

PUBLIC CONTRACTS APPEALS BOARD

Case 110

Advert No. CT/164/2007 – CT 2026/2007 – WD 60/2006/41
Tender for the supply, delivery and laying of natural paving materials for Merchants' Street and St. John's Street, Valletta.

This call for tenders was published in the Maltese Government Gazette and the European Journal on 13.04.2007 and was issued by the Contracts Department following a request transmitted to the latter by the Ministry for Resources and Infrastructure (Works Division).

Five (5) tenderers submitted an offer.

The closing date for this call for offers was 05.06.2007 and the estimated value of the total contract was Lm 593,109 (excl. VAT).

Messrs A.F. Ellis (Home Décor) Ltd filed an objection on 16.07.2007 following the decision taken by the General Contracts Committee to cancel the call for tenders for the supply, delivery and laying of natural paving materials for Merchants' Street and St. John's Street, Valletta on the ground that no offer was fully compliant in terms of regulation 45 of the Public Contracts Regulations.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 17.08.2007 to discuss this objection.

Also present for the hearing were:

A.F. Ellis (Home Décor) Ltd

Dr. Joseph Ellis
Architect Joe Zammit

Adjudication Board

Architect Ray Farrugia	Chairman
Architect J. Zerafa Boffa	Member
Mr. J. Grech	Member
Mr. M. Ciantar	Secretary

Works Division

Mr. J. Spiteri	
Mr. S. Xerri	Geologist
Mr. E. Buttigieg	Director BED
Dr. Franca Giordimaina	Legal Officer, Works Department
Architect Robert Cachia	

Department of Contracts

Mr. Francis Attard	Director General (Contracts)
Mr. Anthony Cachia	Director (Operations)
Mr. Anthony Fava	Director (Contracts Division – Compliance)
Mr. Mario Borg	Procurement Manager

After the PCAB's Chairman's introduction, the appellants were invited to give a 'resume' of the motives behind the objection.

Prior to entering into the merit of this appeal, Dr Ellis drew the PCAB's attention that the procedure outlined under Article 83 of the Public Contracts Regulations was not followed. He explained that this was not a normal appeal where one tenderer is objecting against the General Contracts Committee's (GCC) decision to award the contract to a recommended tenderer; it is an appeal relating to the cancellation of a tender where it has been decided to discard the offers submitted by all five tenderers. Dr Ellis said that on 24 July 2007 the Works Division submitted a reply to their letter of objection dated 16 July 2007. The appellants' representative stated that he felt strongly about the fact that the written submissions should have ended after the communication of 24th July 2007 because the Regulations stipulate that 'within five working days from the publication of the letter of objection, any tenderer who had registered an interest may send a reasoned reply to the letter of objection.' He remarked that although it is a tenderer who has to send a reply, given the abnormal circumstances of this appeal, it is acknowledged that the other party shall have the opportunity to give its opinion on the matter.

Furthermore, Dr Ellis said that according to Regulation 83 (g), the Director of Contracts or the Head of the Contracting Authority shall prepare an Analysis report within ten working days of the publication of the replies and, that it was at this stage that all the relevant documentation had to be forwarded to the PCAB and to proceed with the hearing of the appeal. However, he contended that this procedure was not followed because after the issue of an Analysis Report on 8 August 2007, the Works Division sent another letter dated 10 August 2007 wherein they made reference to various issues which were neither mentioned in their reasoned letter of reply of the 24 July 2007 nor in the report of the Evaluation Committee, on which the General Contracts Committee based its decision to cancel the tender.

He maintained that what the Evaluation Committee did after the Evaluation report was irrelevant because the necessary groundwork should have been done at evaluation stage and not after. Dr Ellis insisted that this was a serious shortcoming on the part of the Evaluation Committee. The appellants' representative contended that, in the prevailing circumstances, the letter dated 10 August 2007 and the 'Addendum' to the Analysis Report should not be taken into consideration for the purpose of this appeal.

The Chairman, PCAB responded by stating that albeit note was taken of what had been stated, yet, it was pointed out that as a Board they were more interested in establishing the reasons that led to the decision regarding the cancellation of the tender. He claimed that the PCAB's decision making procedure included (a) an analysis of the files, reports and documentation forwarded to it, (b) the submissions made by the parties concerned during the sittings and (c) the witnesses' testimonies. It was claimed that the Analysis Report 'per se' was only a detail within the context of the entire deliberation process.

