

PUBLIC CONTRACTS REVIEW BOARD

Case No. 462

CT/2001/2012; WSM/9/2012

Tender for Rock Excavation and Ancillary Activities at Ghallis ta' Ġewwa L/O Maghtab

This call for tenders was published in the Government Gazette on the 11th May 2012. The closing date for this call with an estimated budget of € 10,014,339 was the 5th July 2012. Seven (7) tenderers submitted their offers.

Polidano Bros Ltd filed an objection on the 12th July 2012 against the decision of the Contracts Department to disqualify its offer for submitting the copy instead of the original letter bid bond.

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 Tuesday, 2nd October 2012 to discuss this objection.

Present for the hearing were:

Polidano Bros Ltd

Dr Adrian Delia	Legal Representative
Dr Michael Sciriha	Legal Representative
Dr Franco Galea	Legal Representative
Mr Charles Polidano	Representative
Mr Boris Farrugia	Representative
Mr Noel Vella	Representative

Bonnici Bros Contractors Ltd

Dr John Gauci	Legal Representative
Mr Mario Bonnici	Representative
Mr Marcus Bonnici	Representative

Elbros Construction Ltd

Dr Franco Vassallo	Legal Representative
Mr Jimmy Calleja	Representative
Mr Charles Ellul	Representative

Asfaltar Ltd

Ballut Blocks Services Ltd

Bees Joint Venture

Rockcut Ltd

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No representatives turned up at the hearing

WasteServ (Malta) Ltd

Dr Victor Scerri	Legal Representative
Ing. Aurelio Attard	Representative

Contracts Department

Mr Anthony Cachia

Mr Bernard Bartolo

Director, Public Procurement Procedures
Chairperson of the General Contracts
Committee



After the Chairman's brief introduction, the appellant company's representatives were invited to explain the motives of the company's objection.

Dr Franco Galea, legal representative of Polidano Brothers Ltd, the appellant company, submitted that:-

- i. by letter dated 5th July 2012 the Contracts Department informed his client that its tender had been disqualified because, on opening envelope 1, it was discovered that the bid bond was a copy and not the original as requested in the tender document;
- ii. following the opening of the first envelope of each tender submitted on the 5th July 2012, a notice was uploaded on the Department of Contracts' website which featured a remark against Polidano Brothers Limited stating 'bid bond not original';
- iii. representatives of Polidano Brothers Limited immediately called at the Department of Contracts' offices and at 13:15hrs submitted a letter dated 5th July 2012 along with guarantee no. G63TFC29943 issued by the Bank of Valletta which was the same document submitted with the original tender submission;
- iv. the bid bond presented by his client was for the correct amount, issued the day before the closing date and with the text provided in the tender document;
- v. later on (14:45hrs) on the 5th July 2012 the Contracts Department informed his client that its bid bond was being rejected and that the tender would not be considered further;
- vi. the tender document allowed the Contracts Department to seek a clarification/rectification with regard to the bid bond as provided for in note 1 to clause 16.1 wherein it is stated 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';

- vii. it, therefore, resulted that, at the time that the Department of Contracts decided to reject his client's bid bond, it was in possession of a valid bid bond in terms of date, amount, validity period and terminology which rendered its tender submission valid and compliant.

Ing. Aurelio Attard, representing WasteServ Malta Ltd, the entity requesting the works in question, remarked that the tender opening stage was supervised by the Contracts Department and that the decision to reject the tender was made by that same department. He opined that, in this case, the Department of Contracts could exercise no discretion but it simply had to reject the bid bond for not being the original which then led to the offer being discarded.

Dr Adrian Delia, another legal representative of Polidano Brothers Ltd, argued that at the time (14:45hrs) that the Contracts Department communicated its decision to reject the bid bond and, consequently, not to consider the tender any further, the Contracts Department was, in fact, in possession of, at least, one original and valid bid bond and, possibly, even two valid documents, unless the Contracts Department would prove what was amiss with the bid bond found in envelope 1.

