PUBLIC CONTRACTS APPEALS BOARD

Case No. 138

CT 2075/06 – Adv No 381/07Tender for the Reconstruction of Marsascala Bypass, Marsascala/Zabbar

This call for tenders was, for a contracted value of € 10,307,477 (excl. VAT) was published in the Government Gazette on 30.10.2007. The closing date for this call for offers was 20.12.2007.

Four (4) different tenderers submitted their offers.

Following the publication of the 'Notification of Recommended Tenderers', Schembri Joint Venture Ltd filed an objection on 24.09.2008 against the decision by the General Contracts Committee against the intended award of tender in caption to Bonnici Brothers Ltd.

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 three (3) public hearings on 04.11.2008, 14.11.2008 and 25.11.2008 to discuss this objection.

Present for the hearing were:

Bonnici Brothers Ltd

Dr Adrian Delia	Legal Representative
Dr John Gauci	Legal Representative
Mr Reuben Aquilina	Architect
Mr Mario Bonnici	
Mr Emmanuel Bonnici	

Asfaltar Ltd

Dr Michael Sciriha	Legal Representative
Dr Franco Galea	Legal Representative
Mr Paul Magro	Representative of Asfaltar Ltd
Mrs Sandra Magro	Architect

Malta Transport Authority

Dr Duncan Borg Myatt	Legal Representative
Mr Paul Buhagiar	Director ADT, Architect and Adjudication Board Member
Mr Vince Micallef Pule	Adjudication Board Member
Mr Mario Ellul	Consultant Architect

Schembri Joint Venture Ltd

Dr Kenneth Grima	Legal Representative
Mr Marjohn Scicluna	Architect

Contracts Department

Mr Francis Attard	Director General

After the Chairman's brief introduction, Dr Kenneth Grima, legal representative of Schembri Joint Venture Ltd, the appellant Company, was invited to explain the motive of the objection. This was followed by interventions by representatives of the representatives of the Malta Transport Authority (the Contracting Authority), and Bonnici Brothers Ltd, the awarded tenderer.

Dr Grima commenced his intervention by quoting from Section 30.1- page 40 - ('Criteria for Award') of the tender document, viz:

> *The Evaluation Committee will select the tenderer who has submitted the total lowest bid satisfying the administrative and technical criteria.*

Dr Grima argued that since one was dealing with a government tender involving taxpayers' money, the tender document provided that, so long as,

a. a contractor was competent to execute the job ***and***
b. the bid of that contractor was the lowest

anything else that followed was to be considered subsidiary to the fundamental provision found in Section 30.1. He added that it had been established that the offer made by Schembri Joint Venture Ltd was the lowest by 1 million euros (approximately Lm 400,000) compared to that of the awarded tender. Dr Grima added that all the other tenderers participating in stage 3 of this tendering process were found to be technically and administratively compliant and that both his client and Asfaltar Ltd had executed other road works.

Dr Grima proceeded by stating that one of the reasons given for the exclusion of the bid made by Schembri Joint Venture Ltd was that it did not mention the leader of the joint venture. He remarked that that was incorrect and unbelievable because four documents had been submitted wherein the leader of the joint venture was clearly indicated.

Dr Duncan Borg Myatt, legal advisor of the Malta Transport Authority, the Contracting Authority, explained that the *tender submission form* referred to by the Department of Contracts in its communication pertained to envelope 2 which document was correctly filled in and therefore Schembri Joint Venture Ltd was not at fault in that respect.

The Chairman PCAB observed that the question as to whether the appellant Company had indicated the lead partner or not, which was one of the reasons for the exclusion of the said tender, had been clarified just a few minutes before the hearing when that point could or should have been ironed out during the various stages of the tender evaluation process.

At this stage the Chairman, PCAB, also wondered how was it that the Adjudication Board was attributing the non-submission of information on the leading partner in envelope 3 as one of the reasons for the rejection of the tender in question when the same Adjudication Board had already been given this information in envelope 2.

Dr Duncan Borg Myatt explained that a paragraph in the tender declaration in envelope 3 was not filled in and that shortcoming was communicated to the tenderer by the Department of Contracts. He added that if one referred to the tender submission form in envelope 2 one would find that the part relevant to the leading partner was properly filled in and, in fact, he had informed the PCAB that this issue was being dropped.

Dr Delia, legal representative of Bonnici Brothers Ltd stated that two different documents were required - both had to be properly filled in. The same legal advisor argued that the fact that the tender declaration form was not entirely filled in was not the Contracting Authority's fault but it was the tenderer's and, as a consequence, that tender could not advance further.

Dr Grima explained that in spite of the fact that his clients had already clearly indicated elsewhere, at an earlier stage, in envelope 2, the leading partner, nonetheless, it had been decided to reject his clients' tender on this trivial issue when it could have been settled by a simple clarification.

At this point Dr Grima moved on to the non-submission of the *day work* schedule and of the *cash flow payments* schedule, which, according to the Director of Contracts and the Adjudication Board, led to the disqualification of his clients' offer.

With regards to the *Cash Flow Payments* Schedule, albeit not an accountant by profession, Dr Grima contended that, in his view, it was the Company executing the works that could have cash flow problems and not the Contracting Authority. He remarked that the tenderer could not dictate to the Contracting Authority the manner in which it should pay the contractor, in fact, the tender document, in Article 43 (page 171), stipulated how payments to contractor were to be effected. Dr Grima observed that, in most instances, government did not stick to the payment schedule that it stipulated in the tender documents governing its contracts. Therefore, Dr Grima argued that it did not make sense that a tenderer should be disqualified for not submitting how it expected to be paid by the Contracting Authority. On the other hand, he contended that the tenderer ought to be disqualified if he requested something different from that laid down in the tender document. Dr Grima added that the tenderer had only to indicate the amount because the method of payment was left up to the Contracting Authority, e.g. so many days after the certification of works. Dr Grima contended that one could not reject a bid on such a trivial omission like the cash flow payment schedule which involved a few details when the contract itself already contained numerous provisions that catered for everything.

Dr Grima opined that this provision was inserted in this particular tender document because tenderers had the option to request pre-financing from government of up to 20% of the cost of contract, equivalent to about Euro 2 million. Dr Grima argued that it would have made sense to request the cash flow payments schedule in the case of a tenderer opting for pre-financing because in that way the tenderer would indicate to the Contracting Authority when he was going to avail himself of those funds. Dr Grima stated that Schembri Joint Venture Ltd did not request pre-financing but had agreed to be paid according to the provisions of the tender document and, as a result, there was no need for the appellant Company to submit the cash flow payments schedule.

Dr Grima stated that the Contracting Authority requested certain things which, semantically, did not make sense. Such was the case in so far as the request of a day work schedule in the rare event of unforeseen works not covered by the bill of quantities, emphasised the appellants' legal advisor. He contended that it involved basic mathematics to extract the day work rates from the rates already given in the bill of quantities.

Dr Grima remarked that it appeared that the Adjudication Board was questioning minor details to exclude a tenderer who requested 1million euros less than the awarded tenderer to do the same job.

The appellant Company's legal advisor held that the provisions of the tender document were binding to all sides, i.e. the Contracting Authority, the Adjudication Board, the Department of Contracts and the contractors. Once again, he made reference to the provisions of section 30.1 and his interpretation thereof was that a substantially compliant bid could not be discarded. Dr Grima wondered how the Adjudication Board and the Director of Contracts decided that the omission of minor details should lead to the disqualification of a tenderer.

Dr Grima claimed that transparency and fairness dictated that the best offer, i.e. the offer that was substantially in order, technically and financially, should have been awarded the contract.

With regards to the objection filed by Asfaltar Ltd, Dr Grima noted that, during the other hearing session, Architect Paul Buhagiar, a member of the Adjudication Board, was unable to explain what the *rare* and *unforeseen circumstances* stood for because no one could tell what something unforeseen could be. This, notwithstanding, stressed Dr Grima, tenderers were expected to indicate prices for something that was both *rare* and *unforeseen*.

Dr Grima argued that the Malta Transport Authority, and previously the Roads Department, has been including in the standard tender document all the unforeseen events that it had been encountering in the course of the various road works carried out over the years. Dr Grima stated that, according to the awarded tenderers, these had provided for the so-called *rare* and *unforeseen works* by submitting a list of labour, plant and equipment, which, from what he could gather, represented the same items found in the bill of quantities. As a consequence, Dr Grima contended that if what was listed in the day work schedule of the awarded tenderer was also included in the bill of quantities then the list presented was irrelevant because it provided no additional information/items of labour and equipment. Dr Grima recalled that during the previous hearing session related to the other appellants' objection, Architect Sandra Magro, representing Asfaltar Ltd, the other appellant Company, had noted that the list submitted by Bonnici Brothers Ltd was not exhaustive, mentioning in particular, the fact that such list did not include a *tunnel boring machine*. Dr Grima pointed out that the works were not only unforeseen but rare, so rare that they never arose in previous road works otherwise they would have eventually been included in the bill of quantities.

Dr Grima argued that, when adjudicating a tender, the overriding factor should be to get the best value for money and one could achieve that by ensuring that the work

would be carried out by a competent entity at the lowest price. The important factor was that the tenderer had to be substantially compliant and that did not mean that the tenderer had to be 100% compliant but that it was more compliant than not. Dr Grima observed that the counter complaint filed by Bonnici Brothers Ltd, the awarded tenderer, held that it did not matter that the price was lower – his clients' offer was one (1) million euros lower than the awarded tender and it was equally compliant, both technically, as well as, administratively - but the important thing was that the offer of Bonnici Brothers Ltd was within the estimated cost of the tender indicated by the Contracting Authority.

Dr Duncan Borg Myatt, legal representative of the Malta Transport Authority (MTA) explained the difference between the MTA and the Adjudication Board, in the sense that the latter was appointed to adjudicate the tender according to the tender document which was drawn up by the MTA. The Adjudication Board was required to make its recommendations on the basis of the provisions of the tender document. He agreed with Dr Grima that the tender document bound all the parties and, as a result, the Adjudication Board could not have acted outside the provisions of the tender document otherwise its actions would have been subject to an objection.