In reply to Dr Ellis' comments, Dr Franca Giordimaina, Legal Advisor to the Works Division, said that according to Regulation 83 (g), the Analysis Report had to analyse both the letter of objection and replies thereto. She explained that the Works Division submitted their letter of 10 August 2007 because the Department of Contracts' original Analysis Report did not include the views of the Evaluation Committee. She

sustained that the letter dated 10th August 2007 does not add anything to the one dated 24th July 2007 and that the Works Division simply wanted that Government's position be included in the Analysis Report so that the Appeals Board would have the views of both parties.

Although Dr. Ellis accepted that the views of both parties had to be included in the Analysis Report; yet, he insisted that the appeals procedure was not followed.

Dr. Ellis referred to the six points of the Evaluation Report handed to him by the Contracts Department on the 11th July 2007. Dr. Ellis commented that point no. 6 in the same Evaluation Report states that "Financial Identification form not completed." He referred to Clause 11.3 a) of the 'Instructions to Tenders' which requests that such forms had 'to be inserted ONLY in envelope number 3.' Dr. Ellis therefore insisted that, had his Company inserted this data in another envelope, it would have disqualified his tender. He claimed that this showed that the Evaluation Committee was not correct in its assessment.

Dr. Ellis quoted the last paragraph where *'the major shortcoming in this offer is that tenderer failed to submit authentic test certificates for the porfido materials. With regards to the Hardstone material certificates submitted with the tender, the results meet tender specification requirements with the exception for the Mean Relative Density which was not submitted.'* He referred to page 77 of the Tender document which states that *'a laboratory certificate is required, showing the petrographic examination of the stone and stating Density, Compressive strength and Water absorption.'* According to the appellants' representative, there was no mention that the test certificates had to be an original document. At this stage those present for the hearing were told that Messrs A.F. Ellis (Home Décor) Ltd brought the requested samples from their supplier in Albino, Trento. Dr Ellis exhibited *The Porphyry Manual* wherein it is stated that *'These results are based on data from Turin's Polytechnic's 'Dipartimento di Georisorse e Territorio'.*

With regards to point number 3 of the Evaluation Report dated 11th July 2007, where *'no test certificates for Porfido were provided. The only documentation supplied in this regard were copies from standard textbook regarding such materials'*. Dr. Ellis reiterated that the data was extracted from *'Il Manuale del Porfido'*.

The Chairman of the Adjudicating Board intervened and commented on the Interim Report dated 25th June 2007. He said that between this report and the next Evaluation Report dated 28th June 2007, there was the decision of the General Contracts Committee that none of the five bidders were technically compliant. In spite of this and the urgency of the project, it was decided to ask the permission of the General Contracts Committee to ask for further clarifications from the bidders. As already stated, the General Contracts Committee refused this and decided to cancel the tender.

The PCAB noted that the notion of urgency can be problematic. The Chairman of the Adjudicating Board was asked by the PCAB to explain why they needed to ask for further clarifications from the bidders. Furthermore he was asked to clarify what type of clarifications the Adjudicating Board had in mind.

The Chairman of the Adjudicating Board referred to the Interim Report dated 25th June 2007 where the Board listed 10 points that needed clarification on the tender submitted by A. F. Ellis (Home Décor) Ltd.

Mr. Farrugia noted that in point number 3 of this Interim Report, the Adjudicating Board felt that it needed further clarification on *'Article 6.1, wherein in page 45 it was required that a "contractor provides a written agreement through which the contractor declares that he is entrusting part of the contract to a third party". Furthermore, in view of the fact that the latter is a foreign source, it was suggested that "this sub-contractor provides a binding written statement that he would provide the necessary resources for the timely completion of this project, in the event that this tenderer is awarded this contract.'*

The Chairman of the Adjudicating Board then commented on point number 4 *'Test Certificates for the Hardstone paving date back to 2002'*. He claimed that the Board felt that '2002' was unclear and old. The PCAB intervened to question whether the Tendering document specified a particular date for such a certificate as, if the tender document did not specify any date, one cannot rule that a particular specification was not complied with once it was not requested *'ab initio'* and given that the nature of the material in question (*porfido*) cannot be expected to have changed much over the period.

The PCAB questioned the Chairman of the Adjudicating Board on point number 5, namely the one stating that the declaration *'regarding porfido source is not specific to this project and is undated.'* Again PCAB wanted to clarify what was actually requested in tender document.

At this point Dr. Ellis objected to the fact that the Interim Report being referred to in the hearing lists 10 points whilst the document the appellants received from the Contracts Department included only 6 points.

