

PUBLIC CONTRACTS APPEALS BOARD

Case No. 197

Advert No 317/2009 – CT 2584/2008

Reconstruction and upgrading of 4 Sections of the TEN-T Road Network in Malta

This call for tenders was published in the Government Gazette on 14.08.2009. The closing date for this call for offers with an estimated value of Euros 40,150,000 was 19.11.2009.

Five (5) different tenderers submitted their offers.

On 2.03.2010 *Messrs Polidano Bros Ltd and Giustino Costruzioni Spa*, Joint Venture filed an objection after being informed that *'the tender submitted by you is administratively not compliant for the following reasons:*

- *CV's submitted were incomplete, whereby they failed to provide evidence of the necessary experience within the job description field*
- *Financial Identification Form and Non-Collusive tendering certificate were not submitted.'*

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members convened a public hearing on 10.05.2010 to discuss this objection.

Polidano Bros Ltd and Giustino Costruzioni Spa, Joint Venture

Dr Henri Mizzi	Legal Representative
Dr Jesmond Manicaro	Legal Representative
Mr Claudio Grech	

Road Network Joint Venture

Dr Adrian Delia	Legal Representative
Dr John L. Gauci	Legal Representative
Mr Emanuel Bonnici	
Perit Ray Sammut	
Perit David Bonnici	
Mr Mark Vella	

Dr John Refalo	Legal Representative
Perit Malcolm Gingell	
Mr Paul Magro	
Ms Sandra Magro	

Dr Charles Galea	Legal Representative
Mr Victor Hili	

Dr Chris Grima
Mr Frank Schembri
Mr Edward Schembri
Ms Itianna Schembri
Perit Mark John Scicluna

Legal Representative

Transport Malta

Dr Joseph Bonello
Dr Stanley Portelli

Legal Representative
Head Executive

Evaluation Board

Mr Dennis Attard
Ms Henriette Calleja
Mr Joseph Church
Mr John Demicoli
Mr Robert Zerafa

Chairman
Secretary
Member
Member
Member

Contracts Department

Mr Francis Attard

Director General (Contracts)

Following a brief introduction by the Chairman PCAB, Dr Henry Mizzi, legal representative of *Polidano Bros Ltd and Giustino Costruzioni Spa, Joint Venture (PBGCJV)*, the appellants, raised a preliminary objection on the reasoned reply submitted by *Road Network Joint Venture (RNJV)* which was received by his clients on 21 April 2010. He said that on 28 April 2010 they submitted a complaint about this reasoned reply arguing that RNJV did not have any standing in these proceedings. He explained that his clients' complaint of the 2nd March 2010 was regulated by Regulation 82 of the Public Contracts Regulations which referred to procedures to be followed in case of a three package system. Dr Mizzi said that they were contesting the disqualification of their clients' offer in order to remain in the tendering process together with other tenderers. He maintained that, in spite of the fact that the other party had an economic interest to exclude them from the tendering process, yet, this did not mean that they had a legitimate interest in defending or otherwise the evaluation committee's decision that led to the discarding of their offer. It was stated that the law (Regulation 82) did not permit the other party to participate in these proceedings since this was only applicable to objections filed against a proposed award in terms of Regulation 83.

At this point the Chairman PCAB referred to Regulation 84 (11) (a) which specified that:

'The Chairman shall have the power to determine the procedure for the hearing of all complaints lodged with the Appeals Board and shall ensure that during the public hearing all interested parties are given this opportunity to make their case.'

He said that the PCAB had always followed this procedure as a general rule for purpose of transparency.

Dr Mizzi replied that the Regulations made a clear distinction between the type of process where their appeal was filed under Article 82 and an appeal filed under Article 83 where it was clear that the recommended tenderer was deemed to have registered an interest. He claimed that Article 84, that was quoted before, was qualified with what was not specific because that was a general article and, as a result, could not be applied with specific dispositions because who was still in the process would wish that whoever was disqualified remained disqualified. He said that, in this case, other tenderers did not have a legitimate interest because the appellants were not challenging the award of tender but to remain in the process.

Mr Triganza explained that in the past other tenderers who were still in the process had always been given the chance to participate in the proceedings and so the same praxis would be used in this case.

Dr Adrian Delia, legal representative of RNJV, concurred that the PCAB had always adopted this procedure in previous cases.

With regard to the motives of their complaint, Dr Henri Mizzi said that, contrary to what was alleged in the Department of Contracts' letter dated 24 February 2010, namely that the *Non-Collusive Tendering Certificates* were not submitted, his clients had copies thereof that were duly dated and signed by each partner of the Joint Venture which were printed from the copy of the CD that was submitted with the tender.

Dr Mizzi said that, prior to these proceedings, he had submitted a request to the Contracts Department's office to be given the opportunity to view and examine what was submitted by his clients but, for some reason, this request was turned down. As a consequence, he considered that it was important that they should first verify what was submitted in their tender because they wanted to establish what the case against them was. The Chairman PCAB pointed out that the board was in possession of a copy of such documents (in respect of Lot 3 only) that reflected something but it preferred if these were verified with the original ones. So, the Director General (Contracts) was asked to exhibit the relevant original documents in respect of the four lots. The PCAB decided to proceed with the hearing since it transpired that it was going to take some time for the Contracts Department's officials to find them since this tender consisted of four lots and was very bulky.

With regards to the alleged failure to provide evidence of the necessary experience within the job description field of the CVs, the appellants' lawyer made reference to Volume 1 Section 4 *Form 4.6.1.2 Personnel to be Employed on the Contract* and *Form 4.6.1.3 Professional Experience of Key Personnel Curriculum Vitae*. He said that, as a state of fact, his clients acknowledged that *Section 13 Specific experience in industrialised countries* of the latter form was left blank. However, he sustained that, although the relevant information was not in Form 4.6.1.3 where it was requested, it was included in the last column of Form 4.6.1.2 which dealt with the experience of personnel that were to be involved on this project.

As regards Volume 1 Section 4: *Form 4.5 Financial Identification Form*, Dr Mizzi declared that the only document submitted was that which indicated that the account holder was Polidano Bros Ltd and this was duly provided with all the relevant details, including the bank account number and the bank's and account holder's endorsement. The appellants' lawyer said that his clients had agreed between them that payments should be made in the bank account of one of the partners of the joint venture, Polidano Bros Ltd, and that, as a consequence, there was no need for them to submit separate account details pertaining to the other partner in the same joint venture, namely, Giustino Costruzioni Spa.

Furthermore, Dr Mizzi said that where the Contracting Authority requested that a particular form was to be signed by all the members of the consortium, the tender document was very specific, but this was not the case in respect of the 'Financial Identification Form'. At this point he made reference to Clause 14.3.2.2 which stated that:

A signed declaration from each legal entity identified in the tender form certifying their eligibility to participate, using the form in Volume 1 Section 2 – Tenderer's Declaration (refer to Article 3.2 above)

Dr Mizzi made specific reference also to Article 28.2 which dealt with the admissibility or otherwise of the tender. He said that this article was important even in view of what had been stated recently in public regarding tenders that were disqualified on the basis of administrative non-compliance. This article specified that:

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:

28.2.1 in any way influence the scope, quality or execution of works, or

28.2.2 *restrict the rights of the Central Government Authority, the Contracting Authority or the obligations of the tenderer under the contract in a manner inconsistent with the tender documents, or*

28.2.3 *rectification of which would unfairly affect the competitive position of other tenderers presenting admissible tenders.*

He contended that, according to this article, (i) a tender to remain in the process had to be substantially compliant and (ii) the process permitted rectifications of those aspects that had no competitive and negative impact on other tenderers.

