

PUBLIC CONTRACTS APPEALS BOARD

Case 46

CT 2616/2004 :Tender for the reconstruction and upgrading of San Lawrenz to Rabat, Part of Arterial Route 1. Rabat Gozo

This call for offers, which was published in the Maltese Government Gazette and the EU Official Journal on the 28.01.2005, was issued by the Contracts Department following a formal request received from the ADT (Awtorita' Dwar it-Trasport ta' Malta) through the Ministry for Gozo.

The estimated works covered by this tender will be co-financed by the EU under the European Regional Development Fund with a budget of Lm 2,000,000.

The closing date of this tender was 10 March 2005.

In total, three (3) offers were submitted by tenderers on closing date for submission of offers.

A formal objection was filed by **Ganado & Associates Advocates** on behalf of **Polidano Group and Gatt Tarmac Ltd** on 14 July 2005, following a formal notification received from the Director General Contracts in a letter dated 8 July 2005 in which they were informed that their tender was not among the selected ones due to the fact that *“the offer was not in compliance with the Tender Dossier since the identity of the tenderer submitting the tender is obscure because whilst the tender guarantee identified M/S Gatt Development Limited for Gatt Tarmac as the tenderer, the Tender Form did not identify the name of the tenderer.”*

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman), Mr Anthony Pavia (Member), and Mr Edwin Muscat (Member), convened three public hearings on 24.08.2005, 29.08.2005 and 20.09.2005 to discuss this objection.

Also present for the hearing were:

Polidano Group and Gatt Tarmac Ltd

Dr Stefan L. Frendo	Legal Representative
Dr Antoine Cremona	Legal Representative
Dr Noel Camilleri	Legal Representative

MAC Joint Venture – made up of the following partners Roads Construction Co Ltd (Leader), Bonnici Group Ltd and Zrar Ltd, C & F Building Contractors Ltd and Schembri Infrastructures Ltd.

Dr Adrian Delia	Legal Representative
Dr Mario Demarco	Legal Representative
Dr Kenneth Grima	Legal Representative

Ministry for Gozo

Mr Joseph Portelli

Dr Carmelo Galea

Public Official

Legal Representative

Witnesses

Arch. Ivana Farrugia

Mr Saviour Tabone

Arch. Angelo Vassallo

Arch. David Portelli

Arch. Mario Ellul

Mr Bastian Debono

Mr Melvin Cachia

Mr Jack Theuma

Mr Edwin Zarb

Mr Mario Gatt

Mr Charlo Farrugia

Mr Paul Caruana

Dr Michael Borg Costanzi

Dr Joanna Drake

Chairperson

Committee Secretary

Committee Member

Committee Member

Committee Member

Member General Contracts Committee

Department of Contracts

Bank Manager BOV, Victoria Gozo

Director General Contracts

Gatt Tarmac Ltd

Polidano Bros Ltd

Quantity Surveyor, Design and Technical Resources

Head, Legal Office BOV

Expert on EU Law

Following a general introduction by the Chairman, PCAB, relating to the objection raised in this particular case, one of the appellants' legal representatives, Dr Stefan Frendo, remarked that they did not know yet who the other parties were, whether their 'motivated' letter of objection was notified to someone else and whether any reply was submitted by interested parties. He also complained about the fact that when they asked for a copy of the 'motivated letter of reply' filed by all interested parties, the Department of Contracts informed them that they could not accede to their request. At this stage, the PCAB argued in favour of appellants' request for such documentation to be made available and ruled that appellants should be given access to a copy of such correspondence.

Dr Carmelo Galea, legal council to the Evaluation Committee appointed by the Ministry for Gozo, concurred that it was imperative to establish who the interested parties were, and proceeded by presenting a copy of his clients' reply.

Dr Adrian Delia, one of Mac Joint Venture's legal representatives, explained that they had seen the appellants' objection on the Department of Contracts' Notice Board. However, he declared that they found no objection to their 'motivated letter of reply' being forwarded to the rest of the interested parties, agreeing that everyone is rightfully entitled to prepare oneself in the best possible manner, whether to defend or to challenge any decision.

At this point the PCAB directed that all copies of correspondence/submissions regarding the appeal be distributed to the interested parties concerned, including Polidano Bros Ltd / Gatt Tarmac Ltd, Mac Joint Venture and the Ministry for Gozo. The sitting was suspended and the lawyers were allowed fifteen (15) minutes to read and analyse the contents thereof. In view of the fact that it was established that the said parties needed more time to examine thoroughly the documentation given, possibly necessitating some kind of reply in regard, the PCAB suggested that the hearing be postponed to the following week, precisely for Monday, 29 August 2005 at 13.00 hours.

Then, Mr Melvin Cachia, representing the Department of Contracts, was called to the witness stand. He testified that the correspondence had not been passed on to the complainants following legal advice received from the Attorney General's Office. He explained that the procedure regarding the Three Package Tender Offer was regulated by Part XII of the Public Contracts Regulation 2005 (Legal Notice 177/2005) while the procedure of appeals following the decision relating to the award of contract was regulated by Part XIII of the same regulations. He said that the tender in question was under Three Package Tender Offer and relative objection was not considered 'normal' but a 'review'. The praxis followed to date in these types of objections was that they passed such correspondence only to the PCAB. The Chairman, PCAB, said that, irrespective of whether it was a review or not, the Board was of the opinion that the appellant and all interested parties had a fundamental right to have access to all correspondence related to notice/ motivated letters of objection and replies thereto. However, he made it clear that although the PCAB always insisted on the transparency of the appeals' procedures it did not tolerate 'fishing expeditions'.

After the meeting was suspended again, the PCAB clarified that it would not give a preliminary ruling but a final decision on all the case. Also it was agreed to continue with the proceedings.

Dr Noel Camilleri said that this tender was issued for the reconstruction and upgrading of the stretch of road leading from San Lawrenz to Rabat, Gozo. He said that the three tenderers who submitted their offer were accepted at the initial phase, that is, at the opening of the Bid Bond (Envelope 1) and that at the second envelope stage (relating to 'Specifications') one tenderer was accepted and the other two were rejected. Their clients decided to file an objection because they were of the opinion that the manner in which they were rejected was not compliant with the regulations and the spirit of the tender. In their letter of objection they highlighted the points why the PCAB should uphold the appeal. The fact that the appellant deposited Lm10,000 with the objection indicated they felt that the appeal was justified.

Dr Carmelo Galea, the Ministry for Gozo's legal advisor, said that this was a 'Three Separate Package' tender. He explained that when the Evaluation Committee opened the offers of the three competing tenderers, they found that one of them, which pertained to the appellant, did not have the name of the tenderer on it. In spite of this, it was decided to accept this tender '*prima facie*'. When they opened Envelope 1 of Tender No 3 (appellant) they found that it contained a tender guarantee issued by Bank of Valletta to the order of Gatt Development Ltd for Gatt Tarmac Ltd. Although this guarantee did not follow the exact format of the tender guarantee form (page 59 of the 'Tender Document') it was again decided to proceed with the opening of Envelope 2 (relating to 'Specifications') of Tender No 3. However, upon opening this envelope, the 'Tender Form' contained therein failed to identify the 'leader' of the tender. Nor was there any indication of the identity of Partners 1, 2 and 3 of the tender. Partner 4 was identified as 'Messrs Polidano Bros. Ltd'. Gatt Developments Ltd and Gatt Tarmac Ltd did not feature at all on the Tender Form, but they were shown as subcontractors. At that point, this tender was not discarded but left pending because the Evaluation Committee needed to seek legal advice from the Attorney General's Office.

Ms Ivana Farrugia, Chairperson of the Evaluation Committee, testified that the advice sought from the Attorney General's Office was sought because, after consulting the Contracts Committee's representative, the decision as to whether to accept Tenderer No 3's offer or not was left at the discretion of the Evaluation Committee.

Dr Delia said that the tender dossier provided that one of the tendering procedural requirements was that '*The Tender must comprise the following duly completed documents.*' He contended that according to the documents submitted, it was clear that the Complainant failed to comply with the procedural requirements stipulated in the tender dossier. Furthermore, he pointed out that the power granted to the Director of Contracts to seek clarifications was strictly limited to points of a technical nature and not to matters relating to the 'Bid Bond', identification of the 'Tenderer', 'Leader' and 'Subcontractor', and similar matters.

As regards the complainant's allegation that the Director of Contracts' rejection of the tender submission was a *'misuse of administration discretion'*, Dr Delia argued that the law itself specified that if a tender submission was found to have failed with complying to the tendering procedural requirements *'the remaining packages in his tender offer are to be discarded unopened.'*

With regard to the *Bank Guarantee*, he said that clause 18.1 of Volume 1 of Section 1 of the 'General Part' of the tender dossier stipulated that, *'The Tenderer must provide, as part of his tender, a tender guarantee.'* In this case the tender guarantee was provided by Gatt Tarmac Ltd who was a sub-contractor and not by the presumed tenderer, namely Polidano Bros Ltd.

Dr Mario Demarco, another legal advisor representing Mac Joint Venture, said that this was a question of documentary evidence. He argued that it was useless to hear the evidence of witnesses considering the fact that the documents showed that the tender guarantee was not issued by the tenderer, and in the 'Tender Form', Polidano Bros Ltd was indicated as Partner No 4 and no one was indicated as Partner No 1, 2 and 3 or the Leader. He said that the law stipulated the identification of the tenderer so that it would be known who one is dealing with. Dr Demarco also argued that if the tender guarantee was made on behalf of another person then the Department of Contracts would not be able to call in the tender guarantee should the latter deem necessary to do so.

Dr Kenneth Grima, another lawyer forming part of the legal advisory team to Mac Joint Venture, said that the Director of Contracts had no discretion because "will" and "must" could not be interpreted in a different way other than the scope they were originally intended for and as included in the tender forms. He argued that if such mistakes were to be tolerated and this appeal was upheld, such decision would have a repercussion on future cases.

Mr Jack Theuma, BOV Branch Manager (Victoria, Gozo), in taking the witness stand, sought permission from the Bank's client, namely Mr Mario Gatt, representing Gatt Tarmac Limited to exempt him from his professional secrecy. The latter consented to request.

On cross-examination by Dr Stefan Frendo, one of the appellants' legal representatives, Mr Theuma confirmed that the BOV issued a Bank Guarantee for Lm 25,000 in respect of Tender CT 2616/2004 for the Construction and upgrading of San Lawrenz to Rabat Road, Part of Arterial Route 1, Rabat Gozo by the order of Gatt Development Ltd for Gatt Tarmac Ltd in favour of the Director of Contracts. He also produced a copy of the Tender Guarantee No. G24TFC5092.

Mr Theuma testified that if the tenderer would fail to fulfil his obligations under the tender conditions and the Director of Contracts (in this instance known as the 'beneficiary') were to submit a claim accompanied by the original Bank Guarantee, the BOV p.l.c. (the 'guarantor') would pay *"no questions asked"*. He said that it was Mr Mario Gatt, Managing Director of Gatt Development Ltd (Parent Company) and Gatt Tarmac Ltd (Subsidiary Company) who had requested BOV p.l.c. to issue the

bank guarantee. He also confirmed that, independently of who requested the issue of the bank guarantee, it would be honoured by the Bank.

When the witness was asked by Dr Demarco to declare whether Polidano Bros Ltd was indicated as the tenderer on the Bank Guarantee, the reply given was in the negative.

Then, the same lawyer mentioned the fact that, according to the 1st paragraph of the Bank Guarantee, the 'Tenderer' was Gatt Development for Gatt Tarmac Ltd. Also, he pointed out that the conditions regarding the issue of this guarantee were indicated in the 2nd paragraph which stated that:

'At the request of the Tenderer, we, Bank of Valletta p.l.c., hereby guarantee to pay you on demand a maximum sum of Twenty Five Thousand Maltese Lire and 00 cents, Lm25,000 in the event that the Tenderer withdraws its tender before the expiry date or in the event that the Tenderer fails to sign the contract and provide the Performance Bond, if called upon to do so in accordance with the tender conditions or in the event that the Tenderer otherwise fails to fulfil its obligations under the tender conditions.'

On a specific question by Dr Demarco, the witness confirmed that if someone were to withdraw from the tender who was not Gatt Tarmac Ltd, the conditions in the bank guarantee would not be applicable.

Then, Dr Stefan Frendo asked Mr Theuma to state whether the guarantee for this particular tender would be valid if Polidano Bros Ltd (the 'tenderer'), being a business partner with the company on whose behalf the Bank Guarantee was issued, were to withdraw from the tendering process. Mr Theuma replied by stating that, in that instance, the matter would be referred to the Legal Office for advice.

In reply to Dr Delia's question, Mr Theuma confirmed that once in the *Bank Guarantee* it was indicated that Gatt Development Ltd for Gatt Tarmac Ltd was the tenderer, then if this were to ultimately result in the indicated tenderer not being the the real tenderer, the guarantee would be considered invalid.

Also, in his testimony, he said that if the name of the tenderer was not mentioned when they received a claim he would pay, but if it was mentioned he would refer the matter for legal advice to give a ruling whether he was in order to pay or not.

Mr Mario Gatt, shareholder of Gatt Tarmac Ltd, testified that in the said Company he was the person responsible for the preparation and submission of tenders. He said that in Gozo there were only two contractors, namely Roads Construction and Gatt Tarmac Ltd. They were interested in bidding for this tender and since they required a certain amount of turnover in cash they decided to associate themselves with Polidano Bros Ltd. Polidano Group were the main contractors holding 70% of the total participating shares with Gatt Tarmac Ltd acting as the sub-contractor agreeing to hold the balance of the total financial and statutory interest.

According to the same witness, the two Companies also verbally agreed that the Bid Bond be issued by Gatt Tarmac Ltd.

When cross-examined further on this particular issue, Mr Gatt emphasised that there was no written agreement because it was a question of confidence between the Companies concerned. He stated that he was fully aware of the fact that if his partner defaulted in any way the Company he represented would lose the money tied to the bank guarantee.

Mr Gatt confirmed that he had requested BOV p.l.c. to issue the Bank Guarantee for this specific tender; the Bid Bond was valid for 90 days and the Director of Contracts requested them to extend the Bank Guarantee. Also, he testified that they had assigned Architect Robert Sant and that he had worked with Mr Paul Caruana to complete the tender.

Mr Gatt said they submitted their tender in three (3) envelopes in accordance with the established procedure. The envelopes were rubber stamped with the words Polidano Bros Ltd. He said that Mr Charlo Farrugia from Polidano Bros Ltd and himself had submitted the tender at the Department of Contracts before closing time. Prior to the opening of the tenders by the *Evaluation Committee*, they were asked whether there were any representatives of the tenderers. Mr Farrugia identified himself as Polidano Bros Ltd's representative who was then asked to sign a paper. He said that when they opened the first envelope and saw that Polidano Bros. Ltd was not mentioned, he told them that the Bid Bond was issued by his Company because it was a sub-contractor. At this stage, Mr Gatt said that the *Evaluation / Contracts Committee* sought advice in regard from Mr Edwin Zarb (Director General, Contracts), who told them to proceed with the opening of the 2nd envelope. At that stage it was not indicated to him that there were any problems with the 1st and 2nd envelope. However, when after around two days he went to check the Notice Board at the Contracts Department, he discovered that the *Evaluation Committee* was going to seek legal advice on the Bid Bond and to ask for clarification regarding Partner No 4.

At this point he presented to those present a photo of the *Summary of Tenders Received* which was published on the Contracts Department's Notice Board.

According to the same witness, at the opening stage one of the *Evaluation Committee* members had mentioned to him that they needed to seek legal advice on issues relating to the Bid Bond. Mr Gatt also recalled that a representative of the General Contracts Committee had told them that it was valid. However, Mr Gatt insisted that the issue of clarification was never mentioned to him. To his amazement, Mr Gatt emphasised, on 8 July 2005, Polidano Group and Gatt Tarmac Ltd were officially informed that their tender had been rejected.

Dr Galea drew the witness' attention that according to the *Evaluation Committee's* minutes regarding the opening procedure of offers, the first problem arose because the name of the tender box was unmarked bearing no identification of the tenderer who had submitted the offer. At this point, when Mr Gatt was specifically asked to state

whether he was aware that there was a discussion on this matter, the reply given was in the negative.

Then, Dr Galea said that when the Evaluation / Contracts Committee proceeded with the opening of the respective tender guarantees, it was found that the tender guarantee submitted by appellants did not follow the exact format of the tender guarantee form as stipulated on page 59 of the Tender Document. The Ministry for Gozo's legal representative contended that the fact that in Thake and Desira Advocates' letter dated 22nd March 2005 it was stated that there was no conformity because the form was blank proved that at the opening of the 1st envelope the discussion was about this issue. However, Mr Gatt declared that he was not aware of any discussion regarding the lack of conformity of their Bank Guarantee.

Dr Galea explained that at this point in time the Evaluation Committee did not know that the tenderer was Polidano Bros. Ltd because the Tender Guarantee mentioned only Messrs Gatt Development for Gatt Tarmac Ltd. Upon opening Envelope 2 more serious discussion ensued because neither Gatt Developments Ltd nor Gatt Tarmac Ltd featured on the Tender Forms but they were shown as sub-contractors.

Mr Gatt confirmed that he did not inform BOV p.l.c. that he was a sub-contractor and that in the Bank Guarantee he was indicated as the Tenderer. He declared that for him there was no difference between a contractor and a sub-contractor because he was part of the tender. His attention was drawn to the fact that once he was responsible for 30% of the works his obligation was not equal to that of the Tenderer.

At this stage, Dr Galea said that all tender documents were signed by the tenderer and the sub-contractor.

When cross examined by Dr Delia it was established that Mr Gatt was neither a Director nor a Managing Director of Gatt Tarmac Ltd but a shareholder. He said that although Gatt Tarmac Ltd had been in operation for 5 years, he had been involved in the preparation of tenders for 30 years. He reiterated that he did not make any difference between a contractor and a sub-contractor and, as far as he was concerned, the most important thing was that the tenderer was indicated.

Dr Delia argued that once Gatt Tarmac Ltd paid the Lm 10,000, the appeal was invalid because a sub-contractor was not allowed to appeal.

On cross examination by Dr Demarco, Mr Gatt testified that Gatt Tarmac Ltd was tendering as sub-contractor for the first time and that they made a written arrangement between them and Polidano Bros Ltd. He was followed by Mr Charlo Farrugia who, on being cross-examined by Dr Camilleri, testified that he was an employee of Polidano Bros Ltd. He confirmed that he was the Company's representative in the tender opening session and that he had signed the paper where the representatives of the tenderers were identified. He declared that at least one rubber stamp of the Polidano Bros Ltd was stamped on the white wrapping paper of the tender box.

Mr Farrugia said that when a problem arose regarding the Bid Bond which was not issued by Polidano Bros Ltd but by Gatt Tarmac Ltd., the Director of Contracts was requested to come in the room in order to advise on issue. According to Mr Farrugia, the Director of Contracts said that the bank guarantee was acceptable but left the decision as to whether this should ultimately be accepted entirely in the hands of the Chairperson of the Evaluation Committee; on her part, the latter, decided to seek legal advice on the matter.

In reply to Dr Gales's questions, Mr Farrugia declared that it was one of the competitors who was in the public area who had questioned why the Bid Bond was issued by Gatt Tarmac Ltd and not by Polidano Bros Ltd. He could not recall that the issue regarding the format of the Bid Bond (page 59) was raised during the opening of Envelope 1. His attention was drawn to the fact that this matter was mentioned by Dr Norval Desira in his letter dated 22 March 2005.

Mr Farrugia proceeded by confirming that after the opening of Envelope No 2 there was a discussion about the fact that the 'Leader' was not identified.

In reply to Dr Delia's questions, Mr Farrugia confirmed that the rubber stamp was not on the tender box and that the tenderer was Polidano Bros Ltd. He declared that the Bid Bond presented with the tender was on behalf of Gatt Tarmac Ltd and that Polidano Bros Ltd submitted the appeal.

On cross-examination by Dr Demarco, Mr Farrugia confirmed that Polidano Bros Ltd was the contractor and that the Bank Guarantee indicated Gatt Tarmac Ltd as the Tenderer.

In his testimony, Mr Edwin Zarb, Director General Contracts, was first cross-examined by the PCAB. He testified that when he was called to give his interpretation about the format and wording of the tender guarantee, he believed that Government's financial interests were safeguarded because it specified that '*it shall not be incumbent upon us to verify whether such demand was justified.*' However, he said that the Evaluation Committee decided to take legal advice regarding the validity of the Guarantee. Also, he confirmed that the Department acknowledged the tenderer and not the sub-contractor because the contractual obligations were between the Department and the Tenderer. He explained that in the event a sub-contractor defaulted, it was the contractor who was responsible and not the sub-contractor. He explained that, immaterial of the identity of the person at whose request such a guarantee was issued, the Bank would honour the claim.

Then, Dr Frendo referred Mr Zarb to the advice given by the Attorney General's Office which indicated that according to Maltese Law a person could stand as guarantor for another person. However, it was also stated that if the Evaluation Committee was strict in its interpretation of the regulations and conditions of the tender dossier it could reject the offer. He was of the opinion that the advice given by the Attorney General comforted his version because nowhere was it stated that he had taken the wrong decision when he recommended that the tender guarantee was admissible.

Dr Galea intervened and pointed out that the Bank Guarantee was submitted by the order of Gatt Development Limited for Gatt Tarmac Ltd and that the latter was identified as the Tenderer. He argued that if the Director of Contracts were to claim the Bank Guarantee on the request of the Tenderer and the Bank paid the sum claimed, Gatt Tarmac Ltd could take legal action against Director of Contracts because Gatt Tarmac Ltd was not the Tenderer but a sub-contractor.

On his part, Dr Demarco made reference to page 59 of Tender Document regarding the Guarantee Form and Mr Zarb confirmed that, although the Bank Guarantee did not follow the exact format of the tender guarantee form, it was acceptable. Dr Demarco insisted that it was mandatory that the Contractor's name and address be indicated in the Bank Guarantee. Mr Zarb confirmed that Gatt Tarmac Ltd was not the Tenderer. Initially the *Tender Guarantee Form* was accepted because the Guarantee was '*payable on demand*'. However, he agreed with the Evaluation Committee's decision to take legal advice on the whole issue.

Mr Zarb confirmed Dr Frendo's statement that the Attorney General's decision had comforted his position, mainly, that on the basis of that Bank Guarantee, Government's interest was safeguarded. Dr Demarco intervened by stating that the issue was not whether Gatt Tarmac Ltd could act as surety for the tenderer or not but whether it was according to the tender conditions or not. He quoted the 2nd, 3rd and 4th paragraph of page 2 of the Attorney General's advice given on 11 April 2005 wherein the Attorney General put the responsibility on the Evaluation Committee to decide. On the same subject matter Dr Grima said that when the lawyer from the Attorney General's office quoted from the tender document she put emphasis on the words "*strictly in accordance to*". At this stage Mr Zarb intervened and stated that if his Department were to act extremely strict then one could easily end up discarding all tenders. Dr Galea rebutted claiming that in this case one had to take notice of the advice given by the Attorney General's office which 'inter alia' stated that "... *Should the board be of the opinion that the submitted documents are incomplete, obscure, conditional, illegible, contain unrequested information or other irregularities, then on the basis of parag. 27.1, such tender may be rejected.*"

Mr Zarb concluded his testimony by insisting that in this particular instance he was of the opinion that Government's interest was safeguarded, confirming also that it was the Contracts Department which requested Gatt Tarmac Ltd to extend the guarantee.