Dr. Ellis commented on point number 6, namely the one which states that *'No test certificates for porfido were provided. The only documentation supplied in this regard were copies from standard textbook regarding such materials.'* He claimed that Lavorazione Porfido L.P. S.r.l. declared that *'il materiale in porfido proposto e di ESCLUSIVA provenienza da cave site in TRENINO – ALTO ADIGE (ITALIA)'*. He claimed that although the same certificate makes reference also to granite, this shall not render the certificate invalid. Dr. Ellis informed those present that the certificates were received by fax from the supplier and at that stage they did not know that they were extracted from a book. The appellants' legal advisor proceeded by stating that on further request, the supplier sent an English version of the manual on porfido.

Dr. Ellis argued that according to clause 52 (2) of the Public Contracts Regulations, the *'Contracting authorities may invite the candidates or tenderers to supplement or clarify the certificates and documents submitted in terms of sub regulation (1) and regulation 49.'* He insisted that the regulations allowed the Adjudication Board to seek clarifications from bidders without the need to obtain prior authorisation from the General Contracts Committee. He sustained that article 52(2) gave the Contracting Authority, being either the Works Division or the Contracts Department, the possibility to consult the bidders without the consent of the General Contracts

Committee. Furthermore, the General Contracts Committee erred when it did not authorise this.

Mr. Farrugia commented that the Works Division could not accept the photocopies of the laboratory certificates for *porfido* as they were not authenticated or signed by the competent authority. He agreed that the tender document did not specify that the certificates had to be signed, but according to Mr. Farrugia, it is understood that any certificates have to be signed and authenticated. Irrespective of authentication, Mr. Farrugia sustained that even if the Board were to accept these certificates, the results do not meet the specifications in the tender document.

The PCAB questioned Mr. Farrugia on whether the ‘Manuale del Porfido’ is an authoritative book. Mr. Farrugia replied that there are several books on *porfido* and that this is one of them. The Works Division had downloaded a document from the internet ‘PORFIDO – THE NATURAL STONE’ on which basis they compiled the tender document.

Specific observations were made by the PCAB with regard to the fact that the level of the specifications listed in the commercial text downloaded from the internet was very high and that, as a result, none of the five bidders managed to attain these specifications. Mr. Farrugia admitted that the Adjudicating Board decided to lower these specifications in the ‘negotiating procedure.’ However the ‘negotiating procedure’ had to be halted because of this appeal.

Mr. Farrugia was asked by the PCAB to state whether this is the first instance that the Works Division had to issue a tender for the provision of *porfido*. Mr. Farrugia admitted that when Works Division had invited tenders for Republic Street, Valletta the specifications were lower. But this time around, the Division aimed at higher specifications to get the best on the market. He pointed out that there were other contractors whose specifications were very close and the test results for *porfido* material of one of the bidders was technically compliant for three out of the four categories, namely, bending strength, mean absorption and mean relative density - the only non compliant field was the compressive strength.

As far as the appellants’ tender is concerned, Mr Farrugia gave the following details when comparing the tender specifications with the data extracted from the book ‘Il Manuale del Porfido’:

	Compr. Strength (Dry) (N/mm ²) (MPa)	Bending Strength (N/mm ²) (MPa)	Mean Absorption (%)	Mean Relative Density (KG/m ³)
Tender Specs	280	> 24	0.8%	2550
A F Ellis	221.5 MPa	22.5 MPa	6.53%	2555

Mr Farrugia reiterated that none of the five bidders qualified for the tender and that this is the first time that the specifications were so high. The Adjudicating Board had even tested the samples submitted with tenders. Furthermore, Mr Farrugia said that the General Contracts Committee decided to cancel the tender and to adopt the

'Negotiated Procedure' with all eight bidders who collected the tender document (including those three who did not submit an offer).

The Chairman of the PCAB said that, in his personal opinion, he did not agree with such decision because if one were to resort to this 'modus operandi', one could erroneously give the wrong impression as to the real reason behind such a decision. He stressed that it was indispensable for the rules of the game to be known beforehand because public officials deal with public funds and public procurement and that, in the circumstance, everybody had to abide by the tendering procedures. Also, he felt that it was a commercial decision of the bidders concerned not to tender.

Dr Giordimaina intervened to remark that it might be appropriate if reference is made to the Director General (Contracts)'s letter where he indicated the reasons why the negotiated procedure was initiated with all bidders who purchased the tender document.

