

PUBLIC CONTRACTS REVIEW BOARD

Case No. 397

CT/3004/2010; Adv. No. 60/2011

Works Tender for to Design, Build and Operate of the Gozo Waste Treatment and Transfer Facility at tal-Kus l/o Xewkija, Gozo

This call for tenders was published in the Government Gazette on the 4th March 2011. The closing date for this call with an estimated budget of € 8,479,870 was the 2nd June 2011.

Four (4) tenderer submitted their offers.

BS Environment Joint Venture filed an objection on the 16th January 2012 against the decision of the Contracts Department to disqualify its offer as administratively non-compliant for the purposes of clause 14 of the tender document.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Thursday, 12th April 2012 to discuss this objection.

Present for the hearing:

BS Environment Joint Venture

Dr John Gauci	Legal Representative
Mr David Bonnici	Representative
Mr Emanuel Bonnici	Representative

Polidano Eco JV

Dr Franco Galea	Legal Representative
Mr Boris Farrugia	Representative

WasteServ Malta Ltd

Dr Victor Scerri	Legal Representative
------------------	----------------------

Evaluation Board

Mr John Vella	Chairman
Ing. Christopher Grech	Member
Ing. Aurelio Attard	Secretary

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

Dr John Gauci, legal representative of BS Environment Joint Venture, the appellant, stated that by letter dated 6th January 2012 the Department of Contracts had informed his client that the joint venture's offer was considered to be administratively non-compliant on the basis of clause 14 'Language of Tenders' of Volume 1 – Instructions to Tenderers and the relative sub-clauses since the following documents provided by the partner, Sidercamma S.r.l., were submitted in the Italian language without an adequate translation into the English language:-

- Board Resolution giving Power of Attorney
- Audited Accounts
- Credit Facilities declaration from Banca Nazionale di Lavoro (Italy)
- Experience as contractor
- CVs of Key Personnel

Dr Gauci conceded that the tender submission had to be presented in the English language as per clause 14.

A) (i) Board Resolution giving Power of Attorney, (ii) the Audited Accounts and (iii) Credit Facilities declaration from Banca Nazionale di Lavoro (Italy) or the Bank Statement

Dr Gauci made the following submissions:-

- i. the contracting authority stated that these three items of documentation were submitted only in the Italian language without an adequate translation in English;
- ii. as far as clause 16 'Content of Tender – Three Package Procedure' of the tender document was concerned, these three documents were included under clause 16.1 as follows:

(b) General/Administrative Information - in respect of which 'Note 2' applied:

(iii) Power of Attorney (Volume 1, Section 7);

(c) Financial and Economic Standing – in respect of which 'Note 2' applied:

(i) Audited Accounts for the last three (3) years (i.e. 2007, 2008 and 2009) (or abridged version thereof signed by a certified auditor) if not appearing on the website of the Malta Financial Services Authority (MFSA) by the closing date of this call for tenders;

(ii) A bank statement from his bank, that he has available, or he

has access to, liquid assets, lines of credit, or other financial means sufficient to meet the construction cash flow for the Contract for a period of 6 months (cf. Clause 6.1.1.(b) of the ITT).

- iii. in respect of the submission of these three documents Note 2 to clause 16.1 was applicable which provided as follows:

"2. Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two working days from notification;

(Notes 1 and 3 read as follows:

1. Tenderers will be requested to clarify/rectify, within two working days from notification, the tender guarantee only in the following two circumstances: either incorrect validity date, and/or incorrect value.