At this stage, he referred to point 2 of the PCAB's conclusion in *Case No 170: CT 2286/2009 Tender for Artificial Ground Surface at the Mosta Football Ground* wherein, *inter alia*, it was stated that:

The PCAB also feels that given that, in some way or other, pertinent details were included in the appellant Company's tender, albeit, admittedly, not necessarily in the form requested, yet, the PCAB concludes that the appellant Company's offer was substantially compliant

He claimed that the same situations in the above article regarding substantial compliance were reflected in this case and the facts as to where the relevant information regarding experience of personnel was included were also similar.

Dr Mizzi explained that their complaint was based on the argument that (i) the relevant information regarding experience of personnel, though not included in the form requested, was actually provided (ii) even if for the sake of the argument there were shortcomings in the other two forms (which was not admitted), these deficiencies were not substantial. He argued that if the Department had asked them to rectify or clarify the matter instead of eliminating them from the tendering process none of the other tenderers' position would have been prejudiced. Dr Mizzi insisted that if the Contracting Authority found that the administrative mistake was not of a substantial nature and it was not going to negatively affect the other tenderers, it was obliged to use its discretion by allowing the tenderer to remedy the situation. He emphasised that it was in the public interest that more than one tenderer remained in the process. He said that in this case, if his clients were to be disqualified, the Contracting Authority would end up with only one bidder because all the others were disqualified.

The appellants' legal representative said that, in their reasoned letter of objection, they made specific reference to two cases decided upon by the European Court of Justice whereby in

1. *Commission vs Denmark (Storebaelt)*, the Contracting Authority conducted negotiations with a tenderer whose tender was not compliant (missing items) and the court decided that this was prohibited because it was fundamental for the contract.
2. *Tideland Signa vs Commission*, the appellants were disqualified because when they resubmitted the tender they did not change the validity period of 90 days from the final date for submission of the original tender and the court decided that this was something that applicant should have been allowed to rectify.

Dr Mizzi also made reference also to PCAB's Case 138: *CT 2075/06 – Adv No 381/07 OTender for the Reconstruction of Marsascala Bypass, Marsascala/Zabbar* wherein, *inter alia*, it was stated that the PCAB:

“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 tenderer ...”

Dr Mizzi said that the PCAB did not uphold this appeal and confirmed the disqualification because there was the possibility that the tenderer could carry out a fine tuning of an aspect of the tender that was fundamental.

He said that in the above-mentioned cases the PCAB reflected the jurisprudence of the European Court of Justice.

Dr Jesmond Manicaro, also representing the appellants, pointed out that the most important thing was that the Evaluation Committee had all the information available because there were a number of documents that were common to each lot and therefore there was no need to submit them in every lot. Here, he made reference to Note 6 of Clarification No 3 issued on the 19 October 2009 (a copy of which was tabled – which *inter alia* stipulated that:

The different bids must include the documents listed hereunder and as indicated in the attached table:

- (i) Documents which are common for all road projects, irrespective of the number of road projects and irrespective of the combination of the road projects for which the tenderer decides to bid – These must be included in Envelope 2.*

The PCAB (Mr Pavia) intervened to draw Dr Manicaro's attention that this did not specify that one document had to be submitted for all lots but that it had to be included in Envelope 2.

Dr Joseph Bonello, legal representative of Transport Malta, intervened to state that tenderers had to submit the documents for each lot and these had to be included in Envelope 2.

Continuing, Dr Manicaro argued that the fact that the title of the rejection letter dated 24 February 2010 received from the Department of Contracts was '*Reconstruction and Upgrading of 4 sections of the Ten-T Road Network in Malta*' suggested that their offer was considered as one tender and this was because their clients submitted the bid for all four lots. Furthermore, he pointed out that in the same letter no reference was made to the specific lots when it was stated that the *Financial Identification Form* and the *Non-Collusive Tendering Certificates* were not submitted.

Nevertheless, Dr Bonello intervened to rebut what had been argued by making reference to Question/Answer 1 of Clarification Number 4 that was issued to all prospective bidders on 27 October 2009 wherein it was stated that:

***Question 1:** with reference to Question 7 of Clarifications issued on 6 October 2009 Since the answer appears to us still not clear please confirm that the Tenderer must submit a separate form for each Lot (i.e. Lot 1A, Lot 1B, Lot 2A, etc.) where he shall indicate at point 2 the description of only one Lot, i.e. the Lot to which refers the form, and at point 3 the tender price of only the same Lot.*

***Answer 1:** Bidders are hereby being notified that they must submit one form for each lot i.e. one for lot 1A, one for lot 1B, one for lot 2A, one for lot 2B, etc.*

When his attention was drawn that these clarifications were not related with one another, Dr Bonello insisted that, in spite of the fact that it did not make reference to the clarification mentioned by Dr Manicaro, it dealt with the same issue. He said that the clarification issued on 27 October 2009 superseded all previous clarifications on the same subject.

Mr Claudio Grech, one of the appellants' representatives, drew the attention of those present that (i) this clarification referred to those forms that had to be inserted in Package 3 and not in Package 2 since reference was made to the price and (ii) they were referring to documents (*Financial Identification Form* and *Non-Collusive Tendering Certificate*) which had nothing to do with the proper offer.

Mr Francis Attard, Director General (Contracts) and Mr Dennis Attard, Chairman of the Evaluation Committee were the main witnesses during these proceedings. They gave their testimony under oath.

Mr Francis Attard testified that the clarifications were sent to bidders by post and were also published on the Contracts Department's website.

The Director General (Contracts) said that in their letter dated 24 February 2010 addressed to Polidano Bros Ltd and Giustino Const. Spa. Joint Venture it was stated that:

'Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the tender submitted by you is administratively not compliant for the following reasons:

- *CVs submitted were incomplete, whereby they failed to provide evidence of the necessary experience within the job description field*
- *Financial Identification Form and Non-Collusive tendering certificate were not submitted.*

The Extract of the Evaluation Report concerning your offer is attached in annex to this letter.'

Mr Triganza intervened to point out that, in spite of the fact that in the above-mentioned letter it was stated that the documents referred to in the second bullet were not submitted, in the

Extract of the Evaluation Report it was stated that '*The Non-Collusive Tendering Certificate as per Form 4.6.14 was submitted but not signed by Giustino Costruzioni Spa, one of the partners in the Joint Venture.*'

Furthermore, when Mr Attard was shown the original document of one of the lots and asked to confirm whether it was signed by Giustino Costruzioni Spa, the reply given was in the affirmative. Moreover, in reply to a specific question by the PCAB, Mr Attard confirmed that this document was requested for each lot.