Dr. Ellis objects to the fact that the 'Negotiating Procedure' was issued and opened to those who did not even submit the tender. He claimed that if their appeal were to be withheld, the bidders concerned would be integrated in the negotiated procedure.

When specifically asked by the PCAB to state whether it was acceptable that the standards indicated in the manual of *porfido* fell short of the tender specifications, the reply given by Dr Ellis was in the negative. He remarked that, apart from the above stipulated four requirements, bidders were also requested to give the values of '*Impact resistance 61 cm*' which was not mentioned in their letter dated 10th August 2007. When pressed by the PCAB, Dr Ellis said that the only item that did not meet the specifications was the compressive strength. With regard to the water absorption, the appellant bidders alleged that the Evaluation Committee had misinterpreted the figures because theirs was 0.653% and not 6.53% and so it was less than 0.8% as requested in the specifications. With regard to Impact resistance, he said that their certificate result showed that it was 62 cm whilst the tender required 61cm.

Dr. Ellis presented the PCAB with papers on compressive strength of *porfido* mined in Argentina which showed that it was the same as that mined in Italy. He argued that if the Contracting Party included high specifications in the tender document, they should sustain it with data that such *porfido* can be found on the market. Dr. Ellis argued that it is not ethical to draw up the specifications from material downloaded from the internet and then refuse extracts from the 'Manuale del Porfido' which was an authoritative book.

When Dr Ellis mentioned the fact that the evaluation report sent to them contained only six points and that it was stated that '*The major shortcoming in this offer is that tenderer failed to submit authentic test certificates for the porfido materials*', Mr. Farrugia remarked that the appellants were furnished with an extract of the Evaluation Report and that in their report it was made clear that '*On close inspection of test certificates results in 'Ref. 1', it is evident that none of the submitted test certificates incorporate a satisfactory compressive strength value.*'

When, during the hearing, Dr Ellis was furnished with the ten-point Evaluation Report he pointed out that point 3, which referred to article 6.1 where it was stated that a contractor was required to provide '*a written agreement through which the contractor*

declares that he is entrusting part of the contract to a third party. On this particular issue, Dr Ellis insisted that this article was not part of the tender but was part of the draft agreement that the successful tenderer had to sign with the Department of Contacts.

Mr. Farrugia confirmed that the testing on the samples was carried out on the 21st June 2007 by Mr. Azzopardi and Mr. Montecin at the Building and Civil Engineering Department of the University of Malta. Mr. Farrugia commented that they did not reach the average of 280 Compressive Strength. He presented a copy of the signed Laboratory Report.

The PCAB enquired on the new 'Negotiated Procedure'. Mr. Farrugia explained that the Works Division had prepared a new tender document which included lower specifications. They included the 5 existing bidders (who were given the chance to retain the same samples) together with the other 3 bidders who collected tender document.

Architect Spiteri from the Works Division, explained that there may be a slight discrepancy between certificates submitted by foreign laboratories and those from the University of Malta because the latter only tests representative samples from a whole quarry. He said that testing is carried out just for indication purposes and that was the reason why bidders are required to submit authentic test certificates. He said that under normal circumstances they do not test samples, but this time tests were required to sustain the decision of the Adjudicating Board.

When Mr Francis Attard, Director General Contracts, was asked by the PCAB to explain what is implied by a 'Negotiated Procedure', he stated that the regulations permitted Contracting Authorities to request an offer from tenderers of their choice. He explained that in view of the fact that the specifications were revised, all prospective bidders were required to purchase the tender document.

Mr Attard claimed that although eight bidders had originally collected the tender documents, only five submitted their offer and these were all non-compliant with the specifications. The other three might have not tendered because they did not have a material that met the specifications. Therefore, once the required standards were not met, the General Contracts Committee felt that they should give the opportunity to all those who showed interest in supplying the material and carry out these works. At this stage Mr Attard confirmed that the five bidders could change their financial offer.

Dr Ellis intervened by stating that Regulation 71 of the Public Contracts Regulations specifies that a 'Negotiated Procedure' may be resorted to in the event of irregular tenders or unacceptability in terms of the pertinent regulations and *'in such cases a contracting authority may refrain from publishing an EU contract notice where it includes in the negotiated procedure all and only the tenderers who satisfy the criteria of regulations 45 and 49 to 52'*. He argued that, once there was no prior publication of an EU contract notice, the GCC could not carry out the 'Negotiated Procedure' and include those contractors who had not submitted a tender. Such negotiated procedure should have been limited to those who had originally submitted their offer. He insisted that alternatively they should have issued a fresh call for tenders with new specifications.