3. No rectification shall be allowed. Only clarifications on the submitted information may be requested.)"

- iv. therefore, with regard to the power of attorney, the audited accounts and the bank statement, the contracting authority was obliged – *tenderers will be requested* – to request the bidder to submit the ‘missing’ English translation of these three documents which were submitted in the Italian language;
- v. whilst his client did submit these documents – albeit in Italian instead of in English - yet, Dr Gauci contended, even if his client had not submitted them at all, the contracting authority was equally obliged to request the said tenderer to submit the documents within 2 working days and against a stipulated fee but the contracting authority should certainly not disqualify the tenderer;
- vi. Notes 1 to 2 to clause 16.1 allowing rectifications and clarifications were introduced in the public procurement process through the June 2010 amendments and the purpose was to put a stop to the elimination of tenders on mere administrative shortcomings;
- vii. decisions of the European Court of Justice indicated that even if the rectification mechanism was at the discretion of the contracting authority (‘may’ not ‘will’), the contracting authority was still expected to resort to the rectification mechanism in order to save a tender;
- and
- viii. the Director of Contracts was regularly resorting to the rectification and clarification mechanism identical to that provided for in Notes 1 to 3 to clause 16.1 of this tender document.

B) Experience as contractor

Dr Gauci remarked that:-

- a. this requirement was listed under clause 16.1 'Technical Capacity' (i) 'Experience as Contractor' (Volume 1, Section 4) in respect of which Note 3 applied and therefore in this case no rectification was permissible but only clarifications on the submitted information;

and

- b. contrary to what was being claimed by the contracting authority, his client had submitted the experience of the partner, Sidercamma s.r.l., in English and in the same format provided in page 26 of the tender document

C) CVs of Key Personnel

Dr Gauci referred to Clarification Number 3 dated 27th April 2011 where the reply to question 25 read as follows:-

'The CVs of key staff shall not be included in the tender submission, but the Evaluation Committee reserves the right to request the CVs during evaluation';

Dr Gauci stressed that the contracting authority should not disqualify his client for submitting the CVs of the key personnel in Italian by way of additional information because the joint venture was not obliged to provide them at all at that stage.

On his part Mr John Vella, chairman of the adjudicating board, provided the following explanations:-

- i. at administrative compliance stage, the adjudicating board referred to clause 14 'Language of Tenders' which read as follows:-

"14.1 The tender and all correspondence and documents related to the tender exchanged by the tenderer and the Central Government Authority must be written in English.

14.2 Supporting documents and printed literature furnished by the tenderer may be in another language, provided they are accompanied by an accurate translation into English. For the purposes of interpretation of the tender, the English language will prevail."

- ii. these provisions were quite clear in that the tender submission had to be made only in the English language and, in the adjudicating board's opinion, as far as supporting documents were concerned, even if these were to be made in another language these would have had to be accompanied by a translation into English;



- iii. during the evaluation process it transpired to the adjudicating board that the five documents in question were submitted in Italian and therefore in violation of clause 14;
- iv. it did not matter that in this particular case the documents were in Italian, a language in which Maltese people were generally quite conversant with;
- v. given that the appellant joint venture was found not compliant in terms of clause 14, the adjudicating board, acting on past experience and guidance from the Departmental Contracts Committee, did not consider the tender submission any further, not even in the light of the provisions of clause 16;

and

- vi. the appellant was correct that the CVs were not required at that stage of the evaluation process but they were included because the appellant joint venture opted to provide them in its tender submission and, in doing so, it provided them in the Italian language.

Ing. Aurelio Attard, secretary to the adjudicating board, remarked that:-

- a. with regard to the experience as contractor, whilst the appellant was correct that the information requested as per template provided at page 26 of the tender document was submitted in the English as far as the Italian partner was concerned, yet, the other documents supporting that experience were submitted in Italian and the reason for rejection was based on clause 14.2 dealing with the submission of supporting documents;

and

- b. whilst the information covering the experience as contractor requested as per template at page 26 of the tender document was mandatory, yet, the other supporting documents provided by the appellant were not mandatory.

At this stage, the Chairman Public Contracts Review Board made the following remarks:-

- i. expressed his reservations to the provision that a tender submission was permissible only in the English language thus excluding the Maltese language, our native language and constitutionally one of our official languages;
 - ii. observed that, in the light of the explanations provided, there seemed to be no issue with regard to the CVs of the key staff and the experience as contractor, because a bidder should not be disqualified in respect of information which was not requested or which was submitted in addition to mandatory requirements;
- and
- iii. with regard to the bank statement, which was generated through the system operated by the Italian bank, one could have requested a synopsis of it in English



and that such should be the practice with technical documentation presented in any other language apart from English.



