

PUBLIC CONTRACTS APPEALS BOARD

Case No. 223

Advert No. CT 466/2009 – CT 2679/2009

Tender for Restoration Works to Valletta Land front Fortifications – VLT 12 – Tender for the restoration of St James' Counterscarp and Bridge

This call for tenders was published in the Government Gazette on 11 December 2009. The closing date for this call for offers was 28 January 2010.

Five (5) tenderers - submitted their offers.

The budget available for this tender was Euro 273,947 (excluding VAT).

De La Valette Joint Venture filed an objection on the 21 June 2010 against decision by the Contracts Department in respect of the tender in caption which has been recommended for award to C.A.V.V. Allieri Joint Venture.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman, Mr Anthony Pavia and Mr. Edwin Muscat as members convened a public hearing on Monday, 6th September 2010 to discuss this objection.

Present for the hearing were:

De La Valette Joint Venture

Dr. David Wain	Legal Representative
Ms. Denise Xuereb	
Mr Angelo Xuereb	

C.A.V.V. Allieri Joint Venture

Dr. Franco Galea	Legal Representative
Mr. Brian Miller	
Mr. Ivan Farrugia	
Mr. Joe Farrugia	

MRRA – Project Design and Implementation Division)

Dr Franca Giordmaina	Legal Representative
Arch Ray Farrugia	Director General (Works)

Evaluation Board

Mr Joseph Casaletto	Secretary
Mr Hermann Bonnici	Evaluator
Ms Mireille Fsadni	Evaluator
Ms Mark Azzopardi	Evaluator

Department of Contracts

Mr Francis Attard	Director General (Contracts)
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After the Chairman's brief introduction as to how the PCAB was going to conduct the hearing, the appellant joint venture was invited to explain the motives of the objection.

Dr David Wain, representing De La Valette JV, the appellants, started by making reference to the Department of Contracts' letter dated 11 June 2010 whereby his clients were informed that their bid was disqualified because it was considered as administratively non-compliant on the grounds that *"One of the project is not within the last 5 years as requested under Article 14.3.2.12 and 4.2 and has expired by around 4.5 months."* He contended that this was not an issue of an administrative nature. The lawyer argued that the fact that the clarifications sought by the Adjudicating Committee were of a technical nature showed that they had already passed the administrative stage.

In reply to a specific question by the PCAB, Dr Wain said that the articles referred to earlier stipulated that tenderers had to submit information about three projects carried out over the past five years and each had to be valued at not less than €40,000. He claimed that it appeared that they were not satisfied with the information provided in respect of some of the projects carried out by the companies forming the Joint Venture.

When asked by the PCAB to state whether there was any material change in the company that carried out this project, the reply given by Dr Wain was in the negative. He further said that the Joint Venture was strengthened as there was an increase in resources and also included a renowned Italian restorer as a key expert.

Dr Franca Giordmaina, legal representative of the Contracting Authority, in her response said that the appellants had submitted four projects, two of which were accepted, one was not completed within the last five years and the other project was not accepted because they did not submit the necessary details as requested in the tender dossier.

She said that Clause 4.2.6 (page 9 of the tender document) specified that:

"They must provide a list of related works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Tenderers shall prove the satisfactory completion of at least three restoration intervention projects on masonry structures carried out by the bidders during the last five years. The value of each of these three projects shall not be less than €40,000."

The Contracting Authority's lawyer pointed out that this clause was mandatory and that bidders were not requested to provide only a list of projects but to provide also relative details.

Dr Giordmaina even quoted the following from Clause 4.6.4.2 in *'Form 4.6.4 Experience as Contractor'* (page 54 of the tender dossier):

- *Attach here available references and certificates from the relevant Contracting Authorities proving the satisfactory completion of at least three restoration intervention projects on masonry structures carried out by the bidders during*

the last five years. The value of each of these three projects shall not be less than €40,000. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed.

- *Attach here a dossier of not more than 20 A4 size pages containing description including photographs of at least three restoration intervention projects on masonry structures carried out by the bidder/s during the last five years. The value of restoration works of each of the three projects listed shall not be less than € 40,000. The dossier must be accompanied by a written declaration signed by the bidder confirming that personnel with similar or better qualifications and/ or experience will be engaged on this contract to carry out specialised restoration works as specified in this tender document.*
- *Attach here references from previous clients for at least the three projects mentioned above, clearly indicating: works carried out, location of works, value of works carried out, whether works were carried out to client's satisfaction and within established timeframes.*

Dr Giordmaina said that, contrary to what was stated by Dr Wain, the appellants' offer was rejected on the basis of the fact that they did not satisfy the requirement in the 5th column of the Administrative Compliance Grid (*Proof of the Qualifications/Selection criteria as per Clause 4 of the ITT*) and not because of technical issues. Furthermore, she pointed out that this was a single package tender. The PCAB said that such tenders were adjudicated holistically and, as a result, the issue raised by the appellants was considered irrelevant.

Architect Mireille Fsadni, a member of the Evaluation Committee, gave the following information regarding the projects submitted by De La Valette Joint Venture:

Project	Value	Remarks
Valletta Waterfront	€592,410	Exceeded 5 years by 45 months from closing date of tender.
Villa Cagliares	€250,000	Accepted
Fort Rinella	€500,000	Accepted
St Cecilia Chapel	€87,000	Only pictures were submitted and no references were provided.