Dr Manicaro failed to understand how it was stated that such documents were not submitted considering the fact that these were available. Furthermore, he pointed out that these were also available on the CD that was submitted with his clients' offer.

At this stage the Chairman PCAB asked Mr Dennis Attard, Chairman Evaluation Committee, to explain why the appellants' offer was discarded. The witness pointed out that, on the basis of what had been stated by the appellants, the details and information requested in Form 4.1.6.3 were much more specific and different from those requested in Form 4.1.6.2. He explained that the job description field under part 14 *Professional experience* in Form 4.6.1.3 of most of the CVs was left blank. He claimed that such details were indispensable for evaluation purposes because they had to ascertain that the professional experience of the Key Personnel was relevant to the roads projects referred to in this tender. He sustained that the lack of experience would have a negative impact on the implementation of the project.

When his attention was drawn to the fact that the fields under part 13 *Specific experience in industrialised countries* were empty, Mr Attard said that their contestation was on part 14 *Professional experience* because they found themselves in a difficult situation to ascertain the capabilities of the experts provided by the appellants *vis a vis* the road works for which the tender was issued.

Furthermore, he said that, although this was not indicated in the rejection letter, some CVs in respect of Lot 2 were found in Lot 3 and vice versa.

The PCAB also drew the attention of Mr Attard that, whilst in the letter of exclusion it was stated that the *Non-Collusive Tendering Certificate* was not submitted, the fact that the Department of Contracts had forwarded the PCAB a copy of the relevant document pertaining to Lot 3 indicated that it was, in actual fact, submitted. However, the Chairman Evaluation Committee explained that in their report they said that as far as Lots 3 and 4 were concerned they had no problems. The Evaluation Committee pointed out that it was the *Non-Collusive Tendering Certificates* pertaining to Lots 1 and 2 that were not signed by the two partners. The PCAB remarked that the extract of the Evaluation Report forwarded to the appellants did not make any reference to lots and therefore, once it resulted that this document was submitted, it would conclude that they made a mistake. He maintained that the lot numbers should have been indicated in their report because, otherwise, the appellants could not defend themselves appropriately.

Here, Mr Attard claimed that these were four lots that had four separate contracts. Dr Manicaro intervened and stated that this was not true and he insisted that the PCAB should not be misled in this manner.

On his part, Mr Grech said that, if these were four different lots, it would have been more than necessary that the lots were indicated and he was not surprised that the General Contracts Committee had taken such a decision because it was misled. Mr Dennis Attard said that they had attached the detailed minutes of the adjudication meetings in respect of each bidder with their report and these clearly indicated the deficiencies under each lot.

Dr Bonello said that the appellants should have drawn the attention of the Department of Contracts if they had doubts about the correctness of the letter once it was stated that the relevant forms were missing instead of not signed.

Dr Mizzi replied that when they asked the Department of Contracts to have access to their tender, such request was turned down.

Mr Triganza explained that, as it happens in similar circumstances, the PCAB did not give its consent to such request in order to ensure that no tampering with documents took place. Furthermore, the Chairman PCAB added, it was acknowledged that each bidder should retain a copy of a submission.

Dr Bonello clarified that he was not stating that the appellants should have been given access to documents but, once the appellants submitted a formal request, the Authority should have clarified the matter in writing.

Dr Adrian Delia, legal representative of RNJV, argued that the manner in which the proceedings were developing showed that the only advantage that the eliminated tenderer could have was that of trying to create confusion or uncertainty. He said that their main arguments dealt with the admissibility of tenders and the substantiality or otherwise of missing elements in their offer. He insisted that the only state of fact that the appellants' representatives were contesting was that concerning the *Non-Collusive Tendering Certificate* which was not submitted. Dr Delia contended that, in the prevailing circumstances, the appellants were admitting the grounds of rejection with regard to the other issues, that is, the CVs and the *Financial Identification Forms*. Dr Mizzi interrupted by stating that he was being misquoted.

Dr Delia continued by making reference to the legal point raised by Dr Manicaro wherein he maintained that this did not consist of four tenders but one tender. The lawyer said that, on the basis of this argument, he failed to understand why the appellants were insisting that if they had something missing this would affect only one offer and not the other. Dr Delia explained that if the CVs and the *Financial Identification Forms* were missing in the four lots then their disqualification should be confirmed.

Dr Delia also explained that, as a result of a clarification, it was decided that bidders had to submit four guarantees. He said that this was being mentioned just to point out why he did not agree with the appellants' submission that this should be considered as one contract. Furthermore, he said that the Contracting Authority or the Department of Contracts could award different lots to different bidders.

As regards the *Non-Collusive Tendering Certificate*, Dr Delia said that, on the basis of the appellants' argument that this was one contract, if they had 4 lots and

- (i) they had missing documents and/or shortcomings in any of these lots;

- (ii) it was specified in the tender document that such forms had to be submitted by every tenderer and by each partner of the joint venture; and
- (iii) according to the clarification referred to by the appellants, this form had to be common for all lots and inserted in Envelope 2,

then the appellants were condemning themselves and would, as a consequence, lose the whole tender.

Dr Delia said that on the basis of Transport Malta's arguments that these were four separate contracts only those lots where the Non-Collusive Tendering Certificates were found to be deficient would be discarded. He also contended that the appellants had to decide because it was not so clear for one to comprehend what they were actually stating. Dr Delia remarked that, as was being explained by the Chairman of the Evaluation Committee, this tender was not discarded capriciously but because the shortcomings were affecting their deliberation in substance. He maintained that there was no need to identify which lot/s was/were deficient because if this was one contract and they had shortcomings, then the whole tender would have to be eliminated since, in similar circumstances, the law did not permit the Evaluation Board to continue with the adjudication process.

At this stage Dr Delia made reference to the two case laws of the European Courts of Justice that were mentioned by the appellants' legal representatives.

He said that in the *Commission vs Denmark* case it was stated that:

"In this regard it must be stated that first of all that observance of the principle of equal treatment of tenderers required that all the tenderers comply with the tender conditions so as to ensure an objective comparison of the tender submitted by the various tenderers."

In the *Tideland Signal vs Commission* case, he said that the tender document itself provided a 24-hour period within which clarifications could be sought. He contended that once this clause was not included in the tender under reference, they could not quote from this case because the ECJ decided on completely different facts.

With regard to Case 138 relating to the Marsascula By-Pass which was also mentioned in their reasoned letter of reply, Dr Delia said that, rightly so, this tribunal decided against one of the partners he was representing precisely because they had missing documents that were mandatory and substantive. He argued that, on the basis of this decision and once the appellants made the same mistake, the PCAB should, likewise, confirm the decision of exclusion since, otherwise, they would be creating an injustice with another tenderer who passed from the same experience. Dr Delia pointed out that in those instances where a tenderer did not comply with the tender conditions and requirements (mandatory documents not filled in or incomplete, or unsigned, not submitted in separate forms and so forth) the PCAB had always decided against such appellants and should continue to decide accordingly since, otherwise, the public tendering system would collapse. He said that the PCAB had always been consistent in such instances.

