

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 483

**OHSA/34/2011**

**Services Tender for the Provision of Legal Services on a Retainer Basis for the Occupational Health and Safety Authority (OHSA)**

This call for tenders was published in the Government Gazette on the 17<sup>th</sup> February 2012. The closing date for this call with an estimated budget of € 94,915 was the 21st March 2012.

Four (4) tenderers submitted their offers.

Aequitas Legal Ltd filed an objection on the 8<sup>th</sup> August 2012 against the decision of the Ministry for Health, the Elderly and Community Care to discard its offer as financially not fair and reasonable and to recommend the cancellation of the tendering process.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Thursday, 1st November 2012 to discuss this objection.

Present for the hearing were:

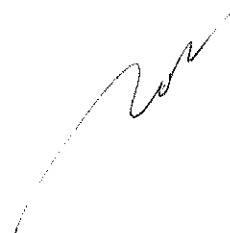
### **Aequitas Legal Ltd**

Dr Adrian Delia	Legal Representative
Not. Matthew Paris	Legal Representative
Dr Nicolette Spiteri Bailey	Legal Representative

**Central Procurement and Supplies Unit (CPSU) - Ministry for Health, the Elderly and Community Care (MHEC) - Occupational Health and Safety Authority (OHSA)**

### **Evaluation Board**

Mr Gilbert Bonnici	Chairman
Mr David Saliba	Member
Mr Vincent Attard	Member
Mr Charles Micallef	Member
Mr Kenneth Buttigieg	Secretary



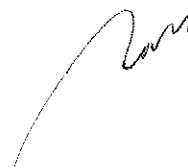
After the Chairman's brief introduction, the appellant firm's representative was invited to explain the motives of the firm's objection.

Dr Adrian Delia, legal representative of the appellant firm, made the following submissions:

- i. by email/letter dated 1st August 2012 the contracting authority informed the appellant firm that its offer was not acceptable because the quoted rates were deemed to be not fair and reasonable and that the tender was being recommended for cancellation;
  - ii. the term 'quoted rates not fair and reasonable' was not contemplated in public procurement regulations;
  - iii. clause 33.3 provided that the cancellation of tender could occur in four instances and the firm assumed that the one applicable to the case under reference was (a), i.e. *"the tender procedure has been unsuccessful, namely where no qualitative or financially worthwhile tender has been received or there has been no response at all"*;
  - iv. it would appear that what the contracting authority had in mind, but failed to reproduce in its letter of rejection, was that no financially worthwhile tender had been received;
  - v. there were four participating tenderers and the offers ranged from € 141.60/hr or €566,400 over 4 years to €14.16/hrs or €56,640 over 4 years and the appellant firm's two options, option 1 €42.48/hr or €169,920 for 4 years and option 2 a flat rate of €88.50;
  - vi. the appellant firm was the incumbent, namely it had been rendering this service for the previous 8 years and, as a result, was fully aware of what was involved;
  - vii. clause 6.1.2 requested 5 years previous experience and evidence of a total value of similar services of not less than €30,000 per annum;
- and
- viii. invited the contracting authority to explain the reasons why its offer was adjudicated to be not fair and reasonable.

Mr Gilbert Bonnici, chairman of the evaluation board, explained that:-

- a. with regard to financial considerations, the evaluation board was faced with two financial constraints, namely the budget available for these services, i.e. €112,000 and the fact that this was a departmental tender which, according to regulations, could not exceed the limit of €120,000, excluding VAT (€141,600 incl. VAT) otherwise it would have to be issued through the Contracts Department;



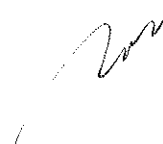
- b. two of the four bidders failed at technical evaluation stage with the remaining two bidders, representing three offers, qualifying for financial consideration;
  - c. the bid submitted by Ganado & Associates at €566,400 together with options 1 and 2 submitted by the appellant firm amounting to €169,920 and €354,000 (i.e. €88.50 x 1000 hrs x 4 years) respectively were all well above both the budget of the contracting authority and the departmental tender threshold;
- and
- d. therefore, the evaluation board had no other option but to declare all the technically compliant offers not fair and reasonable when compared to the budget available or to merit consideration within the departmental tender threshold.