Mr Bernard Bartolo, chairperson of the General Contracts Committee which supervised the tender opening stage of the tender under review, under oath, gave the following evidence:-

- a. at the time of the hearing the Department of Contracts was in possession of the bid bond that was in envelope 1 at tender opening stage (the first bid bond) and also of the original bid bond which was submitted on the same day but after the opening of envelope 1 (the second bid bond);
- b. at about 10:00hrs of the 5th July 2012 on opening envelope 1 of Polidano Brothers Ltd there was no original bid bond and it was instantly displayed on the Department's website that the offer by Polidano Bros Ltd was being discarded because the original bid bond had not been submitted;
- c. after the tenders' opening stage, the Department of Contracts was in the course of preparing the letter to notify the appellant company of the decision to reject its offer and of the reason behind that decision, and it was then (13:15hrs) that the appellant company's representative turned up at the Department of Contracts and presented the original bid bond. Despite this the Department still sent the letter of disqualification to the appellant company (at 14:45hrs) - that was the correct sequence of events;

and

- d. he disagreed with the repeated claim made by Dr Michael Sciriha, also acting on behalf of the appellant company, that the Contracts Department was in possession of the original valid bid bond at the time that his client was disqualified.

The Chairman Public Contracts Review Board noted that:-

- i. from the snapshot of the Contracts Department's website taken at 12:37hrs, a note was entered against Polidano Brothers Ltd 'Bid bond not original';
 - ii. the cut-off date and time for the submission of tenders was 5th July 2012 at 10 am CET;
- and
- iii. what had to be established was whether an original valid bid bond had, in fact, been submitted in the tender box by 10 am of the 5th July 2012.

Dr Adrian Delia stated that:-

- a. there was no admission on the part of his client that at tender opening stage the company did not submit a valid bid bond;
- b. at 10am on the 5th July there was the first bid bond, which the Contracts Department claimed that it was not the original, which he was not conceding that it was a copy even if he had not yet examined that document;

and

- c. between the time that the Contracts Department made public, through its website, the fact that the bid bond submitted by his client in envelope 1 was not the original and the time the Contracts Department conveyed to his client the disqualification decision, a second bid bond was delivered at the Contracts Department, which Mr Bartolo confirmed that it was an original bid bond.

Mr Bartolo confirmed that:-

- i. the second bid bond was delivered at the Contracts Department after opening envelope 1 and displaying its contents on the Department's website;
- ii. the letter of disqualification was communicated after the delivery of the second bid bond and in doing so the Department was acting in accordance with Reg. 83 (3) of the Public Procurement Regulations which stated as follows:-

'Any decision leading to the discarding of any tender during any stage of the process is to be given publicity at the office of the contracting authority or at the Department of Contracts as the case may be and the affected tenderer is to be informed of the decision within two working days of its publication'.

- iii. in this case the letter of disqualification was communicated on that same day – 5th July 2012.

At this point Dr Delia intervened by

- a. reading out Note 1 to clause 16.1 regarding package 1, namely the submission of the bid bond which stated 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"*;
- b. saying that if, for the sake of the argument, his client submitted the bid bond for the value of €1 instead of €120,000, the contracting authority was obliged to request his client to pay €50 and submit another with the correct value within two working days and the same applied in the case that the bid bond was submitted with an incorrect validity date;

and

- c. reading out note 2 to clause 16.1 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 workings days from notification*".

At this stage Dr Sciriha made reference to the 'Marinelli Case', where the bid bond was issued by an overseas bank and, he claimed, not with the standard wording.

This time it was Mr Bartolo's turn to:

- i. declare that, as far as the bid bond was concerned, only note 1 of clause 16.1 was applicable whereas note 2 was applicable to other documentation but not to the bid bond;

and

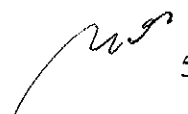
- ii. explain that when a bid bond was issued by an overseas financial institution, the Contracts Department would approach the Malta Financial Services Authority to advice that the financial institution issuing the bid bond did exist and, in such a case, the process of opening package 1 would be halted until such time that the Malta Financial Services Authority would communicate no adverse remarks on the financial institution issuing the bid bond and only then the General Contracts Committee would resume its examination of the bid bond.

The Chairman Public Contracts Review Board pointed out that, as per clause 16.1, the tender had to comprise (a) (i) *an original bid bond for the amount of 120,000 in the form provided in Volume 1* and, as a consequence, it was crucial to establish if the bid bond submitted in package 1 was the 'original' or a 'copy'. He stated that in case there was no general agreement on whether the first bid bond was a copy or not then he would consider suspending the hearing to invite a BOV official to confirm if it was the original or a copy.