When cross-examined by Dr Frendo, Mr Paul Caruana, Quantity Surveyor with Architect Robert Sant of *Design and Technical Resources*, testified that Mr Charles Polidano had assigned him to fill in the tender *dossier*. He explained that when they filled the information on the Tender Form, they were also filling in the Hal Far Tender wherein Polidano Bros Ltd was Partner No 4 and unfortunately they copied and pasted them from the documents thereof. He declared that Partner No 4 was included only once in the tender document, that is, on page 55. He said that the entire tender was filled in with information about the tenderer, namely, Polidano Bros Ltd. At this point it was decided to adjourn the sitting for Monday, 29 September 2005 because it was felt necessary to verify witness' testimony with the tender document.

When the hearing reconvened on the agreed date, the Chairman informed those present that the PCAB decided to summon Dr Michael Borg Costanzi, Head of the Bank of Valletta Legal Office as a witness in view of the fact that in the previous hearing a BOV Branch Manager had testified that, if there was a point of clarification, the matter would be referred to the Legal Office.

Dr Borg Costanzi was first cross-examined by the PCAB. He was given the copy of the Bank Guarantee issued for this particular tender and was asked to explain how he would interpret this document if this were referred to him by a Branch Manager. He said that this was a bank guarantee in favour of the Director of Contracts for Lm 25,000 in respect of Tender No CT 2616/2004. It was issued by the order of Gatt Tarmac Ltd as the tenderer. BOV guaranteed to pay Lm 25,000 in the event the Tenderer withdrew its tender before the expiry date or in the event the Tenderer failed to sign the contract. He said that the Director General Contracts could claim the guarantee at any time, provided that such request was made in writing and accompanied by the original tender guarantee. The bank would not verify whether such demand was justified or not, continued Dr Borg Costanzi. Although it was a guarantee in favour of the Director General Contracts, they would not be involved between the Director General Contracts and the Tenderer. Also, the guarantee specified that it expired on the 10th June 2005. Finally, BOV's Head, Legal Office, said that if the guarantee were to be cancelled or no longer required, the document would be returned to them. The guarantee was issued in favour of the Director of the Contracts and it was not transferable or assignable.

In reply to specific questions by Dr Delia, the witness asserted that the guarantee was a 'stand alone' document; it was issued on the request of their client and that it was not important for the Bank to know who the tenderer was. Dr Borg Costanzi confirmed that a bank guarantee was a tripartite agreement. Also he explained that it created a legal relationship between the beneficiary (Director of Contracts) and the bank (BOV) wherein the bank bound itself to pay the beneficiary the amount indicated in the guarantee '*no questions asked*'. He confirmed that a bank guarantee also created a legal relationship between the beneficiary and the person on whose order the guarantee was issued, but this was beyond the guarantee. He could not exclude the possibility that Gatt Tarmac Ltd could sue the Director General, Contracts Department, for damages if the latter were to call upon the bank guarantee in case Polidano Bros Ltd failed to fulfil their obligations under the tender conditions considering the fact that Gatt Tarmac Ltd were not the tenderers.

Finally, he was asked to state what would be the position if the Director General (Contracts) were to mention specifically Polidano Bros Ltd by name in his request. Dr Borg Costanzi replied that he would ask him to remove the name so that he would be able to pay. On the other hand if the Director General (Contracts) would refuse to remove that reference, he would have to interpret whether the claim remained within the tender guarantee or not. In reply to a question put to him by a member of the Board he stated that he could not rule out the possibility that he might have to consult with Gatt, his client.

The next witness was Mr Caruana who, proceeding with the testimony he had commenced during the previous session, on cross-examination by Dr Frendo, confirmed that he filled most of the voluminous technical offer under Section 4 of the tender and that all information contained therein referred to Polidano Bros Ltd who was the tenderer. The only part that Gatt Tarmac Ltd was mentioned was in Section 4.6.3 (Page 76).

At this stage, Dr Galea intervened and referred the witness to the Tender Form (page 55) and to Point no 7 on page 62 which specified that *'Each partner in a joint venture/consortium must fill in and submit every form.'* He argued that if Polidano Bros. was Partner No 4, it's representative should have filled the form and that it was mandatory to fill and submit such form for each of the other partners. Dr Delia interjected to point out that together with his clients he had failed to identify the *Leader* in the Tender Form submitted. Mr Caruana explained that he had copied and pasted the text from another tender document wherein Polidano Bros Ltd was 'Partner 4'. Furthermore, when asked by Dr Frendo whether it was a joint venture and whether there were any other partners, the reply given was in the negative.

On cross-examination by Dr Frendo, Arch Ivana Farrugia, Chairperson Evaluation Committee, said that she was employed at the Ministry for Gozo. She declared that the Chairperson and the members of the Evaluation Committee were appointed by the EU Directorate at the Ministry for Gozo and that the Department of Contract was the contracting authority. The witness proceeded by stating that the said members sent the Curriculum Vitae for approval by the Department of Contracts and they subsequently signed a declaration stating their independence and impartiality. She testified that this was the first time that she had chaired an Evaluation Committee for a Department of Contracts' tender. Previously she had been appointed as a member for the evaluation of Departmental tenders within the Ministry for Gozo.

Ms Farrugia explained that on the date of the opening session at the Department of Contracts there were three packages and the Evaluation Committee numbered each package. Two of the tenders had the name of the tenderer printed on the box and the third one was not identifiable. She declared that neither the box nor the wrapping paper was rubber stamped with the name of the tenderer. After they consulted a member of the General Contracts Committee, the Evaluation Committee agreed not to consider this as a valid reason to reject the tender and so they decided to open it and they assigned it number '3' for identification purposes. Architect Farrugia confirmed that the Committee members did not take any minutes of the session relating to the tender opening procedures.

The Chairperson of the Evaluation Committee said that the tenderers' or partners' representatives present for the opening session were Architect Rueben Aquilina for MAC, Charlo Farrugia for Polidano Bros Ltd and Architect Sandra Vassallo for Asfaltar Ltd and Tal-General.

She said that when they opened Envelope No 1 of Tenderer No 3, they noticed that the bank guarantee referred to tenderer Gatt Tarmac Ltd and that the wording was not exactly like that of the Tender Guarantee Form in the tender dossier (page 59).

However, it was considered as valid because both the names of tenderer and the bank were identified. At that stage they believed that Gatt Tarmac Ltd was the tenderer. So they decided to proceed with the opening of Envelope No 2 ('Technical Specifications') of Tenderer No 3. Upon opening this envelope, it resulted that the Tender Form document did not identify the 'Leader' and that Partner 4 was identified as Polidano Bros Ltd. Apart from this, Gatt Tarmac Ltd were identified as sub-contractors in Form 4.6.3. They decided to seek legal advice from the Attorney General's Office because they had problems regarding the identity of the tenderer, the validity of the tender guarantee and admissibility of the tender. Ms Farrugia claimed that Attorney General's advice was not clear but it tended to be in favour of rejection. The Chairperson declared that the Evaluation Board members were unanimous in their decision.

When asked to state which criterion of adjudication would be adopted, that is, the 'most economic advantageous tender' (MEAT) or lowest price offer, which were the only two criterion mentioned in the EU Directive, Ms Farrugia replied by stating that they did not know the price yet because at that stage Envelope No 3 (Price) had not yet been opened. When Dr Frendo referred the witness to clause 31.1 which stipulated that '*The tender will be awarded to the compliant bidder with the lowest price*', she said that the award would be based not solely on the price because at that stage the tenderers would have already been found to be compliant with the technical specifications. Dr Antoine Cremona, another legal advisor to the appellant, intervened and alleged that apparently the Chairperson of the Evaluation Committee was not conscious that she had selected the wrong criterion (MEAT).

During cross-examination Ms Farrugia also testified that the Evaluation Committee did not seek clarifications from Polidano Bros Ltd because they were not of a technical nature. In the *Summary of Tenders Received* the Evaluation Committee indicated that they 'requested further clarification' because they had difficulty in the identification of the contractor and the sub-contractor. She added that the clarifications that were sought from other bidders were of a technical nature.

When cross-examined by Dr Galea, Ms Farrugia explained the procedure of the *Three Package System*, wherein first they opened Envelope No 1 ('*Tender Guarantee*') and if found admissible then they would proceed with the opening of Envelope No 2 ('*Specifications*'). Those tenderers who were found compliant with the specifications would proceed to the 3rd and last Envelope ('*Price*'). She declared that neither the Secretary nor herself, as Chairperson, had a vote and that only the members had voted. When Dr Galea made reference to Clause 31.1 of the *Tender Dossier* and asked what did she understand by 'compliant bidder', Ms Farrugia replied that the bidder would have satisfied the tender guarantee's and technical specifications' requirements and also compliant to the tender dossier.

Also, Ms Farrugia stated that the Evaluation Committee's decision was referred to the General Contracts Committee who could have approved or rejected it, but in this case their decision was approved. She said that their report was submitted to the Director of Contracts and that during the process they always held contact with the Department of Contracts.

In reply to specific questions by Dr Delia, the Chairperson of the Evaluation Committee confirmed that (i) the tender box was neither rubber-stamped with *Polidano Bros Ltd* nor *Gatt Tarmac Ltd*, (ii) the Leader was not indicated in the *Tender Form*, (iii) there was no tender guarantee form of Polidano Bros Ltd, (iv) tenders which did not conform to the tender procedure requirements had to remain unopened and (v) clarification could only be sought on points of a technical nature.

Following Architect Farrugia's testimony, it was the turn of the other three members of the Evaluation Committee, namely Messrs Angelo Portelli (Architect at the Ministry for Gozo), Mario Ellul and David Vassallo (both from ADT – Awtorita' Dwar it-Trasport), to take the stand. In their testimony, they all confirmed Ms Ivana Farrugia's version of events and statements regarding their appointment and the signed declaration.

At this stage, Dr Noel Camilleri requested to testify under oath and to be exempted from his professional secrecy. He declared that on 12 July 2005 he had a meeting with Mr Zarb who confirmed that the procedures applicable in this case were those of LN 299 of 2003 and not those of LN 177 of 2005.

The appellants' legal representatives' request to produce Dr Joanna Drake as an expert witness on EU Law was rejected by the PCAB because it was felt that the appellant could make reference to EU legal matters in their written submissions and as a consequence Dr Drake's intervention was considered by the Board as not relevant to the proceedings. During the long discussion that ensued on this issue, the appellants' lawyers insisted that Dr Drake's testimony was indispensable because they wanted to prove that the laws regulating the public procurement regulations as transposed in Malta differed from the EU directives and also because the EU law was now superior to domestic law. They argued that the PCAB should seek clarification on the matter. After the PCAB's decision to abide by its original ruling against Dr Drake's summoning in view of the fact that it considered this hearing not the right forum to bring about any misconceptions on Maltese law by the appellants' legal representatives, Dr Frendo verbalised that:

“Dr Frendo, Dr Noel Camilleri and Dr Antoine Cremona jitolbu lill-Bord jisma' lil Dr Joanna Drake prodotta mill-patrocinati tagħha sabiex tixhed dwar l-applikabilita o meno tad-dritt komunitarju għal dan il-kaz kif ukoll id-decizjonijiet kunsinjati tal-Qorti Ewropea tal-Gustizzja u Qorti ta' l-Ewwel Istanza tal-UE għal dan l-istess kaz.”

At this stage, all parties involved agreed with the PCAB's request to forward their written submissions to the BCAB's Secretary by 10 September 2005 (12.00 hrs) and to exchange same among themselves. It was also agreed that the said parties were to submit such submissions by electronic mail.

The submissions in question are being reproduced 'verbatim' in annexes 'A', 'B' and 'C' respectively attached to this document.

As agreed, the third and final hearing was held on the 10 September 2005.

At the beginning of this hearing the Chairman, PCAB said that the parties concerned, namely, Ganado & Associates Advocates for Polidano Bros Ltd and Gatt Tarmac Ltd, Sapiano & Associates for MAC Joint Venture and Dr Galea for Ministry for Gozo, had exchanged their respective written submissions. He pointed out that the purpose of this final session was mainly intended for each party to rebut the written submissions forwarded by the other parties. The initial part was dedicated to each party for these to make their first interventions which could be followed by further interventions as a result of the proceedings throughout the same hearing.

After this introduction, Dr Frendo was allowed to sign the note of their written submission because when it was presented he was abroad.

However, before proceeding with the oral submission, Dr Camilleri pointed out that although all parties were asked to submit their written submissions by 12.00 hours (Noon) on Monday, 12th September 2005 (the date of 10th September 2005 indicated earlier was changed because it was brought to the attention of this Board that it was going to fall on a Saturday), by 12.05 hours only the appellants' submission and that of Dr Galea, on behalf of the Ministry for Gozo, were received. He said that he became aware of the fact that the written submission presented by the legal advisors representing the MAC Joint Venture was not presented on time and therefore he requested that this should not be taken into consideration. Dr Camilleri claimed that this was verified by Mr Saviour Debono (Secretary PCAB), Dr Cremona, Mr Mario Gatt and himself. At this point the Chairman PCAB replied that the written submission by Sapiano & Associates on behalf of MAC Joint Venture would be accepted as it results to them that it was submitted within the stipulated time, even though erroneously to the Contracts Department instead of the Secretary PCAB. At this stage, the Secretary of the Board confirmed and presented this Board with an original stamped document denoting the recipient at the Department of Contracts, and date and time of receipt of the said submission. When Dr Camilleri continued to insist that submissions had to be submitted to the Secretary PCAB and not to the Department of Contracts, the Chairman PCAB drew his attention that it was also a state of fact that the submissions should have also been exchanged between the parties concerned by that time but they were not. Dr Delia intervened to reiterate that their note of submission was submitted on time. The PCAB confirmed its ruling and advised legal representatives to proceed.

Dr Antoine Cremona, initiated his intervention by giving background information regarding the issue of the tender and the apposite appeal

He said that there were three bidders for this first tender in Gozo which was co-financed by the EU. One of the two rejected tenderers, namely his clients, had filed an objection against a deposit of Lm 10,000, this being 0.5% of the total estimated cost of tender amounting to Lm2 million. He contended that, given that the aggregate procurement value of this contract exceeded the thresholds stipulated by the EU directives, it was the responsibility of the Director of Contracts, as the Contracting

Authority, to administer and adjudicate this tender. He said that this tender fell under the *Three-Separate Package* procurement procedure and that the appellants were excluded from the final phase, that is, the opening of the third Envelope which considers the financial package. The PCAB was being requested to remedy the situation by re-instating them in the bidding process.

Dr Cremona proceeded by referring to what he labelled as '*Invalidity of the objection*' placing particular emphasis on the applicability or otherwise of the legislation as well as the relationship between Polidano Group, Polidano Bros and Gatt Tarmac Ltd.

As regards the law applicable in this instance, Dr Cremona said that their appeal should not be considered "invalid and without effect and should be dismissed immediately" as stated by the lawyers of MAC Joint Ventures in their written submission because, although at the time of filing their objection LN 299 of 2003 had already been replaced by LN 177 of 2005, in substance, nothing had changed, and as a matter of fact, the dispositions of the relevant regulation remained the same.

Furthermore, he pointed out that when the tendering process was initiated, the applicable regime was LN 299 of 2003. In fact, the *Contract Notice* was published in the *Official Journal of the European Union* on 20 January 2005; the appellants retrieved a copy of the Tender Dossier on 28 January 2005 against a deposit of Lm100; the evaluation process was almost terminated on 10 March 2005; and the new regime (LN 177 of 2005) entered into force on 3 June 2005. Therefore the latter could not be said to apply retroactively.

Also, he said that their appeal was based on the dispositions included in the Tender Dossier wherein Article 38 entitled 'APPEALS' referred to Part XII of the Public Contracts Regulations (LN 299 of 2003) in connection with the procedure for appeals from decisions of the contracting authority in procurement using the separate packages procedure. The tender dossier created a juridical relationship between the Contracting Authority and potential bidders.

With regard to the other party's claim that the appellants' objection should be dismissed because the appeal was not filed by the 'tenderer', *Polidano Bros Ltd.* but by *Polidano Group* and *Gatt Tarmac Ltd.*, Dr Cremona pointed out that they appealed on the basis of the Director General Contracts' letter of rejection dated 8 July 2005 which was addressed to Polidano Group and Gatt Tarmac Ltd and not to Polidano Bros Ltd. Therefore, he failed to understand how his colleagues argued that the fact that Polidano Group was not a juridical entity in this case and Gatt Tarmac Ltd were sub-contractors, the appeal should be considered as 'null and void'. In this respect they could also argue that there was no sentence or exclusion in the first place.

Dr Cremona proceeded by considering the 'Tender Guarantee' issue and he rebutted the other parties' remarks on this matter by stating that in his letter of rejection, the Director General Contracts did not say that the tender guarantee was not in order but that the offer was excluded due to alleged obscurity in the identity of the tenderer. In actual fact the reason given was that:

'The offer was not in compliance with the Tender Dossier since the identity of the tenderer submitting the tender is obscure because whilst the tender guarantee identified M/S Gatt Development Limited for Gatt Tarmac as the tenderer, the Tender Form did not identify the name of the tenderer.'

He contended that the fact that the Evaluation Committee proceeded with the opening of the second envelope was a confirmation that the tender guarantee was valid since otherwise the remaining two envelopes would have been discarded unopened. Apart from this, the validity of the tender guarantee was confirmed during these proceedings by the testimony given by Mr. Theuma and Dr Borg Costanzi respectively. Also, Mr Zarb testified that the tender guarantee, as presented, safeguarded the public interests and that the Attorney General's advice comforted his version.

Dr Cremona said that, according to the *Tender Dossier*, the tenderers were obliged to submit a valid tender guarantee for the amount of Lm 25,000 issued by a Maltese bank in favour of the Contracting Authority. It was not specified that the tenderer had to furnish a valid bank guarantee in his "own name" or out of "own funds". He said that it was confirmed by the Attorney General that a bank guarantee issued by a person/legal entity in favour of a third party was valid at law. In the circumstances, the bid bond furnished by Polidano Bros Ltd was valid and compliant with the Tender Dossier.

Dr Cremona said that this issue should be considered in the context that a tender guarantee was intended exclusively to safeguard the interests of the Contracting Authority at pre-award stage only. As soon as the Contracting Authority awarded the contract, the tender guarantee would be withdrawn and replaced by a performance bond amounting to 10% of the contract price.

The appellants' legal representative also placed major emphasis on the fact that they were not appealing because of the invalidity of the tender guarantee but from the decision taken by the Director General Contracts to exclude Polidano Bros Ltd's bid because of alleged obscurity on the identity of the tenderer. He said that they were not contesting the mistake made by Mr. Caruana when the latter copied the term 'Partner 4' from the electronic text of another tender document which he was simultaneously compiling for Polidano Bros Ltd and which named Polidano Bros Ltd as *Partner 4*. It was evident that a human error was committed in the *Partner 4* designation. However, the Evaluation Committee felt that this mistake was beyond redemption and clarification. He said that Gatt Tarmac Ltd, who were subcontracted to carry out 30% of the project in accordance with the requirements of the Tender Dossier, featured only on one page (Sub-contractors' Form 4.6.3). All the other pages in the tender document contained detailed and consistent information relating to Polidano Bros Ltd as the only company submitting the tender. This was a proof that the tender was not being submitted as a Joint Venture. Furthermore, he maintained that, in view of the fact that two out of three tenderers were identified at the opening session; the third could be no one other than Polidano Bros Ltd. Therefore, it could not be argued that the designation as *Partner 4* could have led the Evaluation Committee to some confusion or, worse still, to obscurity in the identity of the Tenderer! So, the problem could have been 'the tender guarantee' because this was provided by a third party,

However, Dr Cremona contended that this was not indicated as one of the reasons for the rejection of the tender.

Also, he questioned whether it was justified to disqualify a tenderer from a Lm2 million contract simply because a '*Partner 4*' designation was written instead of the word '*Leader*'. He said that in spite of the fact that the notice 'SUMMARY OF TENDERS RECEIVED' which was published on the notice board of the Department of Contracts contained the words '*Req further clarification*' next to Polidano's bid, no clarifications were sought. Dr Cremona was of the opinion that the Evaluation Committee should have asked the tenderer to clarify the matter. The fact that it did not seek clarification was "a great example of bad administration".

Dr Cremona proceeded by referring to the fact that when the Chairperson of the Evaluation Committee was asked to state the basis on which criterion [out of the two available at law, i.e. the Most Economically Advantageous Tender (MEAT) or the lowest price] would the contract be adjudicated, she unequivocally and wrongly declared "MEAT" when in actual fact Article 31.1 of the Tender Dossier specifically stated that the criterion to be used was the 'lowest price'. He contended that there could not be competition with one tenderer.

At this point Dr Frendo took over the floor stating that this appeal was based on formalities. He was of the opinion that if the PCAB would conclude that the Evaluation Committee had to seek clarification then it would have no alternative but to quash that decision. Also, if it was not yet clear whether such clarification should be sought, then the PCAB, as an authority of last resort, should request to seek clarification from the competent European authority.

Dr Frendo said that, according to the provisions of the law, the Director General Contracts was obliged to issue, administer and determine the procurement process (Regulation 33 of LN 299/2003). He questioned where the Director General Contracts featured in these procedures, arguing that the said Director, somehow, was reduced to a mere rubberstamp. Dr Frendo contended that the Ministry for Gozo should have never appointed the Evaluation Committee as, such appointment, should have been made by the Director General Contracts. As a matter of fact, Dr Frendo also claimed that the Director of Contracts had reneged on fully assuming his responsibilities "to issue, administer and determine the contract".

Furthermore he insisted that in view of the fact that in Article 5 (2) (1) of LN 299 of 2003 it was specified that it was the function of the Director General Contracts '*to institute and to defend any judicial or arbitral proceedings that may be necessary in relation to any contract awarded by him*', it was the Director General Contracts who had to be a party in these proceedings defending the decision taken and not the Ministry for Gozo.

He concluded by stating that, in the prevailing circumstances, the decision of the Department of Contracts should be quashed because of serious breach of public procurement legislation.

Dr Galea, the Ministry for Gozo's legal representative, said that the *Planning and Priorities Coordination Division* (PPCD) within the Office of the Prime Minister (OPM) has been designated as the *Managing Authority* in terms of Article 9 (1) Reg EC 1260/99 by Cabinet decision 405/2005 of the 20 September 2000. He said that according to the *Manual of Procedures for Structural Funds 2004 – 2006* issued by the said authority, the Evaluation Committee had to be appointed by the final beneficiary (FB). He tabled extracts of the *Manual of Procedures* and highlighted the relevant parts. In this case the final beneficiary of this project were the Ministry for Gozo and the Malta Transport Authority (ADT). Paragraph 7.5, referring to 'Evaluation Committees', specified that *'Tenderers will be evaluated by means of an Evaluation Committee (including tendering procedures for less than Lm 20,000) recommended and appointed by the head of the FB responsible for the contract.'*

He said that the Ministry for Gozo appointed the *Evaluation Committee* in accordance with the *Manual of Procedures* and in consultation with the Director of Contracts. The opening of tenders was done in the presence and under the surveillance of the representatives of the Director General Contracts. The Chairperson and Members of the Evaluation Committee declared that they consulted continuously with the Director General Contracts' officials and their recommendations were studied and the final decision was made by the Director General Contracts based on such recommendations. The Evaluation Committee rejects the claim that the Director of Contracts said that he did not know what was going on. It had to be acknowledged that it was impossible for the Director General Contracts to monitor personally the evaluation process of each tender. The fact that he was not present during evaluation stage was irrelevant because the decision was made on the Evaluation Committee's report and acted accordingly. However, when the Director General Contracts issued the rejection letter, he was assuming responsibility for that decision. Thus the statement made in para 3.2.6 (appellants' written submission) that *'the Director has been divested of his role at law'* was not correct. Furthermore, he asserted that the adjudication process of this contract was transparent and that the procedures were strictly observed.

