify appellant.

Here the hearing was brought to a close.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned letter of Objection' dated 19th October 2013 and also through the Appellant's verbal submissions during the hearing held on 12th November 2013 , had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant submitted two projects instead of three as was required in the tender document. The Appellant contends that the requirement of 'three projects' was a discrimination and a deterrent factor to new bidders.

b) Another reason for the Appellant's to be discarded was due to the fact that Appellant failed to submit the requested regarding the 'Key Expert' on this project.

c) The Appellant contends that the Architects listed in the tender documentation had enough experience to satisfy the requirements of the tender works.

d) The Appellant had listed more projects than the required three as specified in the tender document.

Having considered the Contracting Authority's verbal submissions during the hearing held on 12th November 2013, in that:

a) Apart from the fact that the Appellant failed to specify the reasons for his objection, the Evaluation Board established two basic reasons for his bid's refusal, as follows:

i) The expertise as requested in the tender document entailed a high knowledge of concrete works. This amounted to 40% of the tender works.

ii) The tender document clearly specified the technical mandatory qualifications and experience needed for the proper execution of the tender works.

b) The Appellant did not submit the required information with regards to the mention of the 'Key Expert' to the project as stipulated in the tender.

Reached the following conclusions:

1. **The Appellant's bid did not satisfy the conditions as stipulated in the tender document. The mandatory requirements were of vital importance to the execution of the tender works.**

2. **The technical Evaluators of the Evaluation Board clearly informed this Board of the importance of the experience required of the Appellant's bid to offer the necessary services according to the tender document's conditions.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

4 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 631

TD/T/3124/2013

Contract for Trenching Works Between Rabat Mosta Road and Rabat Villa Messina Substation.

The tender was published on the 17th May 2013. The closing date was the 19th June 2013.

The estimated value of the Tender was €108,000 (Exclusive of VAT).

Four (4) bidders had submitted an offer.

On the17th October 2013, Hydrorocks Contractors Company Limited filed an objection against the rejection of its offers and against the cancellation of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 12th November 2013 to discuss the appeal.

Present for the hearing were:

Hydrorocks Contractors Co. Limited - Appellant

Mr John Farrugia	Representative
Ms Nathalie Farrugia	Representative
Dr Mark Portelli	Legal Representative

Enemalta Corporation - Contracting Authority

Ing. Ivan Bonello	Chairman Evaluation Board
Ing. Charles Bugeja	Member Evaluation Board
Dr Antoine Cremona	Legal Representative

The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Dr Mark Portelli on behalf of the appellant said after the tender was published a clarification was issued adding another requisite to the tender requirements that construction methods offered had to be 'environmentally sound'. His client, who has over twenty years experience, works both using traditional methods, with open trenches, and another method using directional drilling that runs underground without disturbing the road surface. This method creates no dust and does not pose traffic problems, drilling holes only 200 metres apart. The work asked for in the tender is to be done in Borg Olivier Street Rabat, a road known for its traffic problems as it is quite strait. He contended

that the clarification specifically referred to this method when asking for environmentally sound methods of construction.

Dr Portelli continued that his client the appellant had submitted two options for the tender. Option one using the normal open trenching method which was rejected because the evaluation board decided that the offer was non-compliant because appellant did not show the necessary experience during the past three years. Option two offered the directional drilling but was disqualified on the grounds that it was not according to the tender specifications because no variant solutions were acceptable. Dr Portelli contended that appellant's offer was environmentally sound as requested in the tender clarification. This clarification was after all probably issued because of national guidelines that had been issued. Clause 5.5 at page 60 of the tender says that the contractor may be required to draw cable through ducts, and this is precisely what client's option two offered. The technology used in directional drilling, using GPS co-ordinates creates no problems whatsoever. Even Clause 5.4 says that the contractor shall make sure that he uses the right equipment to pull and lay the cable. He brought up the example of modern surgery where some operations are performed without the need of opening up the patient. He contends that appellant's permits issued by Transport Malta refer to this directional drilling as trenching works. When this type of trenching works is used there is no need for the reinstatement of the road surfaces. Finally Dr Portelli contended that other options were considered if one examines Clause 17.4 at page 12 of the tender.

Dr Antoine Cremona on behalf of the Contracting Authority said that the present hearing was not intended to judge the working of the appellant firm or the equipment it uses. The tender is adjudicated solely on what the tender and bids contain. The appellant wants to promote its product. The tender document was committed to use trenching works. This was what the contracting authority committed itself to use and what it wanted. The contracting authority had valid reasons for requesting this type of trenching. The road in question is known for the archaeological remains the area contains and directional drilling would not allow any finds to be immediately be noticed. The contracting authority had encountered many difficulties of the kind before. Open trenching allows examination of what lies underneath the road enabling works to stop if anything is found. The contracting authority expected compliance with what was requested. Enemalta had chosen to have open trenches and that was what was requested in the tender. The contracting authority was bound by law not to accept variants. The goal posts cannot be changed in the middle of the game. On page 13 point number 21 clearly states that no variant solutions will be accepted.

Dr Cremona continued that appellant had submitted two solutions, one of these, option two could not be chosen because it was not what was requested. Option one submitted by appellant offered open trenching as requested but was rejected because it failed one of the administrative compliance criteria. Appellant did not have the necessary experience in open trenching.