Dr Borg Myatt explained that in page 29 of the tender document there were listed the documents that had to be submitted in package 3.

At that point, Dr Grima quoted from chapter 26 (page 38) of the tender document, namely:

> *Tenders which are incomplete, conditional, illegible, and obscure or contain unrequested additions or other irregularities <u>may</u> be rejected.*

Dr Grima added that the tender '<u>may</u>', not '<u>should</u>', be rejected in all the circumstances mentioned in that clause and not as the other side was contending. Dr Grima stated that discretion ought to be used judiciously. He argued that one may submit a tender with some things missing but it would still be substantially complete. Dr Grima argued that the important clauses, such as the interpretation clause and the general conditions, of any document were found at the beginning of the document. Dr Grima then went on to quote from page 38 of the tender document, namely:

"27.2 - 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:

> *27.2.1 in any way influence the scope, quality or execution of works, or*
> *27.2.2 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*
> *27.2.3 – rectification of which would unfairly affect the competitive position of other Tenderers presenting admissible tenders"*

Dr Grima argued that those were the only grounds for exclusion and contended that none were applicable in this case. He recalled from the other hearing, concerning the objection raised by Asfaltar Ltd that the architect who had intervened on behalf of

Bonnici Brothers Ltd, had confirmed, under oath, that the rates they quoted in the day work schedule were, in essence, the same rates quoted in the bill of quantities. Therefore, Dr Grima remarked that, once Schembri Joint Venture Ltd quoted only the rates of the bill of quantities and Bonnici Brothers Ltd, the competitor, quoted the same rates both in the bill of quantities and in the day work schedule, then no one was unfairly affected.

Dr Grima explained that an unforeseen circumstance could be either a 'modification' or a 'variation'. "Otherwise, what else could it be", questioned Dr Grima! Dr Grima added that the tender document already dealt with the issues of modifications and variations and how these were to be paid for.

On the other hand, Dr Borg Myatt intervened to point out that clause 8.3 (page 25) of the tender document stated 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.*

Dr Borg Myatt stressed that, in this instance, there was no discretion and that the tender had to be rejected.

He added that, with regard to envelope 3, the Adjudication Board was bound to find all the documents mentioned in page 29, including the cash flow payments during the project mentioned in 14.3.2.12.

Dr Borg Myatt and Architect Buhagiar explained that the cash flow payments were required so that the Contracting Authority would know when payments were to fall due, in other words, indications were to be given of the payments due according to the programme of works submitted in envelope 2. Dr Borg Myatt continued that, since this contract involved funds from the EU, then the Contracting Authority required this information in order to submit claims against these EU funds.

At that point Dr Grima asked Mr Buhagiar to indicate where, in the tender document, reference was made that the cash flow payments during the project were required in connection with EU funds. Dr Grima made reference to the provisions under the title 'Payments' in page 9 of the tender document where it was laid down how payments were to be effected.

The Chairman, PCAB, queried about

a. what was being requested from tenderers apart from those provisions *and*
b. if the tenderer could deviate from those provisions.

Architect Buhagiar explained that what they requested was a breakdown of the interim payments amounting to 90% of the value of the works certified as indicated in para (b) in the apposite form (covering payments in the first and successive months) according to the programme of works submitted by the contractor. He further

explained that, in envelope 2, the tenderer had to submit the *programme of works* broken down in phases whereas, in envelope 3, the tenderer was asked to submit the projected payments in relation to the planned execution of works. Architect Buhagiar insisted that, in accordance with clause 8.3 (page 25), the Adjudication Board had to ensure that this document had been submitted. Mr Buhagiar explained that the value of works was not spread evenly according to the timeline of the project because there were certain works, for example, asphalting works, which albeit carried out in the last phase of the project, yet they represented a good part of total expenditure.

When the PCAB asked if one could extract the day work rates for labour and construction plant from the rates given in respect of the bill of quantities, Mr Buhagiar answered that one could not do that.

Dr Adrian Delia, legal representative of Bonnici Brothers Ltd, remarked that the documents that governed these issues were the general law, the Public Contracts Regulations, the tender document and the decisions of the PCAB. He argued that there was no legal backing to the appellants' claim that what was being requested by a Contracting Authority was not binding on the part of the tenderer.

Dr Delia stated that he agreed with what Dr Borg Myatt said with regard to clause 8.3 and he referred to the four documents that were being specifically requested in page 29 (para. 14.3.2.10 to 14.3.2.13), of which, Schembri Joint Venture Ltd failed to submit two in envelope 3. Dr Delia remarked that the various provisions in the tender document quoted by the appellant Company had no relevance to the objection and were to be discarded.

Dr Delia mentioned sections 26, 27 and 28 which had to do with technical compliance so much so that para. 28.5 stated that:

> *Upon completion of the technical evaluation, the financial offers for tenders which were not eliminated during the technical evaluation will be opened.*

Dr Delia reiterated that the appellants' offer was found compliant in stages 1 and 2 but then failed in stage 3. At that point, Dr Delia quoted from his reasoned letter of reply dated 14th October 2008 with reference to the PCAB's decision in a previous case relating to tender reference CT2202/05 MMA/C/15/96 wherein it was declared and decided that …

> *"the Board could neither excuse the Appellant from what he wrongly considers to be a genuine oversight nor accept his view that the error committed as a trivial one. According to the Board, the instructions of separated tender packages were clear, amply stressed and not subject to possible different interpretations…..Furthermore, the Board is not statutorily competent to consider, let alone uphold, any pleas or appeals merely on grounds of clemency. In the light of these several considerations, the Board had no alternative other than confirming the decision taken by the Contracts Committee, namely that…tender should be disqualified and also discarded for breaching the instructions given…"*

Dr Delia cited also PCAB case 92 i.r.o CT/2204/2006 as follows:

> *"This Board in fact interprets this rule quite categorically and the sole admission by an Objector that not all terms and conditions of the tender document were adhered to should lead to its automatic disqualification:*
>
> > *"appellants' own admission that they had not fully complied with all tender requirements is, 'sui generis', pretext enough for this Board to exclude the appellants from an eventual award of this tender"."*

Dr Delia repeated that four documents were required, two were submitted and the other two were not submitted. He added that with regard to the term 'unforeseen', according to him, the appellants wrongly chose to tie that term to the classes of labour and construction plant whereas what was unforeseen, in his opinion, were the events.

Regarding the cash flow payments during the project, Dr Delia remarked that the appellant Company did not seem to understand their purpose and, as a consequence, did not consider them necessary.

He argued that it was not within the responsibility of the Adjudication Board to go into what the appellants had in mind but its duty is to see that what the Contracting Authority requested was in fact submitted.

Dr Delia added that it was not true that these types of documents were being requested for the first time because these have been requested since 2004.

The awarded tenderers' legal representative proceeded by contending that, in

a. envelope 2, the tenderer was requested to submit a programme as to how the works were going to be executed

and

b. envelope 3, the tenderer was requested to quantify that *programme of works* in monetary terms.

Dr Delia further submitted that the appellants apparently did not understand what was required of them in this case. However, Dr Delia argued that the same appellant Company had the opportunity to seek a clarification but it chose not to and instead they arbitrarily decided that it was not necessary and, therefore, did not submit what was requested.

Dr Delia added that it would be unfair and, even unjust, if the tenderer that abided by what was requested in the tender document were to be sidelined for doing so.

The same lawyer argued that, *per se*, 'unforeseen' referred to something 'unknown' and, therefore, it was useless for anyone to insist on being told what *unforeseen events* were. He added that the rates were requested and required so that, if an unforeseen event occurred, then the Contracting Authority would know what rates in respect of labour and equipment normally used in road works would be applicable. Dr Delia insisted that, even in this case, the appellant Company could have sought a

clarification but it chose not to. Dr Delia stated that it should not go unnoticed that these two requirements constituted 50% of the documents that were required in the financial package.

Dr Delia said that in spite of the fact that the appellants declared that their bid was the cheapest, yet, that was based on the two requirements submitted with the financial offer without taking into account the other two requirements which were not submitted. Dr Delia argued that, at that stage, one could not tell the price of the offer submitted by the appellant Company.

The awarded tenderer's legal advisor stated that he was not arguing against the fact that the appellants were compliant in the requirements of packages 1 and 2 but that they were not compliant in package 3 and, as a result, had to be disqualified according to the tender conditions. Dr Delia explained that through the *3 package system* the tenderer had to qualify from each stage and, as a consequence, if the appellant Company failed in the third package due to the non-submission of requested documents, then, in these circumstances, a bid could not be favourably considered for award. He stated that when the Adjudication Board noted that two documents had not been submitted it had no discretion in the matter so it had to disqualify that tender.

Dr Delia disagreed with the appellants' argument that the cash flow payments schedule was tied to pre-financing facilities because one had nothing to do with the other.

Dr Franco Galea, legal representative of Asfaltar Ltd, an interested party, noted that both presently and during the previous hearing, the issue of lack of communication between the Contracting Authority and the Department of Contracts was highlighted. He recalled how, at one stage, it was claimed that Asfaltar Ltd had not submitted certain documents when in fact it had submitted them.

Dr Grima argued that what was being said, in the sense that every single thing had to be submitted otherwise one would be disqualified, was not true both at law and for the purpose of transparency. He referred to the general conditions / principles of the tender where it was stated that government had the right to refuse all tenders or that government could opt for the highest offer or, for that matter, any other offer.

The Chairman PCAB remarked that, for correctness sake, Government had the right to do that but not the Adjudication Board.

Dr Grima stated that, in order to ensure that the award of tender was carried out correctly, one had to look at the pertinent section 30 (page 40) of the tender document, i.e. 'The Criteria for Award'. He stated that what was being disputed was the fact that the tender was awarded to a bidder whose bid was one million euros higher than that of his clients, therefore, his contention was about the award of the tender.