Dr Galea maintained that the points mentioned under para 8.1 of the appellants' submission regarding the nullity of the tendering process and the referral of the matter to the EU, should not be taken into consideration because it is considered to be irrelevant as only the issue of obscurity regarding the identity of the tenderer was mentioned in their objection.

With regards to the issue of the Tender Guarantee, Dr Galea stated that the said guarantee that was issued by the Bank of Valletta plc "by order of Gatt Development Ltd for Gatt Tarmac Ltd" was not invalid. However, there was lack of clarity because the tender guarantee identified Gatt Tarmac Ltd as the 'Tenderer' when they were only sub-contractors and also because the tenderer was Polidano Bros Ltd. Therefore, he argued that, once Gatt Tarmac Ltd were not the 'tenderer', they were not assuming any binding obligation towards the Director of Contracts. He said that a third party could stand as 'surety' but, in that case, the guarantee should have been issued as *'Gatt Tarmac Ltd acting as surety for Polidano Bros Ltd'*. Therefore, he argued that

if the Director General Contracts were to call upon the tender guarantee he would be laying himself open to an action for damages.

At this stage Dr Galea stated that, in his opinion, the regulations applicable in this case were those of 2003 (LN 299 of 2003) even though the *letter of refusal* indicated LN 177 of 2005. He said that there was no substantive difference between the two legal notices and the matter had no bearing on the ultimate decision.

On this issue of 'MEAT' vis-à-vis 'Lowest Price', the Ministry for Gozo's legal representative said that, with all due respect, it was premature because one had to consider the parameter within which to evaluate the tender when the 3rd Envelope is eventually opened.

Finally, Dr Galea said that the Evaluation Committee was obliged to seek 'clarifications' subject to such clarifications being solely of a technical nature.

Dr Demarco commenced his intervention by saying that appellants admitted that they had committed errors in the submission of their tender. Therefore, the other party could not blame their mistakes on others. Furthermore, in view of the fact that this was a tender of Lm2 million, bidders were expected to take matters even more seriously.

He said that the Evaluation Committee was faced with a situation where the appellant's package was not identified; the tender guarantee (Envelope 1) identified Gatt Tarmac Ltd as the tenderer; in the 2nd Envelope, Polidano Bros Ltd was identified as *Partner 4* and Gatt Tarmac Ltd as *sub-contractor*; each and every page of the tender document was signed by both Polidano Bros Ltd & Gatt Tarmac Ltd; and the name of Polidano Bros Ltd did not feature on the tender guarantee.

He contended that these mistakes merited the disqualification of the tender because nothing was clear, hence the 'obscurity'.

Dr Demarco said that LN 299/2003 was replaced by LN 177/2005 on 3 June 2005 and therefore all procedures after that date are to be regulated by the new law. They were arguing that Polidano's appeal was invalid because once it was lodged on 14 July 2005, namely, one month after LN 177/2005 came into force, then it should not have been filed in terms of Article 102 (4) of LN 299/2003 as the latter was no longer effective. He said that the purpose of the reproduction of pertinent appeals regulations in the tender *dossier* was intended to make tenderers aware that, in case of rejection, they had a right of appeal and, should they decide to appeal, such regulations described the procedure that had to be followed. In actual fact even the Director General (Contracts) in his letter of rejection quoted LN 177/2005 as the basis of his rejection. Dr Demarco emphasised that it was not a question that the new regime was to be applied retroactively.

Dr Demarco rebutted the other party's arguments by stating that they would not have raised the issue of the validity or otherwise of the tender guarantee if Gatt Tarmac Ltd was the tenderer. However, when the 2nd Envelope was opened, it transpired that Gatt

Tarmac Ltd was a sub-contractor and also that, according to the appellants, the tenderer was Polidano Bros Ltd. In the circumstance this was not only an issue of obscurity but also a direct contradiction between Envelope 1 and Envelope 2 as far as the identity of the tenderer was concerned. MAC Joint Venture's legal representative proceeded by stating that the law stipulated that a 'guarantor' could act as 'surety' for the obligations of a third party but this could only be done in writing as surety could never be presumed. The tender guarantee submitted by Gatt Tarmac Ltd did not indicate that it was acting as surety for the obligations of Polidano Bros Ltd. The name of the latter was not even mentioned in tender guarantee.

Mr Theuma's and Dr Borg Costanzi's testimonies were referred to by Dr Demarco. He claimed that in these testimonies both witnesses testified that, in case of eventual default, the Director General Contracts would be paid because the tender guarantee could be called on demand. However, when specifically asked what would they do if they received a request for the withdrawal of the guarantee on the grounds that Polidano Bros Ltd withdrew from the tender, both answered that they would have to refer. Also it was revealed that if the Director General Contracts were to mention Polidano Bros Ltd in his claim, he would be requested to remove it, otherwise the bank would not pay. However, he pointed out that there was another relationship between the guarantor and the beneficiary because in the event that the bank paid the Director General Contracts, Gatt Tarmac Ltd could sue the beneficiary for damages stating that it was not tenderer.

Dr Demarco insisted that the Evaluation Committee was not obliged to seek clarifications if it had doubts on the identity of the tenderer. He said that the law was very clear on this issue because it specified that *'The Director of Contracts or, with his authorisation, any contracting authority, shall have the right to seek clarifications on points of a technical nature to enable a proper evaluation of any tender, which, however, would at that stage have already been declared to be basically compliant.'*

MAC Joint Venture's legal representative proceeded by saying that by the statement *'While the Commission's evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender'* (page 32 of appellant's submission), the Court of First Instance was not obliging the Evaluation Committee to seek clarification on each issue. Furthermore although it was stated that *"In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then, in principle, it is contrary to the requirements of good administration for an evaluation committee to reject a tender without exercising its power to seek clarification"*, Dr Demarco contended that this was not a case which required a simple explanation because in Envelope No 1 the Tenderer was identified as being Gatt Tarmac Ltd and in Envelope No 2 as Polidano Bros Ltd. According to Dr Demarco, this was a case of a total contradiction regarding the identification of the tenderer.

He alleged that only three pages out of thirty-eight pages in the note of submission presented by appellants were directly related to the issues mentioned in their letter of objection.

With regard to the court case / sentence mentioned in the appellants' submission, Dr Demarco said that no Court or authority was bound by a sentence of another Court.

At one point during his intervention, Dr Demarco said that insinuations had been made on the integrity of the Ministry for Gozo, the Evaluation Committee and Dr Carmelo Galea. Dr Frendo, Dr Cremona and Dr Camilleri vehemently objected as regards the fact that they had passed any remarks against the integrity of their colleague, Dr Galea, and asked Dr Demarco to withdraw such comments. Dr Demarco confirmed that the remarks towards Dr Galea were not passed during the public hearings. The Chairman PCAB made reference to the article featured on the 'Independent on Sunday' wherein it was reported that Dr Galea had a conflict of interest. Also, he pointed out that since this issue was never raised by any of the interested parties in the first place, as well as the fact that there was no proof of allegations made, the Board would not be conditioned by the contents of this article during its deliberations leading to a final decision. All represented parties in principle agreed with this line of reasoning.

Dr Demarco went on to conclude his intervention by stating that the appellants had to accept that they made a mistake in the formulation and submission of the tender and, as a consequence, they should allow the process to continue. He claimed that the decision to disqualify the appellants' tender was good because it failed to comply with the requirements of the tender *dossier*. The fact that the value of the tender was substantial meant that the tenderers had more responsibility.

Dr Delia said that the mistake appellants made when they did not put the name of the tenderer on the outer envelope had immediate repercussion on the whole tendering process. He argued that if the outer envelope were marked with the name of the tenderer, the Evaluation Committee would have immediately realised that the tender guarantee (Envelope 1) was irregular and the remaining packages would have been discarded unopened. The mistake continued to escalate because when the Director of Contracts informed the appellants that they had been disqualified, he addressed the letter of rejection to Polidano Group and Gatt Tarmac Ltd. The first had no legal entity in this case whatsoever and the latter was a sub-contractor. The actual tenderer was Polidano Bros Ltd. Furthermore, Dr Delia contended that the actual tenderer did not even submit an appeal.

With regard to the statement, *'It instead proceeded to open the second envelope thereby confirming and ratifying the existence of a valid tender guarantee'* (3rd para of page 21 of appellants' legal representatives' submissions), Dr Delia said that it was opened only because (i) at that stage the Evaluation Committee did not know that the tenderer was Polidano Bros Ltd and (ii) the Tender Guarantee identified Gatt Tarmac Ltd as the Tenderer.

Dr Delia said that all points mentioned in the appellants' submission under 5 – 'Third Party (subcontractor) Acting as surety' should be discarded because these were irrelevant to this case.

Also, referring to the same written submissions presented by appellants' legal representatives, Dr Delia said that 6.7 was the only point relevant to this case because Polidano Group had no juridical entity in this instance and the fact that it was mentioned first in the letter of rejection did not mean that it was the tenderer.

Dr Delia concluded by saying that, with regard to 7.5 of the same submission, appellants' legal representatives should not have mentioned only clause 28.2 but also clauses 28.1 and 28.3 of the tender dossier because the tender documents did not comply with the requirements of the tender *dossier*.

On his part, Dr Grima commenced his oral submission by referring to the use of the words 'shall' and 'must' in the relevant law which, according to him, implied that the Director of Contracts and the Evaluation Committee were not given discretionary power. This was done on purpose to avoid disputes. In this case, Dr Grima said, the fact that the tenderer failed to adhere strictly to the requirements of the tender *dossier* and regulations meant that the Director General Contracts was obliged to discard the tender. Dr Grima said that such failing scenarios included the fact that (i) the name of the tenderer was not marked on the outer envelope and (ii) the tender guarantee indicated the tenderer as a person different from the tenderer.

Referring to other matters, Dr Grima said that the PCAB was the judicial body of last resort. No Court of last resort should seek advice from another court because of the independence of the judiciary, which, together with the parliament and executive, were the three pillars of the rule of law.

At this stage all legal representatives were given one last opportunity to clarify or highlight any issues they felt pertinent, reasonable and justified.

Dr Frendo said that, after having heard all the lawyers, the PCAB could appreciate the difference in the approach of the two sides; whilst the appellants' legal representatives' approach was constructive, the approach adopted by the other parties was destructive. One of the reasons why they were requesting the PCAB to be reinstated in the tendering process was to ensure that the contract be awarded to that tenderer who had the lowest and best offer and to ensure that the element of competition prevailed since otherwise the scope of the tendering process would be defeated. He argued that the approach of the other party was destructive because they raised the issue of the applicability of the law and they mentioned Polidano Group instead of Polidano Bros Ltd in their letter of objection.

He did not agree that the final beneficiary was the Ministry for Gozo. Dr Frendo said that he believed that the final beneficiary should have been the Director General Contracts and/or the Chairman ADT. He alleged that the Evaluation Committee interpreted the doubt in favour of exclusion rather than in favour of who had the best

tender. Dr Frendo reiterated that, as a consequence, the process should be continued with the inclusion of Polidano Bros Ltd.

With regard to the *Manual of Procedures*, Dr Frendo said that these were just guidelines and, therefore, were not intended to substitute in any way the relevant regulations. However, he noted that not even these guidelines were followed because although it was stipulated that '*it was important to ensure transparency and competition*' there could be no competition with one tenderer in the final phase.

Dr Cremona referred to the fact that the Evaluation Committee should have been appointed by the Department of Contracts. He made reference to the sentence under Section 7.10 of their written submission referring to the relevance of ECJ and CFI rulings on all national courts and tribunals and the repercussions in state liability if a local tribunal went against such sentences.

Dr Camilleri, said that in his opinion, the process of adjudication adopted by the Evaluation Committee was bad practice because the purpose of the adjudication was not to exclude but to retain an element of competition.

According to Dr Galea, the regulations specified that the Director General Contracts should administer the tender, however, it was impossible for him to evaluate all tenders, and therefore he is allowed to appoint an Evaluation Committee. The Curriculum Vitae (CV) of the Evaluation Committee was submitted to the Department of Contracts.

He denied that the Evaluation Committee was in favour of exclusion of Polidano Bros Ltd and Gatt Tarmac Ltd because in spite of the fact that their outer envelope was not marked with the name of the tenderer, they accepted to proceed with the opening of Envelope No 1. The same applied to the tender guarantee, because although it did not conform exactly with the tender dossier, the Evaluation Committee accepted it on the advice of the Director of Contracts and proceeded with the opening of Envelope No 2. This was done precisely because they wanted competition. However the bone of contention was that the name of the tenderer on the bank guarantee was different from that indicated in the Tender Forms.

Dr Delia said that the PCAB was not the forum to decide regarding the composition and experience of the Evaluation Committee. He said that if the appellants were not satisfied with the final decision taken by the PCAB, they had other remedies by referring the matter to the First Hall of the Civil Court.

On his part, Dr Demarco said that, with regard to the applicability of the law, it appeared that the lawyers of the appellants did not understand the distinction between aspects of substance and those of procedure. As regards substance, the tender should be adjudicated on the basis of LN 299/2003; however, LN 177/2005 should regulate the procedure governing the appeal.

According to Dr Demarco, with regard to 'MEAT' and 'lower price' which were the guiding principles of evaluation, each tenderer had to follow certain formalities. Once

it was proven that the appellant did not adhere to the tender dossier's requirements, then the above criterion was rendered irrelevant.

As regards transparency, he said that it was precisely because of this that they could not risk to negotiate and seek clarification on error/s submitted by the tenderer on issues that could not be clarified. Dr Demarco pointed out that any such request for clarification must not seek the correction of formal errors. He said that this was not a case of simple explanation because it concerned a formal error regarding the identity of the tenderer.

Dr Demarco brought his intervention to an end by arguing that the PCAB was not a tribunal of last instance because appellants could seek remedy in the First Hall of the Civil Court. However, Dr Frendo intervened by stating his disagreement claiming that the PCAB was a quasi-judicial tribunal of last instance in this appeal, with appellants having right of recourse to the Commission if the PCAB took the wrong decision on grounds of a wrong statement of the law.

After the public hearings were concluded, the Board proceeded with its deliberations and reached its decision as stated hereunder.

The Public Contracts Appeals Board, having considered the following issues, namely:

Legislation governing appeal – LN299 / 2003 or LN 177 / 2005

The Board considered the fact that the legal provisions were changed in the intervening period between the issue of the tender document and the lodging of the Appeal. The Board believes that lea way should therefore be allowed in the circumstances.

Moreover, the Board also considered that substantially, regulation LN 177 / 2005 and LN 299 / 2003 are identical.

The Board, therefore, considers that the request for annulment of the appeal as requested by MAC Joint Venture should not be entertained because this would constitute an injustice to appellants denying them the right of redress.

'Locus standi' of the Ministry for Gozo

The Board noted that appellants contend that the Ministry for Gozo had no '*locus standi*' in the proceedings and therefore should not have been allowed to submit its representations and the oral and written submissions should not have been considered during the whole process.

The Board notes that the Ministry for Gozo has been delegated by Government with various responsibilities, amongst which those for road maintenance and construction although ADT remains responsible for the regulatory aspects. The Board therefore considers that the status of the Ministry for Gozo can be accepted as the final beneficiary. As the final beneficiary, the Board agrees that the Ministry for Gozo has a definite '*locus standi*'

Breach of Regulation 33 and the invalidity of the award procedure

According to appellants, the procurement regime of this Contract was applied incorrectly because Reg. 33 of LN 299 / 2003 states:

*“Provided that public contracts required by those contracting authorities listed in schedule 2 shall be **issued, administered and determined** by the Department of Contracts, which for the purposes of these regulations shall act on their behalf; and public contracts required by those contracting authorities listed in Schedule 3 shall be issued, administered and determined by the contracting authorities listed subject to the provisions set out in these regulations.”*

Appellants argue that the appointment of the *Evaluation Committee* should have been made by the Director of Contracts and not by the Ministry for Gozo and therefore the appointment is null and void since, in their opinion, this directly contravenes the provision of the above regulations.

The Board considers that although legislation clearly lays down the responsibility for public procurement in certain cases on the Director of Contracts, it is the normal practice that the evaluation of the tender submitted is carried out by technical boards appointed by the Departments or entities on whose behalf the tender has been issued.

Moreover, during the last sitting, Dr Galea presented a *Manual of Procedure* wherein it is clearly shown that the appointment of the evaluation committee is to be made by the final beneficiary responsible for the contract.

The Board accepts that the document presented is the official document governing procedures in such cases and therefore accepts that the procedure adopted in respect of this tender was correct.

Validity of Tender Guarantee

The Board notes that from the evidence submitted, it appears that at the time when Envelope No.1 of Tender No. 3 was opened, the Guarantee was issued in the name of Gatt Development Limited for Gatt Tarmac Limited identifying them as the 'tenderer'.

At that moment, the question of the real identity of Tenderer No. 3 had not yet materialized and, therefore, the decision taken by the Director of Contracts to accept the *tender guarantee* having deemed such Guarantee sufficient to safeguard the interests of the Government was justified. Furthermore, this Board agrees that such decision was not taken within the context of the problem that arose later regarding the identity of the 'tenderer'.

When the bid for tender no. 3 was opened, it became evident that the tender was not submitted by Gatt Tarmac Limited and at this stage it became clear that the Guarantee was not serving the purposes for which it was made in the first place.

Moreover, the evidence given both by Mr Theuma and Dr Borg Costanzi served to bring out the confusion that the Guarantee could have created, going so far as to have Dr Borg Costanzi stating that he might even have to consult with his client, Gatt Bros.

It also became evident that had the Director of Contracts demanded payment without advising the Bank of the tenderer's identity, such action could have possibly rendered him liable for damages.

In their submissions, the appellants appeared to have played down the importance of this Guarantee in the knowledge that at a later stage, a Performance Bond would be issued instead.

The Board considers that the Bid Bond was a clear requirement of the *Tender Document* and the fact that a Guarantee was produced which, in the opinion of this Board did not satisfy this Tender Document, cannot be argued away.

The principle cannot be accepted that tenderers can pick and choose from a *Tender Document* which are the more or lesser important features and proceed according to their subjective estimation.

Third Party (subcontractor) acting as ‘surety’

The Board acknowledges that a Bank Guarantee issued on behalf of a person or legal entity in favour of a third party is valid at law, provided, however, that such Guarantee clearly indicates the identities of the third party.

In this case the guarantee carried no indication whatsoever that it had been made to cover the responsibilities of other persons such as Polidano Bros.

Had Gatt Tarmac issued this guarantee on behalf of Polidano Bros., the matter would have been different.

Alleged conflict between the names appearing on the Tender Guarantee and the Tender Form

It may be agreed that if one were discussing this issue in isolation, the indication given in the tender form of Polidano Brothers as ‘Partner 4’, the case could be relatively simple.

However, the case needs to be examined in its complexity and, therefore, one has to associate the above ‘mistake’ with the fact that the Tender Guarantee was issued by Bank of Valletta to the order of Gatt Development Ltd for Gatt Tarmac Ltd, the ‘tenderer’.

Also according to the testimony of the members of the adjudicating board the tender package had no indication upon it as to the identity of the ‘tenderer’. This requirement arises out of the provisions of clause 14.2.3.e. of the tender document. Messrs. Farrugia and Caruana, witnesses brought forward by the appellant gave evidence that the packages were stamped but the PCAB on balance feels that this evidence was not as concrete as that given by the members of the adjudication board and therefore considers that it is highly probable the tender document was not marked as it should have been.

It is true that in the same tender document Polidano Bros. Ltd. were indicated in various sections as the tenderers, however in the same document there also appear certain details in regard to the organization of Gatt Tarmac Ltd. who, as sub-contractors, did not need to produce. This could only have served to compound the confusion of who actually is the responsible ‘tenderer’.

Application of local legislation

The Board feels that Maltese legislation reigns supreme.

From the evidence heard and submissions made the Board feels that this is sufficient to allow the Board to form a clear opinion within the context of local legislation and it does not therefore deem that it should go beyond this.

Clarifications

Also, with regards to the submission made that this case could and should have been resolved by the *Evaluation Committee* seeking clarifications, the Board is of the opinion that the extent of the obscurities was such that these were not amenable to simple clarifications. Indeed, the Board feels that any attempt at clarification between the *Evaluation Committee* and the tenderers could well have developed into a series of negotiations which are clearly inadmissible under the provisions contemplated in a tendering process.

Competition

While the Board agrees that healthy competition should be fostered, it can never concede that tenders which are submitted in a flawed or obscure manner, for whatever reason, should be allowed to proceed.

Insufficient attention

Finally, the Board notes that the evidence given indicates that insufficient attention was given to the formulation of this tender in spite of its magnitude, a fact which should have merited a greater sense of responsibility and therefore attracted greater attention in its compilation.

In consequence, the Board has decided to reject the complaint raised by the appellant and authorises the tender award procedure to continue with the exclusion of appellant's bid.

Moreover, the Board has also concluded that, in terms of the provisions of regulation 102 (4) of the Public Procurement Regulations 2005, the deposit paid by Appellant cannot be refunded.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

Date: 7th October 2005

Attachment 'A'

Written submissions in connection with the appeal lodged by 'Polidano Group and Gatt Tarmac Limited' ("The Appellants") in terms of the letter dated 8th July 2005 issued by the Director General (Contracts) and in terms of regulation 102(4) of LN 299/2003 quoted in Article 38 of the Tender Dossier pertaining to Tender Number CT2616/2004.

Written submissions in connection with the appeal lodged by ‘Polidano Group and Gatt Tarmac Limited’ (“The Appellants”) in terms of the letter dated 8th July 2005 issued by the Director General (Contracts) and in terms of regulation 102(4) of LN 299/2003 quoted in Article 38 of the Tender Dossier pertaining to Tender Number CT2616/2004.

The Appellants duly and respectfully submit that:

1. Facts leading to this appeal procedure:

1.1 The Publications Office of the European Union published on behalf of the Department of Contracts (contracting authority) an EU-Prior Information Notice [2004/S 204-174491] on the S-Supplement of the Official Journal of the European Union in connection with the contract for the Upgrading and Restoration of Dwejra to Rabat Road, Gozo (GD2, Dwejra to GA30jct. at NW of Rabat) on the 19th of October 2004;

1.2 On the 22nd January 2005, the Publications Office, also on behalf of the Department of Contracts (contracting authority) published a Contract Notice [2005/S 16-014869] in the S-Supplement of the Official Journal of the European Union called ‘Tender for the reconstruction and upgrading of San Lawrenz to Rabat, from junction GD1, San Lawrenz Square, to junction ja 30, Rabat, part of arterial route No 1, Rabat, Gozo’;

1.3 The Appellants retrieved a copy of the Tender Dossier for tender number CT 2616/2004 from the Department of Contracts against a fee of Lm 100 on the 28th of January 2005;

1.4 The Appellants cast their offer in the tender box at the Department of Contracts, Notre Dame Ravelin, Floriana on the 10th March 2005, some minutes before the closing time set in terms of Article 14.2.2 of Volume 1 of the Tender Dossier for Thursday, 10th March 2005 at 10:00 am;

- 1.5 The Appellants' Tender was signed by Mr. Charles Polidano, Director, on behalf of Polidano Bros. Ltd. and by Mr. Raymond Gatt, Director, on behalf of Gatt Tarmac Ltd. in the latter's capacity as sub-contractor;
- 1.6 An Evaluation Committee, appointed by the Ministry for Gozo and made up of Architect Ivana Farrugia (Chairperson), Arch. Angelo Portelli (Member), Arch. Mario Ellul (Member), Arch. David Vassallo (Member) and Mr. Saviour Tabone (Secretary), proceeded with the public opening of the sealed offers at the premises of the Department of Contracts in Floriana on the 10th of March 2005;
- 1.7 In total three (3) offers were submitted, and, as evidenced in the 'List of Tenderers/ Tenderers' Representatives Present' at the opening session circulated by the Evaluation Committee and signed by authorised representatives of the three bidders, all the three bidders were represented at the opening session and their presence was duly ascertained by the Evaluation Committee prior to the actual opening of the three bids;
- 1.8 The Evaluation Committee assigned numbers to the three tender packages. The Polidano bid was assigned the number '3' and was opened last;
- 1.9 After opening the first package in the three-separate package procedure, the Evaluation Committee ascertained that the Tender Guarantee issued by Bank of Valletta plc in connection with the tender number CT 2616/2004 for the value of twenty five thousand Maltese Liri (Lm 25,000) identified Messrs Gatt Development Ltd. for Gatt Tarmac Ltd. as the 'Tenderer';
- 1.10 From the short extract of the deliberations of the Evaluation Committee given to the Appellants by the Director General (Contracts), it transpired that at the second envelope stage, the Evaluation Committee considered that: *"The Tender Form (Volume 1 Section 2 of the Tender Dossier) within envelope no. 2 identified Messrs*

Polidano Bros. Ltd as Partner 4 with no further information being given as regards to the Leader and any other Partners submitting this offer."