Mr Bonnici, under oath, then gave the following evidence:-

- i. he confirmed that whilst the contracting authority had allocated the budget of €112,000 and that this estimate did not feature in the published tender document, yet, the contracting authority was not obliged to publish its budget;
  - ii. being a departmental call for tenders the bidders should have known that the offers made had to be under €120,000;
  - iii. Volume 3 Section 1 under 2 'Contracts Duration and Objectives' para. 2 (page 43) it was stated that "*The Contractor shall provide up to one thousand hours (1000) per year of legal services which may be spread unevenly throughout the year as required by OHSa, at a flat rate annual fee*";
  - iv. on the other hand, Volume 4 'Financial Bid' item 'B' (page 46) clearly stated as follows '*Annual rate (1000 hours) for provision of legal services*';
- and
- v. as a consequence, the evaluation board, acting on the provisions of the tender document and in order to compare all the bids on a like-with-like basis multiplied the hourly rate quoted by 1000 hours, even in the case of option 2 where the appellant firm quoted the flat rate of €88.50/hr.

Dr Delia argued that:

- a. the contracting authority issued a clarification whereby the phrase in Volume 3 Section 1 Art. 2 second para. 'at a flat rate annual fee' was amended to read 'at a flat rate hourly rate';
- b. on the strength of this clarification, the appellant firm submitted option 2 where a flat hourly rate was quoted, i.e. €88.50/hr;
- c. option 1 quoted the rate of €42.48/hr because the bidder had a contractual commitment to provide 1000hrs of service per annum whereas in option 2



quoted the rate of €88.50/hr on a when-and-as-required basis, namely without the comfort of providing 1000hrs p.a. which explained the difference in the rates in the two options;

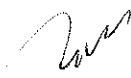
- d. if one were to concede that option 1 was beyond the Occupational Health and Safety Authority's budget and beyond the departmental tender threshold, in the case of option 2 the contracting authority could have availed itself of the firm's services at the rate of €88.50/hr up to the limit set by the Occupational Health and Safety Authority's budget of €112,000 or up to the €120,000 departmental tender threshold, thus remaining within regulations;
- e. the evaluation board could have multiplied the quotes by 1000hrs for comparison purposes but, according to the terms of reference and the clarification the evaluation board, the latter was not obliged to request 1000 hrs per annum but only 'up to' 1000hrs;

At this point Dr Delia presented the guidelines on fees to be charged by advocates for services rendered where various jobs were laid down and, at the end of it, indicated the rate of €50/hr for any other service and that ought to have given the evaluation board an idea of the legal charges applicable.

Mr David Saliba, a member of the evaluation board, pointed out that the only reason cited in the letter of objection was the evaluation board's reason for rejection, namely that the quotes were not fair and reasonable and that the issue had been addressed by Mr Bonnici.

The Chairman Public Contracts Review Board remarked that:-

- i. the term 'quotes not deemed to be fair and reasonable' used by the evaluation board to describe the reason for rejecting was not appropriate because it has emerged that the true reason for rejection was that the quotes were in excess of the Occupational Health and Safety Authority's budget and in excess of the €120,000 limit set for departmental tenders;
- ii. the recommendation to cancel the tender had nothing to do with 'fairness' and 'reasonableness' but simply that the quotes were beyond the limits on two counts and that the evaluation board could not go beyond the budget available and the limit laid down in the public procurement regulations;
- iii. Reg. 20 (d) provided that "*Where the estimated value exceeds six thousand euro (€6,000) but not one hundred and twenty thousand euro (€120,000), the equipment, stores, works or services may be procured after a departmental call for tenders or after publishing a call for quotations in the Gazette*";  
and
- iv. the constraints were evident for the adjudication board and it was odd how in their quotes certain bidders overlooked the fact that this was a departmental tender with the limit of €120,000 set by regulations.



Mr Saliba and Mr Bonnici agreed with the Chairman's line of reasoning. Mr Saliba pointed out that the 'guidelines on fees to be charged by advocates' were only guidelines and not legally binding.