Dr Gauci insisted that Note 2 to clause 16.1 was both very clear and very wide ranging in the sense that it obliged ('will') the contracting authority to request the bidder to clarify/rectify any incorrect or incomplete information and even submit missing information limited to administrative, financial and economic standing aspects, namely sections (b) and (c) of clause 16.1, which included the three remaining documents in question, i.e. the power of attorney, the audited accounts and the bank statement.

The Chairman Public Contracts Review Board expressed his reservations to Dr Gauci's wide interpretation of clarification/rectification provisions under clause 16.1 because, in the first place, it was the responsibility of the tenderer to present a correct and complete tender submission and it was not the duty of the contracting authority to request the submission of mandatory information which ought to have been correctly and completely provided by the bidder in the latter's original tender submission. He added that if one were to go by the appellant's interpretation of the Notes to clause 16.1 then one would have to redefine the term 'mandatory requirements' in a tender document.

Dr Gauci pointed out that the clarifications/rectifications permissible as per Notes 1 to 3 invariably concerned the submission of mandatory information as laid down right from the start in clause 16.1: *The tender must comprise the following duly completed documents*. He added that with regard to the three remaining documents what was missing was their version/translation in English and, if anything, that constituted a missing document in respect of which the contracting authority was obliged to request a rectification as per Note 2.

Dr Franco Galea, legal representative of Polidano Eco JV, the only administratively and technically compliant tenderer, contributed the following remarks:-

- a. whilst the documents in question were presented in Italian, a language with which, generally speaking, in Malta one was conversant, yet things would have been quite different if it were to be another language, say, Russian or Chinese, as the contracting authority would not even be in a position to identify what type of the documents they were;
- b. clause 14.2 was qualified in the sense that a translation was admissible only in the case of supporting documents and printed literature whereas the documents in question, namely the power of attorney, the audited accounts and the bank statement, were not supporting documents;
- c. the documents in question were not 'missing' because they were, in fact, submitted but in the Italian language and they were not even unclear or incorrect as indicated in Note 2;
- d. the appellant's interpretation of the notes to clause 16.1 could give rise to abuse, for example, if a bidder was running out of time to present a complete tender submission then one could opt to leave out documentation knowing that one could provide it at a later stage on the payment of a €50 fee;



- e. the 2010 amendments were meant to give the bidder the opportunity to clarify certain aspects of the tender submission but not to submit mandatory documentation which had not been submitted in the first place;
- and
- f. this case did not concern the non-submission of documents but the submission of documents not in the form requested and in breach of tender conditions.

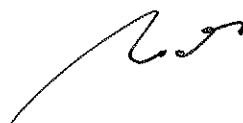
The Chairman Public Contracts Review Board made the following observations:

- i. there was no room for a clarification or rectification with regard to the submission of the audited accounts because one either submitted them or not;
 - ii. in the case of, say, the CV of a key person which made reference to a diploma then there was room for a clarification by requesting the submission of the relevant supporting certificate;
- and
- iii. certain documents did not involve merely a literal translation but, for instance, financial documentation would require certification by an auditor.

Dr Gauci argued that:-

- a. the 2010 amendments did not change a thing with regard to mandatory requirements so much so that all the documentation included under clause 16 remained mandatory;
- b. the 2010 amendments were introduced for the purpose of avoiding the elimination of tenders because of certain specified shortcomings by allowing the contracting authority to seek a clarification and/or rectification with regard to the requirements under sections (a), (b) and (c);
- c. the same amendments still did not allow any rectification to the requirements under sections (d), (e) and (f) of clause 16.1 so much so that the non-submission of documents under these sections still led to outright disqualification;
- d. if a tenderer submitted the audited accounts for two years instead of three years, the provisions of the published tender document compelled the contracting authority to request the bidder to submit the missing set of audited accounts;
- e. if the bidder did not rectify one's tender submission after having been notified to do so in terms of Note 2 to clause 16.1 within the stipulated two working days and after paying the fee due, then, and only then, would the contracting authority disqualify that bidder for the non-submission of mandatory documentation;

and



- f. these provisions were included in this tender document and his interpretation matched the official and regular interpretation given to them by the Director of Contracts.