- 1.11 The Evaluation Committee subsequently published a notice with the summary results of the tender opening session on the notice board of the Department of Contracts signed by the Chairperson Ivana Farrugia and containing the words "to seek further clarification" next to the second package of the Polidano bid;
- 1.12 However, no clarification whatsoever was sought from the Appellants in the intervening four-month period between the tender opening session and the letter of rejection;
- 1.13 On the 8th of July 2005 Polidano Group and Gatt Tarmac Limited were notified with the letter of rejection issued by the Director General (Contracts) quoting LN. 177 of 2005;

2. Appeal Proceedings – Contracts Appeals Board

- 2.1 On the 14th of July 2005, Appellants lodged an appeal against the decision dated 8th July 2005 and in terms of Regulation 102(4) of LN 299 of 2003 (as amended) this appeal application was accompanied by the deposit of Lm 10,000, equivalent to 0.5% of the total procurement value;
- 2.2 The Director General (Contracts) issued an acknowledgement of the Objection in terms of Regulation 102, Part XII of LN 299/2003 expressly quoted therein¹;
- 2.3 From this date, to the date of the first sitting held on the 24th August 2005 the Appellants were repeatedly denied by the Secretary of the Appeals Board and by the Department of Contracts access to all documentation concerning this case, including replies by interested parties and minutes of the Evaluation Committee;

¹ See informal copy of said acknowledgement attached and marked as 'Doc B'

- 2.4 During the first sitting of the Contracts Appeals Board, the Appellants were served with informal copies of a reply to their appeal filed by the MAC consortium (Leader: Road Construction Limited), one of the three original bidders and of another unsigned reply (surprisingly) on behalf of the Ministry for Gozo only after oral representations to this effect made by legal counsel for Appellants at the first sitting;
- 2.5 In these proceedings the Appellants and the other parties opposing the appeal produced a number of witnesses;
- 2.6 **Mr. Jack Thewma**, Gozo Branch Manager of Bank of Valletta plc, gave evidence on the validity of the Tender Guarantee no. G24TFC5092 provided for Tender CT 2616/2004 and included in the Polidano bid. He asserted that if presented with the original bank guarantee, the Bank would honour it and transfer the funds (Lm 25,000) in favour of the beneficiary, the Director General (Contracts) with no “questions asked”. In cross-examination, Mr. Thewma said that although the bank in principle would need no reference in the request by the Director General (Contracts) either to Polidano or to Gatt Tarmac Ltd, he would refer the issue to the Bank’s legal office in case the request would expressly mention Polidano Bros. Ltd. However, Mr. Thewma reiterated that if the original bank guarantee is presented to the Bank accompanied by a mere request referring to tender no. CT2616/2004 the Bank would affect payment with no hesitation;
- 2.7 The second witness produced by the Appellants was **Mr. Mario Gatt**, shareholder of Gatt Tarmac Ltd., who explained that he was directly involved in the process of compilation of the Tender document. He also stated that the underlying business relationship between his firm and Polidano Bros. Ltd, in terms of which Gatt Tarmac Ltd was to furnish a bank guarantee and act as subcontractor, was concluded by means of a written private agreement between the two companies. He confirmed Gatt Tarmac Ltd.’s status as subcontractor in this process and also that its contribution to the whole project was limited to 30% of the total procurement value in line with the

requirements of the Tender Dossier. Mr. Gatt confirmed that there were only three bidders in this process and all were represented at the tender opening session on the 10th of March 2005. He also confirmed that the Polidano bid was the last one to be opened by the Evaluation Committee. In cross-examination the witness confirmed that the List of Tenderers' representatives present at the meeting was not signed by him but by Mr. Charlo Farrugia representing the Tenderer Polidano Bros. Ltd. Mr. Gatt also recalled that the Polidano bid was clearly marked by at least one Polidano stamp placed on the paper wrapper in which the box containing the separate packages (envelopes) was wrapped.

2.8 **Mr. Charlo Farrugia**, (Polidano Bros. Ltd) then confirmed on oath his presence on behalf of Polidano at the tender opening session. He said that the tender was deposited only some minutes before 10:00 am and that the package contained at least one Polidano stamp on the wrapping paper. Mr. Farrugia also gave some details on the underlying commercial relationship between Polidano Bros Ltd. and Gatt Tarmac Ltd. on this project and confirmed the former's status as Tenderer and the latter's role as subcontractor. Mr. Farrugia confirmed that at the tender opening session, in reply to a question put by a member of the Evaluation Committee, he had identified himself as the Polidano representative who had signed the List of Tenderers/Tenderers' Representatives present at the session. The witness stated that he was well aware that Polidano occupied the role of Leader in this Tender and that Gatt Tarmac Ltd. was simply being subcontracted with 30% of the total works value. Mr. Farrugia said he had vetted the majority of documentation and information relating to Polidano Bros. Ltd. which the company submitted in this Tender;

2.9 The fourth witness in these proceedings was the Director General (Contracts) himself, **Mr. Edwin Zarb**. Mr. Zarb recalled how he had been called in to clarify some issues raised by the Evaluation Committee in connection with the Tender Guarantee and that he had asserted that the Tender Guarantee present in the first envelope of the Polidano offer was in his opinion perfectly valid. He asserted that Banks always use their own wording when issuing tender guarantees and that unfortunately although this was

invariably the case, public contracting authorities still published specimen/models as the one contained in the Tender Dossier. In his examination-in-chief, in cross-examination as well as in replies to questions asked directly by the Chairman and the Members of the Contracts Appeals Board, Mr. Zarb had no hesitation to reaffirm several times that the financial interests of the contracting authority (i.e. the Department of Contracts of which he is the Director General and therefore the public interest) were sufficiently safeguarded with the Bank Guarantee in question. He considered the bid bond furnished to be compliant with the requirement of a *valid* Tender Guarantee in terms of the Tender Dossier. He reiterated however, that he later became aware that the Evaluation Committee had encountered other problems with the Polidano bid, in particular with respect to the identity of the Tenderer. Finally Mr. Zarb also asserted that if one were to adopt strictly formalistic attitudes in public procurement then hardly any one tender could ever be judged as ‘compliant’²;

2.10 **Mr. Paul Caruana**, quantity surveyor, in his deposition identified himself as the person responsible for drafting most of the Tender documentation. He confirmed what was earlier stated by Mr. Gatt and Mr. Farrugia that the Tender document left no room for interpretation as to the roles of Gatt Tarmac Ltd. and Polidano Bros Ltd. in this project. The latter was the Tenderer whereas the former was clearly identified as a subcontractor. However, Mr. Caruana admitted committing a human error in the compilation of the Tender Form. Although the form still identified only Polidano Bros Ltd. as the Tenderer and provided clear contact details for the said company, the words ‘Partner 4’ instead of the word ‘Leader’ were included in the first left-hand side column. Mr. Caruana explained that this text was copied and pasted from the electronic text of another tender document which he was simultaneously compiling for Polidano Bros Ltd. and where Polidano Bros Ltd. showed as ‘partner 4’. Mr. Caruana also made ample reference to Volume 1, Section 4 of the Tender Dossier which contained detailed and consistent information concerning Polidano Bros. Ltd. as the company submitting the Tender as the Tenderer. He also stated that there was no form of project partnering or other legal setup as for instance a joint venture on

² “Jekk noqogħdu nfittxu l-irqaqat kollha possibbli ma jkunx hemm tender wieħed li jgħaddi!”

this project. Gatt Tarmac Limited was however to be responsible for the maximum amount of works permissible in terms of the subcontracting provisions of the Tender Dossier, i.e. 30%. As Mr. Caruana was going through the various sections of the Tender document identifying Polidano Bros. Ltd. as the Tenderer, both legal counsel for the other parties and the Contracts Appeals Board agreed that no further evidence was required to establish that Polidano Bros. Ltd. featured as the Tenderer on the document;

2.11 **Dr. Michael Borg Costanzi**, Head of the Bank of Valletta Legal Office, produced by the Contracts Appeals Board, then confirmed the validity of the tender guarantee. He asserted that Bank guarantees are 'stand alone' documents and that from their own nature if the beneficiary, in this case the Director General (Contracts) presents the original guarantee, the Bank would immediately release funds on presentation of the original guarantee with 'no questions asked'. Asked directly by the Board whether reference to 'Polidano Bros. Ltd.' in the request letter by the Director General (Contracts) (calling the guarantee) would prevent the Bank from releasing the funds in favour of the beneficiary because the guarantee itself refers to obligations assumed by 'Gatt Tarmac Limited', the witness was very clear in his reply. He said that the Bank would ask the Director to simply delete any such reference and it would immediately release funds in the beneficiary's favour.

2.12 The next witness to be produced by the Appellants was the Chairperson of the Evaluation Committee, **Architect Ivana Farrugia**. Arch. Farrugia stated that she was employed by the Ministry for Gozo and that this was the first time she had been nominated to chair such a committee in a procurement process. She had been appointed to serve as Chairperson in this adjudication by the Ministry for Gozo but that she did not recall the official who signed her letter of appointment. She said also that on the date of the tender opening session there were three packages and that each package was numbered by the Evaluation Committee. Arch. Farrugia also stated that the Committee had circulated a List of Tenderers/ Tenderers' Representatives present at the opening session and that it was signed by representatives of the three bidders.

After opening the first two packages out of three containing the other offers, Arch. Farrugia said that the third package could still not be identified by the Committee as it allegedly did not bear any identification and that for all that she knew it 'could have been a bomb' (sic). The witness explained that no minutes of proceedings or deliberations were taken at the tender opening procedure. Instead the Members of the Committee drafted a summary report some days later. On the question of the validity of the Tender Guarantee, Arch. Farrugia stated that on opening the first envelope, in her opinion, the bank guarantee did not reflect the standard wording shown in the specimen contained in page 59 of the Tender Dossier. She also recalled that a member of the Contracts Committee had expressed his opinion that the bank guarantee was valid and that this was later confirmed by the Director General (Contracts) Mr. Zarb who had been called in to verify the validity or otherwise of the guarantee. Mr. Zarb had expressed no reservations on the validity of the guarantee. The witness stated that after Mr. Zarb had affirmed that the bank guarantee was valid in terms of the legal requirements stipulated by the Department of Contracts, as the contracting authority, the Evaluation Committee proceeded to open the second envelope. At this point she asserted that the Members of the Committee could not find any reference to Gatt Tarmac Ltd. in the tender document and that Mr. Mario Gatt had indicated the part of the Tender document referring to Gatt Tarmac Limited as the subcontractor. Because Polidano Bros. Ltd. was indicated in the Tender Form as '*Partner 4*' and because the Tender Guarantee was not issued in the name of Polidano but in the name of Gatt Developments for Gatt Tarmac Limited, she asserted that the Board could not deduce the identity of the tenderer. In agreement with the other Members she therefore sought the Attorney General's advice on this matter. In addition they published a signed schedule on the notice board of the Contracts Department containing the words "*to seek further clarification*" next to envelope no. 2 of the Polidano bid.

In reply to questions made by the Chairman of the Contracts Appeals Board, Arch. Farrugia stated that to her the advice given by the Attorney General was not sufficiently clear and that it left room for interpretation as to the validity or otherwise

of the Tender Guarantee furnished. She later stated that the Evaluation Committee held some meetings in the premises of the Government Farm at Xewkija, Gozo discussing the issues involved and that the Evaluation Committee decided to recommend a rejection of the Polidano bid. Arch. Farrugia argued that the Evaluation Committee was competent to reach such a decision irrespectively of the advice given by Mr. Zarb and the Office of the Attorney General. Asked by legal counsel for Appellants why notwithstanding the undertaking to seek clarification, no such clarification was sought, Arch. Farrugia declared that it was evidently a mistake on her part to have made such an undertaking.

In addition, when asked the very basic question to state on which criterion (out of the two available at law, i.e. the Most Economically Advantageous Tender 'MEAT' or the lowest price offer) had been adopted by the contracting authority to award this contract, she unequivocally and wrongly declared 'MEAT' when in actual fact Article 31.1 of the Tender Dossier specifically states that the criterion to be used is the lowest price offer.

Ivana Farrugia also declared on oath that all Members of the Evaluation Committee had signed a declaration of independence and impartiality.

2.13 The other members of the Evaluation Committee **Arch. Angelo Portelli**, **Arch. Mario Ellul** and **Arch. David Vassallo** produced by the Ministry for Gozo confirmed that they were appointed to the Evaluation Committee by the Ministry for Gozo and that they signed a declaration of independence and impartiality. No one confirmed that such declaration included lack of any real or potential conflict of interest.

2.14 **Dr. Noel Camilleri** then on oath testified that in a meeting held at the Department of Contracts on the 12th July 2005 with Mr. Edwin Zarb on behalf of the Contracting Authority, Mr. Zarb confirmed that the applicable regime was that enshrined in LN 299/2003.

2.15 In view of the technical arguments on EC Law which legal counsel for Appellants planned to expound in further detail in written and oral legal submissions in front of the Contracts Appeals Board, they finally requested to produce **Dr. Joanna Drake** as expert witness on EC Law. This request was however, rejected by the Board following strong representations by legal counsel representing MAC Joint Venture (Leader: Road Construction Limited).

3. Irregularity of the Procurement Process

3.1 Wrong Application of the applicable law – legitimate expectations under LN 299/2003

3.1.1 Article 38 of the Tender Dossier³ entitled '*Appeals*' contains extracts from Part XII of the Public Contracts Regulations (LN 299/2003) in connection with the procedure for appeals from decisions of the contracting authority in procurement processes using the separate packages procedure.

3.1.2 In his 'rejection letter' of the 8th July 2005 addressed to Polidano Group and Gatt Tarmac Ltd., the Director General (Contracts) however refers to the provisions of the 'new' public procurement regime promulgated by means of LN 177/2005 on the 3rd of June 2005;

3.1.3 The application for appeal lodged in terms of Article 38 of the Tender Dossier, referred to the applicable regime in terms of LN 299/2003 (as amended) quoted in the Tender Dossier and as endorsed in the official acknowledgement sent to the Appellants by the Director General (Contracts) on the 14th July 2005⁴;

³ p. 50 *et seq*

⁴ Doc A attached

- 3.1.4 In the reply to the application for appeal, filed by the MAC consortium (Leader: Road Construction Limited), the respondents refer to the fact that LN 299 of 2003 has been replaced by LN 177 of 2005 and assert that any reference to the 'old' procurement regime renders the appeal null and void.
- 3.1.5 The Appellants humbly submit that this is a gross misapplication of basic rules on legal certainty and retroactivity of the law. It is not only self-evident but also requires little legal argumentation in terms of the doctrine of legitimate expectations. Non-retroactivity of the law is a basic tenet of the doctrines of the rule of law and legal certainty, and such the decision to apply the new regime in the absence of a clear transitory provision to that effect is symptomatic of the manner in which this adjudication process has been handled. Not only is the decision of the contracting authority in breach of EC Law (as will be argued hereunder), and not only was the Evaluation Committee irregularly constituted⁵; but it even applied the wrong procurement regime!
- 3.1.6 It is essential at this stage, before submitting any legal arguments on the applicable legal regime to this procurement process, to set a brief time-line of main events in the award of this public works contract:
- 19/10/2004: Prior Information Notice (Official Journal)
 - 20/01/2005: Contract Notice (Official Journal)
 - 28/01/2005: Retrieval of Tender Dossier by Appellants
 - 10/03/2005: Deadline for submission of tenders
 - 10/03/2005: Tenders Evaluation by Evaluation Committee
 - 22/03/2005: Letter from legal counsel for Polidano Bros. Ltd
Director General (Contracts)
 - 03/06/2005: LN 177/2005 comes into effect
 - 08/07/2005: Rejection letter issued in terms of LN 177/2005

- 3.1.7 LN 177 of 2005 transposes into Maltese Law the provisions of the new EU public procurement regime – Directives 17/2004/EC and 18/2004/EC enacted in April 2004 and replacing the existing procurement rules which were divided in three distinct directives on public works, supplies and services accompanied by a remedies directive which still remains in force. The deadline for transposition in Maltese Law was set by the European Commission for the 31st January 2006, but Government has now already transposed the new regime.
- 3.1.8 However, this new regime which entered into force in Malta on the 3rd June 2005 cannot be said to apply retroactively to a procurement relationship which was:
- (a) initiated on the 28th January 2005 with the retrieval of the tender documentation;
 - (b) preliminarily adjudicated on the 10th of March 2005;
 - (c) acknowledged by the Director General (Contracts) in terms of LN 299/2003; and which above all
 - (d) is based on a Tender Dossier which makes express reference to LN 299/2003 as the regime applicable to the tender process including any appeal procedures⁶.
- 3.1.9 The principle of legal certainty is a general principle of law and a fundamental element in the doctrine of the rule of law. In specific circumstances however, it has been applied to refer to the principle of *legitimate expectations* and the principle of *non-retroactivity of the law*. According to the basic principle of non-retroactivity, a measure cannot take effect before it is published. LN 177/2005 was published on the 3rd June 2005, i.e. when the tenders compiled in accordance with the contract Notice and in terms of the provisions of the Tender Dossier, had not only been submitted, but had already been opened and subject to an evaluation on their merits by the Evaluation Committee on the 10th March 2005. It is obvious that this process is governed by the law in place at the time of publication of the

⁵ See

⁶ See Article 38 of the Tender Dossier

contract notice, which is the time when all bidders or potential bidders in the Internal Market (by retrieving copies of the Tender Dossier) acquired legitimate expectations that the contracting authority will conduct the process of adjudication in accordance with the provisions of the Tender Dossier, including therefore Article 38 thereof which **specifically quotes Regulation 102 of LN 299/2003 as the applicable appeals mechanism.**

- 3.1.10 Furthermore, it is inconceivable in terms of the principle of legal certainty that a contracting authority invokes a supervening procurement regime, which has entered into force just before the formal notification of the rejection, only for the first time in that same rejection letter, i.e. after having applied throughout the 'old' regime.
- 3.1.11 For correctness sake however, it has to be stated that the changes brought by the 'new' procurement regime with the introduction of revised thresholds and the new 'competitive dialogue' procedure, may have no substantive effect on the current proceedings. The application by the contracting authority of a new regime which is clearly not applicable to a procurement process that has already been published, evaluated and reached a late stage in the adjudication however, further highlights the superficiality with which the process has been handled and the total disregard for vested rights of the Appellants.
- 3.1.12 In addition, apart from the fact that the Tenderers in these proceedings could certainly rely on the express provisions of the Tender Dossier, the applicable regime was confirmed by the Director General (Contracts) himself Mr. Edwin Zarb in a meeting held on Tuesday 12th July 2005 with Dr. Noel Camilleri at the Department of Contracts. This was confirmed under oath by Dr. Camilleri himself and his evidence was not in any way contested.
- 3.1.13 The tenuous nature of the argument in favour of the applicability of the new regime is further exposed if one were to consider the legislative history of the new

EC Procurement Directives transposed by LN 177/2005. In the discussions and consultations at EU-level prior to the adoption of the 'new package', there was a strong move in favour of eliminating the 'lowest price offer' as a selection criterion and retaining exclusively the MEAT ('Most Economically Advantageous Tender'). In the end this amendment was not adopted. However, had this selection criterion been removed from the new EC legislative package, and therefore from LN 177 of 2005, what would have happened to this procurement process which is clearly and unequivocally based on the lowest price criterion per Article 31 of the Tender Dossier? Would it have been suspended? And what about the legitimate expectations of the three bidders? Could they sue the contracting authority for damages? Or would the procurement process be aborted and reissued accordingly?

3.2 Breach of Regulation 33 and the invalidity of the award procedure

3.2.1 The incorrect application of the procurement regime governing this contract highlighted in the last preceding section, is not the only evident serious irregularity in this process. Regulation 33 of LN 299/2003⁷ regulates the contracts whose estimated value equals or exceeds the applicable thresholds, including procurement processes in which the "separate packages" procedure is used. The proviso to Reg. 33 reads as follows:

"Provided that public contracts required by those contracting authorities listed in schedule 2 shall be issued, administered and determined by the Department of Contracts, which for the purposes of these regulations shall act on their behalf; and public contracts required by those contracting authorities listed in Schedule 3 shall be issued, administered and determined by the contracting authorities listed subject to the provisions set out in these regulations."

3.2.2 Although in the oral hearings the Chairperson and the Members of the board were evidently confused as to whether the contracting authority was the ADT, the Ministry for Gozo or the Department of Contracts, it is very clear from the

⁷ See also Regulation 36(1) of LN 177/2005

provisions of Regulation 33 that for contracts exceeding the EU thresholds, **the contracting authority is the Department of Contracts**. In this particular case the issue is amply settled by mere reference to the EU Contract Notice published in the Official Journal of the European Union⁸ which unambiguously indicates the *'Department of Contracts, Notre Dame Ravelin, Floriana Malta'* as the *'Contracting Authority'*.

- 3.2.3 However, in spite of the provisions of the law which require the Department of Contract to **issue, administer and determine** similar procurement processes, the Chairperson and the other Members of the Board confirmed that they were appointed by the Ministry for Gozo. This is a serious irregularity in the procurement process: a direct violation of the provisions of Regulation 33.
- 3.2.4 As a confirmation of this, the letter of rejection was signed by Mr. Edwin Zarb, Director General (Contracts), who is the person identified as the 'contracting authority' in the EU Contract notice and not by an official/director from the Ministry for Gozo. This renders the appointment by the *Ministry for Gozo* of Architect Farrugia and the other Members of the Evaluation Committee null and void as are all the decisions taken by the said Evaluation Committee including the decision to reject the Polidano bid.
- 3.2.5 The Director General (Contracts) is *ex lege* the contracting authority in contracts whose value exceeds the EU thresholds clearly reflected in the transposing Maltese legislation⁹. Its obligation to **issue, administer and determine** the contract, includes the appointment of any Evaluation Committee/Adjudication Board and a significant presence within that Committee ensuring active participation in determining the contract award. No other authority in Schedule 2 of LN 299/2003 (which includes the Ministry for Gozo and the ADT) can issue,

⁸ See informal internet printout of notice attached and marked as 'Doc C'.