Mr Bartolo remarked that:-

- a. the signature on the first bid bond was a photocopy and that the Bank of Valletta (BOV) sticker did feature on the second bid bond but not on the first bid bond;
- b. in reality, the bank would definitely not honour the first bid bond found in envelope 1;
- c. in the case of unsuccessful tenderers the Contracts Department had to return the original bid bond to the bank in order to release that guarantee;

and



- d. four different provisions in the tender document made it quite clear that the submission of the original bid bond was a mandatory requirement.

Dr Delia referred to clause 20.1 which, among other things, stated that “*The tender guarantee (bid bond) is a pledge that the tenderer will not retract his offer up to the expiry date of the guarantee and, if successful, that he will enter into a contract with the Director General of Contracts on the terms and conditions stated in the tender document*”. He wondered what was wrong with the first bid bond such that it did not provide the peace of mind that the Contracts Department expected from such a document.

The Chairman Public Contracts Review Board observed that if the first bid bond was the original then it was no use discussing this appeal any further and so the problem would arise if the first bid bond was not the original and, in that case, one had to see whether a copy of the bid bond was equivalent to the original bid bond for the purposes of this tendering procedure. He pointed out that the Public Contracts Review Board had, invariably, held the view that the contracting authority was obliged to abide by note 1 to clause 16.1 only when the bid bond submitted was the original.

Dr Delia argued that note 1 to clause 16.1 obliged the contracting authority to take the line of action indicated but that did not mean that there were no other legal provisions which enabled the Director of Contracts to exercise his discretion in such circumstances.

Mr Anthony Cachia, Director Public Procurement Procedures at the Department of Contracts, under oath, gave the following evidence stating, *inter alia*,

- i. the non-submission of the original bid bond automatically led to the disqualification of the tender;
- ii. the clarification/rectification contemplated in note 1 to clause 16.1 concerned only an incorrect value and/or an incorrect validity date, provided that the bid bond submitted was the original;
- iii. in the tender document it was clearly indicated that Note 2 to clause 16.1 did not apply to section (a) ‘the bid bond’ but applied to sections (b) ‘administrative information’ and (c) ‘financial and economic standing’;
- iv. the bid bond was required for the duration of the evaluation process;
- v. in the case of an original bid bond the Department was only obliged to request a rectification in connection with an incorrect validity date and an incorrect value;
- vi. the tender document specified that the submission of the original bid bond was a mandatory requirement in respect of which the Department of Contracts could exercise no discretion but it had to reject the offer, which stand had the backing of the advice of the Attorney General’s Office;

- vii. the transparency and equal treatment of tenderers meant that all bids would be adjudicated on the same published criteria and that the published tender provisions would be, invariably, applied to all bids in the same measure;
- viii. the contracting authority was bound by the published tender provisions and it was not allowed to depart from them;
- ix. the contents of package 2 were handed over to the evaluation board and if the latter would need to contact a bidder to submit any missing document, it would have to seek the approval of the General Contracts Committee;
- x. what constituted an original bid bond were an original signature and the bank's original letterhead;
- xi. the decision as to whether a bid bond was an original or not was, ultimately, taken not by any one single person/officer but by the General Contracts Committee;

and

- xii. the Director of Contracts did not have the discretion to contact the bank so as to enquire if, in this case, the copy of the bid bond submitted was backed up by the original because it was mandatory on the bidder to submit the original bid bond in the first place.

Dr Franco Vassallo, representing an interested party, concluded that:-

- a. the crucial element in any bank guarantee was that it had to be original and that was the reason why the tender document requested 'only' the original;
- b. once the tender document did not permit the Director of Contracts to accept a copy of the bid bond then he did not have any discretion to accept one;

and

- c. if the Director of Contracts were to accept a copy of the bid bond instead of the original then he would be acting in violation of regulations and he would have to bear the consequences for his actions.