Regarding the Case in respect of CT 2286/09 - Mosta Turf, Dr Delia maintained that the facts were different because in that case the PCAB decided (i) in favour of a shortcoming that was

not substantial and (ii) not on issue regarding a form that was not submitted but on a form that was not submitted in the format requested.

Dr Delia sustained that, considering the fact that the appellants admitted that Section 13 of the CVs was left blank and that the *Financial Identification Form* was submitted by only one of the partners, then the PCAB should confirm their exclusion from the tender procedure since the PCAB had always argued that admission ‘per se’ does not automatically lead to a party being excused. With regard to the *Non-Collusive Tendering Certificate*, Dr Delia maintained that, after checking the documents exhibited, these were not submitted in the form requested in the tender since this stipulated that these had to be presented by each partner of the Joint Venture and for each lot and the appellants had, until then, not provided any proof to the contrary.

Dr Stanley Portelli, Head Executive of Transport Malta, requested to intervene to state that he did not know whether the Evaluation Committee was representing the Contracting Authority or the Department of Contracts because they (Transport Malta) might not be agreeing fully with the evaluation process. He said that whilst they were not stating that the recent regulations were not followed, yet, they thought that, as the regulations were recently changed to ascertain that ultimately the paying authority would get the best deal, a tender should not be excluded solely on administrative shortcomings. Dr Portelli maintained that he was not mentioning these points to defend any particular tenderer but to ensure the money that would be spent would go to a tenderer that gave the best value.

In reply to a specific question by the PCAB, Dr Portelli said that he did not know whom the adjudication board was representing and the reason given was that the procedure adopted by the Adjudication Board was so rigid that he, as an Executive Head of an Authority, at no point in time was aware of what was happening in the adjudication process.

At this point the Chairman PCAB drew Dr Portelli’s attention regarding the fact that once he was not part of the adjudication committee it was not his role to be involved in such a process. However, it was explained that, prior to the adjudication, there was the preparation of the tender document which reflected the authority’s goals and, as a result, the adjudication process had to, ultimately, reflect what would have been strategically decided upon *ab initio*.

Furthermore, the Chairman PCAB said that the new amendments to the local procurement procedures concerning administrative shortcomings were not applicable retroactively and, therefore, were not applicable to this tender because these were introduced before the closing date of tender.

Dr Portelli concluded by stating that Transport Malta, being the entity that was going to pay for this project, preferred if it had a wider selection of contractors where to choose from.

Dr Delia responded by stating that the query regarding who was the Contracting Authority was indicated in the tender document and in this case was Malta Transport Authority. He said that the tender sometimes made a difference as to who was the implementing authority and who was the Contracting Authority.

With regard to the amendments concerning administrative procedures, Dr Delia said that in Case 194 re CT/2173/2008; Advert CT/250/2008 - *Period Contract for the Handling and Compaction of Permitted Waste Delivered to Għallis Landfill and to Undertake other Works*

within the Magħtab Environment Complex, the PCAB had already decided on the applicability or otherwise of such amendments where the closing date of tender was before their introduction. Furthermore, he said that even if they were to apply the new amendments, considering the fact that under ‘Technical Capacity’ of the new Tender Forms it was specified that *“No rectification shall be allowed. Only clarifications on the submitted information requested may be requested. This is indicated by the symbol”*, in this particular case they could not sanction relative shortcoming as regards experience of personnel.

At this stage the PCAB decided to continue with the cross examination of the witnesses.

In reply to a specific question by the PCAB, Mr Francis Attard said that the scope of the *Financial Identification Form* was that the Contracting Authority (not the Department of Contracts) would know where payments resulting from this contract were to be made. When asked to state whether the whole consortium was expected to sign this document if the only account number indicated on this form was related to one partner of the joint venture, he replied that, if the consortium had not been officially set up yet, then this had to be signed by all partners.

Dr Manicaro intervened to claim that once the parties of the Joint Venture had agreed that payments by the Contracting Authority should be made in one particular bank account, there was no need for one to have the names both partners. However, Mr Attard also maintained that it was important that somewhere in the submission of the bid it would have been explained that the Bank account was not representing one particular economic operator but that it was in the name of the Joint Venture. On his part, Dr Mizzi also intervened to point out that the Form only requested the signature of the account holder and not that of the partners of the Joint Venture.

However, Dr Delia drew the attention of the PCAB that point 7 on page 71 under the heading ‘ADDITIONAL NOTICE TO TENDERERS’ specified that:

‘Each partner in a joint venture/consortium must fill in and submit every form.’

He explained that once the tenderer was the ‘joint Venture’ and in this ‘Joint Venture’ there were two partners, if they decided to have a common account they had to provide the relevant details and submit the signatures of both partners and if they had a separate account they had to provide details of the account in respect of each partner. He argued that if the appellants provided an account number of one of the partners of the ‘Joint Venture’ then there was one missing.

In reply to a comment by the PCAB, Dr Bonello said that they were not contesting that there was one account number but that the ‘form’ had to be signed by both partners. Mr Triganza pointed out that he could sign as an account holder but the partner could not sign on his behalf. Dr Delia insisted that each partner was obliged to submit every ‘form’ in accordance with the requirements of the tender.

At this stage the Chairman PCAB moved on to discuss the issue concerning the CVs and this with a view to establish where the appellants were not compliant. He said that according to the Evaluation Report:

“The bidder submitted incomplete CVs (Form 4.6.1.3) whereby the bid failed to provide the necessary evidence of experience within the job description field, in order to fulfil the requirements as stipulated in Clause 4.2 paragraph 6 of the Instructions to Tenderers.

From the information provided:

- a. *In Form 4.6.1.1 for both partners it resulted that Giustino Costruzioni Spa. has a less human resources contribution than Polidano Brothers. The contribution of these resources was made as Key Personnel, who mostly have submitted incomplete CVs*
- b. *The Evaluation Committee was not in a position to endorse the contribution of Giustino Costruzioni Spa with regards to Plant since the relative Form 4.6.2 was not submitted in the tender.*

From the details submitted in Form 4.6.6 – Data on Joint Ventures – it was indicated that the bid is a joint venture with 50% /50% responsibility of both partners. The Evaluation Committee was not in a position to endorse this shared responsibility due to the very limited resources (both human and plant) allocated by Giustino Costruzioni Spa. This was considered to have an important bearing on the commitment of Giustino Costruzioni Spa, given that this partner is indicating most of the required project experience (Form 4.6.5) for eligibility of the bidder for this tender.”

He said that the first reason given by the Evaluation Board that the bidder should not be considered further was as follows:

‘Lack of the necessary evidence of experience of the Key Personnel, in order to fulfill the requirements as stipulated in Clause 4.2 paragraph 6 of the Instructions to Tenderers’

On cross-examination by the PCAB, Mr Dennis Attard testified that para. 6 of Clause 4.2 of the *Instructions to Tenderers* stipulated and provided guidance in respect of the *Key Personnel* that were requested for each lot and related experience, such as, *Minimum Years of Professional Experience* and *Minimum years of Experience in Similar Works*. He explained that when they (the appellant Company) examined the CVs submitted, while in respect of Form 4.6.1.2 they had no particular problems, as far as Form 4.1.6.3 was concerned, the job description field under item *14 Professional Experience* of most of the CVs was missing. Furthermore, he said that they were concerned about the capabilities of *Key Experts* because of incomplete CVs whereby the job description field was not detailed enough.