⁹ Both LN 299/2003 and LN 177/2005

administer or determine such procurement processes. The law bars these authorities from having direct participation in the procurement process.

3.2.6 In this particular tender however, the Director has been divested of his role at law. No member of the Evaluation Committee was appointed by him, he played no role in the deliberations and adjudication apart from being called in to clarify alleged difficulties relating to the bid¹⁰ and was, in his own words at the oral hearings, unaware of the proceedings leading to the rejection of the Appellants' bid¹¹.

3.2.7 In view of this serious breach of public procurement legislation, the Appellants submit that the Contract Appeals Board should declare the adjudication process invalid and should order the Director General (Contracts) to initiate fresh proceedings for the award of this contract in terms of Regulation 33 of LN 299/2003.

3.3 No *locus standi* of Ministry for Gozo

3.3.1 At the very initial stages of these proceedings, appellants had unsuccessfully debated and requested the Contracts Appeals Board to establish who the parties to the appeal were. This preliminary request was made because appellants wanted to reaffirm the Board's first pronouncement that transparency should reign during these proceedings and therefore it was imperative not only for Appellants but even for the Contracts Appeal Board itself to establish who were the parties involved in these proceedings. This plea was submitted due to the fact that at the opening of the first hearing of these proceedings, *an unsigned note of submissions on plain paper* was presented to the Board on behalf of the Ministry for Gozo.

3.3.2 Appellants submit that it is highly irregular that a note of submissions is filed without any signature and clear written identification whatsoever of who had

¹⁰ Only to be in turn ignored by the Evaluation Committee

prepared it and on whose behalf it was being presented. This lack of transparency leads one to conclude that there was and is some obscure and ulterior motive behind the Ministry's of Gozo interest and representations in these procedures. This is being said because appellants humbly submit that the Ministry for Gozo has no "locus standi" in these procedures and therefore should not have been allowed to submit its representations on the whole matter. Moreover any submissions whether oral, or written should not be considered and consequently removed from the whole process.

- 3.3.3 It has to be kept clearly in perspective that the contracting authority is the Department of Contracts, as has been amply expounded in these submissions. As such it is the said Department through its Head, whose designation is now Director General (Contracts) which should be a party to these procedures.
- 3.3.4 The basis of our submission is clearly found in Article 5(1) of LN 299/2003 which specifically stipulates that "*There shall be a Director of Contracts who shall be responsible for the running of the Department of Contracts and generally for the administration of the procurement procedures as laid down in these regulations*".
- 3.3.5 This regulation distinctly states that it is the Director General (Contracts) [as he is presently known] who is responsible for the administration of the procurement procedures and **not** the Ministry for Gozo. The regulations go further. In fact Article 5(2)(1) states that "*Unless otherwise provided for in these regulations it shall be the function of the Director of Contracts [Director General (Contracts)] to institute and to defend any judicial or arbitral proceedings that may be necessary in relation to any contract awarded by him*" [emphasis added].
- 3.3.6 It is quite evident from the wording of these two articles of LN299/2003 that it is the Director General (Contracts) who is empowered to be a part in any arbitral or

¹¹ v *supra* 2.9

other judicial/quasi-judicial proceedings concerning any contract administered by him as the contracting authority and NOT (as in this case) the Ministry for Gozo. This signifies that it is the Director General (Contracts) who had to be a party in these proceedings and defend the decision taken and not the Ministry for Gozo which very strangely filed an unsigned and under no official letterhead a note of submissions to the Contracts Appeal Board and made oral submissions during the whole proceedings and presumably will also file a signed note of final submissions. This, in our opinion, is highly irregular and in violation of the said regulations. Not only, but also it goes contrary to spirit of the whole appeal proceedings.

3.3.7 It is pertinent to point out, if in reality there is such a need to do so, that these whole appeal proceedings have been initiated in the light of the decision dated 8th July which was sent to Polidano Group and Gatt Tarmac Limited. This decision was not issued by the Head of the Ministry for Gozo. It was not issued by an official of any department falling within the same Ministry for Gozo. Had the Ministry for Gozo been the contracting authority then appellants would not have raised this legal argument for it would have been correct for the Head of the same Ministry to sign and issue the decision of the 8th July. However this is not the case under examination.

3.3.8 It was the Director General (Contracts) who signed the decision of the 8th July. It was the Director General (Contracts) or his representative who sent this decision to Polidano Group and Gatt Tarmac Limited. It was the Director General (Contracts) who is clearly identified as the Contracting Authority in the EU contract notice. It was from the office of the Director General (Contracts) that this decision was faxed to appellants and NOT FROM THE MINISTRY FOR GOZO. These are facts that cannot be rebutted unless one has to doubt the authenticity of the official documentation found and held by the Contracts Appeals Board.

3.3.9 The Appeal lodged by appellants was filed against the letter dated 8th July and signed by Mr. Edwin Zarb as Director General (Contracts) - the Contracting Authority. This appeal was lodged on Thursday 14th July at the Department of Contracts and an official receipt of the said appeal and of the deposit of ten thousand Maltese Liri (LM10,000) was handed over by the same Department. Therefore once an appeal was received by the Head of the Contracting Authority (the Director General (Contracts) against its decision, it should have been the same Director General (Contracts) who should have been a party to these proceedings and again we humbly submit, *NOT* the Ministry for Gozo. The presence of the Ministry for Gozo rather than the Director General (Contracts) leads Appellants to submit that there is a sinister or ulterior motive on the part of the Ministry of Gozo which lacks clarity and transparency. How can a party who has not signed the decision against which an appeal has been lodged and is being debated in these proceedings be a party to answer to that decision?

4. Question of Validity of the Tender Guarantee

4.1 In the letter dated 8th July 2005, the Director General (Contracts) informed the Appellants that their tender had not been selected since:

“The offer was not in compliance with the Tender Dossier since the identity of the tenderer submitting the tender is obscure because whilst the tender guarantee identified M/S Gatt Development Limited for Gatt Tarmac as the tenderer, the Tender Form did not identify the name of the tenderer.”

The Appellants respectfully submit that this is legally and factually incorrect for the reasons which will be analysed hereunder. However, since at the sittings of the 24th and the 29th August 2005 questions relating to the validity of the Tender Guarantee were raised, it is very important to deal first with this matter even though the validity of the Tender Guarantee was never put into question by the contracting authority in its letter of rejection.

4.2 Article 18 in Volume 1 of the Tender Dossier, imposes an obligation on the Tenderer to provide a *Tender Guarantee* in favour of the contracting authority (Department of Contracts) in the following terms:

18.1.1 *The Tenderer must provide, as part of his tender, a tender guarantee in the form set out in Volume 1, Section 3 of the Tender Dossier and meeting the essential requirements set out therein. The tender guarantee must be for an amount of twenty five thousand Maltese Liri (Lm 25,000). The original guarantee must be included in envelope no. 1 with the tender;*

18.1.2 *The Tender guarantee shall only be accepted if issued by a Maltese bank in the form set out in Volume 1, Section 3 and any modifications to the said form shall render the Tender Guarantee inadmissible.*

18.1.3 *The Tender Guarantee must be valid for at least 90 days from the deadline for submission of tenders and be issued to the Contracting Authority for the requisite amount. In exceptional cases, before the period of validity expires, the Contracting Authority may ask the Tenderers to extend the period for a specific number of days, which may not exceed 40 days.*

18.1.4 *Any Tender not accompanied by an admissible Tender Guarantee will be rejected by the Contracting Authority.*

4.3 The reason for this obligation to provide a tender guarantee which may be called on demand by the Director General (Contracts) as the contracting authority, is that of *inter alia* insuring against all expenses incurred by the said contracting authority throughout the procurement process, including at subsequent negotiation stages (if any), prior to the conclusion of the contract. In addition, such guarantee will furnish the contracting authority with sufficient security that the tenderer(s) can sustain their bid throughout the adjudication process and that if selected, the successful tenderer will be bound by the terms of his offer to sign the contract after its award. This is very common practice in the field of public procurement, in particular with contracts having a relatively high procurement value.

4.4 It has to be clearly remembered however, that this guarantee will be replaced at the post-award stage by a performance bond amounting to 10% of the contract price in terms of Article 15.1 of the specimen contract included in the Tender Dossier¹².

4.5 The obligation of the Tenderer is therefore to provide a **valid Tender Guarantee** which should serve as a bid bond safeguarding the interests of the contracting authority throughout the procurement process until the award and the subsequent conclusion of the contract in question.

4.6 There can be no doubt that the Tenderer, Polidano Bros Ltd., has fulfilled this obligation enshrined in Article 18.1, and incumbent on all tenderers, to provide a valid tender guarantee. This has been confirmed in corroborated evidence given by (a) the Bank of Valletta Gozo Branch Manager Mr. Jack Thewma, (b) by the Head of the Bank of Valletta Legal Office Dr. Michael Borg Costanzi and (c) by the head of the Contracting Authority itself, the Director General (Contracts) Mr. Edwin Zarb, on this matter. In addition, this was also the opinion of the Attorney General and originally also that of the Evaluation Committee itself, which proceeded to open the second envelope. If the bid bond was deemed invalid then the Committee had to discard unopened the remaining two envelopes. It instead proceeded to open the second envelope thereby confirming and ratifying the existence of a valid tender guarantee.

4.7 Mr. Thewma in his examination-in-chief and in cross-examination at the sitting of the 24th August 2005, when presented with a copy of the Tender Guarantee No. G24TFC5092 did not hesitate to affirm that the Bank would honour a demand by the Director General (Contracts) "*with no questions asked*". This was subsequently confirmed by Dr. Michael Borg Costanzi when he asserted that the Bank did not require any reference whatsoever to Polidano Bros. Ltd. or to Gatt Tarmac Ltd. in order to honour the guarantee and release funds in favour of the Director of Contracts. Dr. Borg Costanzi confirmed that the Tender Guarantee was a "*stand-alone*

¹² p.108 of the Tender Dossier, in this case amounting to c.a. Lm 200, 000

document” and as such the Bank would honour the claim on simple presentation of the original. Asked whether reference to Polidano in the Director of Contract’s request would bar the bank from releasing funds, the witness said that he would simply ask the Director General (Contracts) to remove reference to Polidano Bros Ltd. and upon mere reference to the Tender number, the Bank would honour the request immediately.

4.8 Therefore, the opinion of the Director General (Contracts) that the tender guarantee was valid¹³ and that the public interests which it seeks to protect were sufficiently safeguarded, is comforted both by banking practice as explained by Mr. Thewma and Dr. Borg Costanzi and by the legal opinion of the Attorney General. This was strongly reaffirmed by the Director General (Contracts) several times both in cross-examination and when answering direct questions from the Appeals Board itself.

4.9 From the evidence produced, the Appellants humbly submit that it is therefore sufficiently clear that the Tender Guarantee was valid and executable. In addition the opinion of the Attorney General’s office left no room for interpretation on the question of the validity of the Tender Guarantee – it was valid and the contracting authority was entitled to exercise its rights thereunder. In this respect the Appellants also refer to the evidence given by Mr. Mario Gatt and subsequently confirmed by Arch. Ivana Farrugia that a member of the Contracts Committee present in the adjudication room also expressed his opinion that the Tender Guarantee was valid.

4.10 Without prejudice to the above however, it has to be restated that this argument which was so emphatically stressed by legal counsel for the Ministry for Gozo and for the MAC Consortium (Leader Road Construction Limited) is completely irrelevant to the merits of this appeal.

4.11 The Appellants have lodged an application to initiate these review proceedings leading to the reversal of the decision of the Director General (Contracts) of the 8th

¹³ v. *supra* 2.9

July 2005. The reasons for rejection in this letter refer **exclusively** to an alleged conflict in the identity of the Tenderer – between what is indicated in the Tender Guarantee form and what is stated (or allegedly not stated) in the Tender Document. The validity of the Tender Guarantee was however, **never at issue** since the rejection letter made no direct or indirect reference to the validity or otherwise of the guarantee. It is in any case a question amply settled by the Director General (Contracts) (the head of the contracting authority) himself physically present on the 10th of March and by the fact that the Evaluation Committee itself proceeded with the opening of second envelope.

5. Third Party (subcontractor) Acting as surety

5.1 As was clearly crystallised in the very lucid analysis of the principles of suretyship and the principles of bank guarantees under Maltese Law made by the Attorney General's office, a bank guarantee issued by a person/legal entity in favour of a third party is valid at law and was rightly deemed executable by the contracting authority (Director of Contracts).

5.2 Notwithstanding what has been suggested by interested parties in the present proceedings, it has to be stated that there is also nothing odd or strange in having this legal set-up. To the contrary this is one very simple type of commercial transaction. Gatt Tarmac Limited was interested in a project which required high turnover and general capacity requirements which it could not satisfy on its own. It therefore decided to act as subcontractor in the Polidano Bros Ltd. bid obliging itself to do only 30% of the total procurement value in works and to provide the initial pre-award bank guarantee in favour of the Director of Contracts. This Bank guarantee would be used by Polidano Bros Ltd. in its first envelope and would enable the latter therefore to satisfy its obligation (incumbent on all Tenderers) in terms of the Article 18.1 of the Tender Dossier quoted above: to furnish a **valid bank guarantee issued by a Maltese bank in favour of the Director of Contracts**. The Tender Dossier does **not** require that the Tenderer should furnish a valid bank guarantee **in his own name**. It

only requires the Tenderer to secure the pre-contractual short-term interests of the contracting authority by providing a valid bank guarantee for the amount of Lm 25,000.

5.3 In a public procurement process, the tendering documentation has to be narrowly construed. If for the Contracting authority, it was more important to have the bid bond or 'Tender Guarantee' issued in the name of the Tenderer itself rather than having *any* valid and executable bank guarantee, then this should have been clearly and expressly set out in Article 18 of the Dossier. Simple reference to the model Tender guarantee form (p. 59 of the Tender Dossier) is not enough, in particular as it is common knowledge for example, that the wording used in guarantees is invariably different from the specimen¹⁴. In addition the specimen itself cannot be adopted in a literal way in the Tender Guarantee to be provided by the Tenderer as it also contains other obvious incorrect use of terminology. For instance, it refers to 'the Contractor' when it is evident that in a pre-contractual guarantee which is intended to secure the short-term pre-award interests of the contracting authority, there is as yet no figure of a 'Contractor' but only Tenderers or Bidders.

5.4 In the absence of an express prohibition to have third parties providing a bank guarantee for obligations assumed by the Tenderer, the Tenderer can rely on the general principles of Maltese civil law and ask an independent entity (as the subcontractor) provide such security. This was clearly and unequivocally confirmed in the advice given by the Attorney General, sought by the Evaluation Committee itself.

5.5 Without prejudice to the above, in any case however, even if the Evaluation Committee was not ready to rely on the opinion of the Attorney General to the effect that under basic tenets of Maltese Civil Law and in terms of a literal construction of Article 18 of the Tender Dossier the guarantee *could* be furnished by a third party, in

¹⁴ See 2.9 *supra*

a procurement process underpinned by the criterion of the **lowest price offer**, the Committee should have at least adopted a *pro-competition* approach.

5.6 So long as the short-term interests of the contracting authority were sufficiently protected, even if the Evaluation Committee still found personal or other reasons not to be convinced by the opinion of the Attorney General, it should have decided in favour of competition and not in favour of an outright exclusion of a tenderer who had fully complied with the minimum requirement contained in the Tender Dossier, i.e. the duty to provide a valid bank guarantee issued by a Maltese bank. This is a fundamental principle at the core of public procurement legislation.

5.7 However, the Evaluation Committee completely failed to appreciate the very nature of a procurement process and the spirit in which it has to be conducted¹⁵, but with such an inexperienced and *ad hoc* committee appointed by the Ministry for Gozo, the Appellants were perhaps asking too much to have a pro-competition approach! This Evaluation Committee was not even aware of the very basics of public procurement. The Chairperson herself was unaware of the most fundamental principle in every call for tenders – the **selection criterion** – which is the core rule which should guide an evaluation/ adjudication panel throughout the process. Indeed in examination-in-chief, Architect Farrugia, when directly asked whether she knew which one of the two criteria (i.e. Most Economically Advantageous Tender [MEAT] or the Lowest Price Offer) available in terms of the Public Contracts Regulations¹⁶, had been adopted for **this** process, replied clearly the ‘most economically advantageous tender’ when in reality Article 31.1 of the Tender Dossier is categorical in this respect: “*The tender will be awarded to the compliant bidder with the lowest price*”¹⁷[emphasis added]

¹⁵ See to the contrary the evidence given by Mr. Edwin Zarb, Director General (Contracts). *V. supra* 2.9

¹⁶ Both under LN 299/2003 (as amended) and under LN 177/2005 these are the only two criteria for selection that can be adopted by a contracting authority in a procurement process.

¹⁷ p. 47, Tender Dossier, Article 31 “*Criteria for Award*”

6. Alleged conflict between the names appearing on the Tender Guarantee and the Tender Form

6.1 Section 4 above has addressed the question of the validity or otherwise of the Tender Guarantee provided by Polidano Bros. Ltd. in the first package of its Tender. This was done for the sake of clarity and to exhaustively address issues that were raised in the proceedings. It has to be stressed again however that the issue of the validity of the Tender Guarantee however, was not the reason for the rejection of the Polidano Tender and was not even mentioned in the letter dated 8th July 2005 informing the Tenderer and the subcontractor of the decision by the contracting authority.

6.2 The sole reason for the exclusion of the Polidano tender in terms of the said decision by the Director General (Contracts) was that the offer was not in conformity with the Tender Dossier *"since the identity of the tenderer submitting the tender is obscure because whilst the tender guarantee identified M/S Gatt Development Limited for Gatt Tarmac as the tenderer, the Tender Form did not identify the name of the tenderer."*

6.3 The issues to be addressed are therefore (1) whether the Tender Form actually failed to identify the name of the tenderer as alleged and whether (2) such identification (or lack of it) would render the identity of the tenderer obscure (*sic*) given that the guarantee identified M/S Gatt Tarmac Limited.

6.4 In the evidence given by Mr. Paul Caruana¹⁸, the quantity surveyor in charge of drafting the tendering documentation, the Contracts Appeals Board ascertained that Volume 1 Section 4: *'Questionnaire'* was full of voluminous and detailed information relating to Polidano Bros. Ltd. as "Tenderer". Form 4.1 *'General Information About the Tenderer'* which includes contact details, details on corporate structure, experience, registration details and shareholding details was compiled in connection with *Polidano Bros. Ltd.* In Form 4.2 *'Organisation Chart'* Mr. Caruana

¹⁸ v. *supra* 2.10

furnished a detailed corporate organisation chart starting from the shareholders/directors of *Polidano Bros. Ltd.* to the architects and civil engineers, quantity surveyors and employees of the same company involved in this project. Form 4.3 '*Power of Attorney*' then contained a general power of attorney by *Polidano Bros. Ltd.* in favour of one of the company directors Mr. Charles Polidano. On the other hand, Form 4.4 '*Financial Statement*' provided detailed financial information including the basic capital structure and the annual value of construction work for each of the preceding three (3) financial years and a projection for the next two (2) years for *Polidano Bros. Ltd.* This Form also contained copies of audited accounts for the last years, details of bankers and the approximate value of works in hand also for *Polidano Bros. Ltd.* In Form 4.5 '*Financial Identification Form*' the banking details of *Polidano Bros. Ltd.* were clearly included, Forms 4.6.1 to 4.6.9 '*Technical Qualifications*' provided detailed breakdown of Contractor experience, personnel and plant for *Polidano Bros. Ltd.* whilst 4.6.10 '*Non-collusive Tendering Certificate*' was signed by Mr. Charles Polidano on behalf of *Polidano Bros. Ltd.* The existence of clear, exclusive and unambiguous references to *Polidano Bros. Ltd.* throughout Volume 1 Section 4 was not contested by the parties and their legal counsel in these proceedings, including counsel for the MAC Consortium (Leader: Road Construction Limited) and the Ministry for Gozo. However, in spite of all this, the Evaluation Committee appointed by the Ministry for Gozo opined that the Tender document did not identify the name of the Tenderer!

6.5 In the very short extract of deliberations afforded to the Appellants prior to this appeal, which is in itself a breach of procurement legislation¹⁹, the Evaluation Committee has argued that "*The Tender Form (Volume 1 Section 2 of the Tender Dossier) within envelope no. 2, identified Messrs Polidano Bros. Ltd. as Partner 4 with no further information being given as regards to the Leader and any other Partners submitting this offer.*" With reference again to the evidence given by Mr. Paul Caruana, the Contracts Appeals Board has also ascertained in these proceedings

that whereas the Tender Form in Volume 1 Section 2²⁰ clearly shows *Polidano Bros. Ltd.* as the Tenderer in the column named '*name(s) of tenderer(s)*', the designation on the left-hand side column was erroneously printed as '*Partner 4*'. In the same page contact details were filled in, again relating to *Polidano Bros. Ltd.* There was no reference to any other entity as the Tenderer was not using any project partnering in this case.

6.6 The fact that *Polidano Bros. Ltd.* was designated as *Partner 4* however, cannot possibly justify an exclusion of the whole Tender in a procurement process worth two (2) million Maltese Liri. This is a tender document which contains a very long and consistent series of detailed references and financial information relating to only one company, in a set-up where there are no partners or joint ventures involved and where collaboration with other firms is exclusively limited to Gatt Tarmac Ltd. acting as subcontractor, as clearly indicated in the subcontractor form of the Tender document. It cannot be therefore argued that the designation as *Partner 4* could have led to some confusion or worse still to obscurity (whatever that term may mean) in the identity of the Tenderer as it was amply clear that there were no partners in the first place. It was in addition extremely evident that the *Partner 4* designation should have read 'Leader' and that it was a simple misprint. Above all, the Evaluation Committee could have asked for a simple explanation of such a matter which is capable of being so easily resolved. In fact, if one were to consider the notice signed by the Chairperson of the Committee and posted on the notice board with the words "*to seek further clarification*" this seems to have been the original and more logical intention of the Evaluation Committee. In the intervening four (4) months from the 10th March to the 8th July however, the Evaluation Committee surprisingly changed its mind with the result that the Director General (Contracts) issued the letter of rejection. Of particular significance in this matter is the oral evidence given by the Director of Contracts, somehow reduced to a mere rubberstamp in proceedings whom he is

¹⁹ As Article 25.1 of the Tender Dossier (p.43) [*it will draw up minutes of the meeting, which shall be available to tenderers on request*] gives right to full access to minutes containing deliberations and not to mere selected extracts .

²⁰ p. 55 of the Tender Dossier

supposed to 'issue, administer and determine'²¹, who asserted that if one were to adopt incredibly formalistic attitudes then hardly any one tender could ever be judged as 'compliant'.

6.7 Finally, by way of general remark, it has also to be pointed out that the lack of any 'obscurity' whatsoever in the identity of the Tenderer is indirectly highlighted by the Director General (Contracts) in his rejection letter, itself addressed in evident hierarchical order first to 'Polidano Group.' and in second instance to 'Gatt Tarmac Limited'. Notwithstanding the Evaluation Committee's efforts to try to find the identity of the Tenderer 'obscure', the Director General (Contracts), as head of the contracting authority, himself addressed the rejection letter first to the Tenderer, then to the Subcontractor, i.e. exactly in terms of the Tender documentation submitted, which clearly identified Polidano Bros. as the Tenderer and Gatt Tarmac Limited as the Subcontractor.