At this stage, the Chairman, PCAB, queried whether the Contracting Authority had the right to request something and whether the tenderer had the discretion to decide whether to submit the requested information or to choose the form in which to submit the information.

Dr Grima stated that the Contracting Authority had the right to request something and in the form it so desired but the 'contract' conditions did not state that if there was something missing someone would be disqualified. He reiterated that his clients were objecting for not being awarded the tender and again quoted Section 30.1 under 'Criteria for Award' (page 40) of the tender document, namely:

> *"The Evalutation Committee <u>will</u> select the tenderer who has submitted the total lowest bid satisfying the administrative and technical criteria."*

Dr Grima contended that the 'evaluation committee' (Adjudication Board) had no discretion there because it was Government that had discretion with regard to award and it was the Government, through the General Contracts Committee, that, ultimately, would award the tender. He continued that, as a result, the 'evaluation committee' had to select the cheapest compliant tenderer.

The appellant Company's legal advisor argued that, whilst it is true that Government seeks the advice of the 'evaluation committee', yet, then, it remains its choice as whether to heed or not to the advice given citing, for instance, the fact that Government could be unwilling to spend more than was necessary, in this case 1 million euros.

Dr Grima reiterated that his client Company's bid was in fact the cheapest bid and that it satisfied the administrative and technical criteria, otherwise it would not have qualified to stage 3. At that point he quoted from section 24.3 (page 36):

> *"Prices will be opened following the administrative and technical evaluation, dealing with the acceptability or otherwise of the documents submitted in packages 1 and 2."*

He proceeded by arguing that, once the Adjudication Board opened the prices, then it had accepted that his clients' bid was administratively and technically compliant.

The Chairman, PCAB asked who was to decide about compliance with regard to package 3 in the light of the fact that two requirements were not submitted with the financial offer, in other words, "How many documents would render the submission non-compliant in respect to package 3 compliant … one, two, three <u>or</u>, say four out of four?", emphasised the PCAB's Chairman.

Dr Grima contended that in this tender document there was specified what was substantially required, the *sine qua non* type, because in every law one had certain things which were more important than others. He added that the important factors were 'administrative' and 'technical' compliance and the other important issue was the 'price', which, in the case of his clients, was cheaper by 1 million euros.

The Chairman PCAB asked again how serious a deviation was it to have two out of four documents missing in package 3 and also noted that the interpretation that the appellant Company was giving to section 30.1 seemed to be subject to some proviso which was missing.

Dr Grima stated that one had departed on the wrong premise in the sense that the awarded tenderer had stated that the appellant Company did not submit that information. Dr Delia retorted, arguing that it was the same appellant Company that had admitted to such an omission.

The appellants' legal advsior remarked that both his client and Asfaltar Ltd, through Architect Magro, had stated that they did submit the information requested but what they did not submit was a sheet of paper containing the list of classes of labour and construction plant. He contended that what the tender had requested on that list had been submitted by his clients in greater detail elsewhere in their submission.

At this point Dr Grima quoted from page 38 of the tender document, viz:

> 'Section 27 *'Checking of Tenders and Their Compliance with the Requirements of the Tender Documents'*
>
> > *27.2 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:*
> >
> > *27.2.1 - in any way influence the scope, quality or execution of works,*
> >
> > *or*
> >
> > *27.2.2 – 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*
> >
> > *27.2.3 – rectification of which would unfairly affect the competitive position of other Tenderers presenting admissible tenders.'*

Dr Grima claimed that none of these cases arose.

The Chairman, PCAB, intervened and referred those present to 27.3 which stated 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.'*

Dr Grima maintained that his clients had met the requirements of the financial evaluation grid in the tender document (Volume 1 Section 6: Evaluation Grid and other Annexes) which even contained the total tender amount which the awarded tenderer had claimed that it was not given in the tender document. Moreover, Dr Grima stated that unforeseen events had to refer to variations or modifications once one was dealing with road works.

On cross examination, Architect Buhagiar declared that

a. he had been attached to the Malta Transport Authority (MTA) for two and a half years;

b. he was involved in scores of road works;

c. he had read the tender document in question and that he was aware of section 27 regarding a tender being substantially compliant;

d. the Adjudication Board had sought the advice of experts, among them, Architect Mario Ellul, a MTA employee, to carry out a comparative analysis of the offers and the financial controller of the same Authority to report on financial matters;

e. the Adjudication Board was made up of

i. Engineer Paul Cardona (Chairman)
ii. Architect Henry Sultana
iii. Architect Paul Buhagiar (himself)
iv. Mr Vincent Micallef Pule', Director Public Transport (MTA);

f. in its deliberations, the Adjudication Board took section 27 into consideration

g. the decision to reject the appellant Company's tender (in view of the fact that it transpired that it had two documents missing) was taken unanimously by the Adjudication Board.

Dr Grima drew the attention of Architect Buhagiar that the tender document made provision for *modifications* and *variations* which referred to works not included in the bill of quantities. Dr Grima quoted article 35 'Modifications' (page 128):

> *"The supervisor shall have power to order any modification to any part of the works necessary for the proper completion and/or functioning of the works. Such modifications may consist of additions, omissions, substitutions, changes in quality, form, character etc…."*

Dr Grima remarked that, as a result, the supervisor, who was contracted by the Contracting Authority, had the power to, practically, effect changes of any kind.

At this stage, Dr Grima asked Architect Buhagiar what was the difference between what was provided for in Article 35 and the phrase 'in the rare event of any unforeseen circumstances not included in the bill of quantities'. Architect Buhagiar explained that the day work rates schedule was required for works not included in the bill of quantities so that the supervisor would be able to work out the cost of the unforeseen works. Dr Grima asked again whether he was being given to understand that the supervisor could not work out the rates for extra works in the absence of the day work schedule, i.e. there was no method how extra works/modifications were going to be paid for. Architect Buhagiar said that there was not. Dr Grima maintained that Government always retained the right to make additions, modifications or omissions to a contract and, in spite of what Architect Buhagiar had just said, the tender document provided that the same rates had to apply in the case of extra works. Architect Buhagiar said that variations referred to quantities included in

the bill of quantities. Architect Buhagiar added that if there was no rate in the bill of quantities then a rate would have to be proposed and submitted for the consideration of the Board for approval.

Dr Grima stated that according to the tender document 'modification' could mean something that was *added on* or *omitted* or *substituted* and, therefore, it could also mean *unforeseen* and that meant that the eventuality of 'unforeseen works' was already catered for. He added that the supervisor had the power to order any modification and that the supervisor represented the Malta Transport Authority.

Reacting to Dr Delia's remark that the supervisor was an independent person, Dr Grima contended that the supervisor was appointed by the MTA following a call for tenders. As was stated in the previous hearing, the supervisor was paid by the MTA and, as a consequence, he was the *lunga manu* of the MTA who had the power to order modifications including substitutions.

Architect Buhagiar stated that, nevertheless, the supervisor had no power to fix rates. Yet, Dr Grima contended that in section 1 of Article 35 (page 128) nothing was left out with regard to works modification or substitution. Moreover, he claimed that, if the contractor failed to carry out the extra works, the supervisor had the power to bring in another contractor to carry out those extra works

Architect Buhagiar reiterated that the fact remained that the Contracting Authority requested the day work rates schedule and that schedule was not submitted. The reaction by Dr Grima was to lament that the Adjudication Board was concerned solely with the day work schedule but it totally overlooked the other provisions.

Architect Buhagiar admitted that the provisions of article 35 were important and, at that point, Dr Grima quoted from section 35.5 (page 128):

> *'The prices for all modifications ordered by the Supervisor in accordance with articles 35.2 and 35.4 shall be ascertained by the Supervisor in accordance with the following principles…'*

The Chairman, PCAB, remarked that what one had to question was whether the tenderer had the right to be subjective because the Contracting Authority requested four mandatory requirements but the tenderer submitted only two of them. He proceeded by questioning whether the Adjudication Board had any discretion whatsoever in this matter or whether the Adjudication Board had to reject the tender because the tender document said so irrespective of whether the Adjudication Board agreed with it or not.

Architect Buhagiar agreed that it was the latter case.

To Dr Grima's question as to whether the Adjudication Board rejected the offer made by his clients because they did not indicate the daily rates of labour and plant, Architect Buhagiar insisted that Schembri Joint Venture Ltd did not present the day work rates schedule.

Dr Grima agreed that although his clients did not present the information in the form of a list, yet he added that it was not the case that his clients did not present the information requested in the day work rates schedule.

Architect Buhagiar stated that the rates make up and the day work rates schedule were two different things and that, in his opinion, one could not arrive at the day work rates from the rates given by Schembri Joint Venture Ltd in the bill of quantities and from the rates make up.

At that point, Dr Grima started questioning whether Architect Buhagiar had actually seen the rates given by his client Company because he claimed that the daily rates were actually there.

Architect Buhagiar explained that the rates make up were a break down of the labour, material, plant and equipment required to produce, say, one cubic metre of excavated material and he insisted that from the rates make up one could not arrive at day work rates or, if so, the rates would be approximate.

Dr Grima maintained that, in the bill of quantities submitted by his clients, there were indicated, amongst others:

- the rate of Lm 5 per hour for an employee
- the rate of Lm35 an hour for an excavator *and*
- the rate of Lm45 per hour for a caterpillar

Dr Grima maintained that it, therefore, took little effort to calculate how much an employee would cost for 4 hours, i.e. 4hrs @ Lm 5 = Lm 20.

At this stage, Architect Buhagiar was handed over the submission of Schembri Joint Venture Ltd to verify what was being claimed by Dr Grima.

Following Architect Buhagiar's observation that the labour cost was not broken down, Dr Grima rebutted that, earlier on, it was held that the hourly rates for experts, archaeologists etc did not matter but all that mattered were the rates of 'skilled' and 'unskilled labour'.

Replying to a question put forward by the PCAB as to whether it was Architect Mario Ellul or the Adjudication Board that decided to exclude the appellants' offer, Architect Buhagiar stated that Architect Ellul drew up and submitted his report and then the Adjudication Board considered it. Architect Buhagiar reiterated that the rates make up explained how the rates given in the bill of quantities were made up in terms of labour, material, plant, and so forth, whereas, the day work rates, referred to how much, for example, a labourer would cost per hour.