Dr Portelli stated that the goal posts were changed through the clarification.

Dr Cremona said that the tender was hundred percent clear that what was being requested was open trenches. He reiterated that appellant's option one was not administratively compliant and option two was not what was requested and could not be accepted.

Ing. Charles Bugeja on behalf of the contracting authority under oath said that appellant's option 2 was in fact environmentally friendly but technically it was not good for what the contracting authority wanted. We wanted to be able to visually examine the cables. These cables are very delicate and easily damaged. When these cables are pulled through drilled trenches they could very easily be snagged and damaged. This would result in faults arising later on. Replying to a question by Dr Portelli, Mr Bugeja said that directional drilling was used by the contracting authority for low voltage cables. In such cases tenders are specifically issued for directional drilling. However directional drilling is avoided in Mdina, Valletta, and Rabat because of likely problems because of archaeological remains. From experience it is known that these cables are very delicate. Furthermore there were cases where directional drilling ended up in shafts and basements.

Ms Nathalie Farrugia on behalf of appellant said that directional drilling was used by Enemalta at Burmarrad. She claimed that overseas, the directional drilling method was used in heritage sites, because you can dig as deep as you like and then drill across.

Dr Antoine Camilleri finally stated that what the Board had to examine was not the difference between the two technologies, but if appellant's tender was according to the tender document or not; and that the principle of substance over form does not always apply.

Here the hearing was brought to a close.

This Board,

Having noted the Appellant's objection , in terms of the 'Reasoned Letter of Objection' dated 17th October 2013 and also through the Appellant's verbal submissions during the hearing held on 12th November 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant contends that his bid was in compliance with the requirements as set out in the tender document.**

b) **The Appellant's proposed method of the execution of the requested tender works was 'environmentally sound' and does not create any inconvenience to the surroundings.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 12th November 2013, in that:

a) **The Contracting Authority clearly requested the 'Open trench method' of excavating for valid and solid reasons as stated in the submissions during the hearing.**

b) **The Appellant did not possess enough experience to carry out the 'Open trench' works as stipulated in the tender document.**

Reached the following conclusions:

1. **The technical reasons for discarding the Appellants' bid were justified after hearing the submissions of the technical experts of the Evaluation Board of the Contracting Authority.**

2. **The Appellant was made fully aware of the mode of the excavation works requested by the Contracting Authority to be carried out. This was clearly stated in the tender document.**

3. **The Tenderer has to abide by the conditions laid out in the tender document and it is futile to object or to appeal if the tenderer fails to be awarded a tender if same did not abide or submit the requested information stipulated in the tender document.**

4. **The Evaluation Board of the Contracting Authority was technically correct in discarding the Appellant's bid.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

9 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 635

CT 2037/2013

Tender for the Provision of Environmentally Friendly Cleaning Services to All Buildings on the Campuses of the University of Malta and the Junior College and Other University Designated Sites.

The tender was published on the 18th June 2013 with a closing date on the 30th July 2013.

The estimated value of the tender was €1,045,500.00.

Five (5) bidders had submitted an offer for this tender.

On the 28th October 2013 TF Services Limited filed an objection against the decision to reject its offer as being non-compliant and against the award of the tender to Gafa' Saveway Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 21st November 2013 to discuss these concerns.

Present for the hearing were:

TF Services Limited - Appellant

Mr Simon Turner	Representative
Mr Raymond Fenech	Representative
Dr Victor Axiaq	Legal Representative

Gafa` Safeway Limited - Preferred Bidder

Ms Paulette Gafa`	Representative
Mr Gejtu Vella	Representative

University of Malta - Contracting Authority

Mr Elton Baldacchino	Secretary
Mr Mark Debono	Member Evaluation board
Mr Karm Saliba	Member Evaluation board
Mr Christopher Spiteri	Member Evaluation board
Dr Oriella Degiovanni	Legal Representative

Department of Contracts

Mr Sandro Drago	Representative

The Chairman made a brief introduction and the appellant's representative was invited to make his submissions regarding the objection,

Dr Victor Axiak on behalf of his client TF Services Limited, the appellant, said that the objection is based on two principal reasons. His client's offer was excluded because the evaluation board deemed it not to have the necessary experience. The tender required bidders to show four instances during the last three years where they had provided similar services in order to prove that they had the necessary experience. Appellant had submitted these and also submitted instances where the similar services had been provided by two other companies. These two other companies, Clentec and Cleanmasters, although legally do not form of the appellant company, are owned by the same owners, and appellant wanted to rely on the experience of these to add to its own. However the experience of these two other companies was rejected by the evaluation board as were the services provided by appellant during 2013. The evaluation board decided that only services rendered up to the year 2012 were to be considered in terms of the tender evaluation criteria. He contended that the wording of the main body of the tender document was 'during the last three years' and not calendar years. Since the tender was issued in June 2013 therefore the tender meant to consider services rendered during the three years up to June 2013. Therefore his client was compliant.

Dr Axiak continued that the two other companies, whose experience was rejected, between them had vast experience for a number of years, citing for example Clentec who have had the contract valued at €1,200,000 for Mater Dei Hospital. The shareholders and owners of these two other companies are the same as those of the appellant company. Mr Simon Turner is the sole owner and director of Clentec Limited and Mr Raymond Fenech is the majority shareholder and owner of Cleanmasters Limited. These two persons formed the appellant company TF Services Limited. Finally Dr Axiak contended that appellant company itself was still fully compliant and should not have been disqualified, seeing also that it had filed the cheapest offer.