At that stage, the Public Contracts Review Board, at the request of the appellant joint venture, contacted the Director of Contracts and cordially requested him to present himself at the hearing to clarify certain issues.

Mr Francis Attard, Director of Contracts, under oath, gave the following evidence:-

- i. Notes 1 to 3 to clause 16.1 in this tender document were introduced by the amendments effected to public procurement in 2010 and the primary aim was to avoid the rejection of tenders due to certain shortcomings and thus enhance competition in public procurement processes;
 - ii. Note 2 obliged the contracting authority to seek a clarification and/or rectification from the bidder in cases of incorrect and/or incomplete information and in cases of non-submission of certain documents and such clarification/rectification had to be effected within two working days and upon the payment of the prescribed €50 fee;
 - iii. if the bidder submitted documents in Italian instead of in English then that amounted to missing information and if Note 2 to clause 16.1 applied in respect of those documents then the bidder had to be given the opportunity to rectify that shortcoming;
 - iv. confirmed that Note 2 to clause 16.1 in the tender document was applicable to the non submission of, among other things, the power of attorney, the audited accounts and the bank statement;
 - v. the submission of documents after the closing date of the tender, the rectification process, did not apply in all instances so much so that it was not applicable as far as technical capacity and the financial offer were concerned – sections (d), (e) and (f) of clause 16.1;
 - vi. confirmed that, in the previous weeks or months, he had a meeting with WasteServ officials about various issues regarding the tendering process, the details of which he could not recall but they could have included clause 14, however that meeting did not concern this tender but future tenders;
- and
- vii. although he had issued the letter of rejection in this particular case he could not tell how the evidence he had just given would relate to the disqualification of the appellant because he could not recall the details of the justifications brought forward for disqualification since he had just been called to attend the hearing with no time to prepare himself.

Dr Gauci remarked that one could argue whether, in future tenders, clause 16 and the notes thereto should remain as they were or if they should be modified or even



eliminated but that was not the point at issue at this hearing. He added that the evidence given by the Director of Contracts carried its weight and could not be discarded.

At this point the hearing was brought to a close.

This Board,


- having noted that the appellants, in terms of their ‘letter of objection’ dated 16th January 2012 and also through their verbal submissions presented during the hearing held on the 12th April 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company’s representative’s claims and observations, particularly, the references made to the fact that (a) that by letter dated 6th January 2012 the Department of Contracts had informed the appellant that the joint venture’s offer was considered to be administratively non-compliant on the basis of clause 14 ‘Language of Tenders’ of Volume 1 – Instructions to Tenderers and the relative sub-clauses since certain documents provided by the partner, Sidercamma S.r.l., were submitted in the Italian language without an adequate translation into the English language, (b) the documents referred to in (b) included (1) Board Resolution giving Power of Attorney, (2) Audited Accounts (3) Credit Facilities declaration from Banca Nazionale di Lavoro (Italy) (4) Experience as contractor (5) CVs of Key Personnel, (c) regardless, the appellant joint venture was conceding that the tender submission had to be presented in the English language as per clause 14, (d) the three items of documentation referred to in (b) (1), (b) (2) and (b) (3) respectively, were submitted only in the Italian language without an adequate translation in English, (e) as far as clause 16 ‘Content of Tender – Three Package Procedure’ of the tender document was concerned, these three documents were included under clause 16.1 and that in respect of the submission of these three documents Note 2 to clause 16.1 was applicable which stated that tenderers “*will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two working days from notification*” ... that tenderers “*will be requested to clarify/rectify, within two working days from notification, the tender guarantee only in the following two circumstances: either incorrect validity date, and/or incorrect value*” and that no “*rectification shall be allowed. Only clarifications on the submitted information may be requested.*”), (f) with regard to the power of attorney, the audited accounts and the bank statement, the contracting authority was obliged – *tenderers will be requested* – to request the bidder to submit the ‘missing’ English translation of these three documents which were submitted in the Italian language, (g) whilst the appellant joint venture did submit these documents – albeit in Italian instead of in English - yet, Dr Gauci contended that, even if the appellant had not submitted them at all, the contracting authority was equally obliged to request the said tenderer to submit the documents within 2 working days and against a stipulated fee but the contracting authority should certainly not disqualify the tenderer, (h) notes 1 to 2 to clause 16.1 allowing rectifications and clarifications were introduced in the public procurement process through the June 2010 amendments and the purpose was to put a stop to the elimination of tenders on mere administrative shortcomings, (i) decisions of the European Court of Justice indicated that even if the rectification mechanism was at the discretion of the contracting authority (‘may’ not ‘will’), the contracting authority was still expected to resort to the rectification mechanism in order to save