Dr Grima declared that his clients had indicated that a labourer would cost Lm 5 per hour and that, as far as he knew, labour was classified as *skilled* or *unskilled*.

Architect Buhagiar stated that the notes to volume 4 para (a) referred to 'the various classes of labour and construction plant' …. 'on a day work basis' with Dr Delia

intervening to state that the rates given by the appellants did not refer to the *unforeseen events* but to the *bill of quantities*.

Dr Grima declared that his client Company had bound itself not to charge more than Lm 5 an hour for an employee in case of an unforeseen event. He added that the important factors were the substance of the content and the one million euro difference in the price and not the format in which things were presented. He, once again, claimed that Schembri Joint Venture Ltd gave the information requested but did not present it on a separate sheet of paper but that did not mean that they did not submit it.

At this point, the Chairman, PCAB, asked if it was normal for the rates applicable to the bill of quantities and the day work rates to differ.

Architect Buhagiar replied that it was the contractor who had to indicate both sets of rates and that one could not assume that they were the same.

Dr Grima noted that, once in the case of Bonnici Brothers Ltd, the day work rates and the rates in the bill of quantities were the same and once his clients had also quoted daily rates in the bill of quantities, then it was a question of comparing like with like.

At this stage Dr Grima requested Architect Buhagiar to read out the rates quoted in his clients' submissions and complained about the way Architect Buhagiar was answering, or better still, according to him, not answering his questions.

The Chairman, PCAB, remarked that it would appear that the Contracting Authority had requested the list and anyone who did not produce the requested list was considered not good enough. Dr Grima pointed out that, in the tender document, there was no template format that the tenderer had to fill in.

Architect Marjohn Scicluna, representing Schembri Joint Venture Ltd, stated under oath that the appellants had aggregated labour in one rate, namely, it quoted an average/flat rate of Lm 5 per hour. He admitted that they did not present the day work rates schedule in the form of a separate list but he insisted that hourly rates were given for various items of plant along with the average hourly rate of Lm 5 for labour. Architect Scicluna also explained that one did not need to work out these rates because they were clearly given in the documentation submitted by Schembri Joint Venture Ltd.

Dr Grima declared that he could not pass on to make his concluding remarks prior to obtaining independent expert advice as to whether the supervisor or a qualified person could work out the day work rates from the rates given in the bill of quantities. He added that this was also agreed with in the previous hearing concerning the objection raised by Asfaltar Ltd.

At this stage those present agreed to hold another meeting in connection with this appeal. Friday 14th November at 16.30 hrs was decided upon and it was further agreed that independent technical experts will be summoned for cross-examination purposes and so forth.

Further public hearing held at the Department of Contracts on Friday, 14 November 2008 at 16.45 hours.

As agreed during the public hearing of 29 October 2008 and through correspondence that had been exchanged between all the parties concerned, it was agreed to hold this joint hearing so that Asfaltar Ltd, Schembri Joint Venture Ltd and Bonnici Brothers Ltd would present experts to give evidence as to whether it was possible for a technical person to extrapolate daily or hourly rates for different classes of labour and construction plant – as requested under 'day work schedule' in the Notes to Volume 4 – Schedule of Quantities - from the rates make up of the priced bill of quantities.

Mr Anthony Cassar, an architect and civil engineer, was summoned by Dr Kenneth Grima, legal represestative of Schembri Joint Venture Ltd, to take the stand. Architect Cassar, under oath, declared that he had no interest in the tender under reference. During the course of the said hearing Architect Cassar …

- stated that Schembri Joint Venture Ltd had presented him with a set of the rates make up and the notes to volume 4 – schedule of quantities - which were verified during the hearing to be a copy of those submitted by Schembri Joint Venture Ltd in evelope 3, to carry out an exercise with a view to establishing whether daily or hourly rates could be worked out from the rates quoted in the bill of quantities;

- analysed the rates make up and the bill of quantities, an exercise that took him about 10 hours and produced a set of rates. From this exercise it emerged that under 'different classes of labour' there was indicated an employee @ Lm 5 per hour and a warden @ Lm 3.64 per hour whereas under 'plant and machinery' the following were listed: excavator @ Lm 45 per hour, jackhammer and compressor @ Lm 5.50 per hour, bobcat / Hiab / skip / handtools (e.g. a shovel) @ Lm100 per day, truck @ Lm 50 per trip and there were also a bowser and a pole planting machine. He remarked that this exercise could be undertaken by any architect though it usually was the work of a quantity surveyor;

- conceded that there were no rates for the different classes of labour but that he considered the rate for labour at Lm 5 per hour as an average rate because the normal rate of an unskilled labourer was about Lm1.60 per hour and that of a skilled labourer was of about Lm 3 per hour;

- noted that para (a) in the Notes to Volume 4 under 'day work schedule' it was stated:

  > *a list of the various classes of labour and construction plant for which basic <u>day work rates or prices</u> are given, together with a statement of the conditions under which the Contractor will be paid for work executed on a day work basis.*

- stated that Schembri Joint Venture Ltd gave him neither a cash flow payments schedule, which, to him would have represented a breakdown of the payments that had to be made to the contractor, nor did he come across the list or

schedule of day work rates for the different classes of labour and construction plant.

Dr Grima, stated tht the workings produced by Architect Cassar proved that, in fact, the submission by Schembri Joint Venture Ltd did contain rates per hour and per day and prices as required in para (a) of the notes to volume 4 unlike what the Adjudication Board had indicated, i.e. that no such rates were submitted. He added that the rates were extracted from the breakdown of rates submitted in envelope 3. Architect Cassar said that the rates for the main items of plant required for road construction were there.

Mr Stuart Azzopardi, another architect, was summoned by Dr Sciriha, legal representative of Asfaltar Ltd. Under oath, Mr Azzopardi declared that he had worked on this tender on behalf of Penza Construction Ltd, which tenderer had been disqualified at an earlier stage of the tendering process. However, notwithstanding, he did not render any service to the contractors involved in these two appeals.

Architect Azzopardi …

- conceded that he had limited time, a few hours in fact, to go through the rates make up presented to him by Asfaltar Ltd. He went on to explain that, as a technical person, he would be able to work out the rates for different classes of labour and construction plant from the rates make up and the programme of works presented by Asfaltar Ltd. He added that he could even arrive at the nominal quantities per day of construction plant, e.g. the amount of material that an excavator could excavate in a day. As an example, Architect Azzopardi explained that from the programme of works he would obtain the amount of excavation works involved and the time required to carry it out, then from the rates in the bill of quantities and from the rates make up he would arrive at the rates for labour (even its different classes) and the construction plant like an excavator, a truck and so forth. He added that in case unforeseen works involving trenching arose, the site supervisor could charge the rates found under trenching in the bill of quantities, which would be the lowest rates. Architect Azzopardi continued that in a case where the roller, the grader and the driver were to be involved, one could work out the rates individually;

- to the question put forward by Dr Grima as to what was the difference between ‘modification’ and ‘variation’ works and ‘unforeseen’ works in road construction, Architect Azzopardi remarked that unless something extraordinary arose, what usually happened was that more trench work would be involved or else instead of excavating in soft stone one would encounter hard stone. However, the same witness proceeded by stating that the rates in the bill of quantities relative to trenching in hard stone would apply;

- claimed that the list of classes of labour and construction plant that a contractor was asked to submit could hardly ever be exhaustive. Yet, the bill of quantities was very detailed in this respect. He noted that the day work schedule referred to various classes of labour but was not specific.

The Chairman PCAB asked Architect Buhagiar whether he agreed with what Architect Azzopardi had just explained. Architect Buhagiar declared that he did not agree with the method explained by Architect Azzopardi because the programme of works submitted could undergo changes during execution and, with regard to the rates for various classes of labour, they were interested only in the rate of a labourer – to apply it for unforeseen works whatever those might be - rather than the rate of a labourer that would change according to the different types of work that he would be detailed to do.

At this point the PCAB's Chairman drew the attention of Architect Buhagiar that

(i) at tendering stage the tenderer could only quote the standard rate then the variations that would occur during execution would have a bearing on the contractor's profit margins

(ii) no list of the various classes of labour was given in the tender dossier.

To a direct question by the PCAB, Architect Buhagiar was unable to indicate how many items on the list would have satisfied the contracting authority.

Architect Azzopardi stated that the term 'foreman' was not exhaustive because, even at foremen level, there were grades, e.g. a foreman on asfalting works had a different grade from another one detailed on other works. In this respect, Dr Grima intervened to observe that in his clients' case, the average rate of labour was given, namely, Lm 5 per hour, and he was disqualified whereas Architect Buhagiar now stated that the Adjudication Board was interested in one rate. Architect Buhagiar insisted that the contracting authority wanted one rate for a labourer irrespective of the job he was detailed to and not one rate applicable for a skilled or unskilled or technical person and so forth.

To questions put forward by Dr Delia, Architect Azzopardi replied that he received no instructions with regard to the cash flow payments during the project and that with regard to the day work schedule he would need the programme of works along with the rates make up to work the rates of a labourer on a particular job. Dr Delia remarked that, contrary to what architect Azzopardi was trying to impress, it was not at all simple to carry out this rates-computation exercise.

Mr Maurice Galea, an Architect and Civil Engineer, was summoned as a witness by Dr Delia, legal representative of Bonnici Brothers Ltd, and, under oath, Mr Galea declared that he was in no way professionally connected with the tenderer or had in any way participated in the submission of any offer. Mr Galea stated that he graduated in architecture in 1955, worked for a long time at the Water Works and Industry Departments and at the Malta Development Corporation and that he acted as technical adviser to the Contracts Department for about 13 years.