Dr Delia concluded that:-

- i. whilst the requirement of the original bid bond was relevant if it could be used for more than one purpose, yet, that was not so in this case;
- ii. this bid bond was issued specifically to the Director of Contracts, for a specified value and for a specific tender and therefore it could not be utilised for any other purpose except in connection with this tender;



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- iii. the notes to clause 16.1 were introduced not so long ago so as to avoid having tenders disqualified on rather trivial matters and thereby limiting competition unnecessarily;
- iv. one could safely say that, in this case, the bid bond had been issued by the closing time for the submission of tenders;
- v. the bid bond was issued by the bank (on behalf of the tenderer) to the contracting authority and, as a result, at the closing time for the submission of tenders there existed a contractual relationship between the bank and the contracting authority;
- vi. it had been established at the hearing that, by the time the Contracts Department issued its decision to disqualify his client's tender, the same department was already in possession of the original bid bond;
- vii. the Director of Contracts would not be liable to any penalties if he were to ask the bank to verify things concerning the issue of this bid bond;
- viii. what the Director of Contracts had to watch out for was that the provisions of clause 20.1 were satisfied, namely that the required pledge was in place;
- ix. it made no sense that an incorrect value and an incorrect validity date of a bid bond could be rectified and then one could not rectify a situation where a copy instead of the original bid bond was submitted;
- x. in this case the bank would have honoured payment at any time during the validity date of the bid bond;
- xi. no evidence had been brought forward at the hearing that the bank would not have honoured the bid bond presented by his client who, after all, was well known to the Contracts Department;
- xii. the notes to clause 16.1 obliged the contracting authority to take the action indicated but they did not prevent the contracting authority from taking other measures to ensure that the tendering process would unfold in a fair and transparent manner for all;
- xiii. in actual fact the Director of Contracts did exercise discretion in this case because he had accepted the second (original) bid bond without any reservations and, therefore, even if one were to concede that the first bid bond was not the original, still the Director of Contracts had the comfort of the second bid bond;
- xiv. there were two situations, namely (1) if the Director of Contracts did not have the discretion to accept the second bid bond then he would have to make good for his mistake or (2) once the Director of Contracts accepted the second bid bond then that bid bond was a valid one so much so that the €120,000 were still frozen by the bank;



xv. in the appeal submitted by Messrs Ballut Blocks Services Ltd with regard to Case no. 285 (CT/07/2011), the Tribunal had decided that although the Director of Contracts may have acted correctly, in the circumstances the oversight committed by the appellant tenderer was trivial and the tender submission should not be rejected for such a genuine oversight the direct effect of which does not, in any way, alter the transparent and equitable adjudication process;

and

xvi. therefore, the principle applied in that case was that one should not resort to rejection so long as the transparency and fairness of the tendering process would not have been prejudiced and, in this case, this issue did not damage any of the other participating tenderers.

Ing Aurelio Attard, representing WasteServ Malta Ltd, concluded that:-

- a. the bidder had to submit an original bid bond and the Director of Contracts had no discretion in that regard;
- b. the second (original) bid bond was not in the possession of the Contracts Department at the closing time for the submission of tenders and, as a result, there was a gap between the closing time of the tender and the time the second (original) bid bond was actually submitted, during which the contracting authority was not covered by the required bank guarantee;
- c. the appellant company submitted the second bid bond without being requested by the contracting authority to do so and that amounted to an alteration to the appellant company's original tender submission after the closing date/time which was not allowed as per clause 26.1;
- d. clause 25.1 provided that all tenders received after the deadline for tenders submission were to be kept by the Central Government Authority;

and

- e. Clause 27.2 provided, among other things, that "*Tenders unaccompanied by package 1 (a Valid Original bid-bond shall not be considered for the award of this contract.*"

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 11th July 2012 and also through their verbal submissions presented during the hearing held on the 2nd October 2012, had objected to the decision taken by the pertinent authorities;