The same witness testified that the details of some of the personnel indicated in Form 4.6.1.2 of lots 2 and 3 did not corroborate with the relative CVs because some of those pertaining to Lot 2 featured in Lot 3 and vice versa. Yet, he argued that, unfortunately this did not feature in their report. In reply to the PCAB’s remark, Dr Delia pointed out that although this was one tender there was the possibility that different lots were awarded to four different bidders.

When the PCAB made reference to the Evaluation Committee’s report whereby it commented about the two partners’ contribution in respect of human resources and plant, Mr

Dennis Attard said that, while the joint venture was a 50%/ 50% basis partnership, the contribution of Giustino Costruzioni Spa in terms of plant could not be verified because it was not submitted and that regarding human resources it was difficult for them to establish whether these were 50%. When asked by the PCAB to state what did the specifications of the tender document request, Mr Dennis Attard said that they did not specify the number of *Key Experts* or *Plant* each partner had to contribute, because the most important thing was that they were capable of carrying out these works.

When asked to state whether the submission of such information as regards human resources and plant was mandatory, the reply given was in the affirmative.

At this stage Dr Delia intervened to draw the attention of those present regarding page 6 of the tender document which stated that:

“4 INFORMATION/DOCUMENTS TO BE SUPPLIED BY THE TENDERER

NOTE: All items required under this section shall be submitted for every lot being tendered for.

Tenderers bidding for more than one road section must demonstrate in their submissions that they possess sufficient human resources, plant and equipment in order to carry out these works concurrently.”

Mr Grech interjected to claim that in a joint venture there were different but joint responsibilities of the partners. He said that they submitted sufficient resources (plant, equipment and labour force) for the execution of the works that had to be delivered. He argued that, once Polidano Bros Ltd contributed sufficient resources in accordance with requirements of the tender, then the contestation was on how many resources would be contributed by Giustino Costruzioni Spa over and above those required in the tender.

In reply to a specific question by the PCAB, Mr Dennis Attard said that when they were checking the administrative compliance of the appellants' offer, the Evaluation Committee did not find the list of plant that was supposed to have been submitted by Giustino Costruzioni SpA. When asked to state whether this was mandatory, the reply given was in the affirmative and this was due to the fact that in the tender document it was stipulated that each partner in a Joint Venture had to submit all forms.

The Chairman PCAB pointed out that any party in a joint venture may participate by contributing through various means, such as, know-how. The PCAB's Chairman proceeded by stating that, hypothetically, based on the reasoning of the Evaluation Committee, a tenderer could proceed to the technical stage of the evaluation process following the submission of the forms regardless of the fact that such tenderer might not have, for example, the necessary plant. Similarly, another tenderer's bid could be discarded by an Evaluation Committee at the administrative stage simply for not submitting the forms even though such tenderer may be the supplier of all the plant being provided by the joint venture.

The Chairman Evaluation Committee said that at administrative stage tenders were evaluated to establish whether they were compliant with the requirements of the tender documents. He

said that they had to evaluate the tenders in this sequence: administratively, technically and financially.

Dr Manicaro claimed that in case of a joint venture it would be futile if the partners submitted the same things.

Dr Delia said that the partners in a joint venture did not need to provide the same quantity of equipment or the same number of human resources but it was mandatory for each partner to submit a form even if their contribution was nil. At the administrative stage, continued Dr Delia, the Evaluation Board had to ascertain that tenderers submitted everything in order to proceed to the next stage. He contended that the Evaluation Board would have breached the regulations if they were administratively non-compliant and proceeded with the technical evaluation.

Mr Dennis Attard confirmed that the Evaluation Board could not evaluate a tenderer technically if not administratively compliant.

On cross-examination by the PCAB, Mr Francis Attard testified that the *Financial Identification Form* was mandatory and that whoever signed it (i) represented the Joint Venture and not part thereof and (ii) had to assume responsibility on behalf of the Joint Venture. He said that the *Financial Identification Form* would not be valid if that economic operator in the Joint Venture did not indicate that it was being signed on behalf of the Joint Venture.

The DG Contracts said that he was of the opinion that, in case of a dispute between the partners regarding payments, the parties involved did not need to sue the Department because the contractual relationship was between the 'Contracting Authority' and the 'Joint Venture'. He insisted that the *Financial Identification Form* had to be signed by all partners of the joint venture but if signed by one of the partners it had to be clearly indicated that the signatory was assuming responsibility on behalf of the Joint Venture. The witness said that the *Financial Identification Form* as submitted did not provide legal comfort since it was not indicating that Polidano Brothers Ltd were also representing someone else.

The Chairman PCAB begged to slightly differ because it could never happen that a company would be allowed to sign on behalf of another's account holder unless accompanied by an authorization.

Dr Delia said that, if the Joint Venture opted to use one account number, both partners could have filled in the two forms and made a cross reference.

Dr Manicaro contended that the issue concerning the submission of the account number of Polidano Bros Ltd was an internal matter between the partners of the Joint Venture. He said that the authority had the necessary comfort considering the fact that in the Tenderer's Declaration(s) in the *Tender Form for a Works Contract* it was confirmed that '*all partners are jointly and severally liable by law for the performance of the contract*' in respect of all lots. Mr Dennis Attard said that he was not in a position to sanction this statement because the *Tender Form* was inserted in Package No 3, which had not yet been opened. Mr Francis Attard pointed out that in Package 2 one could find 'Details of Bidders', who according to Dr Manicaro were Polidano Bros Ltd and Giustino Costruzioni Spa. However, Mr Dennis Attard said that the 'Details of Bidders' and the 'Tender Form' were two separate and

different documents and that it was the latter that was binding and stated that the partners were jointly and severally liable.

Dr Delia said that the tender document made it clear that all forms were to be submitted by all the partners of the joint venture and, as a result, the Evaluation Committee would have failed from its responsibilities had it decided to accept offers which did not comply with this requirement. At administrative stage tenderers were obliged to submit all forms otherwise they would have been rejected, contended Dr Delia.

Dr Manicaro argued that he would foresee a problem if there were two forms with two different account numbers because then the Authority would not know where to effect payments.

In his concluding remarks, Dr Mizzi said that the letter of disqualification was misleading because, up to that time, they had already traced the documents of three Lots in respect of the *Non-Collusive Tendering Certificates* in their original bid. With regard to the CVs, they thought that their shortcoming was in Form 4.6.1.3 Section 13 and not in Section 14, yet, it appeared that the Evaluation Committee did not find any problem with the former section.

Dr Mizzi pointed out that in spite of the fact that the heading of Section 14 was *Professional experience*, none of the sub-items made reference to experience but to *Position* and *Job Description*, which had the same meaning. He contended that, if anything, 'experience' was to be included under Section 13 *Specific experience in industrialised countries* but it resulted that under this section the Evaluation Board did not find any deficiencies. However, the appellants' lawyer said that the necessary information regarding experience was duly provided in Form 4.6.1.2.