a tender, (j) the Director of Contracts was regularly resorting to the rectification and clarification mechanism identical to that provided for in Notes 1 to 3 to clause 16.1 of this tender document, (k) with regard to experience as contractor, this requirement was listed under clause 16.1 'Technical Capacity' (i) 'Experience as Contractor' (Volume 1, Section 4) in respect of which Note 3 applied and therefore in this case no rectification was permissible but only clarifications on the submitted information, (l) contrary to what was being claimed by the contracting authority, the appellant joint venture had submitted the experience of the partner, Sidercamma s.r.l., in English and in the same format provided in page 26 of the tender document, (m) the reply received following the submission of question 25 stated that the "*CVs of key staff shall not be included in the tender submission, but the Evaluation Committee reserves the right to request the CVs during evaluation*", (n) the contracting authority should not disqualify the appellant joint venture for submitting the CVs of the key personnel in Italian by way of additional information because the joint venture was not obliged to provide them at all at that stage, (o) clarifications / rectifications permissible as per Notes 1 to 3, invariably, concerned the submission of mandatory information as laid down right from the start in clause 16.1, namely '*The tender must comprise the following duly completed documents*', (p) with regard to the three remaining documents what was missing was their version/translation in English and, if anything, that constituted a missing document in respect of which the contracting authority was obliged to request a rectification as per Note 2, (q) the 2010 amendments did not change a thing with regard to mandatory requirements so much so that all the documentation included under clause 16 remained mandatory, (r) the 2010 amendments were introduced for the purpose of avoiding the elimination of tenders because of certain specified shortcomings by allowing the contracting authority to seek a clarification and/or rectification with regard to the requirements under sections (a), (b) and (c), (s) the same amendments still did not allow any rectification to the requirements under sections (d), (e) and (f) of clause 16.1 so much so that the non-submission of documents under these sections still led to outright disqualification, (t) if a tenderer submitted the audited accounts for two years instead of three years, the provisions of the published tender document compelled the contracting authority to request the bidder to submit the missing set of audited accounts, (u) if the bidder did not rectify one's tender submission after having been notified to do so in terms of Note 2 to clause 16.1 within the stipulated two working days and after paying the fee due, then, and only then, would the contracting authority disqualify that bidder for the non-submission of mandatory documentation and (v) one could argue whether, in future tenders, clause 16 and the notes thereto should remain as they were or if they should be modified or even eliminated but that was not the point at issue at this hearing;