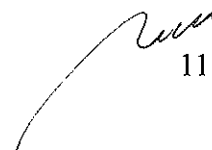


- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 5th July 2012 the Contracts Department informed the appellant company that its tender had been disqualified because, on opening envelope 1, it was discovered that the bid bond was a copy and not the original as requested in the tender document, (b) following the opening of the first envelope of each tender submitted on the 5th July 2012, a notice was uploaded on the Department of Contracts' website which featured a remark against Polidano Brothers Limited stating 'bid bond not original', (c) representatives of Polidano Brothers Limited immediately called at the Department of Contracts' offices and at 13:15hrs submitted a letter dated 5th July 2012 along with guarantee no. G63TFC29943 issued by the Bank of Valletta which was the same document submitted with the original tender submission, (d) later on (14:45hrs) on the 5th July 2012 the Contracts Department informed the appellant company that its bid bond was being rejected and that the tender would not be considered further, (e) the tender document allowed the Contracts Department to seek a clarification/rectification with regard to the bid bond as provided for in note 1 to clause 16.1, (f) it, therefore, resulted that, at the time that the Department of Contracts decided to reject the appellant company's bid bond, it was in possession of a valid bid bond in terms of date, amount, validity period and terminology which rendered its tender submission valid and compliant, (g) at the time (14:45hrs) that the Contracts Department communicated its decision to reject the bid bond and, consequently, not to consider the tender any further, the Contracts Department was, in fact, in possession of, at least, one original and valid bid bond and, possibly, even two valid documents, unless the Contracts Department would prove what was amiss with the bid bond found in envelope 1, (h) there was no admission on the part of the appellant company that, at tender opening stage, the company did not submit a valid bid bond, (i) at 10am on the 5th July there was the first bid bond, which the Contracts Department claimed that it was not the original, which the appellant company conceded that it was a copy, (j) between the time that the Contracts Department made public, through its website, the fact that the bid bond submitted by the appellant company in envelope 1 was not the original and the time the Contracts Department conveyed to same appellant company the disqualification decision, a second bid bond was delivered at the Contracts Department, which Mr Bartolo confirmed that it was an original bid bond, (k) note 2 to clause 16.1 stated that "*Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two workings days from notification*", (l) note 1 to clause 16.1 obliged the contracting authority to take the line of action indicated but that did not mean that there were no other legal provisions which enabled the Director of Contracts to exercise his discretion in such circumstances, (m) in conclusion (•) whilst the requirement of the original bid bond was relevant if it could be used for more than one purpose, yet, that was not so in this case (•) this bid bond was issued specifically to the Director of Contracts, for a specified value and for a specific tender and, therefore, it could not be utilised for any other purpose except in connection with this tender (•) the notes to clause 16.1 were introduced not so long ago so as to avoid having tenders disqualified on rather trivial matters and thereby limiting competition unnecessarily (•) one could safely say that, in this case, the bid bond had been issued by the closing time for the submission of tenders (•) the bid bond was issued by the bank (on behalf of the



tenderer) to the contracting authority and, as a result, at the closing time for the submission of tenders there existed a contractual relationship between the bank and the contracting authority (•) it had been established at the hearing that, by the time the Contracts Department issued its decision to disqualify the appellant company's tender, the same department was already in possession of the original bid bond (•) the Director of Contracts would not be liable to any penalties if he were to ask the bank to verify things concerning the issue of this bid bond (•) what the Director of Contracts had to watch out for was that the provisions of clause 20.1 were satisfied, namely that the required pledge was in place (•) it made no sense that an incorrect value and an incorrect validity date of a bid bond could be rectified and then one could not rectify a situation where a copy instead of the original bid bond was submitted (•) in this case the bank would have honoured payment at any time during the validity date of the bid bond (•) no evidence had been brought forward at the hearing that the bank would not have honoured the bid bond presented by the appellant company who, after all, was well known to the Contracts Department (•) the notes to clause 16.1 obliged the contracting authority to take the action indicated but they did not prevent the contracting authority from taking other measures to ensure that the tendering process would unfold in a fair and transparent manner for all (•) in actual fact the Director of Contracts did exercise discretion in this case because he had accepted the second (original) bid bond without any reservations and, therefore, even if one were to concede that the first bid bond was not the original, still the Director of Contracts had the comfort of the second bid bond (•) there were two situations, namely (1) if the Director of Contracts did not have the discretion to accept the second bid bond then he would have to make good for his mistake or (2) once the Director of Contracts accepted the second bid bond then that bid bond was a valid one so much so that the €120,000 were still frozen by the bank (•) in the appeal submitted by Messrs Ballut Blocks Services Ltd with regard to Case no. 285 (CT/07/2011), the Tribunal had decided that although the Director of Contracts may have acted correctly, in the circumstances the oversight committed by the appellant tenderer was trivial and the tender submission should not be rejected for such a genuine oversight the direct effect of which does not, in any way, alter the transparent and equitable adjudication process and (•) therefore, the principle applied in that case was that one should not resort to rejection so long as the transparency and fairness of the tendering process would not have been prejudiced and, in this case, this issue did not damage any of the other participating tenderers;