On being cross-examined, Mr Galea submitted the following explanations:

- In his view the cash flow payments during the project referred to in clause 14.2.3.12 (page 29) of the tender document represented a forecast, usually reviewable on a monthly basis, of the payments that the contracting authority

would have to provide to the contractor. He added that the provisions of para (a) to (d) under 'Payments' (page 9) of the tender document were general provisions of how payments were to be effected but the cash flow payments schedule, which was tied to the programme of works, was still required because that quantified the payments and established the date the payments would fall due;

- With regards to the rates make up, Architect Galea stated that this was a breakdown of the rates in the bill of quantities in terms of

    - labour
    - materials
    - plant *and*
    - equipment

  He added that this was not always requested but it was useful in case of variations to arrive at the rates applicable to those variations;

- Mr Galea remarked that he disagreed with Architect Azzopardi with regard to the relationship between the rates in the bill of quantities and the day work rates. According to him, the day work rates served a different purpose because they were applicable to odd jobs not included in the bill of quantities, such as, in case the contracting authority required the services of 4 labourers for 3 hrs or a crane for five hours. He remarked that the day work rates were usually higher than those applicable to the rates in the bill of quantities because the latter were based on a high volume of work whereas the day work rates would involve undertaking small jobs and therefore had to take into account other considerations, such as, mobilisation and demobilisation costs. As an example, he mentioned the day work rate of Lm 4.50 per hour for a labourer and Lm 5.50 per hour for a skilled labourer.

  At this point, the Chairman PCAB asked whether the rates in the bill of quantities and the day work rates were the same in the case of the awarded tenderer. Architect Buhagiar replied that albeit the said rates were the same, yet, Bonnici Brothers Ltd could have presented different rates but the important thing was to have both rates. Architect Aquilina, intervening on behalf of Bonnici Brothers Ltd, tried to explain that, in an earlier intervention during the same hearing proceedings of this appeal, he did not say that both sets of rates were the same because one was given in cubic metres and the other on a daily/hourly basis. What he did say, continued Architect Aquilina, was that, in his computations, he started with the day work rates but ended up differently. Architect Aquilina contended that he never said that both sets of rates were the same.

  This claim was received with a certain level of disagreement by many of those present for the hearing with the latter claiming that, during the previous meeting, Architect Aquilina had said that the two sets of rates were basically the same;

- Architect Galea explained that one could not give a standard rate because, for example, there were excavators of different capacities and one ought to quote a rate for each according to its capacity. He added that if only one rate were to be given for an item of equipment, say, an excavator, one wouldn't know for which type of excavator that rate referred because, for example, ordering a crane of 10 tons was different from ordering a crane of 20 tons;

- Architect Galea tended to disagree with Architect Azzopardi for the latter basing his workings on the rates make up in relation to the programme of works because, on a large project, it usually happened that the programme of works would be subject to various revisions or modifications;

- With regard to *the nominal quantities for each item of day work* referred to in para (b) under 'day work schedule' as stated in the notes to Volume 4, Architect Galea agreed that, although it was not very clear, he understood that the term referred to the capacity of the plant, e.g. how much material would an excavator excavate in an hour or a day. He added that the problem with day work rates was that if the excavator was on site for, say, 4 hours, then one had to verify that it, in fact, excavated the amount of material relative to its capacity otherwise one would end up paying the rate for 4 hours when it might have been idle for some of that time;

- Mr Galea declared that he would not be satisfied if the day work rates were not given because he would encounter problems when day works arise at implementation stage. He added that, in his opinion, one could not extract correct day work rates from the data available in the bill of quantities and the rates breakdown. He reiterated that one could use the normal rates for works that vary from that in the bill of quantities but that were similar in nature. However, Architect Galea continued by stating that day work was something completely different because it represented only labour and plant together or separately;

- The Chairman PCAB remarked that no template was provided in the tender document with regard to the day work schedule and asked what would constitute an exhaustive list of classes of labour and construction plant for the works contemplated in the tender. For example, he asked whether 10 items or 15 items would be enough when the likelihood could mean that 20 or perhaps, 50 items would be far more realistic. He proceeded by asking whether, on the other hand, would a list of four (4) items be adequate so long as a list was presented. On these same lines, Architect Cassar remarked that it would have been better to have the list of day work rates, however, he wondered where such a list would start and end given that even the term 'excavator' was not exhaustive enough in view of the different types/sizes of excavators available.

  Architect Galea conceded that

  (a) it would have been better had a template been provided in the tender document *and*

(b) in the case of classes of labour or construction plant not covered by the day work schedule, one would still have to establish or negotiate the rate per hour or day.

Mr Galea remarked that the tender document was quite clear in requesting the list.

When the Chairman PCAB asked if there were any other witnesses, Dr Grima remarked that although Architect Mario Ellul, who acted as advisor to the Adjudication Board, was at that time abroad, he still intended to call him to give evidence because he alleged that it was Mr Ellul who had advised the Adjudication Board to reject his client Company's offer. Architect Buhagiar stated that the Adjudication Board had examined the advice given by Arhictect Ellul and although it did not amount to a cut and paste exercise, the Adjudication Board, unanimously, endorsed the report by Architect Ellul. The PCAB argued that, in the circumstances, the evidence of Architect Ellul would not be relevant because once the Adjudication Board unanimously adopted his advice, in part or in full, then clarifications, if any, had to be sought from the Adjudication Board. Besides, the PCAB had heard enough contrasting views to enable it to come to a conclusion. Dr Grima informed the PCAB that, in the circumstances, he had no further witnesses.

At this stage it was agreed that the winding up with regard to both objections would take place during two separate hearings on established dates convenient to all interested parties.

Further public hearing held at the Department of Contracts on Tuesday, 25 November 2008 at 16.45 hours

Dr Grima stated that the purpose of the hearing was to see whether the Adjudication Board had carried out the evaluation process in a correct, fair and transparent manner as it should have done. He added that in the final stage of this process there were three participants who were all found to be competent and therefore one had to determine which one of them deserved most to be awarded the tender. Dr Grima insisted that if a student made the grade then the examiner should grant him a pass mark, after which, one had to establish who would have been the best student. He argued that it was not the role of an examiner to disqualify the best student because of a missing full stop or a comma. Dr Grima remarked that in this case the Adjudication Board eliminated the best tenderer and it did so unfairly and without going into the very purpose of issuing a public call for tenders. Through the issue of a tender the Contracting Authority would be in a position to identify that contractor which had submitted the best offer in its entirety and, as a result, the more competitors there were the better it was to obtain the best result with regard to value for money.

Dr Grima said that one had to determine who was

- competent
- financially sound *and*
- experienced in that kind of work

The appellant Company's legal advsior claimed that about 70% of road works carried out in the Maltese islands were carried out by the three contractors that were competing for this tender and, therefore, the Adjudication Board had to choose the best one out of the 'best'. He claimed that what happened in this case was that, when the envelopes were opened, the cheapest one was ranked number one and then, all of a sudden, the tenderers that were ranked in the first two places were disqualified. Dr Grima declared that the Contracting Authority did not stand to gain from such action but, on the contrary, it was going to end up paying much more in taxpayers' money for the same work.

Dr Grima argued that what the PCAB had to decide on was whether it was correct to eliminate a tenderer who was one (1) million euros cheaper than the awarded tenderer. He claimed that the cheapest tender was not disqualified on substance, i.e. on what was submitted in the bill of quantities and on the breakdown of rates, but on the non-submission of a form and in so doing the Adjudication Board had discarded what was really important and substantial according to the tender document which was the law that guided the Adjudication Board and the PCAB. Dr Grima stressed that tenders were acceptable unless they were substantially unacceptable and he went on to quote section 30.1 (page 40):

> *"the evaluation committee will select* – Dr Grima said that there was no room for discretion here – *the tenderer which had submitted the total lowest bid satisfying the administrative and technical criteria."*

Dr Grima contended that his clients had the total lowest bid and had also satisfied the administrative and technical criteria.

Dr Grima then quoted section 27.1(page 38), viz:

"*Before beginning a detailed analysis of the tenders, the evaluation committee will check that each tender*

> *27.1.1 had been properly signed, and*
> *27.1.2 includes the required Tender Guarantee of Lm50,000 and*
> *27.1.3 substantially complies with the requirements of these tender documents as per 'Administrative Compliance Grid'.*

He proceeded by saying that, according to the Oxford Dictionary, 'substantial' meant of real importance or value, essential, having substance. He added that it did not refer to minor details or to insignificant issues. Dr Grima argued that his clients were competent to undertake this contract and had quoted the best price.

Dr Grima stated that, at first, it was claimed that the appellants did not submit day work rates but then Architect Maurice Galea had stated that there were two categories of labour, 'skilled' and 'unskilled' who were paid Lm5.50 per hour – inclusive of profits etc – and Lm4.50 per hour respectively. He observed that it so transpired that Schembri Joint Venture Ltd quoted the average rate of Lm5 per hour which was in line with what Architect Galea had indicated. Dr Grima stated that Architect Ellul, who had not appeared before the PCAB, had decided that his clients did not submit the day work rates and should, therefore, be disqualified, which advice was reproduced in the Adjudication Board's report.

Dr Grima said that, during one of the hearing sessions, he had asked Architect Buhagiar whether the Board had noted that the day work rates were given elsewhere in the documentation other than in the format expected by the Contracting Authority and Architect Buhagiar's reply was that the Adjudication Board had adopted the advice of its consultant, Architect Ellul, to the tune of about 40%.

It appeared to Dr Grima that the Adjudication Board had not gone through the documentation submitted by his clients thoroughly enough and, it did so, when there was at stake the sum of one million euros of taxpayers' money that were going into the pockets of Bonnici Brothers Ltd instead of remaining in the taxpayers' pockets or else directed to finance a programme of works covering 40 to 50 roads.

Dr Grima argued that his clients had submitted everything except one form which, then again, during the hearing, it emerged that the information was there, e.g. the rates for a dumper, truck, bulldozer, compressor, generator, excavator, bowser and three categories of labour, i.e. skilled, unskilled and the warden. He argued that the tender document did not stipulate that one had to list 30 or 40 items of day work rates and, as such one could not be penalised for listing 8 items, which, according to the contractor, were enough to undertake unforeseen works.