- having considered the contracting authority's representatives' reference to the fact that (a) at administrative compliance stage, the adjudicating board referred to clause 14 'Language of Tenders', (b) these provisions were quite clear in that the tender submission had to be made only in the English language and, in the adjudicating board's opinion, as far as supporting documents were concerned, even if these were to be made in another language these would have had to be accompanied by a translation into English, (c) during the evaluation process it transpired to the adjudicating board that the five documents in question were submitted in Italian and therefore in violation of clause 14, (d) it did not matter that in this particular case the documents were in Italian, a language in which Maltese people were generally quite conversant with, (e) given that the appellant joint venture was found not compliant

in terms of clause 14, the adjudicating board, acting on past experience and guidance from the Departmental Contracts Committee, did not consider the tender submission any further, not even in the light of the provisions of clause 16, (f) the appellant was correct that the CVs were not required at that stage of the evaluation process but they were included because the appellant joint venture opted to provide them in its tender submission and, in doing so, it provided them in the Italian language, (g) with regard to the experience as contractor, whilst the appellant was correct that the information requested as per template provided at page 26 of the tender document was submitted in the English language as far as the Italian partner was concerned, yet, the other documents supporting that experience were submitted in Italian and the reason for rejection was based on clause 14.2 dealing with the submission of supporting documents and (h) whilst the information covering the experience as contractor requested as per template at page 26 of the tender document was mandatory, yet, the other supporting documents provided by the appellant were not mandatory;

- having considered the references made by the legal representative of Polidano Eco JV (the only tenderer deemed by the evaluation board to be administratively and technically compliant), especially the ones relating to the fact that (a) whilst the documents in question were presented in Italian, a language with which, generally speaking, in Malta one was conversant, yet things would have been quite different if it were to be another language, say, Russian or Chinese, as the contracting authority would not even be in a position to identify what type of the documents they were, (b) clause 14.2 was qualified in the sense that a translation was admissible only in the case of supporting documents and printed literature whereas the documents in question, namely the power of attorney, the audited accounts and the bank statement, were not supporting documents, (c) the documents in question were not 'missing' because they were, in fact, submitted but in the Italian language and they were not even unclear or incorrect as indicated in Note 2, (d) the appellant's interpretation of the notes to clause 16.1 could give rise to abuse, for example, if a bidder was running out of time to present a complete tender submission then one could opt to leave out documentation knowing that one could provide it at a later stage on the payment of a €50 fee and (e) the 2010 amendments were meant to give the bidder the opportunity to clarify certain aspects of the tender submission but not to submit mandatory documentation which had not been submitted in the first place, (f) this case did not concern the non-submission of documents but the submission of documents not in the form requested and in breach of tender conditions;
- having noted all of the Director of Contracts' claims and observations, particularly, the references made to the fact that (a) Notes 1 to 3 to clause 16.1 in this tender document were introduced by the amendments effected to public procurement in 2010 and the primary aim was to avoid the rejection of tenders due to certain shortcomings and thus enhance competition in public procurement processes, (b) Note 2 obliged the contracting authority to seek a clarification and/or rectification from the bidder in cases of incorrect and/or incomplete information and in cases of non-submission of certain documents and such clarification/rectification had to be effected within two working days and upon the payment of the prescribed €50 fee, (c) if the bidder submitted documents in Italian instead of in English then that amounted to missing information and if Note 2 to clause 16.1 applied in respect of those documents then the bidder had to be given the opportunity to rectify that shortcoming, (d) confirmed that Note 2 to clause 16.1 in the tender document was



applicable to the non submission of, among other things, the power of attorney, the audited accounts and the bank statement, (e) the submission of documents after the closing date of the tender, the rectification process, did not apply in all instances so much so that it was not applicable as far as technical capacity and the financial offer were concerned – sections (d), (e) and (f) of clause 16.1 and (f) although he had issued the letter of rejection in this particular case he could not tell how the evidence he had just given would relate to the disqualification of the appellant because he could not recall the details of the justifications brought forward for disqualification since he had just been called to attend the hearing with no time to prepare himself,

reached the following conclusions, namely:

1. In the light of

- a. the explanations provided and bearing in mind Notes to Clause 16.1, particularly

'... 2. Tenderers will be requested to either clarify/rectify any incorrect and / or incomplete documentation, and/or submit any missing documents within two working days from notification