7. EC Law: Obligation to seek clarification

7.1 Without prejudice to the claim that the Evaluation Committee was irregularly appointed and is therefore in the first place not competent to adjudicate the tendering process, the Appellants above all respectfully submit, that with its failure to seek a clarification on this matter²², the Evaluation Committee committed a manifest error of assessment. This is so both in terms of the Public Contracts Regulations and in terms of the interpretation given by the Court of First Instance (CFI) and the European Court of Justice (ECJ) in case-law on directly applicable EC public procurement legislation. In failing to seek clarification on such a matter, the Evaluation Committee breached consolidated EC Law principles of good administration and equality of treatment in public procurement processes.

²¹ *V. supra* 3.2

²² As it had obliged itself to do in terms of the notice signed by the Chairperson and published on the notice board at the Contracts Department

7.2 The Appellants have been denied by the Contracts Appeals Board, on the objection of legal counsel for the MAC Consortium (Leader: Road Construction Limited), to produce Dr. Joanna Drake as expert witness in EC Law. Notwithstanding this denial, and notwithstanding the fact that breach of EC Law will be investigated in detail in other fora in case this appeal for reintegration in the process is not acceded to, the Appellants will here expose their legal arguments for the finding by the Contracts Appeals Board of a manifest breach of EC Law by the Evaluation Committee.

7.3 This breach of EC Law by the contracting authority may lead to state liability in damages and to formal action initiated by the Commission of the European Communities in its role as guardian of the Treaties, claiming the reimbursement of funds allocated under the European Regional Development Fund [EDRF]. These proceedings for a thorough review of adjudication in this EDRF co-financed project will however be initiated by the Appellants in other fora and are not the subject of the present proceedings if the case may be.

7.4 The question to be analysed here is whether in cases where the Evaluation Committee is not convinced on the validity or otherwise of similar issues, it is *bound* in terms of EC Law to seek clarification particularly in such cases where it had already obliged itself to do so. This issue has been long settled in EC jurisprudence which can directly be invoked by the Appellants in these proceedings.

7.5 In these proceedings however, the Ministry for Gozo-appointed Evaluation Committee, through the evidence given by the Chairperson Arch. Ivana Farrugia, has argued that the Tender Dossier restricted the power to seek clarification to tenders that have already been declared admissible or 'basically compliant'. Now the Tender Dossier, in Article 28²³ defines an admissible tender in the following terms:

"28.2 An admissible Tender is one which conforms to the requirements and specifications described in the tender documents with no substantial deviations or reservations. Substantial deviations and reservations are those which:

²³ p. 45

- 28.2.1 *in any way influence the scope, quality or execution of works, or*
- 28.2.2 *restrict the rights of the Contracting Authority or the obligations of the Tenderer under the Contract in a manner inconsistent with the tender documents, or*
- 28.2.3 *rectification of which would unfairly affect the competitive position of other Tenderers presenting admissible tenders."*

7.6 Even if one were to leave aside the question of the contracting authority's obligation under EC Law to seek clarification wherever such clarification is necessary²⁴, the Tender submitted by Polidano Bros. Ltd. cannot possibly be categorised as 'inadmissible' and therefore a tender for which no clarification could be sought. The instances where a tender should be deemed inadmissible (or not substantially compliant with the Tender Dossier) are exhaustively listed in the sub-articles quoted above. It needs hardly to be argued that the Tender submitted by Polidano Bros. Ltd. did not contain any substantial deviations which could (a) *influence the scope of the works or the rights of the contracting authority* or (b) *restrict the rights of the Contracting Authority* or else (c) *unfairly affect the competitive position of other Tenderers presenting admissible tenders*.

7.7 In this case, the Evaluation Committee was presented with a perfectly admissible tender in which the identity of the Tenderer was made amply clear by a huge amount of consistent information relating to the Tenderer and therefore there could be no obscurity whatsoever. It was only in one particular page, the designation of the tenderer was erroneously printed as *Partner 4*. For the remaining part of Volume 1 Section 4, all information pertained to one and only one Tenderer – Polidano Bros. Ltd. It was furthermore accompanied by a valid Bank guarantee furnished in terms of the Tender Dossier by the Tenderer in his bid but provided out of third party (subcontractor) funds. These elements confirm that the Evaluation Committee was faced with *'circumstances where clarification of a tender is clearly both practically*

²⁴ in itself an overriding principle directly applicable to the present case

*possible and necessary*²⁵ and therefore in this case the ‘*principle of good administration, [is] accompanied by an obligation to exercise that power*’²⁶.

7.8 In *Tideland Signal v. Commission (Case T-211/2002)*²⁷ the Court of First Instance (CFI) in Luxembourg considered in detail the question of whether a contracting authority is *bound* in certain circumstances by EC Law to on public procurement as well as by principles of good administration, to seek clarification. The appellants in *Tideland* submitted a tender which did not comply to the requisite 90-day tender validity period contained in the dossier. Their tender was therefore rejected and in review proceedings, they alleged that the decision of the contracting authority not to seek clarification with respect to this factor (which is undoubtedly more serious than the alleged ‘obscurity’ in the identity), was illegal, because by failing to seek clarification, the contracting authority infringed procurement legislation, the duty of care and the principle of proportionality. Although in *Tideland* the contracting authority argued that the principle of equal treatment of tenderers, the impossibility to correct any sort of formal errors (as was argued by Architect Ivana Farrugia) and the transparency of the process barred it from seeking clarification, the CFI was categorical and very clear in its analysis of the obligations of contracting authorities in the internal market:

“In response to the Commission’s argument that its Evaluation Committee was nevertheless under no obligation to seek clarification from the applicant, the Court holds that the power set out in the [...] instructions to Tenderers must [to seek clarification], notably in accordance with the Community Law principle of good administration, be accompanied by an obligation to exercise that power in circumstances where clarification of a tender is clearly both practically possible and necessary.[...] While the Commission’s evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender. In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then, in principle, it is contrary

²⁵ v. *supra* footnote no. 28

²⁶ Judgement of the Court of First Instance (First Chamber) dated 27.09.2002. See informal copy of judgement attached and marked as ‘Doc B’ for ease of reference

²⁷ Ibid.

to the requirements of good administration for an evaluation committee to reject a tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is liable to be vitiated by a manifest error of assessment on the part of the institution in the exercise of that power.²⁸ [emphasis added]

7.9 From the witnesses produced in the oral hearings in these proceedings, as well as in terms of the Tender Dossier, it is clear that the Evaluation Committee was vested with the discretion to seek or not, a clarification. The CFI however, in *Tideland* has provided guidelines for the exercise of such discretion by evaluation committees of contracting authorities in the Internal Market:

*"It would however, be contrary to the principle of equality, [...] for an evaluation committee to enjoy an unfettered discretion to seek or not to seek clarification of an individual tender regardless of objective considerations and free from judicial supervision...Moreover, contrary to the Commission's argument, the principle of equality did not preclude the Evaluation Committee from allowing tenderers to clarify any ambiguities in their tenders."*²⁹

7.10 These principles were already explained by the CFI in the Joined Cases T-112/96 and T-115/96 *Séché v. Commission*³⁰ and can safely be considered as established principles of EC Law on public procurement. In addition, following *CILFIT*³¹, ECJ and CFI rulings have now an impact on all national courts and tribunals. Past rulings of the European Courts have authority in situations where the point of law is the same even though the proceedings in which the issue originally arose differed³²

7.11 The application of these principles of EC Law on public procurement assumes even greater importance in these proceedings because the Contract Appeals Board, as a tribunal of last instance is **obliged** to refer a question of interpretation of EC Law to the ECJ in terms of Art. 234 of the EC Treaty, whenever it is not satisfied that the applicable provisions of EC Law are sufficiently clear or it is not certain that the

²⁸ para. 37 of the judgement attached

²⁹ para. 38 of the judgement

³⁰ [1999] ECR-SC I-A-115 and II-623, para. 127

³¹ Case 238/81 Srl CILFIT and Lanificio di Gavardi SpA v. Ministry of Health [1982] ECR 3415

³² *vide* Paul Craig and Gráinne DeBurca, *EU Law, Text, Cases, Materials*, 3rd Edition [Oxford University Press – 2003], p.450

provisions indicated apply to the facts of the particular case in front of it. This will allow the ECJ to give a ruling on the correct application of EC Law³³ in the context of the subject-matter of the particular case which will enable the Contracts Appeals Board to arrive at its decision based on the exact and correct interpretation of primary and secondary EC legislation.

7.12 The Contracts Appeals Board can only refuse to make such a reference if it feels that the issue of EC Law is so clear that no reference to the ECJ is warranted. The Appellants humbly submit that **this is the case** and consequently the interpretation of EC Law given by the Court of First Instance in *Tideland* to the effect that the principles of good administration impose an obligation to seek clarification for matters that have simple explanation, is squarely applicable to the merits of this case. National Courts have in the past refused to make a reference where they were convinced that issues of EC Law raised in the proceedings were sufficiently clear³⁴. The Contracts Appeals Board therefore should apply the principles of EC Community Law in terms of *CILFIT* and as explained in the jurisprudence of the ECJ, particularly in *Tideland* and quash the decision of the Director General (Contracts), acting on the recommendation of the General Contracts Committee, to reject the Polidano bid. It is now certainly an established principle of EC Law that the power to seek a clarification in the context of public tenders entails an *obligation* (of the Evaluation Committee) at EC Law to seek that clarification in instances where the problem can be easily resolved.

7.13 Nevertheless, should the Contracts Appeals Board consider that this principle is not applicable to the facts of this particular case, it is obliged in terms of Article 234 of the EC Treaty to ask the European Court of Justice the following questions:

A. In a public procurement process co-financed by the European Commission (European Regional Development Fund) and regulated by

³³ *Wiener v. Hauptzollamt Emmerich* [1997] ECR I-6495

³⁴ *Re Société des Pétroles Shell-Berre* [1964] CMLR 462

EC Public Procurement legislation, do the principles of good administration and the corollary obligation to seek clarification in terms of *Tideland Signal v. Commission*, extend to national contracting authorities?

B. In case this obligation is found to apply to national contracting authorities in connection with public contracts co-financed by Community institutions, is a bidder in case of violation of this obligation entitled to an action for damages against the contracting authority in national courts for breach of EC Law?

7.14 Failure by a court, tribunal or quasi-judicial tribunal of last instance as the Contracts Appeals Board, either to consider the EC Law issue sufficiently established and therefore applicable or to refer the issue for preliminary interpretation by the European Court in Luxembourg, would in terms of *Köbler v. Austria*³⁵ expose the Member State to damages and an action by the European Commission in its role of Guardian of the Treaties. In terms of *Köbler*:

“The principle that Member States are obliged to make good damage caused to individuals by infringements of Community Law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community Law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a distinct causal link between that breach and the loss or damage sustained by the injured parties.”³⁶

7.15 In addition, breach of Community law in projects which are co-financed by the Community Institutions will automatically result in proceedings commenced by the European Commission against the Member State and its contracting authorities.

7.16 **Finally, and above all however, the aim of having a public procurement process in the first place is to have a healthy competition between the tenderers. The whole process should enable the contracting authorities to sift through all**

³⁵ OJ C275/13, Case C-224/01, decided 30th September 2003.

the documentation in search of the best offer in terms of its declared selection criterion. Overly formalistic and superficial approaches to bids in which a significant amount of resources has been invested by the individual Tenderers, not only makes the contracting authority answerable in terms of whether the public interest was safeguarded but may also expose that same authority to an action in damages for breach of its contractual duty in terms of the Tender Dossier. **This is not only a general principle of EC Law and Maltese Law but is the only logical approach!**

8. Remedies Sought

8.1 Appellants submit that the Contracts Appeals Board should declare:

- 8.1.1 that the proceedings are in terms of Reg. 102(4) LN 299/2003 'Public Contracts Regulations' and this as specifically stated in Article 38 of the Tender Dossier;
- 8.1.2 the appointment of the Evaluation Committee chaired by Architect Ivana Farrugia by the Ministry for Gozo is in breach of Article 33 of the Public Contracts Regulations and therefore as a consequence of which the whole adjudication process including the recommendations leading the decision of the 8th July 2005 by Director General (Contracts), null and void;
- 8.1.3 order the Director General (Contracts) to proceed with the adjudication process afresh in terms of LN 299 of 2003 and the provisions of the Tender Dossier;

8.2 In the alternative and without prejudice to the above, the Appellants submit that the Contract Appeals Board should in any case:

- 8.2.1 declare that the identity of the Tenderer was sufficiently clear in terms of the provisions of the Tender Dossier and that the finding by the Director General (Contracts) in terms of the recommendation of the General Contracts Committee that the identity of the Tenderer is '*obscure*', is factually incorrect and no such *obscurity* should have resulted from a diligent review of the documentation submitted.

³⁶ Ibid,

8.2.2 declare that the recommendation leading to the decision of the 8th July 2005 to reject the Appellants' bid, is in breach of EC public procurement legislation and the applicable principles of good administration as expressed and interpreted in jurisprudence of the European Court of Justice and therefore to order the full reintegration in the evaluation process of the Appellants' tender;

8.2.3 In the further alternative and without prejudice to the above, stay proceedings and refer in terms of Article 234 of the Treaty establishing the European Community the question of the applicability and the interpretation of the principles of EC public procurement Law as expounded in these submissions, for a preliminary ruling by the European Court of Justice in Luxembourg. In terms of the procedures adopted and the Appellants' submissions, it is hereby humbly submitted that the Contract Appeals Board should seek clarification by submitting the following question to the European Court of Justice:

A. In a public procurement process co-financed by the European Commission (European Regional Development Fund) and regulated by EC Public Procurement legislation, do the principles of good administration and the corollary obligation to seek clarification in terms of *Tideland Signal v. Commission*, extend to national contracting authorities?

B. In case this obligation is found to apply to national contracting authorities in connection with public contracts co-financed by Community institutions, is a bidder in case of violation of this obligation entitled to an action for damages against the contracting authority in national courts for breach of EC Law?

8.3 To order the restitution of the appeal registration fee of Lm 10,000 with legal interest in accordance with the applicable laws from the 14th of July 2005.

8.4 All this is being requested without prejudice to Appellant's right to seek further redress.

These are Appellants' written submissions which are being presented in terms of the minutes of the last sitting, reserving the right to present further and more detailed argumentation, should the need arise.

Dr. Stefan L. Frendo

Dr. Antoine Cremona

Dr. Noel Camilleri

ATTACHMENTS

'Doc A'

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JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

27 September 2002 (1)

(Public procurement - Rejection of tender - Failure to exercise power to seek clarification of tender - Action for annulment - Expedited procedure)

In Case T-211/02,

Tideland Signal Limited, whose registered office is in Redhill, Surrey (United Kingdom), represented by C. Thomas and C. Kennedy-Loest, Solicitors,

applicant,

v

Commission of the European Communities, represented by J. Forman, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission decision of 17 June 2002 rejecting the applicant's tender in procurement procedure EuropeAid/112336/C/S/WW - TACIS - (Re-tender),

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, N.J. Forwood and H. Legal, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 17 September 2002,

gives the following

Judgment

Facts and procedure

1. On 27 February 2002, the Commission issued an Invitation to Tender in TACIS project number EuropeAid/112336/C/S/WW (Re-tender) [s]upply of aids to navigation equipment to the ports of Aktau (Kazakhstan), Baku (Azerbaijan) and Turkmenbashi (Turkmenistan). The same project had previously been put out to tender in 2001, but that original procedure had subsequently been cancelled. The re-tender dossier specified at section 8 of the Instructions to Tenderers that the tenderers shall remain bound by their tenders for a period of 90 days from the deadline for the submission of tenders (29 April 2002). That period expired on 28 July 2002.
2. On 25 April 2002, the applicant submitted a tender for Lot 1 of the project. In accordance with the Instructions to Tenderers, the applicant's accompanying letter of 25 April 2002 (section 3 of the Tender Submission Form) stated that [t]his tender is valid for a period of 90 days from the final date for

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submission of tenders, i.e. until 28/07/02. It further indicated at section 4 of the Tender Submission Form that [t]his tender is subject to acceptance within the validity period stipulated in [section] 8 of the Instructions to Tenderers.

3. On 7 May 2002 the Commission issued a notice of amendment entitled Addendum No 1 to Tender Dossier (hereinafter the Addendum) by which it modified the description of one of the lots (Item 4.2.2 of Lot 1) and announced its decision to allow extra time for the submission of tenders so that interested parties might, if necessary, amend their offers and resubmit new tenders by 11 June 2002. Tenders received by the original deadline, including that of the applicant, were returned to tenderers unopened. According to the applicant, since it had no need to modify the relevant part of Lot 1, it resubmitted on 10 June 2002 the very same tender documents including the elements required by the Tender Submission Form and, in particular, the letter of 25 April 2002 containing the sentence quoted in the previous paragraph.
4. At its Tender Opening Session on 17 June 2002, the Commission's Evaluation Committee rejected the applicant's bid. According to the part of the Tender Opening Report relating to the applicant's tender, the reason for rejection was that:

While checking whether the tender submission form, the declarations and the tender guarantee had been duly completed/submitted, the chairperson noted that the validity of the offer was not reflecting the requested 90 days from the date of the submission of the tender.
5. On 28 June 2002, the applicant inquired as to the outcome of the tender procedure by telephone and was informed that its tender had been rejected. On the same date, the Commission also sent to the applicant by fax a copy of the Tender Opening Report.
6. On 1 July 2002, the applicant contacted the Commission by Email stating that it wished to appeal against the rejection of its tender and asking for information about the relevant appeal procedure. The Commission responded that the applicant's tender had been rejected on the ground that its validity was found to be inadequate with respect to the Commission's requirements because:

Section 8, paragraph 1 of the Instructions to Tenderers states that: [t]enderers shall remain bound by their tenders for 90 days from the deadline for submission of tenders. Given as a fact that the deadline was 11 June 2002 and that in section 5, paragraph 3 of your Tender Submission Form you [wrote] that: [t]his tender is valid for a period of 90 days from the deadline for the submission of tenders, i.e. until 28.07.02, the Evaluation Committee was, unfortunately, forced to reject your bid.
7. By letter dated 5 July 2002, the applicant formally requested that the Commission reinstate it in the tender process and asked for an assurance that the Commission would not take any further steps in the tender process pending the resolution of its situation.
8. By letter of 10 July 2002, the Commission replied to the applicant:

Thank you for your inquiry and remarks concerning this evaluation procedure which we will take into account. As the evaluation is not yet finalised, we are not in a position to respond to your observations, but will revert to you in due course.
9. By an application lodged with the Registry of the Court of First Instance on 15 July 2002, the applicant brought the present proceedings. By two separate applications lodged on the same day the applicant also requested, first, the adoption of both an immediate order and subsequently a final order for interim measures and, second, an expedited procedure in the present case.
10. On 16 July 2002, the President of the Court of First Instance granted the request for the immediate adoption of interim measures. The operative part of that order was worded as follows:
 1. The Commission shall alternatively:
 - adopt all the necessary measures to suspend the award of the procurement procedure for the supply

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of aids to navigation equipment to the ports of Aktau (Kazakhstan), Baku (Azerbaijan) and Turkmenbashi (Turkmenistan), referred as EuropeAid/112336/C/S/WW - TACIS - (Re-tender), until the date of the final order in these interlocutory proceedings,

or

- evaluate the tender submitted by Tideland Signal Limited in the above mentioned procurement procedure and allow the said Tideland Signal Limited to participate fully in that procedure in the same way and on the same basis as all the tenderers, until the date of the final order in these interlocutory proceedings.

2. Costs are reserved.

11. Subsequent to the notification of that order, the Commission informed the Court that an award letter had already been sent to another tenderer, Pintsch Bamag A+V, in respect of Lot 1 of the project on 9 July 2002. However, the Commission had subsequently informed that undertaking that the suspension of the award of the contract following that order made it impossible for any further steps to be taken as far as the actual signature of the contract was concerned.
12. Having heard the Commission, the Court of First Instance (First Chamber) decided, on 1 August 2002, to grant an expedited procedure in the present case under Article 76a of its Rules of Procedure.
13. Upon hearing the report of the JudgeRapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure and requested that the Commission produce certain documents referred to in its defence. The Commission complied with that request.
14. The parties presented oral argument and answered questions put to them by the Court at the hearing in open court on 17 September 2002. At the end of the hearing an informal meeting was held and the Commission was asked to indicate by 19 September whether a settlement of the case was possible on the basis of its withdrawal of the decision to reject the applicant's tender. An answer having been provided within the deadline, the Court then requested a further clarification of that decision's status on 23 September 2002 which was provided on the same day.
15. On 24 September 2002, the Court asked both parties to make observations on the question whether the application for annulment had become devoid of purpose. In their observations, lodged the same day, the Commission submitted that the application was now devoid of purpose but the applicant claimed that it was still necessary for the Court to give judgment particularly in order to settle the question whether the decision to reject its tender had been lawful and to ensure its complete disappearance from the Community legal order.

Forms of order sought

16. The applicant claims that the Court should:
 - annul the Commission decision of 17 June 2002 rejecting the tender submitted by Tideland Signal Limited in tender procedure for EuropeAid/112336/C/S/WW - TACIS - (Re-tender);
 - order the Commission to pay the costs incurred by the applicant.
17. The Commission claims that the Court should:
 - dismiss the application;
 - order the applicant to pay the costs.

Substance

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18. The applicant raises two pleas in law. By its first plea the applicant claims that the Commission decision of 17 June 2002 rejecting its tender is unlawful because it is based on an erroneous determination that the tender was valid only until 28 July 2002, and not for 90 days from 11 June 2002 as required by section 8.1 of the Instructions to Tenderers. By its second plea it alleges that the said decision to reject its tender is illegal because, by failing to seek clarification of the period of validity of the tender, the Commission infringed section 19.5 of the Instructions to Tenderers, the duty of care and the principle of proportionality.
19. The Court will proceed to examine the second plea first.

Arguments of the parties

20. The applicant considers that even if the Court does not agree that its tender was clearly intended to be valid for 90 days from the revised 11 June 2002 deadline for the submission of tenders, the wording of the tender documentation in conjunction with the surrounding circumstances should at the very least have led the Evaluation Committee to exercise its power to seek clarification under section 19.5 of the Instructions to Tenderers which states:

In the interests of transparency and equal treatment and without being able to modify their tenders, Tenderers may be required, at the sole written request of the evaluation committee, to provide clarifications within 24 hours. Any such request for clarification must not seek the correction of formal errors or major restrictions affecting performance of the contract or distorting competition.
21. Moreover, the applicant maintains that the Commission is bound by a duty of care when organising procurement procedures, just as it does in other contexts such as the examination of State aid notifications. According to the applicant, the Commission's Evaluation Committee failed to exercise due diligence when it rejected the applicant's tender without making use of its power to ask for clarification of the period of validity of that tender.
22. Similarly, the Evaluation Committee acted disproportionately by rejecting the applicant's tender because of the view it took as to the duration of the validity of the tender when it could instead have exercised its power to seek clarification. This course of action would have avoided any risk that the applicant would be incorrectly excluded from the tendering process, without causing any significant delay in that process.
23. The Commission first reiterates that there was no uncertainty regarding the meaning of the expression until 28.07.02. With regard to the applicant's argument that there may have been a certain suspicion as to the correctness of that date, the institution further points out that is an open question when a suspicion has arisen in a particular case such as would oblige the Commission to accept a date other than that unambiguously put forward by a tenderer.
24. More specifically as to the Instructions to Tenderers, which constitute an integral part of the conditions applicable to all tenders, the applicant's interpretation of section 19.5 is rejected by the Commission. Firstly, it points out that, under that provision, tenderers may at the sole written request of the Evaluation Committee be required ... to provide clarifications within 24 hours. Moreover, in exercising the discretion which it thus enjoys, the Evaluation Committee is to consider the interests of transparency and equal treatment as between all the companies which have submitted tenders. It is also expressly stated that, while tenderers may be required to provide clarifications, this is without being able to modify their tenders and that [a]ny such request for clarification must not seek the correction of formal errors
25. The Commission argues that the issue which the applicant claims should have been clarified is of precisely the kind which is expressly excluded from the remit of the Evaluation Committee. Indeed, according to the applicant's own pleading, its tender contains a formal error, in respect of one of the basic tender conditions, which cannot be corrected.
26. Furthermore, the Commission dismisses the allegation that it has failed to exercise due diligence in rejecting the applicant's tender without seeking clarification. The Commission points out that it is in fact an error which the applicant itself now claims to have made which caused the applicant's tender to be

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rejected.