Dr Delia put forward the following arguments:-

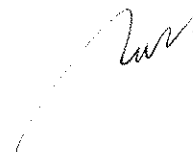
- a. given that it had been conceded that the reason for rejection quoted was inappropriate then he should be allowed to question the real reason behind the tender cancellation:
  - b. the 1000 hours mentioned in the financial bid were meant for comparison purposes but they did not mean that the tender document called for a fixed amount of hours, 1000 in this case, so much so that the contracting authority allowed for two options, namely the annual rate and 4-year total cost together with the flat rate hourly fee as per clarification;
- and
- c. therefore, according to the tender document, the contracting authority was free to opt for the flat hourly rate and apply it to the number of hours which would fall within its undisclosed budget or within the €120,000 departmental tender ceiling and in that way it would have acted within regulations and there would have been no cause for tender cancellation.

Mr Bonnici remarked that:-

- i. the evaluation board considered this issue at length and, in the end, it had decided that, clause 33.3 (a) 'no financially worthwhile tender', was an appropriate basis for cancellation;
- and
- ii. although section 2, para. 2 of the 'terms of reference' mentioned 'up to one thousand hours (1000)', on the other hand, Volume 4 the 'Financial Bid' item B requested the bidder to quote an 'Annual rate (1000 hours) for provision of legal services'.

The Chairman Public Contracts Review Board remarked that:-

- a. in its workings the evaluation board could have considered the worst case scenario, namely the event that the contracting authority would require the 1000 hours per annum service indicated in the tender document within the budget available and the €120,000 limit;
  - b. there was no option but to exclude the bids with the annual and 4-year rates which exceeded the budget and the €120,000 threshold;
- and



- c. in considering the flat hourly rate the evaluation board considered that the contracting authority would exhaust its budget after 1256 hours ( $\text{€}112,000 / \text{€}88.50 = 1256\text{hrs}$ ) thereby not in a position to obtain the maximum number of hours contemplated in the tender, namely  $1000\text{hrs} \times 4\text{years} = 4000\text{hrs}$ .

Dr Delia insisted that the tender, as published, did allow the contracting authority to accept tenders for a fixed number of hours, which rate would be at a certain level, or to accept a flat hourly rate, which rate would be higher, and then utilise the flat rate up to the budget available or up to the  $\text{€}120,000$  limit thus not contravening procurement legislation. He added that one should not cancel a tender on the presumption that, at some point in time, the contract might exceed the budget.

Mr Bonnici:-

- a. acknowledged the point made by Dr Delia in the sense that the terms 'up to 1000 hours per year' and 'for 1000hrs per year' were different;
- b. reiterated that the evaluation board had to compare the bids like-with-like and adopted, after lengthy considerations, the 1000hrs per annum laid down in the 'financial bid' as the yardstick to financially assess all the technically compliant bids and it turned out they were all substantially over the set limits and that led the evaluation board to consider the bids as financially not worthwhile;
- c. stated that the evaluation board took into account what was provided in the tender document and it did not consider the fact that the appellant firm, being the incumbent, knew through experience that in recent years the contracting authority had been requesting on average 500 hours of such services.

Mr Saliba concluded that:-

- i. it was conceded that the reason for rejection was not appropriately defined and that the contracting authority had learnt a lesson from that;
- ii. the evaluation board was not involved in the drawing up of the tender document and, although it found the tender document unclear in certain respects, still it was bound to go by its provisions;
- iii. the evaluation board found that the bids exceeded the parameters set, not by the evaluation board itself, but by the contracting authority and by regulations and, therefore, it had no option but to reject them;
- iv. item B of Volume 4 'Financial Bid' expressed what the drafter/s of the tender document had in mind, namely the provision of legal services for 1000 hours yearly;
- v. it was irrelevant to the evaluation board that, in the past, the contracting authority only requested 500hrs, as claimed by the appellant/incumbent firm, because this time in the tender document the contracting authority mentioned 1000 hours per annum, in the financial bid, and 'up to 1000 hours' in the terms



of reference, and the evaluation board could not overlook that clear tender requirement and neither could it question it, even if it was not unequivocally defined;

and

- vi. in the circumstances, the evaluation board acted correctly in recommending the cancellation of the tendering process and efforts should be made to re-issue the tender in a more clear form so that it would reflect the requirements of the contracting authority in a more defined manner.