Dr Oriella Degiovanni on behalf of the contracting authority said that the bidder here was TF Services Limited and any juridical connection was between this and the contracting authority. The other two companies mentioned are irrelevant to this case. The bone of contention of this objection is the wording of Clause 7.1.B.ii (1) which states: *"State the value of services of a similar scope effected during the last 3 years: the minimum value of which must not be less than €50,000 per annum for the quoted period."* Clause 7.1.ii.(2) continues that *" the minimum number of which must not be less than 4 for the quoted period."* Thus appellant had to show that in 2010, 2011 and 2012 it had contracts of at least €50,000 each year and also that it had at least 4 similar contracts during the same period. The price element was not relevant at the stage of compliance. Appellant did not submit four contracts amounting at least €50,000 each during the last three years.

Dr Victor Axiak queried the reasoning behind the rejection of the appellant's bid submission for 2013 and choosing a costlier tender.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the ' Reasoned Letter of Objection' dated 28th October 2013 and also through the Appellant's verbal submissions during the hearing held on 21st November 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's bid was discarded by the Evaluation Board due to the fact that he lacked the necessary experience as stipulated in the tender document.

b) In this regard, the Appellant's bid relied on the experience of related Companies, the shareholder of which was the Appellant. These related Companies had the necessary experience as was required in the tender conditions; however the

Evaluation Board of the Contracting Authority did not consider this as being valid.

c) The Appellant contends that the conditions regarding 'experience' laid out in the tender document was somewhat unclear.

d) The Appellant's bid was the cheapest.

Having considered the Contracting Authority's verbal submissions during the hearing held on 21st November 2013, in that:

a) The experience requested in the tender document was specifically stated, in that "The tenderer had to prove that same carried out similar activities during the last three years but must at least have carried out similar activities amounting to Euros 50000 per annum" during the same last three years.

b) The Contracting Authority contends that the Appellant did not conform to these conditions as laid out in the tender document.

c) Due to the fact that the Appellant was technically non compliant, the Contracting Authority did not take the price factor of the Appellant's Bid.

Reached the following conclusions:

1. **After having heard the verbal submissions of both the Appellant Company and the Contracting Authority, this Board feels that the clause in the tender document whereby same Authority stipulates the conditions of the 'Experience Clause' was somewhat limiting the range of tenderers.**

2. **This same Board feels that the conditions laid out in the tender document, with regards to tenderers' experience should be more practical and avoid the narrow range of prospective bidders. In this context, this Board feels that due to trivial and unnecessary conditions stipulated in the tender document, the taxpayer is paying more than he should. This is not acceptable, and this Board with the cooperation of the Contracts Department will amend the Public Procurements regulations for the benefit of the National Economy.**

3. **However, under the present regulations, the Evaluation Board had to abide by the parameters of their authority in evaluating the bids. In this regard, this Board will also do its utmost to ensure that this occurrence will not be repeated. These occurrences, which are costing the National Economy, millions of Euros will not happen again.**

4. **The Appellant did not satisfy the 'Necessary Experience' clause as stipulated in the tender document. To this effect, the Appellant's offer is considered to be non compliant.**

5. **The Evaluation Board acted in a diligent manner and abided by the present regulations.**

In view of the above, this Board finds against the Appellant Company however, due to circumstances, this same Board recommends that the deposit paid by the Appellant should be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

9 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 636

CT 3060/2013

Tender for the Provision of Security Services at the Agency for the Welfare of Asylum Seekers (AWAS) Units and Other Centres.

The tender was published on the 4th October 2013. The closing date was the 14th November May 2013.

On the 14th November October 2013 Executive Security Services Limited filed an objection raising **pre-contractual concerns** regarding the tender in terms of Regulation 85 of the Public Contracts Procurement Regulations.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday 21st November 2013 to discuss these concerns.

Present for the hearing were:

Executive Security Services Limited - Appellant

Mr Stephen Ciangura	Representative
Mr Franco Falzon	Representative

Agency for the Welfare of Asylum Seekers - Contracting Authority

Mr Stephen Vassallo	Secretary Evaluation Board
Mr John Vella	Member Evaluation Board
Ms Stephanie Borg Bonaci	Member Evaluation Board
Mr Joseph Camilleri	Member Evaluation Board
Perit Anthony Mangion	Technical Expert
Mr Alex Tortell	Head of Contracting Authority
Mr Robert Grixti	Director Corporate Services

The Chairman made a brief introduction and the appellant's representative was invited to make his submissions.

Mr Franco Falzon on behalf of the appellant firm Executive Services Limited said that the contracting authority had issued a clarification note on the 7th November 2013 just seven days before the closing date of the tender. The clarification note was also not clear enough in that it stated that the number of personnel employed by the bidder was 'expected' to be at least 100. What interpretation should be given to 'expected'? He also contended that this was illegally done since the period during which clarifications could be made had lapsed on the 29th October 2013. The issue of this clarification note was considered unfair and discriminatory by the appellant because it rendered appellant's bid as non-

compliant. This was because there was no time left during the remaining seven days till when the tender closed on the 14th November 2013 to employ more personnel to meet the new criteria.