Dr Ellis maintained that it was so impossible to meet the specifications of the compressive strength that in the Negotiated Procedure the Department itself decided to reduce it from 2800 to 1800, that is, 40% less. Mr. Farrugia pointed out that none of the bidders had ever questioned the Contracting Authority on the specifications of the *porfido*. In reply to specific questions by the PCAB, the Chairman of the Adjudication Board said that they included such specifications because the Contracting Authority was aiming high and confirmed that in the past there were instances where *porfido* was imported from Argentina. The PCAB questioned whether this could be interpreted to mean that the Contracting Party is accepting the second best.

The PCAB agreed that the document may be either in book form, or either partially or fully downloaded from different sources on the internet. However, the crux of it all is that the document had to be accountable, coming from whatever source.

Dr. Ellis reminded the PCAB that the appeal was made on the basis of the reasons behind the cancellation of the tender by the General Contracts Committee. Dr. Ellis argued that after the 24th July 2007 the Works Division shifted the goal posts. He referred to certain inconsistencies including the fact that the documents downloaded from the internet were not authenticated. Their tender was ‘inter alia’ disqualified because it was not authenticated.

Dr. Giordimaina quoted Article 25 in the Tender document where one can find the reasons for the cancellation of a tender, which, taken in the context of this tender, justify the cancellation as no bidder met the specifications.

When Mr Farrugia was asked by the PCAB to state whether they had ever been contacted by those bidders who had collected the tender document and explained to them why they did not submit their tender, the reply given was in the negative.

In reply to a specific request by Dr Ellis, the PCAB informed the parties concerned that there was no need to send written submissions because they had sufficient information to deliberate upon.

In his concluding remarks, Dr Ellis contended that during these proceeding he had proved that the Adjudication Board could seek clarification without prior authorisation from the GCC. He said that the appellants’ assertion that they could not depart from the specifications was unfounded because clause 20.1 of the *Instruction to Tenders* specifies that

‘A tender is deemed to comply if it satisfies all the conditions, procedures and specifications in the tender dossier without substantially departing from or attaching restrictions to them. Substantial departures or restrictions are those which affect the scope, quality or execution of the contract, differ widely from the terms of the tender dossier, limit the rights of the Contracting Authority or the tenderer’s obligations under the contract or distort competition for tenderers whose tenders do comply. Decisions to the effect that a tender is not technically compliant must be duly justified in the evaluation report.’

He contended that in the evaluation report there is no justification that the tender is not technically compliant.

Dr Ellis said that point 1 of the Adjudication Board's ten point report gives the impression that the financial offer had already been opened. He claimed that the requirement mentioned under point 2 regarding the inclusion of original documentation in their bid was not requested in the tender document while the third point refers to a contract which still needs to be signed by subcontractor after award of the contract and not at this tendering stage. As far as point 4 is concerned, the appellants said that the fact that test certificates for the hard stone paving dates back to 2002, such an argument is irrelevant because the most important thing was that it was found according to specifications after testing. With regard to points 5 and 7 which state that the '*Declaration regarding porfido source is not specific to this project and is undated*' and 'Mean Relative density of Hardstone materials not given' respectively, Dr Ellis said that the Adjudication Board could have asked for clarifications. On point 6 the appellants' representative failed to understand why the specifications were not based on the standard text book once this was available. He claimed that there was no problem on point No 8 once it was stated that '*Hardstone samples submitted as requested in tender specifications*'. With regard to point 9 which refers to the Porfido samples, Dr Ellis said that in view of the question '*Can tenderer confirm that they will be in a position to meet tender specification requirements in size and thickness considerations fully?*' it appears that this is not the final report of the Adjudication Board because it seems that the latter was still seeking a clarification. On point 10 'Financial Identification form not completed', Dr Ellis claimed that this specifically requested to be inserted in the Financial offer (Package Three).

Finally, Dr Ellis referred to the concluding statement of the so-called ten point report which states

'the major shortcoming in this offer is that tenderer failed to submit authentic test certificates for the porfido materials. With regards to the Hardstone material certificates submitted with the tender the results meet tender specification requirements with the exception for Mean Relative Density which was not submitted'

According to the appellants' legal advisor, the appellants are of the opinion that the Adjudication Board should have sought the necessary clarifications 'ab initio'.