Dr Grima argued about who could tell that the 'unforeseen works' would entail the use of 40 or 50 items of equipment! He maintained that one could perhaps say that another contractor submitted more items than his client Company but it was not true that the latter did not submit any day work rates. Moreover, Dr Grima contended

that, in his view, there was little difference between 'extra works', 'variations' and 'unforeseen works' because unforeseen works meant extra works.

He continued by pointing out that some of the most experienced road works contractors had not submitted the day work rates schedule and that was evidence enough that it was not clearly laid down.

Dr Grima then turned to the cash flow payments during the project and explained that, in reality, it was up to the Contracting Authority to effect payments and that it was not rare when payments were not effected due to the unavailability of funds and contractors had to wait until the next budget or until such time that the supplementary estimates were approved. He added that the tender document already laid down in a clear way the manner in which payments were to be made and, in that process, the last word rested with the supervisor and so the appellants' legal advsior claimed that there was no point in indicating how his clients wished to be paid. Dr Grima contended that government would pay at its discretion and that no contractor would dare to request the payment of interest on the amounts overdue.

Dr Grima argued that the Adjudication Board disqualified Schembri Joint Venture Ltd for not indicating the timetable of payments, i.e. for not indicating something different from that laid down in the tender conditions, i.e. 30 days after works certification by the site supervisor. Dr Grima stressed that this was not a substantial reason for elimination because one could not be disqualified for not submitting something that was worthless, irrelevant and not legally binding. Dr Grima stated that, even in this instance, the PCAB was being called to judge whether the Adjudication Board made a correct decision to eliminate his clients for failing to submit something which was already laid down in the tender document, which document was the legally binding instrument.

Dr Grima stated that, it would appear that, the Adjudication Board just rubber-stamped the advice of its consultant who had recommended that his clients should be disqualified. Dr Grima pictured a scenario wherein, instead of having been issued by government, this tender would have been issued by a private enterprise. At this stage he questioned whether the Board of Directors, faced with a situation where a competent tenderer offered one (1) million euros less but had not submitted certain information in the form of a list, would disqualify that tenderer and in so doing fork out an extra 1 million euros. Dr Grima remarked that if the shortcoming of his clients was deemed 'substantial' then the Adjudication Board would have acted correctly but, he added that, section 27, even laid down what was meant by 'substantial' and it was not left to the discretion of the Adjudication Board.

According to Dr Grima everyone seemed to overlook the contents of section 27 (page 38) which stated that:

> *27.2 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:*
>
> *27.2.1 in any way influence the scope, quality or execution of the works, or*

27.2.2 restrict the rights of the Contracting Authority or the obligations of the Tenderer under the Contract in a manner inconsistent with the tender document, or
27.2.3 rectification of which would unfairly affect the competitive position of other tenderers presenting admissible tenders.

Dr Grima stated that Schembri Joint Venture Ltd qualified administratively and technically. He added that the fact that these did not submit the list but submitted the same information elsewhere in envelope 3 did not mean as if they intended to deceive the Contracting Authority. Dr Grima argued that Schembri Joint Venture Ltd did not submit the timetable according to which they expected to be paid, if anything was to the advantage of the Contracting Authority because these left that up to the same Contracting Authority, or better, as already laid down in the tender document.

Dr Grima maintained that

(i) contrary to what had been claimed his client did submit the day work rates and, during the hearing, it was demonstrated that these rates were in fact given,

and

(ii) the fact that Schembri Joint Venture Ltd did not submit how they were expecting the Contracting Authority to pay them, did not, in any way, affect adversely the other tenderers.

Dr Grima argued that if his clients' shortcomings did not amount to the 'substantial' deviations and reservations referred to in 27.2.1/2/3 then that would render the tenderer compliant. He added that any shortcomings not mentioned in 27.2.1/2/3 were not substantial otherwise they would have been listed there. Dr Grima remarked that the Adjudication Board should have gone through the details of his clients' submission and, in so doing the Adjudication Board would have ascertained that the day work rates could be found in the bill of quantities. At this point, the appellants' legal advisor argued that such an effort on the part of the Adjudication Board was expected when there were 1 million euros in the balance.

On his part Dr Delia reminded the PCAB that during the hearing concerning the appeal lodged by Asfaltar Ltd, its legal representative, Dr Michael Sciriha, had pleaded with the PCAB to base its decision on three principles, i.e.

- justice
- equity *and*
- transparency

Dr Delia stated that he agreed with that, however, in this objection the appellants based their case on allegations and on arguments on facts that did not result.

Dr Delia did not agree with Dr Grima's statement that there were three competitors that had qualified from all stages. Dr Delia claimed that two of them qualified from

the first two envelopes but failed in the third envelope and so Dr Grima's statement was factually incorrect.

Dr Delia remarked that, contrary to what the appellant Company had stated, in the sense that Schembri Joint Venture Ltd had submitted the information but not in the proper form, the Department of Contracts was very clear in this respect stating that the appellant Company was disqualified because the day work schedule and the cash flow payments during the project were both not submitted.

Dr Delia added that with regards to Dr Grima's allegation that the Adjudication Board did not act correctly, no proof emerged during the hearing that any criminal actions were committed and the appellant Company had all the opportunity to question each and every member of the Adjudication Board. Dr Delia noted that the PCAB offered the appellants the opportunity to present a witness even if that witness was considered irrelevant and even gave the opportunity to Dr Grima to cross-examine the Adjudication Board, something which the appellants chose not to do. The awarded tenderer's legal advisor stressed that, at no point, did it emerge that someone dictated matters to the Adjudication Board or that the latter had simply rubber stamped what others presented to it.

With regard to the day work rates, Dr Delia stated that it was not a question that the appellant Company submitted a list with an insufficient number of items of plant or that the appellants did not submit the bill of quantities - the issue was that the appellants did not submit any day work rates at all, not even a short reference stating that the day work rates were the same as the rates in the bill of quantities or as indicated in the rates make up.

Dr Delia stated that the tender was awarded to the only tenderer that submitted all the four documents requested. He added that Schembri Joint Venture Ltd was not eliminated due to technical incompetence or because it was not one of the leading road contractors but because it did not submit these two schedules. Dr Delia claimed that, perhaps unlike Asfaltar Ltd, Schembri Joint Venture Ltd did know what these two schedules entailed because it was the leader of a joint venture in another tender process and it had submitted this information and, in fact, it was awarded that tender.

Dr Delia explained that the cash flow payments were important because this was a tender funded by the European Union, which in turn requested this information.

Dr Delia pointed out that, unlike what Dr Grima was claiming, i.e. that there was practically no difference between 'extra works' and 'day works', the tender document specified what amounted to extra works and what the day works were. Dr Delia remarked that 'extra works' were paid with the same rates of the bill of quantities because they were works of the same nature, whereas, the 'day works' were different in nature and so were paid by hourly or daily rates.

Regarding the cash flow payments, Dr Delia observed that the appellants were not claiming that they submitted the same information elsewhere, as was the case with the day work rates, but, this time, they were questioning the relevance of the information requested. Dr Delia contended that it was not up to the tenderer to question the validity of the information requested by the Contracting Authority. He stated that the

fact was that the cash flow payments during the project were requested but were not submitted by the appellant Company, no more and no less, continued Dr Delia!

According to the same legal advisor, this was not a trivial thing because the four documents requested in envelope 3 had a bearing on the price and they could not be considered individually.

Dr Delia stated that the appellants had admitted that they did not submit the cash flow payments.

Dr Delia stated that the Adjudication Board could not request the tenderer to submit the missing documents and neither could it qualify a tenderer who had not submitted all the requested documentation otherwise it would have certainly acted incorrectly.

Whilst agreeing that the legal basis of this tendering process were general law, the tender documents, the public contract regulations and the PCAB rulings, all together, and one could not ignore any of them for convenience's sake.

Dr Delia claimed that Dr Grima's arguments revolved around his clients' technical compliance and that he was trying to entice the PCAB by mentioning the price.

He added that Dr Grima's reference to what would a private company do in similar circumstances was irrelevant because the Public Contracts Regulations were applicable to governmental and public entities, like the Lotteries and Gaming Authority, Malta Financial Services Authority, Malta Stock Exchange and the like, which had a big budget of their own, but were not applicable to the private sector.

Dr Delia argued that the aspect of price should be discarded completely because, albeit, the appellant Company was compliant in envelopes 1 and 2, they were found not compliant in envelope 3.

Dr Delia claimed that the interpretation that was being given to the term 'substantially compliant' was legally incorrect because that did not apply to the case in hand. He read out section 27.1, already quoted earlier on by Dr Grima, and remarked that para. 27.1.3 referred to the 'Administrative Compliance Grid' and added that no one was contesting the fact that the appellant Company was administratively compliant, but the hearing was concerned with financial compliance.

Bonnici Brothers Ltd's legal representative then quoted para. 28.5 (page 39):

> *"Upon completion of the technical evaluation, the financial offers for tenders which were not eliminated during the technical evaluation will be opened."*

Dr Delia maintained that all that had been said regarding what was substantial or not referred to technical compliance and pointed out that the hearing had to do with the financial evaluation where no reference was made to the term 'substantial'.

Dr Delia then moved on to section 30 'Criteria for Award' and quoted para 30.1:

"The Evalutation Committee will select the tenderer who has submitted the total lowest bid satisfying the administrative and technical criteria."

He maintained that, once Schembri Joint Venture Ltd was not financially compliant, then the question of price could not be taken into account in this case.

Dr Delia observed that Dr Grima based his case on section 27 and then ended up by claiming that the price offered by his clients was 1 million euros cheaper. Dr Delia explained that envelope 3 dealt with what constituted the price and, as a direct result, if two requested documents were not submitted by a tenderer, the Adjudication Board could not do away with requirements requested in the tender document and it was not even a question of leniency.