Mr Robert Grixti, Director Corporate Services Ministry Home Affairs, on behalf of the contracting authority explained that the 29th October 2013 deadline was for the bidders who wished to submit requests for clarifications. The period that the contracting authority itself could issue clarifications and addendums to the tender document lapsed on the 8th November 2013 at eleven forty-five pm. (23.45), and this was written in the tender document itself. In fact more than a clarification, the note, issued on the 7th November 2013 was a corrigendum. The previous criterion requiring bidders to submit proof of their technical capacity by listing projects costing at least €500,000 during the past three years has been removed, thus opening the tender to more bidders. The clarification note also added a new condition regarding the number of personnel. Bidders had to have at least a workforce of one hundred security officers. It had to be ensured that whoever was awarded the tender had an adequate workforce since the contracting authority had several premises that had to be covered seven days a week and twenty-four hours a day. The contracting authority had to have ease of mind that the contractor had sufficient manpower to provide the service to all its branches. The clarification note had widened the field enabling more bidders to participate.

Replying to a question by the Chairman, Mr Grixti explained the clarification process. There were two deadlines for the submission of clarifications in the tender. The first deadline was intended for bidders who wished to ask for clarification while the second deadline was intended for the contracting authority who had until then to issue clarifications and addenda which would then form part of the tender document.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 13th November 2013 and also through the Appellant's verbal submissions during the hearing held on 21st November 2013, had raised a 'Pre Contractual Concern' regarding the decision taken by the pertinent Authority, in that:

a) The Appellant could not abide by the requirements of the Contracting Authority due to the 'short time 'given by the latter to submit the required information.

b) Appellant contends that the timing of the issue of the clarification note by the Contracting Authority was unfair and discriminatory.

Having considered the Contracting Authority's submissions during the hearing held on 21st November 2013, in that:

a) There were two deadlines for submissions of clarifications:

i) First deadline was 29th October 2013, which was meant for bidders to ask or clarify for details contained in the tender document.

ii) The second deadline i.e. 8th November 2013 was for the Contracting Authority to issue clarifications to bidders.

b) The clarification being contested by the Appellant was totally justified by the Contracting Authority.

Reached the following conclusions:

1. **The Clarifications which the Contracting Authority requested were a safeguard and assurance and in this regard, the same Authority had the duty to ensure that precautions had to be enforced to safeguard the works to be carried out.**

2. **The Contracting Authority, diligently exercised their discretion in establishing that the preferred bidder would have the necessary resources and experience in carrying out the tender works.**

3. **The prospective tenderers should follow strictly the conditions laid out in the tender document and abide by the requirements contained therein.**

In view of the above, this Board finds against the Appellant Company and strongly recommends to prospective bidders to ensure that they follow the correct procedures when filing an appeal. This Board has enough of heavy workload. The Contracting Authority may proceed with the adjudication of the tender.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

4 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 638

PU/010/2013

Expression of Interest – Request for Proposal (RFP) for the Provision of Legal Services.

The tender was published on the 18th October 2013. The closing date was the 29th October 2013.

The estimated value of the Tender was €30,000 (Exclusive of VAT).

Sixteen (16) bidders had submitted an offer.

On the 19th November 2013, Formosa Formosa Grech Advocates filed an objection against the decision taken to reject its offer on grounds of being non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday 4th December 2013 to discuss the appeal.

Present for the hearing were:

Formosa Formosa Grech Advocates - Appellant

Dr Alfred Grech	Representative
Dr Larry Formosa	Representative

Deguara Farrugia Advocates - Preferred Bidder

Dr Kevin Deguara	Representative

Privatisation Unit at MEIB on behalf of MFSS (Parliamentary Secretary for the Elderly and Active Ageing) - Contracting Authority

Dr Emanuel Camilleri	Chairman Evaluation Board
Dr Lilian Cremona	Member Evaluation Board
Mr Philip Rizzo	Member Evaluation Board
Mr John Degiorgio	Member Evaluation Board

The Chairman made a brief introduction and the appellant's representative was invited to make his submissions on the objection.

Dr Larry Formosa on behalf of the appellant said that appellant had asked for further details and submitted the requested documents. He said that still, the appellant's offer had been rejected on two grounds, that of not providing a detailed explanation substantiating how the legal services will be

carried out; and for not providing a proposed draft agreement and a standard confidentiality agreement as was requested. He claimed that all the necessary documents had in fact been submitted by the appellant, except for the confidentiality agreement. He contended that since the appellant is a firm of advocates and was offering its legal services, the confidentiality agreement was superfluous and there was not need to submit it. Lawyers are bound by the law provisions regarding the confidentiality with clients.
He referred to a recent decision by the Court of Appeal where it was decided that substance should take precedence over form. He insisted that therefore appellant's bid should not have been rejected.

Dr Emanuel Camilleri, Chairman Evaluation Board on behalf of the contracting authority said that the evaluation board examined all documents submitted by all bidders in reply to the process letter. All the information submitted was set down in tabular format to enable evaluation. Three items had been requested. 1. A detailed explanation from bidders how they proposed to provide the service; 2 a draft agreement and 3 the standard confidentiality agreement. Appellant's bid did not contain a detailed explanation and did not explain how the appellant firm would provide the service from Gozo. The process letter had made it clear that the service had to be provided on demand and according to the need and time table schedules established. The service had to be provided at all hours and on demand. This was because of the needs of the contracting authority. It was not made clear to the evaluation board how the work would be allotted and how the duties of the two advocates would be distributed. The requested draft agreement submitted by appellant was not satisfactory and was not professional in content. No examples of contractual services were given. The draft showed lack of experience in formulating contractual agreements. Furthermore this draft agreement submitted by appellant was designed to solicit the evaluation board to change the terms and conditions. It renders the tender invalid because it suggested to; "renegotiate or amend this agreement on request". The tender could in fact have been disqualified because of this.