Mr Farrugia said that the Adjudication Board could have lowered the level of the original specifications during the evaluation process. When asked by PCAB to state whether the new specifications were technically acceptable and good value for money, Mr Farrugia replied that the new specifications are similar to those which were issued for Republic Street, Valletta. Also, according to Mr Farrugia, the new specifications would not make the product inferior to the one requested in the previous tender.

Mr. Farrugia and Mr. Attard confirmed that the 'Financial' envelopes are still sealed at the Department of Contracts.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, first through their formal letter of objection dated 16.07.2007, and also through their verbal submissions presented during the public hearing held on 17.08.2007, had objected to the decision taken by the General Contracts Committee;
- 2 having noted the appellants' discord with the points referred to in the *Evaluation Report*;
- 3 having noted the wording of all documentation submitted, particularly the *Tender Document* and the *Evaluation Report* and subsequent recommendations made;
- 4 having also considered the issues raised and comments made by the Contracts Department's representative;
- 5 having taken cognizance of the fact that the General Contracts Committee decided that none of the five bidders were technically compliant;
- 6 having considered the points raised by members of the Adjudication Board during the hearing and the points listed in the *Evaluation Report*;
- 7 having taken note of the questionable methodology adopted by the contracting authority which, to a great extent, relied on specific documentation downloaded from a particular site, to draft the contents of the tender *dossier*;
- 8 having considered that, during the hearing, the said specifications were referred to by key members of the Adjudication Board themselves as 'perhaps' being quite high, impeding bidders from being in a position to fulfil in their entirety requested terms and conditions;
- 9 having noted the fact that, the Adjudication Board, having realised that the levels aimed at in the original tender *dossier* were not reachable, decided to downscale the specifications in the 'negotiated procedure', which procedure was meant to apply to all the eight bidders who had collected the tender document (including those three who did not submit an offer);

concludes, that

- a. recognising that public contracts are a serious issue in view of the utilisation of considerable amounts of public funds, the question of (1) value for money, (2) a highly transparent procedure and (3) a high degree of attention, given by all parties concerned, to detail during the drafting of the tender document as well as in the entire adjudication process is considered to be equally important as the extent of urgency of any particular tender.

This Board feels that a proper and more professional approach by a contracting authority's public official/s is highly imperative as eventual delays in the final adjudication of tenders could turn out to be a costly exercise, a waste of human resources as well as, possibly, an inconvenience to the general public;

- b. this Board cannot favourably consider the option of a tender's specifications being downscaled just because those specifications forming part of the original *dossier* were subsequently considered to have been so high that no participant

could possibly ever meet. Such a theory could send the wrong signal/s with regards to the holistic view of a total transparent and professional procedure in the adjudication of tenders. A ‘negotiated procedure’, whilst generally permissible, at this stage is deemed to be a potentially flawed solution for one to resort to. This line of reasoning becomes more intricate when one considers that, whilst it is true that it has been suggested that all the eight bidders who had originally collected the tender document would be called to participate in the ‘negotiated procedure’, yet one could question how fair would this be in view of the fact that three of these bidders had desisted, for their own reason, to proceed with an actual submission of offer, which, *per se*, could be considered as a commercial decision in its own right. Such a remedy could cast doubts on why should anyone be given a second chance to reconsider.

However, one could also argue that these bidders could have refrained from proceeding with the submission of offer having considered the original terms and conditions as unreachable.

Yet, what about other potential participants who could have simply decided not to collect the said document, let alone submitting the bid, following, say, possible verbal discussions with any other participant who, either simply collected the document, or went as far as to submit the bid?

- c. it would be wrong for this Board to give the impression that it is there to remedy awkward situations brought about by any of the interested parties, solely, by (1) a lack of attention to detail during the drafting of the tender document’s terms and conditions, as well as (2) erroneous assumptions as to potential repercussions one could come across in the future.

As a result of the above-mentioned points, this Board decides that, whilst urging the contracting authority to expedite procedure, as much as possible, in order to minimise the inconvenience to the public at large, the contracting authority should re-issue a fresh call for offers in order to ensure that there is complete transparency and fairness in the procedure. Needless to say that a thorough analysis should initially be conducted in order to ensure, *inter alia*, that potential participants would be able to meet the tender’s specifications and general terms and conditions. Furthermore, it is highly important that specifications should still reflect a high degree of value for money to the ultimate taxpayer as well as the prime beneficiary of the service – the public at large.

Furthermore in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of regulation 83, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

03 September 2007