27. The Commission points out that tender procedures, including those applying to the TACIS Regulation, are the subject of detailed and precise conditions, the ongoing and strict respect of which represents a *sine qua non* for admission to any tender by analogy, in particular, with the position in respect of competitions for the recruitment of Community officials (Case T-54/91 *Antunes v Parliament* [1992] ECR II-1739, in particular, paragraph 40, and the order in Case C-435/98 *P Jouhki v Commission* [2000] ECR I-2229, in particular, paragraph 35). Moreover, economic operators will be fully aware of these conditions when they participate in Community tendering. The Commission points out that the tender submitted in respect of the very same project by the applicant had previously been rejected in 2001 and that the applicant should therefore have been especially vigilant when it submitted its tender on this occasion. In particular, it should not have simply resubmitted the same documents after the Addendum was issued and its tender documents were returned to it, without even checking the dates, assuming that is what actually happened as the applicant claims.
28. The Commission argues that the date at issue regarding the extent of validity of the offer is of fundamental importance, not only for the contracting authority, but for each of the individual tenderers. The former must know with certainty when each offer expires and ensure that all participants enjoy the same opportunity to take into account all possible relevant factors for the same period of time. Essential tender conditions, such as the period of validity for tenders, must therefore be unambiguous and must not be subject to interpretation.
29. In particular, it would be unacceptable, according to the Commission, for reasons of transparency, consistency and equality, for individual tenderers to be able to enter into a dialogue with the contracting authority in order to have it reconsider, on a bilateral basis, their individual offers. In particular, it is therefore improper for the Commission, as contracting authority, to contact a particular tenderer so that the latter could set its tender in order, except in respect of certain specific issues where this is expressly permitted. Indeed, such an approach would fly in the face of a system which is based on the fundamental principle of equality of treatment between all tenderers (Case C-243/89 *Commission v Denmark* [1993] ECR I3353, paragraph 37, and Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 70; also Opinion of Advocate General Stix-Hackl in Case C-57/01 *Makedoniko Metro and Michaniki v Dimossio* [2003] ECR I-1091, paragraph 66). The Commission also points out, in this regard, that such contacts would impose on it a heavy workload, since in 2001, for the TACIS Regulation alone, Directorate A of Commission DG EuropeAid Cooperation Office, dealt with some 240 contracts.
30. In this context, the Commission observes that the applicant's conduct in contacting both the Chairperson and the Secretary of the Evaluation Committee might merit examination under section 19.6 of the Instructions to Tenderers according to which [a]ny attempt by a tenderer to influence the Evaluation Committee in the process of examination, clarification, evaluation and comparison of tenders, to obtain information on how the procedure is progressing or to influence the Contracting Authority in its decision concerning the award of the contract shall result in the immediate rejection of its tender.
31. The Commission also points out that, in the present case, five other tenderers were excluded by the Evaluation Committee at the Opening Session following a variety of errors on their part and that to accept the arguments of the applicant would, at the very least, call into question the situation of those other tenderers. More generally, it contends that the precedent created by a judgment in the applicant's favour in the present case would oblige the Commission to justify why it had followed its own rules whenever a decision it had taken in accordance with those rules was queried by one or more of the unsuccessful tenderers.
32. Finally, in response to the applicant's allegation that it acted disproportionately, the Commission reiterates that the alleged existence of a suspicion as regards the offer's validity is irrelevant in view of the clarity with which the timelimit at issue was set out in the tender and the strictness of the rules governing tender procedures.

Findings of the Court

33. The Court recalls that the Commission enjoys a broad margin of assessment with regard to the factors

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to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Review by the Community courts is therefore limited to checking compliance with the applicable procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-145/98 *ADT Projekt v Commission* [2000] ECR II-387, paragraph 147).

34. Moreover, it is essential, in the interests of legal certainty, that the Commission should be able to ascertain precisely what a tender offer means and, in particular, whether it complies with the conditions set out in the call for tenders. Thus, where a tender is ambiguous and the Commission does not have the possibility to establish what it actually means quickly and efficiently, the institution has no choice but to reject that tender.
35. However, section 19.5 of the Instructions to Tenderers issued in the present case expressly empowered the Commission's Evaluation Committee to seek clarification of tenders submitted within 24 hours subject to the condition that any such clarification must not seek the correction of formal errors or major restrictions affecting performance of the contract or distorting competition. The possibility of seeking such clarification, as a general practice, is also confirmed at section 4.3.9.4 of the document entitled Practical Guide to EC external aid contract procedures, produced by the Commission at the hearing. The issue to be resolved is therefore whether or not the Evaluation Committee acted legally in deciding not to make use of that possibility in respect of the period of validity of the applicant's tender.
36. As to the Commission's contention that the applicant's tender contained a formal error, because its validity was unambiguously and expressly limited to 28 July 2002, and that no request for clarification under section 19.5 of the Instructions to Tenderers was therefore necessary or indeed permissible, the Court finds as a fact that the statement on which the Commission relies in this regard, quoted at paragraph 2 above, was ambiguous with regard to the period for which the tender remained valid. It follows that the statement in question did not necessarily constitute a formal error, but rather gave rise to an ambiguity which might or might not have revealed the existence of such an error, depending on the way that ambiguity was resolved, and in respect of which the Evaluation Committee had power to seek clarification. In the present case, it was therefore only if, after clarification, the tender's validity turned out to be limited to 28 July 2002 that it could have been said to contain a formal error.
37. In response to the Commission's argument that its Evaluation Committee was nevertheless under no obligation to seek clarification from the applicant, the Court holds that the power set out in section 19.5 of the Instructions to Tenderers must, notably in accordance with the Community law principle of good administration, be accompanied by an obligation to exercise that power in circumstances where clarification of a tender is clearly both practically possible and necessary (see, by analogy, Cases T-22/99 *Rose v Commission* [2000] ECR-SC I-A-27 and II-115, paragraph 56, T-182/99 *Carvelis v Parliament* [2001] ECR-SC I-A-13 and II-523, paragraphs 32 to 34; see also, more generally, Case T-231/97 *New Europe Consulting and Brown v Commission* [1999] ECR II-2403, paragraph 42, and Article 41 of the Charter of fundamental rights of the European Union, OJ 2000 C 364, p. 1, proclaimed in Nice on 7 December 2000). While the Commission's evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender. In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then, in principle, it is contrary to the requirements of good administration for an evaluation committee to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is liable to be vitiated by a manifest error of assessment on the part of the institution in the exercise of that power.
38. It would, moreover, be contrary to the principle of equality, to which section 19.5 of the Instructions to Tenderers in the present case makes reference, for an evaluation committee to enjoy an unfettered discretion to seek or not to seek clarification of an individual tender regardless of objective considerations and free from judicial supervision (see, by analogy, Joined Cases T-112/96 and T-115/96 *Séché v Commission* [1999] ECR-SC I-A-115 and II-623, paragraph 127). Moreover, contrary to the Commission's argument, the principle of equality did not preclude the Evaluation Committee from allowing tenderers to clarify any ambiguities in their tenders, since section 19.5 made express provision for such clarification to be sought and the Evaluation Committee was obliged to treat all tenderers in a similar manner with regard to the exercise of this power.

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39. It is also relevant to recall, in the present context, that the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued and that where there is a choice between several appropriate measures recourse must be had to the least onerous (see, for example, Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60).
40. In the present case, the Court finds as a fact that the applicant did indeed, as it claims, simply resubmit its original tender documents on 10 June 2002, without modification, on the basis that the modification to Item 4.2.2 of Lot 1 resulting from the Addendum did not necessitate any change to the terms of its tender.
41. Furthermore, given that the date of 28.07.02 corresponded to the 90 day period for which tenders were required to remain valid under the initial call for tenders of 27 February 2002, the Court considers that the Evaluation Committee should have realised that the applicant was probably not intending to make its tender subject to a different period of validity than that required by section 8.1, but had probably omitted by an oversight to modify that date when it resubmitted its tender following the Addendum. Not only did the applicant's tender documentation submitted on 10 June 2002 state in two other places that the applicant's tender remained valid for the requisite period of 90 days, namely in the letter of 25 April 2002 itself where the letter states, directly above the signature, that [t]his tender is subject to acceptance within the validity period stipulated in [section] 8 of the Instructions to tenderers and in the Terms and Conditions attached to the tender which state [v]alidity of offer: 90 days, but that same letter also stated that the applicant accept[ed] without reserve or restriction the entire contents of the tender dossier for the procedure referred to above.
42. In those circumstances, the principle of good administration required the Evaluation Committee to resolve the resulting ambiguity by seeking clarification of the period for validity of the applicant's tender.
43. In addition, as regards the principle of proportionality, the Court finds that in the present case the Evaluation Committee, faced with the applicant's ambiguous tender, had a choice between two courses of action, either of which would have produced the legal certainty referred to at paragraph 34 above, namely to reject the tender outright or to seek clarification from the applicant. Given the likelihood, noted at paragraph 41 above, that the tender was indeed intended to remain valid for 90 days from 11 June 2002 until 9 September 2002 as required by section 8.1 of the Instructions to Tenderers and the fact that the applicant would have been obliged to provide within 24 hours any clarification sought so that the tender procedure as a whole would have suffered only minimal disruption and delay, the Court holds that the Evaluation Committee's decision to reject the tender without seeking clarification of its intended period of validity was clearly disproportionate and thus vitiated by a manifest error of assessment.
44. As to the Commission's argument that the situation of other tenderers whose offers were rejected might be affected by the annulment of the decision to reject the applicant's tenders, that circumstance can in no way justify rejection of the present application. Under Article 233 EC, it is for the institution whose act has been declared void to take the necessary measures to comply with the judgment. Those measures involve, *inter alia*, the removal of the effects of the illegal conduct found in the judgment annulling the act, and the institution is thus required to take adequate steps to restore the applicant to its original position (see, for example, the judgments in Case 22/70 *Commission v Council* [1971] ECR 263, paragraphs 59 and 60, and in Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] ECR II-2941, paragraph 47). However, the judgment annulling the act cannot entail the annulment of other acts not challenged before the Community courts but which may be alleged to be vitiated by a similar illegality (see Case C-310/97 P *Commission v AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 55).
45. As to the Commission's allegation that the applicant's conduct after the rejection of its tender violated section 19.6 of the Instructions to Tenderers, it is sufficient to state that even were it to be founded in law and in fact, this allegation can have no bearing on the present case since it cannot affect the legality of the decision annulment of which is sought.
46. It follows from all of the above reasoning that the Evaluation Committee committed a manifest error of assessment in failing to exercise its power to seek clarification from the applicant in accordance with

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section 19.5 of the Instructions to Tenderers.

47. In consequence, the Commission decision of 17 June 2002 rejecting the tender submitted by Tideland Signal Limited for Lot 1 in the tender procedure for EuropeAid/112336/C/S/WW - TACIS - (Re-tender) must be annulled, without its being necessary to examine the first plea raised by the applicant.
48. Finally, the Court observes that an application for annulment may, exceptionally, not become devoid of purpose despite the withdrawal of the act whose annulment is sought in circumstances where the applicant nevertheless retains a sufficient interest in obtaining a judgment formally annulling it (see, by analogy, Joined Cases 294/86 and 77/87 *Technintorg v Commission and Council* [1988] ECR 6077, paragraph 11). In the present case, the applicant claims that it retains such an interest.
49. The Court recalls that no settlement agreement has been reached between the parties following the informal meeting of 17 September 2002 and considers that it is not clear from the responses made by the Commission on 19 and 23 September 2002 whether the decision to reject the applicant's tender has truly disappeared from the Community legal order and ceased to have any legal effects (see, for example, the order in Case T-26/97 *Antillean Rice Mills v Commission* [1997] ECR II-1347, paragraph 14). In those circumstances, the Court concludes that the applicant does retain an interest in obtaining the judgment it seeks and, given the urgency of the present case and the requirements of legal certainty, it is therefore appropriate for the Court to proceed to judgment immediately in order to resolve formally and definitively the continuing uncertainty as to the legality and current status of the decision rejecting the applicant's tender.

Costs

50. Under Article 87(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission has been unsuccessful and the applicant made application in that regard, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber),

hereby:

1. Annuls the Commission decision of 17 June 2002 rejecting the tender submitted by Tideland Signal Limited for Lot 1 in the tender procedure for EuropeAid/112336/C/S/WW - TACIS - (Re-tender);

2. Orders the Commission to pay the costs.

Vesterdorf
Forwood
Legal

Delivered in open court in Luxembourg on 27 September 2002.

H. Jung

B. Vesterdorf

Registrar

President

1: Language of the case: English.

<http://curia.eu.int/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79979072T19020211...> 23/08/2005

Doc B

DIPARTIMENT TAL-KUNTRATTI
Notre Dame Ravelin
Floriana CMR 02 - MALTA

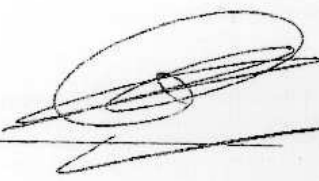


DEPARTMENT OF CONTRACTS
Notre Dame Ravelin
Floriana CMR 02 - MALTA

Telephone: 2122 0212
2122 0313
Fax: 2124 7681

Reference: CI. 2616/2004
Subject: TENDER FOR ROAD CONSTRUCTION
(Gozo)

This is to acknowledge receipt of Notice / Objection submitted in terms of Regulation 102, Part XII of Legal Notice 299 of the Public Contracts Regulations 2003 accompanied by the mandatory deposit of Lm 10,000 was received at this office today THURSDAY 14th July at 11.45 am Cheque No. 247 Bank B.O.V. dated 14.07.05

Signed:  Date: 14.07.05

Doc C1



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19/10/2004 S204 European Communities - Works contracts - Pre-information procedure

I. II. IV. VI.

MT-Floriana: construction work for highways

2004/S 204-174492

PRIOR INFORMATION NOTICE

Works

This contract is covered by the Government Procurement Agreement (GPA): Yes.

SECTION I: CONTRACTING AUTHORITY

- I.1) **Official name and address of the contracting authority:**
Department of Contracts, Att: Mr Edwin Zarb, Notre Dame Ravelin, MT-Floriana CMR 02. Tel.: 00356 21 220212. Fax: 00356 21 247681.
- I.2) **Address from which further information can be obtained:**
Department of Contracts, Att: Mr Edwin Zarb, Notre Dame Ravelin, MT-Floriana CMR 02. Tel.: 00356 21 220212. Fax: 00356 21 247681.
- I.3) **Type of contracting authority:**
Central level.

SECTION II: OBJECT OF THE CONTRACT - WORKS

- II.1) **Title attributed to the contract by the contracting authority:**
Restoration and upgrading of Hal-Far Road, Phase III (WA26 Peace Lab ICT. to SA27 Freeport).
- II.2) **Place of performance:**
MT-Birzebbuga.

NUTS code MTO.

II.3) Nomenclature

II.3.1) Common Procurement Vocabulary (CPV):

45233130, 74142100.

II.3.2) Other relevant nomenclature (NACE):

II.4) Nature and scope of work:

The project includes the reconstruction and upgrading of a 3,7km single carriageway section (WA 26, Peace Lab Jct. To SA 27, Freeport) of the TEN-T. The project includes the following: reconstruction of the road pavement, the construction of pedestrian footpaths, the construction of cycling lane, the construction and improvement of junctions, surface water drainage network and facilities, engineering structures, utility diversions where necessary, street lighting, street furniture and environmental protection facilities.

II.5) Estimated cost of work, excluding VAT:

II.6) Scheduled date:

29.12.2006.

II.7) Completion date:

29.12.2006.

II.8) Main terms of financing and payment:

European structural funds (Measure 1.2).

II.9) Other information:

II.5) Estimated cost of work excluding VAT (if known): Between: 1 500 000 MTL and: 2 000 000 MTL.

SECTION IV: ADMINISTRATIVE INFORMATION

IV.1) Reference number attributed to the file by the contracting authority:

CT2671/2004.

SECTION VI: OTHER INFORMATION

VI.1) Non mandatory notice:

Yes.

VI.2) The contract relates to a project/programme financed by EU funds:

Yes.

This work is co-financed under Structural Funds, Measure 1.2, Transport Infrastructure.

VI.3) Date of dispatch of this notice:

13.10.2004.



Attachment 'B'

Note of submissions of MAC Joint Venture made up of Road Construction Company Limited (Leader), Bonnici Brothers Limited and Zrar Limited, C&F Building Contractors Limited and Schembri Infrastructures Limited

Further to the objection submitted by Polidano Group and Gatt Tarmac Limited following a call for tenders for **“For the reconstruction and Upgrading of San Lawrenz to Rabat Road, part of Arterial Route 1, Rabat Gozo (CT2616/2004)”**.

Note of submissions of MAC Joint Venture made up of Road Construction Company Limited (Leader), Bonnici Brothers Limited and Zrar Limited, C&F Building Contractors Limited and Schembri Infrastructures Limited

It is hereby submitted that:

By way of clarification it is declared that in view of the particular circumstances of this case, the parties who filed the objection shall hereinafter be referred to as **“Polidano & Gatt”** and/or the **“other party”** as appropriate.

Invalidity of Objection

It is reiterated that in their letter of objection Polidano & Gatt declared that the said objection was being filed in terms of sub-article 102(4) of Legal Notice 299 of 2003, which legal notice had at the time already been abolished and substituted by Legal Notice 177 of 2005. Consequently, Polidano & Gatt’s objection is invalid and without effect and should be dismissed immediately.

It is also submitted that during the oral proceedings no evidence was brought to rebut this point. Dr. Noel Camilleri, one of the legal advisors of Polidano & Gatt, when giving evidence explained that when the Director of Contracts had been asked to forward some documentation to Polidano & Gatt, the director refused on the basis of Legal Notice 299 of 2003. This evidence does not hold water and should be discarded primarily because it constitutes hearsay evidence and should have been given by the Director himself in his oral deposition. Moreover and more importantly it is submitted that in establishing which law is applicable to a particular case, one has to refer to the law itself and should not limit oneself to a declaration by the Director of Contracts or anyone else for that matter. A statement of the Director is not tantamount to law. This is well known to the other party who should have known better than to base themselves on an *en passant* comment of the Director. For this reason, this board should dismiss the other party’s objection.

Without prejudice to the above, during the hearing of the objection, a number of witnesses produced by Polidano & Gatt stated that the tenderer was (and therefore should have been) Polidano Brothers Limited. This juridical entity does not feature in the letter of objection which is the subject of these proceedings. This letter of objection was submitted on behalf of Gatt Tarmac Limited, which during the hearing resulted to be simply a sub-contractor and as such did not have the right to object to the decision of the board of adjudication and Polidano Group, which is legally a non-entity and as such has no rights and obligations at law and is definitely not the tenderer.

Consequently, it transpires that the alleged tenderer, i.e. Polidano Brother Limited, did not in effect submit or present an objection in terms of the law.

Polidano & Gatt cannot pick and choose to identify or call themselves as Polidano Brothers Limited or Gatt Tarmac Limited as it best suits their interest. The other party always insisted during the proceedings that the tenderer was Polidano Brothers

Limited, it cannot then submit an objection in the name of Gatt Tarmac Limited, which is nothing else but a sub-contractor or “employee” of the tenderer. The other party can either claim that the tenderer is Polidano Brothers Limited, in which case it is submitted that no objection has been filed by the said company, or else it can claim, which it never did, that Gatt Tarmac Limited was the tenderer.

Lack of identification of tenderer in the tender document

The tender submitted by the other party failed to indicate the name of the tenderer on the outer envelope of the same as required by clause fourteen of the tender dossier. This is a serious omission and not a mere lack of formality as argued by the other party’s legal counsel. The fact that name of the tenderer on the outer envelope is an extremely important detail is clearly demonstrated by the case in question. Had the outer envelope indicated the name of the tenderer, the adjudication board would have immediately realised that the tender guarantee was irregular since it was issued in the name of Gatt Tarmac Limited rather than that of the tenderer Polidano Brothers Limited, and would have rejected the tender immediately without opening the second envelope.

The other party, during the hearing argued that once the adjudication board had proceeded with the opening of the second envelope, it could not subsequently reject the tender on the basis of the contents of the first envelope being the tender guarantee. The adjudication board was, however, in the physical impossibility to establish the irregularity of the tender guarantee when opening the first envelope since at the stage the name of the tenderer had not yet been indicated.

The tender was not even identified on the Tender Form. Clause 14.4.1 (Volume 1, Section 1, General Part, pg. 35) of the tender dossier stipulates that “*The Tender **must** comprise the following **duly completed** documents: Tender Form and appendix, in accordance with the forms provided in Volume 1, Section 2*”. The strong wording of this clause makes it amply clear that the requirements stated therein are mandatory and breach of thereof will lead to the disqualification of the tender.

The tender dossier required that in the case that the tender was submitted by more than one entity, the name of the leader had to be indicated in the first box of the Tender Form under the title “Submitted by:” If a tender was submitted by an entity acting alone, the name of the same had to be indicated in the same box since this can never be left empty. It is clear that the name of a tenderer acting alone cannot be indicated in any other box, especially in a box marked as “Partner 4”, as was the case in the tender under scrutiny.

During the oral proceedings of this objection the other party argued that it was evident that the tenderer was Polidano Brothers Limited, since every page of the tender bore the stamp of the said company. The other party, however, chose to ignore the fact that every page bore also the signature of Mario Gatt in his capacity as shareholder and representative of Gatt Tarmac Limited. The fact that the tender guarantee was drawn out in the name of the same Gatt Tarmac Limited, which company also signed each page of the tender casts serious doubts about the identity of the tenderer: Is the tenderer Gatt Tarmac Limited, Polidano Group or both of them together? What is certain is that the name of Polidano Brothers Limited, failed to appear in those instances in the tender when the name of the tenderer was mandatory: On the outer envelope, on the tender guarantee form and in the box labelled “Leader” on the

Tender Form. Indeed on the tender guarantee there featured a name of another company rather than Polidano Brother Limited.

Failure to identify the tenderer in the Form of Tender, amounts to failure to comply with the tendering procedural requirements as stipulated in regulation 82 of LN 177 of 2005. Once the tenderer has failed to abide by the procedural requirements stipulated in the tender dossier the remaining packages of the tender its offer "are", in terms of the same mandatory regulation, "to be discarded unopened" and the fact that the tenderer could be otherwise identified is immaterial. In such cases the law gives the Director of Contracts no discretion but to discard a tender immediately, as he in fact did. The other party's argument that the law should be interpreted loosely is unacceptable since it is a known maxim of legal interpretation that a law should be interpreted literally independently of whether such an interpretation may harm an affected person – *dura lex sed lex*. The tender dossier leaves no doubt as to its interpretation on the issue and uses apposite words such as "without exception" and "must comply strictly".