He proceeded by contending that

(a) it was not up to the tenderers to decide what was important or not in the tender document;

(b) there was absolutely nothing abnormal in the fact that the Adjudication Board, as a whole, had agreed with the report drawn up by one of its consultants, but the Adjudication Board would have been expected to explain its decision had it differed from the expert opinion tendered by its consultant.

The legal argument that the appellants' offer was 'substantially compliant' did not hold water because, in the financial evaluation, there was no reference to 'substantial compliance'.

Dr Delia pointed out that what had not been mentioned was whether the awarded tender was within the budget or not, at which point he confirmed that his clients' offer was, in fact, within the budget. Dr Delia maintained that if it were the case that the Contracting Authority had drawn up an erroneous estimate, his clients should not suffer because they had abided by all the requirements laid down in the tender document.

Dr Delia concluded that there were three tenderers that were administratively and technically compliant but only one tenderer was financially compliant because these submitted all the four requirements requested in the tender document and, therefore, the Adjudication Board had acted correctly, transparently and legally.

Dr Borg Myatt, legal representative of the Malta Transport Authority, stated that it would not be correct to refer to the appellants' offer as if it had been discarded on unfounded grounds, because the appellants' offer was disqualified, specifically, for not submitting two of the four documents requested in envelope 3.

Dr Borg Myatt agreed with the argument made by Dr Delia in the sense that the Adjudication Board would have acted incorrectly had it noted that despite the fact that two tenderers would have, say, not submitted two of the required documents, they would have still, hypothetically, decided to take all of the bidders into consideration,

regardless, all of a sudden ruling that the missing documents would have not been important to the tendering process.

Dr Borg Myatt argued that once there was general agreement that the tender document was legally binding to all sides and once that document laid down that tenderers had to submit (a) the day work schedule, which was different from the rates make up, and (b) the cash flow payments during the project, then, Dr Borg Myatt queried how was the Adjudication Board expected to evaluate those tenders that did not submit all the documents requested?

With regard to the argument put forward by Dr Grima as to what was 'substantial' and what was not, Dr Borg Myatt pointed out that the Adjudication Board had decided that all the documents clearly requested in envelope 3 (at page 29) were requirements which were 'substantial' in nature.

Regarding the doubts cast as to how the Adjudication Board had acted upon the report drawn up by one of its appointed consultants, Dr Borg Myatt declared that, during the hearing, it clearly emerged that the consultant had submitted his report to the Adjudication Board which, in turn, considered the consultant's report and made its decisions unanimously.

Dr Borg Myatt explained that the cash flow payments did not refer to 'how' payments were to be made but to 'how much' one was going to pay. The tender document stipulated that the supervisor would certify the works carried out and then pass on the papers to the Malta Transport Authority to effect payment but cash flow payments during the project would quantify the payments that were expected to fall due on, say, a monthly basis.

Dr Borg Myatt concluded that the day work rates and the cash flow payments during the project were mandatory requirements in the tender document and the Adjudication Board had no other option but to act as it did because an appeal would certainly have been lodged had the Adjudication Board acted otherwise.

Dr Grima intervened to remark that the fact that his clients had offered 1 million euros less than the awarded tenderer appeared to be a 'no issue' to the legal representative of Bonnici Brothers Ltd, when the price was of the utmost importance in any tendering process. He added that what seemed to be important to the awarded tenderer was the form in which things were presented. Dr Grima remarked that the PCAB was being asked by the awarded tenderer to penalise the bidder who offered to do the work for 1 milllion euros less. Dr Grima added that, according to the case put forward by Dr Delia, the tenderer that came third in the competition – Bonnici Brothers Ltd, the awarded tenderer – should be classified first by disqualifying the rest of the other participating tenderers.

Dr Grima stated that the purpose of the hearing was to award the tender to the most advantageous bid and he added that the awarded tenderer simply avoided this argument because it would have worked against it's own interest.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 06.10.2008, and also through their verbal submissions presented during the public hearings held on 04.11.2008, 14.11.2008 and 25.11.2008 respectively, had objected to the decision taken by the General Contracts Committee

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- *having noted all the arguments brought forward by the appellant Company's legal advisor on behalf of his clients, particularly, those concerning:*

    - the competence of the tenderer in question to execute the job
    - the administrative and technical criteria which were fully satisfied by the appellant Company
    - the fact that, always according to the appellants' legal advisor, the appellant Company submitted the lowest bid thus satisfying another pivotal criterion of the tender dossier
    - the experience and proven track record of his client Company
    - the question relating to the fact that the appellants claimed that their bid was 'substantially compliant' and thus could not be discarded
    - the failure of the appellant Company to submit (a) the day work schedule and (b) the cash flow payments schedule
    - his personal view of what is meant by *cash flow*, wherein an array of arguments were presented as to the reason why such a schedule was not submitted with the appellant Company's bid, particularly
        - the fact that, according to Dr Grima, it was the Company executing the works that could have cash flow problems and not the Contracting Authority, namely, the Malta Transport Authority (MTA)
        - the fact that the tenderer in this particular call was not in a position to dictate the way in which the Contracting Authority wanted to pay the contractor quoting article 43 (page 171) to corroborate his line of reasoning
        - in consideration of the argument raised relating to the fact that, according to Dr Grima, in most instances, government does not abide by payment schedules anyhow so it was absurd for a tenderer to be disqualified for non-submission of a schedule which, most likely, it would end up not being adhered to just the same
        - the fact that Schembri Joint Venture Ltd, the appellants, did not request pre-financing but had agreed to be paid according to the provisions of the tender document and, as a result, his clients argued that there was no need to submit the cash flow payments schedule
        - the inability to explain what is meant by 'rare and unforeseen circumstances' with Dr Grima claiming that, despite this, tenderers were expected to indicate prices for something which could happen in the future and which, to top it all, was rare and unforeseen. Furthermore, it was also argued that it was impossible for anyone to provide such schedule considering

that, regardless of the list of items submitted, it is impossible for anyone to provide an exhaustive list
        - the fact that, according to the appellants' legal advisor, the awarded tenderer contended that it did not matter that the price was lower, some € 1 million cheaper, but the most important thing was that the awarded tenderers' offer was within the estimated cost of the tender indicated by the Contracting Authority
        - a query made by Dr Grima with regards to where, in the tender document, reference was made that the cash flow payments schedule was required in connection with EU funds
        - the fact that, according to Dr Grima, the Adjudication Board had no discretion with regard to the award of tender and, in the circumstances, the said Board had to select the cheapest tenderer
        - the fact that the appellants' legal advisor opined that both his client and Asfaltar Ltd, the other appellant Company in another objection filed in connection with the same tender, had stated that they did submit the information requested in greater detail but not where the tender document had indicated
        - the fact that Dr Grima expected the supervisor to be able to work out the rates for extra works in the absence of the day work schedule
    - the failure of the appellant Company to mention the leader of the joint venture, an issue which was soon resolved during the same hearing when the Contracting Authority's legal advisor admitted his clients' incorrect assessment of documentation submitted in regard by the appellant Company when submitting its bid
    - the fact that, according to Dr Grima, the Contracting Authority requested certain things which, 'semantically' did not make sense e.g. the request of a day work schedule in the rare event of unforeseen works not covered by the bill of quantities
    - the fact that the appellant Company stated that no effort was made by the adjudicating body to calculate rates extrapolated from the bill of quantities submitted by the appellants

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- *having considered the Contracting Authority's legal advisor's interventions and submissions, particularly, those concerning:*

    - the fact that the Adjudication Board was required to make its recommendations on the basis of the provision of the tender document and that the same Adjudication Board could not have acted outside the provisions of the tender document otherwise its actions would have been subject to an objection
    - the fact that clause 8.3 (page 25) of the tender document stated that tenders "which do not comply with the requirements of the tender dossier will be rejected" and that, as a consequence, there existed no discretionary powers in regard, namely a bid either qualified or it did not

- the reason as to why the 'cash flow payments schedule' was compulsory as it was considered imperative for the Contracting Authority to know when payments were to fall due, especially considering the fact that this contract involved funds from the EU necessitating that pivotal information be made available to the Authority prior to evaluation of bid and adjudication and award of tender in order to enable the same Authority to submit claims to recover money from EU designated funds
- the fact that, according to Dr Borg Myatt, the cash flow payments schedule did not refer to 'how' payments were to be made but to 'how much' one was going to pay
- the presentation of a 'day work rates schedule' and 'cash flow payments schedule' respectively, were mandatory requirements in the tender document and the Adjudication Board had no other option but to act as it did because an appeal would certainly have been lodged had the Adjudication Board acted otherwise

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- *having taken cognizance of Dr Delia's cross-examinations, observations and submissions made during the hearing sessions held in connection with this appeal, particularly:*

  - the reference made to a previous case which had been decided upon by the PCAB relating to a situation which was very similar to the scenario the appellant Company was facing in this instance
  - the fact that in this call four documents were required, two were submitted and the other two were not submitted
  - the fact that the appellants seem to have
    - wrongly interpreted the term 'unforeseen' as attributable to the *classes of labour and construction plant* whereas this would have referred to the *events*
    - misunderstood the purpose behind the request for tenderers to provide a cash flow payments schedule
  - the fact that the appellant Company had the opportunity to seek a clarification but it chose not to and instead, arbitrarily, decided that schedules in question were not necessary and, as a result, did not submit what was requested
  - the point raised regarding it being considered as unfair if a tenderer that abides by what is requested in the tender document ends up being sidelined despite complying in full with specifications, terms and conditions
  - the fact that, according to Dr Delia, in the 3 package system, in view of the fact that a tenderer had to qualify from each stage, one had to consider the fact that any tenderer who would have failed in the third package due to non-submission of requested documents, then, in these circumstances, a bid would not have been favourably considered for award
  - the issue relating to how, in Dr Delia's opinion, it was not at all simple for anyone to carry out a rates' computation exercise derived from the bills of quantities