Dr Delia concluded that:-

- a. once it had been generally accepted that the reason for rejection was erroneous or inappropriate then the appellant firm's offer should be re-integrated in the tendering process;
- b. on re-integration, the evaluation board should reconsider the appellant firm's offer in the light that the tender document referred to 'up to 1000 hours' and that the clarification included the concept of 'a flat rate hourly fee' and, as a result, the firm's option quoting the flat hourly rate could be applied within the budget of €112,000, which, if need be, could be increased to the €120,000 limit allowed by regulations for departmental tenders and, should the limit of €120,000 be exhausted during the 4-year period then the contracting authority could request authority to issue another tender;

and

- c. although it appeared that the evaluation board deliberated at length on the decision to cancel the tender, still, that turned out to be an incorrect decision because at tender evaluation stage the quote was compliant with regulations.

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 7<sup>th</sup> August 2012 and also through their verbal submissions presented during the hearing held on the 1<sup>st</sup> November 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by email/letter dated 1st August 2012 the contracting authority informed the appellant firm that its offer was not acceptable because the quoted rates were deemed to be not fair and reasonable and that the tender was being recommended for cancellation, (b) the term 'quoted rates not fair and reasonable' was not contemplated in public procurement regulations, (c) clause 33.3 provided that the cancellation of a tender could occur in four instances and the firm assumed that the one applicable to the case under reference was 'a', namely "*the tender procedure has been unsuccessful, namely where no*



*qualitative or financially worthwhile tender has been received or there has been no response at all*", (d) it would appear that what the contracting authority had in mind, but failed to reproduce in its letter of rejection, was that no financially worthwhile tender had been received, (e) there were four participating tenderers and the offers ranged from € 141.60/hr or €566,400 over 4 years to €14.16/hrs or €56,640 over 4 years and the appellant firm's two options, option 1 €42.48/hr or €169,920 for 4 years and option 2 a flat rate of €88.50, (f) the appellant firm was the incumbent, namely it had been rendering this service for the previous 8 years and, as a result, was fully aware of what was involved, (g) clause 6.1.2 requested 5 years previous experience and evidence of a total value of similar services of not less than €30,000 per annum, (h) the contracting authority should explain the reasons why its offer was adjudicated to be not fair and reasonable, (i) the contracting authority issued a clarification whereby the phrase in Volume 3 Section 1 Art. 2 second para. 'at a flat rate annual fee' was amended to read 'at a flat rate hourly rate', (j) on the strength of this clarification, the appellant firm submitted option 2 where a flat hourly rate was quoted, namely €88.50/hr, (k) option 1 quoted the rate of €42.48/hr because the bidder had a contractual commitment to provide 1000hrs of service per annum whereas in option 2 quoted the rate of €88.50/hr on a when-and-as-required basis, namely without the comfort of providing 1000hrs p.a. which explained the difference in the rates in the two options, (l) if one were to concede that option 1 was beyond the Occupational Health and Safety Authority's budget and beyond the departmental tender threshold, in the case of option 2 the contracting authority could have availed itself of the firm's services at the rate of €88.50/hr up to the limit set by the Occupational Health and Safety Authority's budget of €112,000 or up to the €120,000 departmental tender threshold, thus remaining within regulations, (m) the evaluation board could have multiplied the quotes by 1000 hrs for comparison purposes but, according to the terms of reference and the clarification received from the evaluation board, the latter was not obliged to request 1000 hrs per annum but only 'up to' 1000 hrs, (n) the guidelines on fees to be charged by advocates for services rendered were presented with these referring to various jobs which were laid down and, at the end of it, indicated the rate of €50/hr for any other service and that ought to have given the evaluation board an idea of the legal charges applicable, (o) given that it had been conceded that the reason for rejection quoted was inappropriate then the appellant firm should be allowed to question the real reason behind the tender cancellation, (p) the 1000 hours mentioned in the financial bid were meant for comparison purposes but they did not mean that the tender document called for a fixed amount of hours, 1000 in this case, so much so that the contracting authority allowed for two options, namely the annual rate and 4-year total cost together with the flat rate hourly fee as per clarification, (q) therefore, according to the tender document, the contracting authority was free to opt for the flat hourly rate and apply it to the number of hours which would fall within its undisclosed budget or within the €120,000 departmental tender ceiling and in that way it would have acted within regulations and there would have been no cause for tender cancellation, (r) the tender, as published, did allow the contracting authority to accept tenders for a fixed number of hours, which rate would be at a certain level, or to accept a flat hourly rate, which rate would be higher, and then utilise the flat rate up to the budget available or up to the €120,000 limit thus not contravening procurement legislation, (s) one should not cancel a tender on the presumption that, at some point in time, the