3. No rectification shall be allowed. Only clarifications on the submitted information may be requested'

- b. as well as the appellant joint venture's reference to the fact that the following documents had been submitted by the partner Sidercamma S.r.l in the Italian language without an adequate translation in the English language, viz:

- Board Resolution giving Power of Attorney
- Audited Accounts
- Credit Facilities declaration from Banca Nazionale di Lavoro (Italy)
- Experience as Contractor
- CVs of Key Personnel

the Public Contracts Review Board opines that it considers the following documents, namely:

- Board Resolution giving Power of Attorney
- Audited Accounts
- Credit Facilities declaration from Banca Nazionale di Lavoro (Italy)

as covered by Note 2 referred to above thus implying that the contracting authority should have agreed to a rectification (within two working days from notification) of the documents submitted by the appellant joint venture considering them as incomplete documentation.

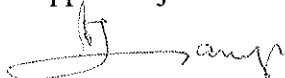
On the other hand, this Board considers 'Experience as Contractor' and 'CVs of Key Personnel' as documents which, under normal circumstances, should have been submitted by any tenderer in English. Nevertheless, whilst this Board still finds it

difficult to comprehend and thus queries the constitutional validity of documents which require that documents be submitted in the English language rather than Maltese and English considering the fact that, constitutionally, these are the formally recognised languages in the Maltese islands, yet, within the context of this tender, this Board cannot remain oblivious of and in total disagreement with the contracting authority's representatives' statement wherein the latter argued that, whilst the appellant joint venture was correct that the CVs were not required at that stage of the evaluation process, yet they were deemed to be administratively non compliant because the appellant joint venture opted to provide them in its tender submission and, in doing so, it provided them in the Italian language. This Board considers the fact that such documents were not mandatory as of huge relevance as to whether a tenderer's submission should be considered compliant or not. Undoubtedly, this Board opines that an evaluation process cannot desist from evaluating a bid upon the pretext that a document which was not mandatory was submitted incomplete or in the wrong language.

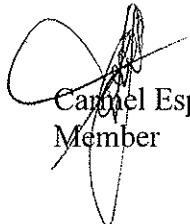
Also, the Public Contracts Review Board feels that with regard to 'Experience as Contractor', Notes to Clause 16.1 (3) would, all things being equal, have applied. Nevertheless, this Board has taken note of the contracting authority's representative's claim that, *inter alia*, stated that, with regard to the experience as contractor, whilst the appellant joint venture was correct that the information requested as per template provided at page 26 of the tender document was submitted in the English language as far as the Italian partner was concerned, yet, the other documents supporting that experience were submitted in Italian and the reason for rejection was based on clause 14.2 dealing with the submission of supporting documents. This Board argues that had the point under review been the other way round the issue could have given rise to a grey area, yet, this Board cannot but take cognizance of the fact that the appellant joint venture did actually submit in the English language the information (in respect of the Italian partner) requested as per template provided at page 26 of the tender document and, as a direct consequence this Board concludes that the fact that other documents supporting that experience were submitted in Italian was not a good enough reason for the evaluation board to reject the tender submitted by the appellant joint venture as the least one could have done was to simply apply the provisions contemplated in Notes to Clause 16.1 (2).

2. This Board maintains that the 2010 amendments were meant to give the bidder the opportunity to clarify certain aspects of the tender submission but not to submit mandatory documentation which had not been submitted in the first place regardless of the fact that these were submitted in another language other than in English as required by the tender specifications. It seems evident that, in this particular instance, one has to query as to whether the specifications reflect the full understanding of the amendments enacted in 2010.

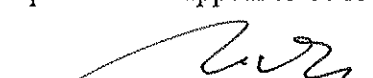
In view of the above, this Board finds in favour of the appellant joint venture and recommends that, apart from being reintegrated in the evaluation process, the said appellant joint venture is to be reimbursed the deposit paid for the appeal to be lodged.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Joseph Croker
Member