As regards the *Financial Identification Form*, Dr Mizzi said that the tender was submitted by the two partners of the joint venture and, therefore, they were assuming responsibility jointly. He failed to understand why there was all this fuss about the fact that his clients had chosen that payments be made in a bank account pertaining to one of the partners.

In response to Dr Delia's statement that the tender document requested that all forms were to be signed by each partner of a joint venture, Dr Mizzi maintained that this was a general clause. He said that the specific clause wherein it was indicated which forms had to be signed by each legal entity identified in the tender was 14.3. The lawyer claimed that the *Financial Identification Form* had to be signed by the Bank Representative and the 'Account Holder' only, who did not necessarily need to be a tenderer.

In reply to a specific question by the PCAB, Dr Bonello confirmed that the *Financial Identification Forms* in respect of all lots were submitted and that these were signed by Polidano Bros Ltd.

At this point, Mr Attard confirmed also that the original *Non-Collusion Tendering Certificates* in respect of all lots were found and that each document was signed by both partners separately. The documents were verified by the legal representatives of both parties.

Dr Bonello said that once it had been confirmed that the *Non-Collusive* forms were found they were withdrawing their claim.

Finally, Dr Mizzi said that this process, if anything, showed how the latest amendments in the department's procedures were necessary and important. However, he said that it was a mistake to think that the law was amended because what happened was that the existing procedures were just being formalized and implemented by the Department. He sustained that it was realized that the Department was not applying the law properly because the law already provided that in case of shortcomings they had to verify whether and which could be sanctioned. He said that if there was any deficiency or administrative shortcomings the tender permitted to be rectified or sanctioned. Dr Mizzi said that in *Case 170 - CT/2286/2009 - Advert No. 213/2009; KMS/TEN/11/2009 - Tender for Artificial Ground Surface at the Mosta Football Ground*, which was also mentioned by Dr Delia in his reasoned letter of reply, the PCAB had identified the criteria of substantial compliance. He said that the PCAB was consistent with previous decisions where it even excluded tenders in those instances where there was a problem of substance and not a problem of form. In cases where there was a problem of substance the PCAB did not allow (i) clarification if a particular tenderer was going to get an advantage over the other or (ii) tenderers to modify the offers.

Dr Mizzi said that the interested party did not state how any of the supposed deficiencies was going to affect them if rectified. He said that, in his opinion, the process required by law was not just checking whether a *form* was signed or not but it required that:

- (i) public funds be properly spent
- (ii) an offer was fair not only in the interest of tenderers but mainly for government
- (iii) anyone who was in the process or could remain in the process without harming others should remain in the process

He said that he was pleased that the Transport Authority mentioned this point.

Dr Mizzi claimed that even if there was a deficiency in the *Non-Collusive Tendering Certificate* this was not a shortcoming that merited the disqualification of a tenderer.

On his part, Dr Delia maintained that the objectives of this tribunal were

- a. to establish what was missing in this tender
- b. if this was the reason, why did the Evaluation Board decide to disqualify the appellants' tender
- c. whether the Evaluation Board was correct in its decision

With regard to the amendments referred to by the appellants' lawyer, Dr Delia clarified that they did not make any reference to the amendments in the Public Contracts Regulations, which he said were going to be amended on that day and were to be effective from 1 June, but to those amendments in respect of Departmental internal regulations.

He said that the public tendering process was carried out so that the implementing Department/ Authority would identify its requirement and an Evaluation Board was set up to verify whether the offers submitted were compliant with the tender requirements. He explained that this process was carried out under the surveillance of the Department of Contracts.

Dr Delia said that they had to establish whether the decision of the Evaluation Committee with regards to deficiency was within the parameters of the tender and the law. He said that

the deficiencies were the *Financial Identification Form* which was submitted by Polidano Bros Ltd only - not on behalf of the Joint Venture but only on his behalf. He said that this was stated by the Evaluation Committee and confirmed by the Department of Contracts and the appellants did not bring any evidence to the contrary. Dr Delia sustained that this was a choice by one of the partners which could not, nevertheless, be sanctioned. At this stage he quoted verbatim from Case 194 re CT 2173/2008 *Period Contract for the Handling and Compaction of Permitted Waste Delivered to Ghallis Landfill and to Undertake other Works within the Magħtab Environment Complex* wherein it was stated that:

“

1. *The PCAB also fails to comprehend as to how contents listed in a mandatory document can be overlooked by a tenderer, even though these may be considered of little or no relevance or significance at all, and this without, minimally, attempting at questioning the fact as to why a contracting authority would include in the tender dossier a 2-3 page document to be filled in by all tenderers specifying that its duly filled submission is mandatory.”*

Dr Delia said the PCAB has always taken this stand on mandatory requirements and he thought it was legally justified. He maintained that this document could not be overlooked or considered irrelevant because it was obligatory and mandatory. He insisted that tenderers could not, explicitly, make choices that went against the tender requirements. Both the Evaluation Board and the PCAB had no power to disregard any of the mandatory tender requirements.

Road Network Joint Venture's legal representative pointed out that the most important thing that the Evaluation Board required for the technical evaluation was the professional experience which was missing. He insisted that the appellants did not provide proof that it was submitted. Dr Delia said that, whilst in form 4.6.1.2 the contracting authority only required a list of personnel, in section 14 *Professional experience* in Form 4.6.1.3 the authority wanted to know the capabilities of the 'Key Personnel' that were to be employed on this contract which consisted of four roads having a length of 10km.

Dr Delia emphasised that the issue was not that once they had 50% shareholding they should contribute 50% of the personnel or plant but the point was that there was a 'Form' which the tender document required that it should be filled in by all partners of the joint venture. Therefore, when they were requested to fill in their professional experience they were expected to describe their professional experience. Dr Delia explained that the Contracting/Implementing Authority had a right to know who were the key personnel (including their professional experience), considering the fact that they were going to be involved in the concurrent reconstruction of a very long stretch of roads. At this point he referred to page 14 of the tender document which stipulated that:

Lot no.	Description	Duration
Lot 1A & 1B	Reconstruction and upgrading of Council of Europe Avenue and Garibaldi Avenue, Luqa	56 weeks
Lot 2A & 2B	Reconstruction and upgrading of Sea Passenger Terminal Access Road, Floriana/ Marsa	50 weeks
Lot 3A & 3B	Reconstruction and upgrading of Marfa Road, Mellieha	56 weeks

Lot 4A & 4B	Reconstruction and upgrading of Mgarr Road, Xewkija and Triq Fortunato Mizzi, Triq ir-Republika Victoria,, Gozo	60 weeks
Total Completion Period		60 weeks

Note: Works on all four (4) road sections must be carried out concurrently.

Dr Delia said that the Evaluation Committee had to verify whether they had sufficient personnel for each lot because a tender could be awarded per lot. The same lawyer maintained that their professional experience was considered substantial because the Evaluation Committee had to ensure that they had the ability to carry out the relevant works.