Tender Guarantee

The other party, strongly argued that the tenderer was clearly Polidano Brothers Limited. If this argument had to be accepted, then the tender guarantee submitted with the tender under scrutiny, is clearly irregular since the tender dossier, in clause eighteen clearly stipulates that the tenderer, and no one else, should submit the tender guarantee. Furthermore, the wording of the specimen tender guarantee clearly stipulated that the tender guarantee had to be issued in the name of the contractor and in favour of the Director of Contracts. The word "contractor" is defined as the "tenderer" in the tender dossier. The tender guarantee was submitted by Gatt Tarmac Limited, which is definitely not the tenderer given that in a different part of the tender it was indicated as a sub-contractor. This is not a formalistic deviation but one of substance since it results in a change in parties.

The tender dossier (see pg 3, 33 para.8.2 & 8.3) obliges the tenderers to read the tender dossier meticulously and submit a tender which conforms "*with all the instructions, forms, contract provisions and specifications contained in this tender document*". Para. 8.2 stipulates that "*the tenderer must provide all documents required by the provisions of the Tender Dossier. All such documents, without exception, must comply strictly with these conditions and provisions and contain no alterations made by the Tenderer. Tenders which do not comply with the requirements of the Tender Dossier will be rejected*". Therefore, it is clear that the above-mentioned irregularities amount to failure to comply with the tendering procedural requirements and therefore the rejection of the tender should be upheld.

This notwithstanding, the other party claimed that the tender guarantee should be considered valid as it still fulfils the function it was meant to fulfil. In order to support this argument the other party produced as witness a Bank of Valletta bank manager, who declared that he was an expert on bank guarantees and Dr. Borg Costanzi as the legal advisor of the bank. Said witnesses were asked by Dr. Delia what they would do if they received a request for the withdrawal of the guarantee on the grounds that Polidano Brothers Limited breached its obligation. Both witnesses answered that they would have to consult other parties, including, according to Dr. Borg Costanzi, the client itself.

It is therefore clear that the bank guarantee not only fails to satisfy mandatory procedural requirements, but also fails to effectively provide an **unconditional, on demand** guarantee. The fact that it cannot be withdrawn on mere demand and that it requires a second opinion, and is therefore dubious, makes it fall short of the requirements of the tender dossier and the law.

If one had to hypothetically argue that the bank would release the guarantee in favour of the Director of Contracts, if a request is made with no direct reference to a breach of Polidano Brothers Limited, this would not change the fact that the bank guarantee was issued in the name of Gatt Tarmac Limited. Consequently the latter company may sue the Director of Contracts for damages stating that it never withdrew its tender (which indeed it has never submitted) and therefore its tender guarantee should have never been forfeited.

The other party argued that Gatt Tarmac Limited, and any other third party, could act as a guarantor of the tenderer's obligations. However, the law stipulates that an obligation to act as guarantor has to be reduced to writing and that a guarantee cannot be presumed. This is a basic principle of law. In the present case there was no document to this effect. In fact the name of Polidano Brothers Limited did not feature anywhere on the BOV tender guarantee submitted by the other party. Gatt Tarmac Limited, if acting as guarantor, could have requested the bank to specify on the tender guarantee that it would release the same guarantee even if Polidano Brothers Limited withdraws its tender. This was not done and now Gatt Tarmac Limited cannot give the tender guarantee an interpretation it was never meant to have.

The advice given by the Attorney General was to the effect that if the evaluating committee was of the opinion that the identity of the tenderer was essential – as was actually the fact – then the Polidano & Gatt tender had to be disqualified and it should remain so disqualified.

The validity and conformity of the tender guarantee is crucial for the success of the tender as results *inter alia* from the adjudication of *tendernumber: IP/2 – 03/ADT*, when the tender submitted by *Alfred Schembri & Sons Limited u General Road Servicing Limited o.b.o Integra S.r.l* was disqualified because the tender guarantee, which had been validly submitted, was accidentally not renewed.

Clarification

The other party claimed that the evaluation committee **should** have asked for a clarification of it had any doubts as to the identity of the tenderer.

However, as already pointed out, the law only allows clarifications of a technical nature. The other party alleged that this goes counter to some European right. Reference is made to -“Statement concerning Article 7(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedure for the award of public works contracts” Official Journal L99, 9.8.1993 p 54 where it was stated that:

*“The Council and the Commission state that in open and restricted procedure all negotiations with candidates or tenderers on fundamental aspects of contract, variations in which are likely to distort competition, and in particular on prices, **shall** be ruled out”.*

Undoubtedly, the identity of the tenderer is of fundamental importance and leaves no room for discussion. A tender is either valid or it is not. Validity cannot be clarified like some technical aspects.

The above-quoted statement continues as follows: "discussions with candidates or tenderers **may** be held but only for the purpose of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities and provided this does not involve discrimination". Firstly one has to appreciate that the wording is not mandatory since it uses the verb "may" rather than "shall". Therefore there is not obligation on authorities to ask for clarifications. However, if they so wish, they can do so within the specified parameters.

The regulations authorise clarifications only with respect to technical aspects. This is definitely not in breach of any European right. Indeed, the law reflects the spirit of the European directive. On the contrary, if authorities start to ask for clarifications to validate, invalid tenders subject to fundamental shortcomings, they would be in breach of both the local law as well as the European Directive.

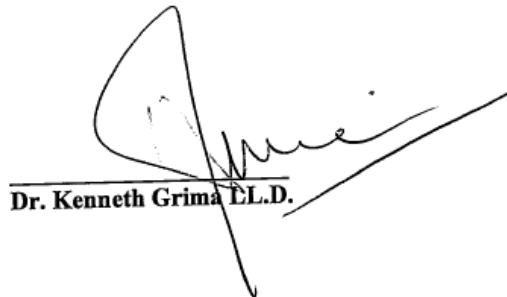
For the above-stated reasons, it submitted that the tender subject of the present proceedings should remain disqualified and the objection of the other party should be rejected.



Dr. Adrian Delia LL.D.



Dr. Maria Demarco LL.D.



Dr. Kenneth Grima LL.D.

Attachment 'C'

Statement of facts and legal submissions on the merits of the case presented on behalf of the Evaluation Committee.

09 September 2005

The Secretary
Public Contracts Appeals Board
Floriana.

Sir,

Re: `Tender CT2616/2004 – Appeal by Polidano Bros. Ltd.

On behalf of the Evaluation Committee I am hereby submitting their statement of facts and legal submissions on the merits of the case.

Chronological statement of facts.

The tender in question was of the type ‘three separate packages’ as described in regulation 102 of Legal Notice 299/2003, and later in section 82 of Subsidiary Legislation 174.04 later incorporated into Legal Notice 177/2005. The opening of these packages has to follow the procedure laid down in that regulation, and in fact this procedure was strictly followed by the Evaluation Committee.

There were three competing tenders for this particular contract, each of which was contained in a sealed box. Whereas two of the tenders had the name of the tenderer printed on the box, the third one was contained in a plain, unmarked box bearing no identification as to the tenderer who had submitted it. Nor did it have any indication of the name or identity of the tenderer on the wrapping of the box itself. (This tender shall hereinafter be referred to as ‘Tender No. 3’)

Tenders were opened publicly, in the presence of the Contracts committee and those members of the public who may have felt they had an interest in the proceedings. Upon noting the fact that Tender No. 3 did not have any indication as to the tenderer shown upon it, the Chairperson asked for directions from the officials of the Department of Contracts who happened to be supervising/assisting the session on whether she should open that particular envelope/box, or ignore it as annulled. She was directed to open it, even though strictly speaking in terms of the relative regulations the whole tender should have been considered as null. Reference is here made to the ‘Tender Document’ paragraph 14.2.3.(e) page 35/36 which states that ‘Tenders must satisfy the following conditions: ‘all tenders including annexes and all

supporting documents must be submitted in sealed envelopes / packages bearing only ...(e) the tenderer's name'; as well as to the 'Supply Tender Opening Checklist' 'Publication Reference CT2616/2004' precisely to paragraph 6 box 2 'For each tender envelope, the Chairman and Secretary announce and check that the summary of tenders received correctly records: ... the name of the tenderer'. At the time it was correctly felt that the tenderer involved should be given the benefit of the doubt and should not be disqualified for mere violation of this requirement.

Envelope 1 of each tender was supposed to contain the 'tender guarantee'. Envelope 1 of Tender No. 3 contained a tender guarantee issued 'by order of Gatt Development Ltd for Gatt Tarmac Ltd'. The guarantor was Bank of Valletta plc and The Director of Contracts was indicated as the beneficiary. This guarantee identified 'Gatt Tarmac Ltd' as the tenderer/contractor. Although this guarantee did not follow the exact format, or reproduce the precise wording, of the tender guarantee form (page 59 of the 'Tender document') it was again felt that the guarantee was substantially similar to the form set down by the tender document and it was again decided to proceed with opening envelope 2 of Tender No. 3.

Upon opening envelope 2 of Tender 3, further and more serious irregularities came to light. The Tender form therein contained failed to identify the 'leader' of the tender. Nor was there any indication of the identity of Partners 1, 2 and 3 of the tender. Partner 4 was identified as 'Messrs Polidano Bros. Ltd'. Gatt Developments Limited and Gatt Tarmac Limited did not feature at all on the Tender form, but they were shown as subcontractors in Form 4.6.3 submitted in terms of Volume 1 Section 4 of the Tender Dossier.

Legal advice was sought from the Attorney General on the validity of this tender as per letter dated the 16th March 2005. This advice was given as per letter of the 11th April 2005.

Acting on the advice contained in the last paragraph of the Attorney General's letter, and basing itself on the facts as ascertained by it, the Evaluation Committee decided at its fifth meeting held on the 26th April 2005 to recommend to the Director of Contracts to consider Tender No. 3 as inadmissible. A letter to that effect was drafted and was actually sent to the Director Contracts on the 26th April 2005.

The Contracts Committee confirmed the decision reached by the Evaluation Committee, and subsequently the Director of Contracts effectively acted on these recommendations and rejected the tender as invalid.

LEGAL CONSIDERATIONS INVOLVED.

Reference should here be made to regulation 102 of Legal Notice 299/2003. This states that:

(2) In the process of adjudicating the tender, the packages for all tenderers shall be opened in public and in the sequence enumerated in the immediately preceding sub-regulation. When at any stage, any tenderer fails to comply with the tendering procedural requirements and, or with the specifications, the remaining packages in his tender offer are to be discarded unopened;

This same provision is reiterated in regulation 82(2) of S.L. 174.04 (L.N. 177/2005) which states that:

‘When at any stage, any tenderer fails to comply with the tendering procedural requirements and, or with the specifications, the remaining packages in his tender offer are to be discarded unopened’.

The right for the Director of Contracts to seek clarifications ‘on points of a technical nature to enable a proper evaluation of any tender’ is subject ‘however’ to the condition that that tender ‘would at that stage have already been declared to be basically compliant’.

It is submitted that Tender No. 3 could not have been declared ‘basically compliant’ for the following reasons:

It should first of all be pointed out, for completeness’ sake that the contents of paragraph b of the letter addressed to the Director of Contracts by Thake Desira Advocates on the 22nd March 2005 are not correct. The ‘relevant page’ regulating the ‘Tender Guarantee’ is not a ‘blank page’. Page 59 regulates the required contents of the Tender Guarantee form in great detail. It is therefore not correct to state that this relevant page contains ‘no other essential requirements ... to validate such a tender guarantee’.

Paragraph 18 (page 38 of the Tender Dossier) refers to Volume 1, Section 3 of the dossier as regulating the Tender Guarantee. Now Volume 1 Section 3 does not consist solely of page 58 as Thake Desira implicitly seem to argue. Page 58 is only the ‘header page’ of that Section and page 59 is an integral part thereof. It is ridiculous for a venture that claims to have invested ‘a significant amount of resources’ in making this offer to claim in the same breath that it failed to read through, or overlooked page 59.

Indeed a correct reading of page 59 indicates that one of the most essential requirements was in fact ignored by Tender No. 3, viz the naming of the contractor, and the provision of his address:

‘We the undersigned, (Bank name and address) hereby declare that we will guarantee as principal debtor to you on behalf of **(contractor’s name and address – bold type reproduced from the original).**’

(‘Contractor’ is defined in the glossary of terms – p. 94 of the Tender Dossier – as ‘the tenderer selected at the end of the procedure for the award of the contract’).

In spite of the fact that the Tender Guarantee was not in strict compliance with those essential requirements, the Evaluating Committee correctly granted the tenderer (whom at that stage it presumed to be Gatt Development Ltd for Gatt Tarmac Ltd as identified in the bank guarantee submitted to it) the benefit of the doubt, and continued with the examination of the contents of Envelope 2 of his tender. Hence it is submitted that the letter of the 22nd March 2005 loses all its relevance.

It was the more serious irregularities contained in Envelope 2 and the conflicts resulting from the information contained in Envelope 1 and that contained in Envelope 2 - that ultimately proved fatal to Tender No. 3. And the consequence or potential consequence of such irregularities is pointed out to the tenderer in Bold type in page 3 of the Tender Dossier:

‘Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this tender dossier. Failure to submit a tender containing all the required information and documentation within the deadline specified may lead to the rejection of the tender’.

The relevant requirements set out in the Tender Dossier with which Tender No. 3 failed to comply include the following:

- a. ‘Information/documents to be supplied by the tenderer’ (pages 28 through to page 31 of the Tender Dossier).
- b. The ‘Tender Form’ reproduced on page 55 of the Tender Dossier was incorrectly filled in, and this in such a way as to render it impossible for the Evaluation Committee to determine whether Polidano Brothers Ltd. was the sole tenderer, or the ‘leader’ in a joint venture, or solely the ‘fourth partner’ in a joint venture.
- c. Indeed that ‘Tender Form’ specifically states and makes it abundantly clear that **‘if this tender is being submitted by an individual tenderer, the name of the tenderer should be entered as a ‘leader’ (and all other lines should be deleted).**
- d. That this tender form reproduced in page 55 must, under pain of rejection, be correctly filled in, results amply clearly from paragraph 14.4.1. (page 36) of the Tender Dossier. Paragraph 14.4 states that the tender **‘must comprise the following duly**

completed documents’. The use of the word ‘must’ here is indicative that failure on the part of the tenderer to fill in this form, and to fill it in correctly, necessarily leads to rejection of the tender.

- e. Nor can it logically be otherwise: if the identity of the tenderer cannot be clearly and unequivocally established from the tender form the Director of Contracts would find himself in a position of being unable to exercise his rights arising out of the tendering process effectively and expeditiously. He could instead find himself mired in an interminable legal dispute about the identity of his adversary, when the whole scope of the rules and regulations set out in the Tender Dossier is precisely that of avoiding such lack of clarity. In this scenario, even executing the tender guarantee might become, if not impossible, at least extremely complicated, costly and lengthy.
- f. Such lack of clarity could indeed serve ulterior and sinister purposes on the part of tenderers who in some way or another wish to avoid the legal obligations that should have been assumed by them when filing the tender in the first place.
- g. In this present case, this lack of clarity, coupled with the fact that the tender guarantee failed to correctly identify the principal contractor involved for the reasons already explained above would have made it well nigh impossible for the Director of Contracts to execute his rights without becoming involved in interminable complications.
- h. It cannot be argued that the Evaluating Committee is bound to go through the other documents forming part of the Tender document with a toothcomb in an effort to determine the precise identity of the tenderer. Its right to ask for clarification can never be transformed into a duty to make good for the deficiencies, downright carelessness, and possibly sinister motives of a tenderer who, for any reason whatsoever, fails to fill in the Tender Form correctly and clearly as required by the Tender Dossier.
- i. Indeed the right of the Evaluation Committee and/or the Director of Contracts to ask for clarification is, in terms of the proviso to Regulation 102(2) of Legal Notice 299/2003 limited to points of ‘a technical nature’.

“Provided that the Director of Contracts or, with his authorization, any Contracting Authority, shall have the right to seek clarifications on points of a technical nature to enable a proper evaluation of any tender, which, however, would at that stage have already been declared to be basically compliant.”

This same provision was later incorporated into regulation 82(2) of LN 177/2005 where again one find reference to ‘**points of a technical nature**’. It should be pointed out in this respect that the

law grants the Director of Contracts the **right** but does not impose an **obligation** on him to seek any clarification. But the most important point in this respect is the fact that the precise identity of the tenderer involved cannot, by any stretch of the imagination, be construed as a point of a technical nature.

- j. Even if it could in some way or another be argued that Tender No. 3 was some form of joint venture between Polidano Bros. Ltd, and Gatt Development Limited or Gatt Tarmac Ltd, it failed to comply with the requirements of paragraph 4.3 of the Tender dossier. Most specifically it failed to include a preliminary agreement stating that all partners assume joint and several liability for the execution of the contract; and binding all partners to remain in the joint venture/consortium for the whole performance period of the contract.
- k. It is submitted that the contents of the objection of the 11th July 2005 are in effect an effort by Polidano Bros Ltd to lay the blame for the extremely careless manner in which Tender No. 3 was filled on the shoulders of the Evaluation Committee. In other words the objector is claiming that the Evaluation Committee was burdened with the duty of making good for all the failings contained in Tender No. 3. Not only is this legally incorrect, but it would also lead to discrimination by the Evaluation Committee to the prejudice of all other tenderers who had submitted their Tenders duly filled in all material respects.
- l. That letter of objection tries furthermore to draw an argument in favour of the objector from the fact that the letter of the 8th July was addressed to Polidano Brothers Limited and to Gatt Tarmac Limited by saying that this indicates that the Director of Contract could at that time identify the main tenderer and the subcontractor. But there is an immense difference between the Director of Contracts assuming the identity of the persons having an interest in a particular tender; and the identity and precise interest of those persons being explicitly, clearly and unequivocally declared by themselves. It was legitimate for the Director of Contracts to assume, on the 8th July, that Polidano Brothers Limited was the company having an interest in Tender No. 3, if only because of the fact that the letter by Thake Desira Limited of the 22nd March 2005 was written 'on behalf of Messrs. Polidano Brothers Limited'; whereas the interest of Gatt Tarmac Limited resulted from the Tender Guarantee contained in package 1.
- m. Much ado was made during the evidence of Mr. Caruana that all the forms attached to, or forming part of, the tender mentioned Polidano Bros Ltd., and only Polidano Bros. Ltd. Appellants argue that this constitutes conclusive evidence that Polidano, and no one else, are the tenderers. With all due respect this argument is fallacious: even if Polidano Bros. Ltd were only one of a series of partners, as in fact they were identified in the tender form, they would have been required to fill in and submit every such form. Point 7 on page 62 of the Tender dossier (Additional Notice to tenderers) makes this amply clear: 'each partner in a joint

venture/consortium must fill in and submit every form'. The same point is emphasised in Cl.4.3 page 31 of the dossier.

Nor can it be argued (as Thake Desira do in their letter of the 22nd March 2005) that the simple fact, by itself, that the Evaluation Committee decided to accept the Tender Guarantee as valid is tantamount to a decision that all the contents of Envelope 2 of Tender No. 3 were thereby being accepted as valid as well. L.N. 177/2005 makes it abundantly clear that the acceptance of a first or second package as valid does not preempt or prevent the rejection of any subsequent package as invalid. (Vide regulation 82).

Furthermore, paragraph 28 of the Tender Dossier (page 45) explicitly binds the Evaluation committee to check that each tender

'28.1.3 substantially complies with the requirements of these tender documents',

and 28.3 specifically states that 'if a tender does not comply with the requirements of the evaluation grid, it **will be rejected** by the evaluation committee when checking admissibility.'

The final, and perhaps the most important consideration that needs to be made is the following:

The tender guarantee submitted in connection with Tender No. 3 was issued by Bank of Valletta plc "by order of Gatt Development Ltd for Gatt Tarmac Ltd". No mention was made of Polidano Brothers Limited or any other company. Neither Gatt Development Ltd, nor Gatt Tarmac Ltd feature in any way in the tender form.

Several issues fall to be considered as a result of this dichotomy:

- a. The Manager of the Victoria Branch of the Bank of Valletta plc as well as its senior legal adviser both confirmed that whereas the bank would pay on the guarantee if no mention of Polidano Bros Ltd was made in the request for payment, they would have second thoughts and would need to take further advice if such request for payment referred to any third party other than Gatt Development Ltd, or Gatt Tarmac Ltd.
- b. Dr. Borg Costanzi also confirmed – and this is a basic legal principle in respect of bank guarantees - that a bank guarantee is a tripartite legal instrument. It creates a legal relationship between the bank and the beneficiary (in this case the Director of Contracts) in the sense that the bank is binding itself to pay the beneficiary the amount indicated in the guarantee 'with no questions asked'.
- c. However, it also creates a legal relationship between the beneficiary (the Director of Contracts) and the person on whose order the guarantee is issued (Gatt Tarmac Ltd/Gatt Development Limited). If the beneficiary were in any way to abuse of the bank guarantee issued in his favour, the issuer thereof can sue the

beneficiary for damages and exercise other means of recourse against him.

- d. In this case, Gatt Tarmac Ltd/Gatt Development Ltd are 'referred to as the tenderer' in the bank guarantee. This guarantee binds the bank to pay the amount therein indicated but only in case of failure on the tenderer's part and not on the part of any third party: 'in the event that the **tenderer** withdraws its tender before the expiry date, or in the event that the **tenderer** fails to sign the contract and provide the performance bond, if called upon to do so in accordance with the tender conditions or in the event that the **tenderer** otherwise fails to fulfil its obligations under the tender conditions'.
- e. However Gatt Tarmac Ltd/ Gatt Development Ltd. did not feature in any way in the tender document except as sub-contractors. And as sub-contractors, they were not assuming any binding obligation towards the Director of Contracts by the mere fact of the submission of the tender form by a third party (Polidano Bros. Ltd). Consequently it would not be legal to argue that they or either of them would have withdrawn the tender before the expiry date, failed to sign the contract, or failed to fulfil any obligations under the tender document. Consequently, were the Director of Contracts to call upon the bank guarantee, and even assuming that the bank would have paid up that bank guarantee without raising queries of its own, the Director of Contract would technically have abused of the bank guarantee. It would consequently be laying itself open to an action for damages.
- f. It would also not be inconceivable, given the uncertainties surrounding the issue of the bank guarantee, for Gatt Tarmac Ltd/Gatt Development Ltd to try and prevent the bank from paying up on the guarantee by disputing the fact that they are in fact 'tenderers' in this tender.

It is precisely in an attempt to avoid these uncertainties that the Tender dossier sets out the guarantee form in great detail, and furthermore stipulates that the guarantee form has to be provided by the tenderer and not by someone else. With all due respect, the issue is not about whether a person can stand surety to a third party with or without that person's knowledge. It is about whether the bank guarantee provided by Gatt Tarmac Limited/Gatt Development Limited could be safely encashed by the Director of Contracts, in respect of a tender to which they are not parties, and without the risk of becoming embroiled in an interminable lawsuit. It is humbly submitted that the answer to this question is most definitely in the negative.

It is submitted that all these irregularities in Tender No. 3 constituted '**substantial deviations and reservations**', which are expressly prohibited in terms of Clause 28.2 (pg. 45) of the Tender Dossier.

In these circumstances, the evaluation committee had no alternative but to effectively reject Tender No. 3.

Finally, it needs to be mentioned, although it does not need to be stressed that the Evaluation Committee and the Ministry for Gozo have no vested interests one way or the other in the decision of the Appeals Board. This submission is being presented only for the sake of defending the correctness of the decision reached by the Evaluation Committee; and in order to avoid, if at all possible the risks involved were a tender to be declared admissible which fails to meet the requirements strictly laid down by the law under pain of rejection or annulment of the tender.

Av. Carmelo Galea.