Dr Emanuel Camilleri continued that the contracting authority had a right to insist for a confidentiality agreement that goes beyond just the normal client confidentiality. And the contracting authority always requested such confidentiality agreements, and legal firms always complied.

The Chairman asked if there was any valid reason why the confidentiality agreement was not submitted when it was specifically requested.

Dr Larry Formosa on behalf of the appellant said that probably it was not sent through an oversight.

Dr Alfred Grech on behalf of the appellant stated that any confidentiality agreement is irrelevant because all lawyers are bound at law on confidentiality. Lawyers, more than other professions, are bound because even if someone divulges to a lawyer any information, even not seriously, the lawyer is still bound. Regarding the other reasons for disqualifications Dr Grech asked rhetorically if appellant gave a Maltese address, would its bid have been accepted. He claimed that the evaluation board discriminated against Gozitan lawyers. He insisted that appellant could have given a Malta address and that the logistics of the provision of the service was appellant's problem as long as the service was provided. The transport between the Islands was available and is used regularly even by members of parliament.

Dr Larry Formosa for the appellant said that once appellant has offered to provide the service, on being given the contract, the firm would ensure that the service is provided. He contended that the lack of details in the CV did not form part of the rejection letter and cannot be raised now at this stage. Furthermore, he explained that draft agreement means just that, a draft. And drafts can be changed, that is why the appellant suggested changes, and offered to re-negotiate. It was normal practice for draft contracts to be submitted by the contracting authority to the bidders who then made their offers. Appellant had asked to be provided with the pricing but this was denied. The price offers had not even been published on the notice board.

Dr Alfred Grech queried if in fact the ability of the bidders to draft agreements was being assessed through this requirement of submitting a draft agreement.

Mr John Degiorgio on behalf of the contracting authority said that the contracting authority required a detailed proposal. Appellant had submitted a proposal that was acceptable, but when comparing this with those submitted by the other bidders the difference was very great. Appellant's bid was cheaper but the contracting authority was after experience more than pricing.

Dr Lilian Cremona on behalf of the contracting authority stated that both the subsidiary legislation LN 296/2010 and the EU Directive 204/18EC exclude the publication of the awards of legal services. The contracting authority had the right not to publish, and it was published only to enable an objection to be made.

Dr Emanuel Camilleri for the contracting authority said that it is not the policy of the Privatisation Unit to publish prices. In fact on the notice board the contracting authority published the awarded price.

Dr Alfred Grech objected to the hearing of the submissions by the preferred bidder as he had no right at law to do so.

Dr Kevin Deguara on behalf of the preferred bidder said that price was not the criterion on which the award of the present tender was based. Legal services are specifically excluded both by the Procurement regulations and the EU Directive. Finally he raised the matter of the appellant influencing the evaluation board.

Philip Rizzo on behalf of the contracting authority explained the importance given to the documents the tender insisted upon. This contract would bind the government for 15 years and the Privatisation Unit needs absolute confidentiality.

Dr Alfred Grech here stated that if the Board finds against appellant in this case, he would have to have recourse to the Court of Appeal. Appellant had to go through the motions of filing this objection and could not accede the Court of Appeal directly. He insisted that tenders are issued because of competition and the price determines whether offers are competitive or not. He raised the matter of proportionality and submitted a copy of the judgement of the Court of Appeal.
The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 18th November 2013 and also through the Appellant's submissions during the hearing held on 4th December 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant's bid was unfairly discarded on the following grounds:

i) The Contracting Authority stated that the Appellant did not submit a detailed description of how the Legal services were to be provided. The Appellant insists that the necessary explanation was given in the draft agreement submitted by same with the tender document.

ii) Although the Appellant did not submit a standard confidentiality agreement, it is a known fact that the Legal profession is bound by Professional Secrecy.

The Appellant insists that this requirement has no substance for refuting the Appellant's bid.

b) The Appellant felt discriminated due to the fact that his Law Firm is based in Gozo. The Appellant insists that he can provide the same services as those rendered by Maltese Law firms.

c) The Appellant also contends that once he signed the tender document he was in duty bound to provide the required legal services to the Contracting Authority, at all costs.

Having considered the Contracting Authority's verbal submissions during the hearing held on 4th December 2013, in that:

a) The Appellant's bid did not contain a detailed description of how the Professional Legal services were to be provided. This was stipulated in the tender document.

b) The draft agreement submitted by the Appellant was not up to the required standard.

c) The Appellant did not submit the 'Confidentiality Agreement' as stipulated in the tender document.