He concluded by stating that, on the basis of the above, the Evaluation Committee's decision to disqualify the appellants' tenderer should be confirmed because it was correct and according to law and also it would have been illegal if they did not act accordingly.

Dr Bonello said that they had nothing further to add to what had already been stated.

Finally, Dr Mizzi said that the *Financial Identification Form* was being misinterpreted because it was signed by Polidano Bros Ltd not as a tenderer but as an account holder. He insisted that the tender did not require that this 'form' had to be signed by tenderers but to be submitted by tenderers and, as a result, who was the account holder was, in his opinion, irrelevant.

Dr Mizzi failed to understand how Dr Delia stated that the appellants did not submit any evidence on the issue of experience because the requested information was included in *Form 4.6.1.2*.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 2.03.March 2010 and also through their verbal submissions presented during the public hearing held on 10.05.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the points raised by the appellants' representatives, in particular:
 - a. the fact that, contrary to what had been stated, namely, that the *Non-Collusive Tendering Certificates* were not submitted, the Evaluation Board had copies thereof that were duly dated and signed by each partner of the Joint Venture which were printed from the copy of the CD that was submitted with the tender;
 - b. the fact that, whilst Section 13 *Specific experience in industrialised countries* was not filled in by appellants as requested, yet, such information was included in the last column of Form 4.6.1.2 (which dealt with the experience of personnel that were to be involved on this project) instead of Form 4.6.1.3 where it was actually requested the relevant information regarding experience of personnel;
 - c. the reference made to Volume 1 Section 4: *Form 4.5 Financial Identification Form* wherein it was stated that the only document submitted by appellants indicated that the account holder was Polidano Bros Ltd with all relevant details pertaining to their account being included;

- d. the fact that, there was nowhere specifically specified that the *Financial Identification Form* had to be signed by all the members of the consortium;
 - e. the fact that, for a tender to remain in the process, it had to be substantially compliant and for such tender to be allowed to remain in the process it had to allow for rectifications of those aspects that had no competitive and negative impact on other tenderers;
 - f. the fact that, even, for the sake of the argument, there were shortcomings in a couple of forms, yet, these discrepancies were not substantial;
 - g. the fact that, if the Department had asked them to rectify or clarify the matter instead of eliminating them from the tendering process, none of the other tenderers' position would have been prejudiced;
 - h. the fact that, the Evaluation Committee had all the information available subject to one taking into consideration the fact that these were common to each lot and, as a result, these needed not to be submitted in every lot;
 - i. the fact that, in case of a joint venture, it would be futile if the partners submitted the same things;
 - j. the fact that, the issue concerning the submission of the account number of Polidano Bros. Limited was an internal matter between the partners of the joint venture;
 - k. the fact that, one could foresee a problem if these (the *Financial Identification Forms*) were two forms with two different account numbers because then the Authority would not know where to effect payments;
 - l. the fact that, the letter of disqualification was misleading because, during the hearing, documents of three lots in respect of the *Non-Collusive Tendering Certificates* were traced in the original bid submitted by appellants;
 - m. the fact that, the *Financial Identification Form* included a general clause whereas the specific clause wherein it was indicated which forms had to be signed by each legal entity, as stated in the tender document, was 14.3;
 - n. the fact that, the *Financial Identification Form* had to be signed by the bank official and the account holder only, who did not necessarily need to be a tenderer;
 - o. the fact that, it was a mistake for one to think that the procedures governing public procurement, as these were recently amended, were a novelty as the law, '*sui generis*', already provided that in the case of shortcomings one had to verify which could be sanctioned, if any at all;
 - p. the fact that, the PCAB, in the past, had already identified the criteria of substantial compliance as distinct from problems of form
- having also taken note of the fact that:
 - a. with regards to the alleged failure to provide evidence of the necessary experience within the job description field, the appellants admitted that Section 13 '*Specific experience in industrialised countries*' was left blank;
 - b. the parties forming the appellant joint venture had agreed between them that payments should be made in the bank of one of the partners, namely Polidano Bros Ltd and that, as a consequence, there was no need for the other member of the joint venture to submit separate account details;
 - c. note 6 of the Clarification No. 3 issued on 19.10.2009 did not, necessarily, specify (as the appellant Company had interpreted it) that one document had to be submitted for all lots but that it had to be included in Envelope 2;
 - d. in spite of the fact that in the Department of Contracts' letter dated 24.02.2010, it was stated that *Financial Identification Form and Non-Collusive tendering certificate were not submitted*", yet, in the *Extract of the Evaluation Report* it was

stated that ‘*The Non-Collusive Tendering Certificate as per Form 4.6.14 was submitted but not signed by Giustino Costruzioni Spa, one of the partners in the Joint Venture.*’

- having heard Dr Bonello
 - a. state that tenderers had to submit the document for each lot and these had to be included in Envelope 2 with the issue being amply highlighted in Question / Answer 1 of Clarification 4 that was issued to all prospective bidders on 27.10.2009;
 - b. state that they were not contesting that there was one account number but that the ‘form’ had to be signed by both partners;
 - c. confirm that the *Financial Identification Form* in respect of all lots were submitted and that these were signed by Polidano Bros. Ltd;
 - d. confirm that the *Non-Collusive Tendering Certificates* were found and that the contracting authority was withdrawing this specific ground for disqualification.

- having taken consideration of Mr Grech’s
 - a. stand relating to the fact that the *Financial Identification Form* and the *Non-Collusive Tendering Certificates* had nothing to do with the proper offer;
 - b. claim that in a joint venture there were different but joint responsibilities of the partners;
 - c. statement that they (the appellants) had submitted sufficient resources (plant, equipment and labour force) for the execution of the works that had to be delivered

- having reflected on the DG Contracts’ testimony who, *inter alia*,
 - a. evidenced the fact that the *Non-Collusive Tendering Certificate* was signed by *Giustino Costruzioni SpA*;
 - b. reiterated the fact that the *Non-Collusive Tendering Certificate* was required for each lot;
 - c. stated that, with regards to the *Financial Identification Form*, if a consortium would not have been officially set up as yet, then this had to be duly signed by all partners;
 - d. claimed that even in a case where the parties forming a joint venture would have agreed that payments by the contracting authority should be made in one particular bank account, yet, in such circumstance, it would be important that, somewhere in the submission of the bid, it would be explained that the Bank account would not be representing one particular economic operator but that it would be in the name of the joint venture;
 - e. testified that the *Financial Identification Form* was mandatory and whoever signed it (1) represented the joint venture and not part thereof and (2) had to assume responsibility on behalf of the joint venture;
 - f. claimed that the *Financial Identification Form* would not be valid if that economic operator in the joint venture did not indicate that it was being signed on behalf of the joint venture and, in his opinion, the *Financial Identification Form*, as submitted by the appellants, did not provide legal comfort since it was not indicating that Polidano Bros. Limited were also representing someone else;
 - g. following a thorough check conducted elsewhere within the same premises during the hearing session by Contract Department staff members, confirmed also that the original *Non-Collusive tendering certificates* in respect of all lots had been located and that each document was signed by both partners (appellants’ joint venturers) separately