- having considered the contracting authority's representative's reference to the fact that (a) the tender opening stage was supervised by the Contracts Department and that the decision to reject the tender was made by that same department and that the Department of Contracts could exercise no discretion but it simply had to reject the bid bond for not being the original which then led to the offer being discarded, (b) the second (original) bid bond was not in the possession of the Contracts Department at the closing time for the submission of tenders and, as a result, there was a gap between the closing time of the tender and the time the second (original) bid bond was actually submitted, during which the contracting authority was not covered by the required bank guarantee, (c) the appellant company submitted the second bid bond without being requested by the contracting authority to do so and that amounted to an alteration to the appellant company's original tender submission after the closing date/time which was not



allowed as per clause 26.1, (d) clause 25.1 provided that all tenders received after the deadline for tenders submission were to be kept by the Central Government Authority and (e) Clause 27.2 provided, among other things, that "*Tenders unaccompanied by package 1 (a Valid Original bid-bond shall not be considered for the award of this contract.*"

- having also considered Mr Bartolo's testimony, particularly, the fact that (a) at the time of the hearing the Department of Contracts was in possession of the bid bond that was in envelope 1 at tender opening stage (the first bid bond) and also of the original bid bond which was submitted on the same day but after the opening of envelope 1 (the second bid bond), (b) at about 10:00hrs of the 5th July 2012, on opening envelope 1 of Polidano Brothers Ltd, there was no original bid bond and it was instantly displayed on the Department's website that the offer by Polidano Bros Ltd was being discarded because the original bid bond had not been submitted, (c) after the tenders' opening stage, the Department of Contracts was in the course of preparing the letter to notify the appellant company of the decision to reject its offer and of the reason behind that decision, and it was then (13:15hrs) that the appellant company's representative turned up at the Department of Contracts and presented the original bid bond, (d) despite the fact that the appellant company's representative turned up at the Department of Contracts and presented the original bid bond the Department still sent the letter of disqualification to the appellant company (at 14:45hrs), (e) he disagreed with the repeated claim made by Dr Sciriha that the Contracts Department was in possession of the original valid bid bond at the time that his client was disqualified, (f) the second bid bond was delivered at the Contracts Department after opening envelope 1 and displaying its contents on the Department's website, (g) in this case the letter of disqualification was communicated on that same day – 5th July 2012, (h) as far as the bid bond was concerned, only note 1 of clause 16.1 was applicable whereas note 2 was applicable to other documentation but not to the bid bond, (i) when a bid bond was issued by an overseas financial institution, the Contracts Department would approach the Malta Financial Services Authority to advice that the financial institution issuing the bid bond did exist and, in such a case, the process of opening package 1 would be halted until such time that the Malta Financial Services Authority would communicate no adverse remarks on the financial institution issuing the bid bond and only then the General Contracts Committee would resume its examination of the bid bond, (j) the signature on the first bid bond was a photocopy and that the Bank of Valletta (BOV) sticker did feature on the second bid bond but not on the first bid bond, (k) in reality, the bank would definitely not honour the first bid bond found in envelope 1, (l) in the case of unsuccessful tenderers the Contracts Department had to return the original bid bond to the bank in order to release that guarantee and (m) four different provisions in the tender document made it quite clear that the submission of the original bid bond was a mandatory requirement;
- having also considered Mr Cachia's testimony, particularly, the fact that (a) the non-submission of the original bid bond automatically led to the disqualification of the tender, (b) the clarification/rectification contemplated in note 1 to clause 16.1 concerned only an incorrect value and/or an incorrect validity date, provided that the bid bond submitted was the original, (c) in the tender document it was clearly indicated that Note 2 to clause 16.1 did not apply to section (1) 'the bid