contract might exceed the budget, (t) once it had been generally accepted that the reason for rejection was erroneous or inappropriate then the appellant firm's offer should be re-integrated in the tendering process, (u) on re-integration, the evaluation board should reconsider the appellant firm's offer in the light that the tender document referred to 'up to 1000 hours' and that the clarification included the concept of 'a flat rate hourly fee' and, as a result, the firm's option quoting the flat hourly rate could be applied within the budget of €112,000, which, if need be, could be increased to the €120,000 limit allowed by regulations for departmental tenders and, should the limit of €120,000 be exhausted during the 4-year period then the contracting authority could request authority to issue another tender and (v) although it appeared that the evaluation board deliberated at length on the decision to cancel the tender, still, that turned out to be an incorrect decision because at tender evaluation stage the quote was compliant with regulations;

- having considered the contracting authority's representative's reference to the fact that (a) with regard to financial considerations, the evaluation board was faced with two financial constraints, namely the budget available for these services, namely €112,000 and the fact that this was a departmental tender which, according to regulations, could not exceed the limit of €120,000, excluding VAT (€141,600 incl. VAT) otherwise it would have to be issued through the Contracts Department, (b) two of the four bidders failed at technical evaluation stage with the remaining two bidders, representing three offers, qualifying for financial consideration, (c) the bid submitted by Ganado & Associates at €566,400 together with options 1 and 2 submitted by the appellant firm amounting to €169,920 and €354,000 (i.e. €88.50 x 1000 hrs x 4 years) respectively were all well above both the budget of the contracting authority and the departmental tender threshold, (d) therefore, the evaluation board had no other option but to declare all the technically compliant offers not fair and reasonable when compared to the budget available or to merit consideration within the departmental tender threshold, (e) the contracting authority had allocated the budget of €112,000 and that this estimate did not feature in the published tender document and that the contracting authority was not obliged to publish its budget, (f) being a departmental call for tenders the bidders should have known that the offers made had to be under €120,000, (g) in Volume 3 Section 1 under 2 'Contracts Duration and Objectives' para. 2 (page 43) it was stated that "*The Contractor shall provide up to one thousand hours (1000) per year of legal services which may be spread unevenly throughout the year as required by OHSAs, at a flat rate annual fee*", (h) on the other hand, Volume 4 'Financial Bid' item 'B' (page 46) clearly stated as follows '*Annual rate (1000 hours) for provision of legal services*', (i) as a consequence, the evaluation board, acting on the provisions of the tender document and in order to compare all the bids on a like-with-like basis multiplied the hourly rate quoted by 1000 hours, even in the case of option 2 where the appellant firm quoted the flat rate of €88.50/hr, (j) the only reason cited in the letter of objection was the evaluation board's reason for rejection, namely that the quotes were not fair and reasonable and that the issue had been addressed by Mr Bonnici, (k) the 'guidelines on fees to be charged by advocates' were only guidelines and not legally binding, (l) the evaluation board considered this issue at length and, in the end, it had decided that, clause 33.3 (a) 'no financially worthwhile tender', was an appropriate basis for cancellation, (m) although section 2, para. 2 of the 'terms of reference' mentioned 'up to one thousand hours (1000)', on the other hand,