Reached the following conclusions:

1. **Prior to the Appellant's submissions during the hearing held on 4th December 2013, the Appellant made a declaration that " Should this Board decides against the Appellant the latter would refer the same decision to the Court of Appeal". In this respect, this Board would like to state firmly that the final decision being taken by this Board is not in any way whatsoever influenced by the above mentioned Appellant's declaration.**

2. **From the Legal submissions of the Evaluation Board, it was vividly exposed that the Appellant failed to submit the requested detailed information of how the Appellant would render the Professional Services as required in the tender document. The Fact that the Appellant Firm was Gozo based had nothing to do with the decision taken by the Evaluation Board. In related Professions, when a service is required across another border of the same Country, it is pertinent to quote a substitute correspondent/affiliate to ensure continuity in case of uncontrollable situations. The Appellant failed to provide the necessary information. In this regard, the Contracting Authority had the duty to examine and identify the substitute corresponding support to avoid interruption of the required Legal services as stipulated in the tender document. At the same time this Board opines that there was no discrimination due to the fact that the Appellant was Gozo based.**

3. **The Draft Agreement submitted by the Appellant was not up to the expected professional standard. This document was a basic and essential requirement in view of the fact that the duration of the tender was for a very long period of time.**

4. **The Appellant did not submit the 'Confidentiality Agreement' as was requested in the tender document. Although it is a known fact that Lawyers/Law Firms are bound by Professional Secrecy, this Board cannot understand why such a mandatory document was not submitted by the Appellant.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

30 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 639

TWO 4/2013

Tender for Catch-Up Repairs, Replacement of Dangerous Structures, Alterations and Maintenance Works at Block 5A, Triq is-Sur, L-Isla in an Environmentally Friendly Manner.

The tender was published on the 10th September 2013. The closing date was the 27th September 2013.

The estimated value of the Tender was €109,157.48 (Exclusive of VAT).

Two (2) bidders had submitted an offer.

On the 27th November 2013, Mr Joseph Caruana filed an objection against the decision taken to disqualify his offer on grounds of being technically non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday 4th December 2013 to discuss the appeal.

Present for the hearing were:

Mr Joseph Caruana - Appellant

Mr Joseph Caruana	Representative
Mr George Farrugia	Representative
Dr John Gauci	Legal representative

B. Grima & Sons Ltd - Preferred Bidder

Mr Adam Grima	Director
Mr Arthur Calleja	Representative
Dr Tonio Cachia	Legal Representative

Housing Authority - Contracting Authority

Perit Felix Sciberras	Chairman Evaluation Board
Mr Emile Lauria	Member Evaluation Board
Mr Charles Vella	Member Evaluation Board
Mr Aldo Ellul	Member Evaluation Board
Perit Melanie Spiteri	Representative
Perit Alessandro Fiott	Representative
Mr Stephen Mc Carthy	Chief Executive Officer
Dr Abigail Caruana	Legal Representative

The Chairman made a brief introduction wherein he stated that this and objection from tender TWO 5/2013 would be heard together since the parties involved are the same in both tenders, and the merits of the objection are the same.
The appellant's representative was invited to make his submissions on the objection.

Dr John Gauci on behalf of the appellant Mr Joseph Caruana said that the two tenders were identical except in one of them, TWO 5/2013 there had been three bidders. His client the appellant had submitted the cheapest tender. The award criterion in both tenders was the price. Yet appellant had been disqualified because the "Literature for concrete repair products – product provided in literature are not adequate for use as concrete repair as requested in the tender." Appellant had produced all the requested literature for concrete repair and it can be confirmed that the products he intended using can be used for any work and is in fact the most used. The literature containing all the details was submitted. The tender provided no specifications regarding what the submitted product had to comply with. Since no specifications were given then the contracting authority cannot disqualify his client's bid. The contracting authority cannot ask for something that was not requested in the tender. Dr Gauci referred to several other cases on this point that had been decided by the Public Contract Review Board and the Civil Courts. These state that a contracting authority cannot at the evaluation stage make choices not stated in the original tender and disqualifying bidders on those choices.

Dr Abigail Caruana on behalf of the contracting authority said that the appellant's offer was disqualified at the technical evaluation stage. The reason for the rejection of the appellant's bid was that the concrete repair products provided by appellant, according to the literature submitted were not adequate for concrete repairs as requested. According to Form 6 bidders had to submit with their offers a list of literature. And point 1.4 refers to the concrete repair products Section H. This section H found at page 82 of the tender explained in detail what was to be provided when repairing concrete. Spalled concrete ceilings required: 1. Coating for the mesh; 2. A bonding coat for concrete surfaces; 3. Freshly mixed repair mortar and 4. A coat of protective finish. Items 2 and 3 could be the same product. The contracting authority required a list of these products to ensure that the products are adequate for the repair of the ceilings. Appellant's bid listed two products only, the mortar mix and the protective coating.
The product submitted by appellant is used for protective finishing, item 4, but he did not submit any metal mesh coating. The mixed repair mortar submitted by appellant cannot be used to repair concrete. The contracting authority wanted to ensure that proper repairs of the spalling concrete were carried out to ensure that it does not spall again in a short time. No rectification was possible on this point.

Perit Melanie Spiteri on behalf of the contracting authority under oath said that the literature for the mortar mix submitted by appellant states " a quality mixture of sand and cement for laying brick, block or stone; for building or repairing chimneys, walls, planters and out-door grills. The work required to be done in this tender involves repairing spalled concrete ceilings where the mesh had rusted. There were many products on the market to enable the repair of concrete ceilings. Thus contractor would have to remove the spalled part of the concrete, clean the metal mesh, coat the mesh with inhibitors and then apply the mortar mix and the finishing and protective coat. The main product is the mortar mix. The mortar mix offered by the appellant is suitable for repairing bricks, and is not used in Malta. As corrosion inhibitor, the appellant offered Sicaguard. This product while good enough for the finishing stage, does not provide corrosion inhibitors for the mesh. Sica also produces such corrosion inhibitors but the appellant did not submit them. The products offered by appellant are not suitable for the repair of spalled concrete ceilings.