- having duly noted Mr Dennis Attard's evidence wherein, *inter alia*, he
 - a. stated that the job description field defined under part 14 *Professional experience* in Form 4.6.1.3 relating to CVs was not filled by the appellants;
 - b. stated that the Evaluation Committee members found it difficult to ascertain the capabilities of the experts provided by the appellants *vis-a-vis* the road works for which the tender was issued;
 - c. explained that in its report, the Evaluation Committee stated that, as far as Lots 3 and 4 were concerned, they had no problem but the said Committee was referring to the *Non-Collusive tendering certificates* pertaining to Lots 1 and 2 which remained (and duly submitted) unsigned by the two partners forming the joint venture;
 - d. stated that while the joint venture was on a 50% / 50% basis, particularly, the contribution of Giustino Costruzioni SpA in terms of plant could not be verified because it was not submitted and that regarding human resources it was difficult for them to establish whether these were 50%;
 - e. stated that the appellants did not specify the number of *Key Experts* or *Plant* each partner had to contribute, because the most important thing was that they were capable of carrying out these works;
 - f. stated that when the Evaluation Committee was checking the administrative competence of the appellants' offer it did not find the list of plant that was supposed to have been submitted by Giustino Costruzioni SpA;
 - g. stated that, at the administrative stage, tenderers were evaluated to establish whether these were compliant with the requirements of the tender documents

- having also considered the points made by Dr Delia, particularly, those relating to
 - a. the fact that given that bidders had to submit four guarantees – one for each lot – was evidence enough that this tender should not be considered as including only one contract, so much so that the Department of Contracts could award different lots to different bidders;
 - b. the fact that there was no need to identify which lot/s was/were deficient because if this was a single contract and they had shortcomings, then the whole tender would have to be eliminated;
 - c. the reference made to appeal filed in connection with CT 2286 / 09 wherein the PCAB ruled (1) in favour of a shortcoming that was not substantial and (2) not on issue regarding a *form* that was not submitted but on a *form* that was not submitted in the format requested;
 - d. the fact that the appellants had admitted that Section 13 of the CVs was left blank and that the *Financial Identification Form* was submitted by only one of the partners, then the PCAB should confirm their exclusion from the tender procedure;
 - e. the fact that even if the PCAB were to apply the new amendments, considering the fact that under 'Technical Capacity' of the new Tender Forms it was specified that "*No rectification shall be allowed. Only clarifications on the submitted information requested may be requested. This is indicated by the symbol*", in this particular case they could not sanction relative shortcoming as regards experience of personnel;
 - f. the fact that point 7 on page 71 it was stated that "*Each partner in a joint venture/consortium must fill in and submit every form.*"
 - g. the fact that partners in a joint venture did not need to provide the same quantity of equipment or the same number of human resources but it was mandatory for each partner to submit a form even if their contribution was nil;

- h. the fact that, at the administrative stage, the Evaluation Committee had to ascertain that tenderers submitted everything in order to proceed to the next stage, placing emphasis on the fact that any tenderer refraining to follow such procedure would be in outright breach of regularities;
- i. the fact that if the joint venture opted to use one account number both partners could have filled in the two *forms* and made a cross reference;
- j. the tender document required that it should be filled in by all partners of the joint venture and that the contracting authority had a right to know who the key personnel (including their professional experience) were, maintaining that professional experience was considered substantial because the Evaluation Committee had to ensure that they had the ability to carry out the relevant works.

reached the following conclusions, namely:

The PCAB claims that, remaining consistent with previous decisions taken, it is of the opinion that ‘substance’ *vis-a-vis* ‘form’ should be the overriding principle governing any tendering procedure. Having analysed documents, heard various interventions and testimonies given under oath, the PCAB...

1. feels that it is not convinced that the procedure followed was the most practical with the Evaluation Board, seemingly, falling short from conducting a proper assessment, overlooking in the process, details submitted by appellant Company – e.g. *Non-Collusive Tendering Certificates* and CVs which were either found (*Non-Collusive Tendering Certificates*) when further analysis was conducted during the hearing or else, amply identifiable in other areas (professional status of key personnel).
2. maintains that with regards to the *Financial Identification Form* the arguments brought by the appellant Company were more convincing, especially, when one recognises the fact that the ‘Form’ formally establishes that it has to be signed by the bank official and the account holder. It is also pertinent to state that the claim made by the DG Contracts regarding the fact that the *Financial Identification Form* would not be valid if an economic operator in the joint venture does not indicate that it is being signed on behalf of the joint venture has been given due consideration. The PCAB feels that had the appellant Company completely disregarded the submission of the said ‘form’, it would have been different. However, in this particular instance, considering that the ‘form’ was submitted but signed only by one of the joint venturers gives more than a hint about ‘substance’ over ‘form’. As a consequence, it is felt that stating that the *Financial Identification Forms* were not submitted is substantially incorrect, especially when the *form*’s content does refer to an account holder and not a tenderer.
3. The PCAB is of the opinion that the contracting authority, regardless of whether the *Financial Identification Form* is signed by one of the joint venturers or all of its components, is irrelevant as, this Board considers that one signature suffices to cover all the legal and pecuniary interests of the said authority in case of possible, albeit undesirable, future litigation. Furthermore, this Board recognises that no one accepts to participate in a joint venture by endorsing and submitting a document with other parties and then try to disassociate itself from a particular ‘form’ as submitted, especially, when in the Tender Form for a Works Contract there is stated that “*all partners are jointly and severally liable by law for the performance of the contract.*”
4. The PCAB is of the opinion that, regardless of whether the *Financial Identification Form* is signed by one or all of the parties involved in the joint venture, the

fact that it relates to the identification of an account number and not the financial standing of a tenderer renders such 'forms' less significant (especially when an account number can easily be changed whilst a financial standing is not easily turned around by a simple stroke of a pen!), albeit important and mandatory. Yet, most importantly, the 'form' was submitted and signed by one of the joint venturers, the account holder. As a consequence, it is the PCAB's opinion that the mandatory obligation was duly fulfilled by appellants.

5. Undoubtedly, this Board, having taken into consideration the fact that:
 - a. pertinent CVs, albeit may not have been submitted by the appellant Company in the format as specified, yet, quite evidently, were described elsewhere in their nature and substance
 - b. the same contracting authority during the hearing has formally withdrawn its claim of non-submission of the *Non-Collusive Tendering Certificates* by the appellants

considers, in view of the points raised in (2) to (4) above, the issues raised in connection with the *Financial Identification Form* are not enough to lead an Evaluation Board to recommend that such a tender, as submitted by the appellants, be deemed as 'administratively not compliant'.

As a consequence of (1) to (5) above this Board finds in favour of the appellant Company.

Furthermore, the PCAB recommends that the appellants' bid be re-integrated in the adjudication process thus enabling the Evaluation Board to thoroughly cross check all the documentation it failed to check from a technical perspective in the first instance in view of its stand not to evaluate further the remaining documents submitted taken as a consequence of it finding the appellants' bid non-compliant administratively at a preliminary stage.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

9 June 2010