- the fact that, unlike what Dr Grima claimed, namely that there was, practically, no difference between 'extra works' and 'day works', the tender document specified what amounted to extra works and what the day works were. He further remarked, notes the PCAB, that 'extra works' were paid with the same rates of the bill of quantities because they were works of the same nature, whereas the 'day works' were different in nature and so were paid by hourly or daily rates
- the fact that the appellants had admitted that they did not submit the cash flow payments schedule
- the fact that, contrary to what Dr Grima had maintained, there was absolutely nothing abnormal that an Adjudication Board, had unanimously agreed with a report drawn up by one of its consultants

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- *having taken note of Dr Galea's interventions, particularly*:

  - the issue of lack of communication demonstrated and experienced between the Contracting Authority and the Department of Contracts

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- *having considered these and other issues, the PCAB …*

  - observes that the Adjudication Board could have clarified much earlier the issue of the alleged non submission of the joint venture's leader
  - notes that the appellant Company contended that the calculation of a day work schedule in the rare event of unforeseen works not covered by the bill of quantities involves basic mathematics to extract the day work rates from the rates already given in the bill of quantities
  - noted that according to the appellant Company's legal advisor, in this scenario, the important factor remained that a tenderer had to be 'substantially compliant' and that this did not mean that the tenderer had to be 100% compliant but that the said tenderer's bid would be more compliant than not
  - also reflected on Dr Grima's remark that, once Schembri Joint Venture Ltd quoted only the rates of the bill of quantities and Bonnici Brothers Ltd, the competitor, quoted the same rates both in the bill of quantities and in the day work schedule, then no one was unfairly effected
  - notes that, unfortunately, members of the same profession disagreed on key 'modus operandi' such as, for example, whether one could extract the day work rates for labour and construction plant from the rates given in respect of the bill of quantities
  - reflected on Dr Delia's contention, namely, that it was not within the realms of the Adjudication Board's (or the PCAB's for all that matters!) responsibility as to establish what the Contracting Authority requested but its priority was to ensure that what had been requested would have been actually submitted
  - deliberated on why the day work rates schedule was so important, giving particular attention to comments made during the hearing sessions, especially the ones which highlighted the fact that these rates were requested so that if an unforeseen event occurred, then the

Contracting Authority would know what rates in respect of labour and equipment normally used in road works would be applicable

- went thoroughly through the evidence given by Architect Buhagiar
- particularly noted that, according to the Adjudication Board's key representative, all decisions taken by the said Board were unanimous
- took note of the role of the 'supervisor' in the said tender
- thoroughly considered that variations and modifications referred to quantities included in the bill of quantities and that if there was no rate in the bill of quantities then a rate would have to be proposed and submitted for the considerations of the Board for approval
- deliberated whether, in the circumstance,
    (a) the tenderer had the right to act in an arbitrary manner and decide what to submit or not
    (b) an Adjudication Board can arbitrarily deviate from the rigidity of the terms and conditions which are applicable to all participants alike
    (c) the Adjudication Board has any discretionary powers at all
- reflected on the fact that rates quoted in the bill of quantities may differ from the day work rates
- thoroughly considered and duly reflected on the evidence given by *Architect Cassar*, particularly,
    - the fact that he was in a position to produce a set of rates from those submitted by the appellant Company
    - the fact that he was in a position to produce such rates in about 10 hours
- deliberated on how much, in reality, one could reasonably, draw the same conclusion arrived at by the appellants' legal advisor in so far as an outright and unequivocal rate schedule is concerned, a schedule, which had to be, supposedly, submitted and not extracted from the breakdown of such rates submitted
- thoroughly considered and duly analysed the evidence given by *Architect Azzopardi*, a witness summoned by the other interested party, appellant Company in the other appeal – PCAB Case No. 137
    - he positively stated that he would be able to work out the rates for different classes of labour and construction plant from the rates make up and the programme of works submitted by Asphaltar Ltd
    - he explained how the site supervisor could change the rates in view of the fact that, according to the same witness, the said supervisor would be in a position to calculate such rates
    - he explained his interpretation of the terms 'modification', 'variation' and unforeseen
    - he claimed that the list of classes of labour and construction plant that a contractor was asked to submit could hardly ever be exhaustive
    - he said that he was not in a position to comment on Asphaltar Ltd's non submission of a cash flow payment schedule as he was not instructed by the appellant Company (Asphaltar Ltd) to examine this issue

        - he claimed that with ergard to the day work schedule he would need the programme of works along with the rates make up to be in a position to work the rates of a labourer on a particular job
    - thoroughly considered and duly reflected on the evidence given by *Architect Galea*, a witness summoned by the awarded tenderers' legal representative wherein the witness:
        - stated that the cash flow payments schedule was tied to the programme of works and was required because it quantified the payments and established the date the payments would fall due
        - disagreed with Architect Azzopardi regarding the different purpose of the rates in the bills of quantities and the day work rates, claiming that the latter would normally apply to odd jobs not included in the bill of quantities
        - stressed on the need for a Contracting Authority to be supplied with both rates
        - stressed on the distinction between the day work rates and the rates offered in the bills of quantities, namely, that both rates served different purposes and that the former would normally be higher because they would include mobilisation and demobilisation rates
        - disagreed with Architect Azzopardi in so far as the fact that the latter had stated that he would be able to calculate the rates in question by basing his workings on the rates makes up in relation to the programme of works because, on a large project, it usually happened that the programme of works would have been better had a template been provided in the tender document, Architect Galea remarked that the tender document was quite clear in requesting the list
    - took into consideration the statement made by the appellant Company's legal advisor wherein the latter argued that the more competitors there were the better it was for a Contracting Authority to obtain the best result with regard to value for money
    - considered and deliberated upon the issue of 'substance' as against 'form'
    - noted Dr Grima's comment regarding the fact that it appeared that the Adjudication Board had not gone through the documentation submitted by the appellant Company thoroughly enough
    - considered Dr Grima's argument regarding a hypothetical scenario wherein, instead of this call having been issued by a public entity, it would have been issued by a private enterprise. In this instance, argued Dr Grima whether such private entity would have disregarded the tenderer on a point of bureaucracy and in so doing it would have had to pay some € 1 million more

reached the following conclusions, namely, the PCAB …

1. concludes that the appellant Company did actually admit to the non-submission of requested schedules albeit they submitted that they had been included in another form;

2. feels that, in spite of the fact that the lack of a specific format in which the required schedules could be presented, may have, *prima faciae*, posed a problem as far as the participating tenderers' overall understanding of what was really required, yet this could have easily been resolved by way of a normal clarification request by the same tenderers;

3. fails to agree with the appellant Company that it did actually fully satisfy both the administrative, as well as, the technical criteria;

4. feels that it is amply clear that both contended schedules were requested, as well as mandatory and, as such, unless otherwise authorised to do so, no participating tenderer had the right or a discretionary power to hand pick what had to be submitted or not, as such right and power remain, as usual, the sole right and power of the contracting authority and, definitely not that of a participating tenderer, and this despite of the perceived importance or reasonableness that one may attribute to such a request, as well as, the level of substance vis-à-vis format;

5. fails to agree with those architects who testified that it is easy for anyone 'in the trade' to arrive at the requested rates from other data submitted;

6. feels that, whether a 'list' is exhaustive or not, remains the prerogative of who is deliberating upon it at evaluation stage. However, no participating tenderer should desist from submitting what was requested unless otherwise agreed by all parties 'a priori';

7. feels that the contracting authority was not obliged to justify as to why it requested the schedules in question, in this instance due to EU funding, as, ultimately, it remains its sole prerogative to ask for any specific item to be submitted as long as this is reasonable and that it does not, in any way, distort an equitable, level-playing field, amongst all participating tenderers;

8. feels that there is absolutely nothing 'abnormal' for Adjudication Board members to, unanimously, agree with a report drawn by any one of its consultants;

9. fails to agree with the appellant Company's position regarding the alleged failure of the contracting authority to place more emphasis on what was considered to be more, holistically, 'substantial'. The PCAB argues that such consideration should determine the way forward only after an Adjudication Board is satisfied that all participating tenderers had complied with mandatory submission requirements. As a matter of fact, the PCAB also concludes that the gauge of what constitutes 'substantiality' should be availed of prior to the publication of the tender *dossier* and not at adjudication stage. Also, it remains the prerogative of the contracting authority to determine what is 'substantial' or not;

10. decides that, regardless of whether anyone 'in the trade' could, possibly, arrive at such rates following various other ancillary computation, remains

unacceptable to the overall evaluation process as it is never an Adjudication Board's remit to take such initiative – the onus of submission of all relevant data and requested documentation which could easily be assessed without additional human intervention, remains with the participating tenderer. As a matter of fact, the PCAB always desists from encouraging such initiatives in order to ensure that overall transparency, fairness and equity will continue to prevail;

11. fails to comprehend the validity of the point raised by the appellant Company's legal advisor with regards to the fact that the arbitrary decision taken by the appellants to refrain from fully complying with what was actually requested in the tender dossier could, in any way, be compared to the various incidences of reported non-compliance of contracting authorities with regards to payment of dues to awarded tenderers in accordance with contracted payment schedules;

12. whilst agreeing, in principle, that, all things being equal, the more competition there is the better for a contracting authority, yet, this Board cannot accede to such statement applying 'sine qua non' as this is also dependent on adherence by participating tenderers to tender specifications, terms and conditions;

13. feels that the distinction made by the contracting authority as regards bills of quantities vis-à-vis the individual rates applicable to 'unforeseen' works not covered by the bills of quantities was justified;

14. decides that, considering all that transpired, as well as, formally submitted during the hearing, the Adjudication Board (a) could not seek a clarification regarding the fact as to why the requested schedules were not submitted because that would have created grounds for any other participating tenderer to cry foul as soon as the latter would have been made fully aware of the apparent over zealousness of a formally appointed adjudicating body to assist any tenderer in particular to, possibly, fine tune a particular submission previously made by one or more of the participating tenderers, and (b) had no option but to disqualify the tenderer

As a consequence of (1) to (14) above this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be refunded.

Alfred R Triganza	Anthony Pavia	Edwin Muscat
Chairman	Member	Member

29 December 2008