Volume 4 the 'Financial Bid' item B requested the bidder to quote an 'Annual rate (1000 hours) for provision of legal services', (n) one could not but acknowledge the point made by Dr Delia in the sense that the terms 'up to 1000 hours per year' and 'for 1000hrs per year' were different, (o) the evaluation board had to compare the bids like-with-like and adopted, after lengthy considerations, the 1000hrs per annum laid down in the 'financial bid' as the yardstick to financially assess all the technically compliant bids and it turned out they were all substantially over the set limits and that led the evaluation board to consider the bids as financially not worthwhile, (p) the evaluation board took into account what was provided in the tender document and it did not consider the fact that the appellant firm, being the incumbent, knew through experience that in recent years the contracting authority had been requesting, on average, 500 hours of such services, (q) it was conceded that the reason for rejection was not appropriately defined and that the contracting authority had learnt a lesson from that, (r) the evaluation board was not involved in the drawing up of the tender document and, although it found the tender document unclear in certain respects, still it was bound to go by its provisions, (s) the evaluation board found that the bids exceeded the parameters set, not by the evaluation board itself, but by the contracting authority and by regulations and, therefore, it had no option but to reject them, (t) item B of Volume 4 'Financial Bid' expressed what the drafter/s of the tender document had in mind, namely the provision of legal services for 1000 hours yearly, (u) it was irrelevant to the evaluation board that, in the past, the contracting authority only requested 500hrs, as claimed by the appellant/incumbent firm, because this time in the tender document the contracting authority mentioned 1000 hours per annum, in the financial bid, and 'up to 1000 hours' in the terms of reference, and the evaluation board could not overlook that clear tender requirement and neither could it question it, even if it was not unequivocally defined and (v) in the circumstances, the evaluation board acted correctly in recommending the cancellation of the tendering process and efforts should be made to re-issue the tender in a more clear form so that it would reflect the requirements of the contracting authority in a more defined manner,

reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that the term 'quotes not deemed to be fair and reasonable' used by the evaluation board to describe the reason for rejecting was not appropriate because it has emerged that the true reason for rejection was that the quotes were in excess of the Occupational Health and Safety Authority's budget and in excess of the €120,000 limit set for departmental tenders. Furthermore, this Board also establishes that the recommendation to cancel the tender had nothing to do with 'fairness' and 'reasonableness' but simply that the quotes were beyond the limits on two counts and that the evaluation board could not go beyond the budget available and the limit laid down in the public procurement regulations.
2. The Public Contracts Review Board feels that since Reg. 20 (d) provided that "*Where the estimated value exceeds six thousand euro (€6,000) but not one hundred and twenty thousand euro (€120,000), the equipment, stores, works or services may be procured after a departmental call for tenders or after publishing a call for quotations in the Gazette*", it was obvious that the constraints were

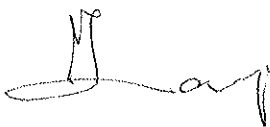


evident for the adjudication board and it was odd how in their quotes certain bidders overlooked the fact that this was a departmental tender with the limit of €120,000 set by regulations.

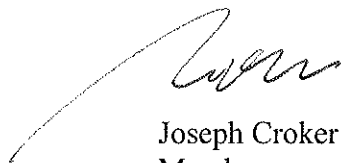
3. From a pragmatic point of view, this Board, under normal circumstances, could have agreed with the appellant firm's argument, namely that one could concede that option 1 was beyond the Occupational Health and Safety Authority's budget and beyond the departmental tender threshold and that, in the case of option 2 (a) the contracting authority could have availed itself of the firm's services at the rate of €88.50/hr up to the limit set by the Occupational Health and Safety Authority's budget of €112,000 or up to the €120,000 departmental tender threshold, thus remaining within regulations and that (b) the adjudication board could have multiplied the quotes by 1000 hrs for comparison purposes but, according to the terms of reference and the clarification received from the evaluation board, the latter was not obliged to request 1000 hrs per annum but only 'up to' 1000 hrs, yet, this Board feels that both the adjudication board, as well as the appellant tenderer, have based their argumentation on erroneous pretences. The adjudication board should not have allowed any tenderer – in this case the appellant tenderer – to proceed beyond the administrative stage in view of the fact that under Item 20 (page 12 of the Tender Document) under 'Tender Guarantee (Bid Bond), clause 21.1, titled 'Variant Solutions', clearly states that "*No variant solutions will be accepted. Tenderers must submit a tender in accordance with the requirements of the tender document*". This Board feels that the fact that the appellant company opted to submit two options should have precluded it from being considered further in this particular tender.

This Board finds against the appellant firm and recommends that the deposit paid by the same appellant for the appeal to be lodged should not be reimbursed.

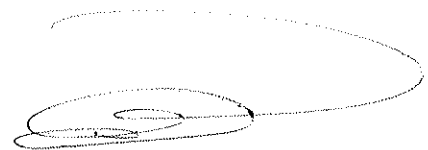
In conclusion, this Board concurs with the decision taken by the contracting authority to cancel this tender but for the reason expressed in '3' above and recommends that this tender be re-issued.



Alfred R Triganza  
Chairman



Joseph Croker  
Member



Paul Mifsud  
Member

19 November 2012