bond' but applied to sections (2) 'administrative information' and (3) 'financial and economic standing', (d) the bid bond was required for the duration of the evaluation process, (e) in the case of an original bid bond the Department was only obliged to request a rectification in connection with an incorrect validity date and an incorrect value, (f) the tender document specified that the submission of the original bid bond was a mandatory requirement in respect of which the Department of Contracts could exercise no discretion but it had to reject the offer, which stand had the backing of the advice of the Attorney General's Office, (g) the transparency and equal treatment of tenderers meant that all bids would be adjudicated on the same published criteria and that the published tender provisions would be, invariably, applied to all bids in the same measure, (h) the contracting authority was bound by the published tender provisions and it was not allowed to depart from them, (i) the contents of package 2 were handed over to the evaluation board and if the latter would need to contact a bidder to submit any missing document, it would have to seek the approval of the General Contracts Committee, (j) what constituted an original bid bond were an original signature and the bank's original letterhead, (k) the decision as to whether a bid bond was an original or not was, ultimately, taken not by any one single person/officer but by the General Contracts Committee and (l) the Director of Contracts did not have the discretion to contact the bank so as to enquire if, in this case, the copy of the bid bond submitted was backed up by the original because it was mandatory on the bidder to submit the original bid bond in the first place;

- having considered Dr Vassallo's verbal intervention in his capacity as legal advisor to another interested party, to the fact that (a) the crucial element in any bank guarantee was that it had to be original and that was the reason why the tender document requested 'only' the original, (b) once the tender document did not permit the Director of Contracts to accept a copy of the bid bond then he did not have any discretion to accept one and (c) if the Director of Contracts were to accept a copy of the bid bond instead of the original then he would be acting in violation of regulations and he would have to bear the consequences for his actions,

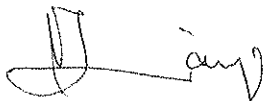
reached the following conclusions, namely:

1. The Public Contracts Review Board opines that what had to be established was whether an original valid bid bond had, in fact, been submitted in the tender box by 10 am of the 5th July 2012. This Board argues that as per clause 16.1, the tender had to comprise "*an original bid bond for the amount of €120,000 in the form provided in Volume I*" and, as a consequence, it was crucial to establish if the bid bond submitted in package 1 was the 'original' or a 'copy'. This Board feels that enough evidence was provided and manifested during the hearing to confirm that the appellant company had, in fact, not submitted the required document in its original format as stipulated in the tender document.
2. The Public Contracts Review Board argues that the fact that the document in question, namely, the bid bond, in its original format, was submitted following the official closing time of the tender went against the mandatory requirements of the same tender specifications.



3. This Board feels that one had to see whether a copy of the bid bond was equivalent to the original bid bond for the purposes of this tendering procedure. The Public Contracts Review Board had, invariably, held the view that the contracting authority was obliged to abide by note 1 to clause 16.1 only when the bid bond submitted was the original. The clarification/rectification contemplated in note 1 to clause 16.1 concerned only an incorrect value and/or an incorrect validity date, provided that the bid bond submitted was the original - the non-submission of the original bid bond automatically led to the disqualification of a tender.
4. The Public Contracts Review Board establishes that, in the tender document under review, it was clearly indicated that Note 2 to clause 16.1 did not apply to section (a) 'the bid bond' but applied to sections (b) 'administrative information' and (c) 'financial and economic standing'. Furthermore, this Board argues that the contracting authority was bound by the published tender provisions and it was not allowed to depart from them.
5. This Board contends that the tender document specified that the submission of the original bid bond was a mandatory requirement in respect of which the Department of Contracts could exercise no discretion but it had to reject the offer, which stand had the backing of the advice of the Attorney General's Office. This Board acknowledges that the Director of Contracts does not have the discretion to contact a bank so as to enquire if, such as in this case, the copy of the bid bond submitted was backed up by the original because it is always mandatory on the bidder to submit the original bid bond in the first place
6. The Public Contracts Review Board recognizes the fact that the transparency and equal treatment of tenderers meant that all bids would be adjudicated on the same published criteria and that the published tender provisions would be, invariably, applied to all bids in the same measure.
7. This Board concludes by contending that, in its opinion what constitutes an original bid bond is an original signature and the bank's original letterhead.

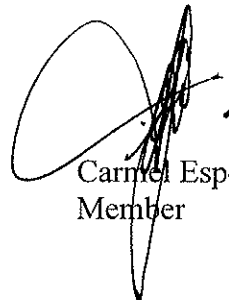
In view of the above, this Board finds against the appellant company and recommends that the deposit paid by the same appellant company for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Carmel Esposito
Member

26 October 2012