Replying to questions by Dr John Gauci Ms Spiteri stated that the product specifications are shown clearly in Section H of the tender document. There were no other specifications. She declared that she did not see before the document being shown by Dr Gauci entitled "long term protection for steel". It was not part of the technical offer. Here the Board examined both the tender documents filed by the appellant and however there was no such document to be found. She confirmed that Form 6, item 1.4 requested the literature of the concrete products. Appellant nowhere in the tender bid stated that he would not comply with the methodology as per section H. Bidders had to submit all literature about all the products they would be using to repair the concrete ceilings. She re-affirmed that the mortar submitted by appellant was not suitable.

Dr Abigail Caruana stated that the term 'concrete repairs' is meant to include all the aspects of the methodology for such repairs and include all the products to be used.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 27th November 2013 and also through the Appellant's verbal submissions during the hearing held on 4th December 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Appellant had submitted the cheapest tender and the principal award criteria was the price.

b) The Appellant's offer was discarded by the Evaluation Board due to the alleged fact, that the literature which the Appellant submitted regarding the product to be used in the tender works, did not meet the technical specifications as required in the tender document.

c) The Appellant contends that the tender document did not specify the technical specifications required for the process to be carried out in the works of the tender.

d) The Appellant also contends that since the Contracting Authority did not specify the technical specifications in the tender document, in the first place, it could not dictate during the evaluation stage specifications which were not stipulated in the tender document.

Having considered the Contracting Authority's verbal submissions during the hearing held on 4th December 2013, in that:

a) The Evaluation Board of the Contracting Authority discarded the Appellant's offer on technical grounds.
b) The Appellant's product being offered is not suitable for the project being contemplated in this tender.

c) The Contracting Authority had to ensure that the preferred tenderer would carry out the required tender works with the requisite technical products so that the works, when completed, would last for a long period of time.

d) The details as specified in section H in the tender document, did in fact stated the technical requirements and procedures to be adhered to by the Appellant.

Reached the following conclusions:

1. This Board opines that the Contracting Authority could have specified in more details the requirements regarding the technical specifications that should have been laid out in the tender document. However, after having heard the technical

experts regarding the quality of the Appellant's products to be utilised in the execution of the tender works, it was evidently clear, that the Appellant's construction products, were not up to the technical standards as laid out in the tender requirements.

2. **The Contracting Authority was in duty bound to ensure that the works specified in the tender document had to be executed with the proper methodology and technical construction products as dictated in the tender document. This Board feels that the Contracting Authority acted diligently in the evaluation process.**

3. **The Evaluation Board took all the necessary safeguards to ensure that the works and materials to be to be adopted by the tenderer had to cater for the natural elements where the works are to be carried out.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

6 December 2013

PUBLIC CONTRACTS REVIEW BOARD

Case No. 640

TWO 5/2013

Tender for Catch-Up Repairs, Replacement of Dangerous Structures, Alterations and Maintenance Works at Block 5B, Triq is-Sur, L-Isla in an Environmentally Friendly Manner.

The tender was published on the 10th September 2013. The closing date was the 27th September 2013.

The estimated value of the Tender was €98,925.58 (Exclusive of VAT).

Three (3) bidders had submitted an offer.

On the 27th November 2013, Mr Joseph Caruana filed an objection against the decision taken to disqualify his offer on grounds of being technically non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday 4th December 2013 to discuss the appeal.

Present for the hearing were:

Mr Joseph Caruana - Appellant

Mr Joseph Caruana	Representative
Mr George Farrugia	Representative
Dr John Gauci	Legal representative

B. Grima & Sons Limited - Preferred Bidder

Mr Adam Grima	Director
Mr Arthur Calleja	Representative
Dr Tonio Cachia	Legal Representative

Housing Authority - Contracting Authority

Perit Felix Sciberras	Chairman Evaluation Board
Mr Emile Lauria	Member Evaluation Board
Mr Charles Vella	Member Evaluation Board
Mr Aldo Ellul	Member Evaluation Board
Perit Melanie Spiteri	Representative
Perit Alessandro Fiott	Representative
Mr Stephen Mc Carthy	Chief Executive Officer
Dr Abigail Caruana	Legal Representative

The Chairman made a brief introduction wherein he stated that this and objection from tender TWO 4/2013 would be heard together since the parties involved are the same in both tenders, and the merits of the objection are the same.
The appellant's representative was invited to make his submissions on the objection.

Dr John Gauci on behalf of the appellant Mr Joseph Caruana said that the two tenders were identical except in one of them, TWO 5/2013 there had been three bidders. His client the appellant had submitted the cheapest tender. The award criterion in both tenders was the price. Yet appellant had been disqualified because the "Literature for concrete repair products – product provided in literature are not adequate for use as concrete repair as requested in the tender." Appellant had produced all the requested literature for concrete repair and it can be confirmed that the products he intended using can be used for any work and is in fact the most used. The literature containing all the details was submitted. The tender provided no specifications regarding what the submitted product had to comply with. Since no specifications were given then the contracting authority cannot disqualify his client's bid. The contracting authority cannot ask for something that was not requested in the tender. Dr Gauci referred to several other cases on this point that had been decided by the Public Contract Review Board and the Civil Courts. These state that a contracting authority cannot at the evaluation stage make choices not stated in the original tender and disqualifying bidders on those choices.

Dr Abigail Caruana on behalf of the contracting authority said that the appellant's offer was disqualified at the technical evaluation stage. The reason for the rejection of the appellant's bid was that the concrete repair products provided by appellant, according to the literature submitted were not adequate for concrete repairs as requested. According to Form 6 bidders had to submit with their offers a list of literature. And point 1.4 refers to the concrete repair products Section H. This section H found at page 82 of the tender explained in detail what was to be provided when repairing concrete. Spalled concrete ceilings required: 1. Coating for the mesh; 2. A bonding coat for concrete surfaces; 3. Freshly mixed repair mortar and 4. A coat of protective finish. Items 2 and 3 could be the same product. The contracting authority required a list of these products to ensure that the products are adequate for the repair of the ceilings. Appellant's bid listed two products only, the mortar mix and the protective coating.
The product submitted by appellant is used for protective finishing, item 4, but he did not submit any metal mesh coating. The mixed repair mortar submitted by appellant cannot be used to repair concrete. The contracting authority wanted to ensure that proper repairs of the spalling concrete were carried out to ensure that it does not spall again in a short time. No rectification was possible on this point.

Perit Melanie Spiteri on behalf of the contracting authority under oath said that the literature for the mortar mix submitted by appellant states " a quality mixture of sand and cement for laying brick, block or stone; for building or repairing chimneys, walls, planters and out-door grills. The work required to be done in this tender involves repairing spalled concrete ceilings where the mesh had rusted. There were many products on the market to enable the repair of concrete ceilings. Thus contractor would have to remove the spalled part of the concrete, clean the metal mesh, coat the mesh with inhibitors and then apply the mortar mix and the finishing and protective coat. The main product is the mortar mix. The mortar mix offered by the appellant is suitable for repairing bricks, and is not used in Malta. As corrosion inhibitor, the appellant offered Sicaguard. This product while good enough for the finishing stage, does not provide corrosion inhibitors for the mesh. Sica also produces such corrosion inhibitors but the appellant did not submit them. The products offered by appellant are not suitable for the repair of spalled concrete ceilings.

Replying to questions by Dr John Gauci Ms Spiteri stated that the product specifications are shown clearly in Section H of the tender document. There were no other specifications. She declared that she did not see before the document being shown by Dr Gauci entitled "long term protection for steel". It was not part of the technical offer. Here the Board examined both the tender documents filed by the appellant and however there was no such document to be found. She confirmed that Form 6, item 1.4 requested the literature of the concrete products. Appellant nowhere in the tender bid stated that he would not comply with the methodology as per section H. Bidders had to submit all literature about all the products they would be using to repair the concrete ceilings. She re-affirmed that the mortar submitted by appellant was not suitable.

Dr Abigail Caruana stated that the term 'concrete repairs' is meant to include all the aspects of the methodology for such repairs and include all the products to be used.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 27th November 2013 and also through the Appellant's verbal submissions during the hearing held on 4th December 2013, had objected to the decision taken by the pertinent Authority, in that:

e) The Appellant had submitted the cheapest tender and the principal award criteria was the price.

f) The Appellant's offer was discarded by the Evaluation Board due to the alleged fact, that the literature which the Appellant submitted regarding the product to be used in the tender works, did not meet the technical specifications as required in the tender document.

g) The Appellant contends that the tender document did not specify the technical specifications required for the process to be carried out in the works of the tender.

h) The Appellant also contends that since the Contracting Authority did not specify the technical specifications in the tender document, in the first place, it could not dictate during the evaluation stage specifications which were not stipulated in the tender document.

Having considered the Contracting Authority's verbal submissions during the hearing held on 4th December 2013, in that:

e) The Evaluation Board of the Contracting Authority discarded the Appellant's offer on technical grounds.
f) The Appellant's product being offered is not suitable for the project being contemplated in this tender.

g) The Contracting Authority had to ensure that the preferred tenderer would carry out the required tender works with the requisite technical products so that the works, when completed, would last for a long period of time.

h) The details as specified in section H in the tender document, did in fact stated the technical requirements and procedures to be adhered to by the Appellant.

Reached the following conclusions:

4. This Board opines that the Contracting Authority could have specified in more details the requirements regarding the technical specifications that should have been laid out in the tender document. However, after having heard the technical

experts regarding the quality of the Appellant's products to be utilised in the execution of the tender works, it was evidently clear, that the Appellant's construction products, were not up to the technical standards as laid out in the tender requirements.

5. **The Contracting Authority was in duty bound to ensure that the works specified in the tender document had to be executed with the proper methodology and technical construction products as dictated in the tender document. This Board feels that the Contracting Authority acted diligently in the evaluation process.**

6. **The Evaluation Board took all the necessary safeguards to ensure that the works and materials to be to be adopted by the tenderer had to cater for the natural elements where the works are to be carried out.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancilleri
Chairman	Member	Member

6 December 2013