She confirmed that the appellants had indicated other projects (such as *Capua Palace* and *Capua Hospital*) but these could not be considered because they exceeded the completion period of the last five years substantially.

Architect Fsadni contended that as an Adjudicating Board they had to abide by the conditions of the tender. When her attention was drawn that in their first adjudicating report they had recommended the award of the tender to De La Valette JV, she responded by stating that this was due to the fact that such an offer was considered acceptable but they also reported the fact that one of the projects was not completed within the last five years as it expired by 4.5

months. At this point, Dr Giordmaina intervened by stating that the Department of Contracts had, subsequently, informed the Adjudicating Board that, once this offer was not in strict compliance with the requirements of the tender dossier, then it could not be considered as valid.

The Chairman PCAB pointed out that the issue did not concern something of pivotal importance as, for example, a 'Bank Guarantee' but an evidence of works carried out. The PCAB stated that, in similar circumstances, one had to consider the relevance of the matter at hand.

Architect Fsadni said that she understood the PCAB's concern about the fact that the completion period of the last five years was exceeded by only 4.5 months, however, for evaluation purposes, the Adjudicating Board had to take into consideration the 'shalls' and 'musts' of each clause. She reiterated that they had sought guidance and the Department of Contracts gave a ruling on this matter.

With regard to clarifications, Architect Fsadni said that these were sought after obtaining the necessary approval from the Department of Contracts and that they were not allowed to ask bidders to submit information that was missing from the original offer.

Ms Denise Xuereb, representing De La Valette JV, said that, in reply to a clarification sought by the Adjudication Board during the evaluation process, they confirmed that Mr Lawrence Buhagiar and Professor Gasparoli were going to be directly involved on this project as 'Master Mason' and 'Key Expert' respectively.

Ms Xuereb said that it did not appear that in the tender document it was indicated that the certificates had to be issued by year and month. She argued that had the VISET certificate been issued by year only it would have qualified. Dr Wain confirmed that even if it was indicated December 2004 it would have been compliant. Architect Fsadni said that they did not ask the tenderer to indicate the date - it was VISET which had indicated that the project under reference was completed in July 2004. However, Dr Franco Galea, legal representative of C.A.V.V. Allieri JV, intervened to clarify that in the tender document it was specifically requested that the certificate had to include the date, value and site of works and, as a consequence, this showed that the date was important.

At this point, Dr Giordmaina and Architect Fsadni pointed out that the objector had attached a new certificate issued by VISET with a different completion date and that this was not at the disposal of the Adjudication Board for evaluation purposes.

In reply to specific question by the PCAB, Architect Fsadni said that an architect would consider a project as complete from the 'date of practical completion', that is, on completion of 99% of the works required by a contract. She said that, finally, a 'handover certificate' would be issued.

Mr Angelo Xuereb, also representing De La Valette JV, the appellants, said that the other partners had a large number of other projects and that Professor Gasparoli was a renowned partner.

Dr Giordmaina sustained that if Professor Gasparoli was a partner of the Joint Venture there was a procedure that had to be followed, including the signing of the tender document or the

authorization of the other partners to sign on his behalf and the filling in of the necessary forms regarding projects according to the requirement of the tender. She pointed out that in the reply to the clarification it was confirmed that he was a 'Key Expert'.

Architect Fsadni explained that De La Valette JV was formed by three partners, namely, *Baron Contractors, The Construction Ltd* and *AX Construction Ltd* (as lead partner). She said that whenever they evaluated a bid of a Joint Venture they evaluated the projects carried by the companies forming the Joint Venture and not the capabilities of the key experts. She remarked that a tender submitted by a Joint Venture must fulfill various requirements, which *inter alia* had to include a preliminary agreement by all partners and the tender had to be signed by each partner. Architect Fsadni maintained that the tender was not signed by Professor Gasparoli and the agreement did not include Professor Gasparoli as a partner of the Joint Venture. She contended that, in the prevailing circumstances, his experience could not be considered for the purpose of projects carried out by the Joint Venture even though he was a valid person in restoration. Architect Fsadni declared that De La Valette JV did not include any of Professor Gasparoli's projects in the list of projects carried out by the Joint Venture.

At this point, Dr Wain made reference to Regulation 51 (3) which specified that:

“An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.”

The appellants' lawyer said that his clients had included such experts because the document stipulated that they could make use of the experience of other operators provided that they produced their undertaking. He said that, in spite of this, they were of the opinion that it did not make sense to disqualify a tender for just 4.5 months.

Architect Fsadni reiterated that Professor Gasparoli was accepted as 'Key Expert' but it could not then be stated that he was a partner of the Joint Venture. The Chairman of the PCAB intervened to draw her attention that the issue under consideration was about the 4.5 months.

Architect Ray Farrugia, Director General Works, said that an Evaluation Board adjudicated a tender on documents submitted and it was not expected to interpret the tender document by arguing that the completion period was exceeded by a few months because they had to abide strictly by the tender conditions. Mr Farrugia maintained that he considered the PCAB's interpretation as dangerous.

The Chairman PCAB responded by pointing out that the 5 years was not arrived at scientifically but was a guideline. He sustained that in the case of, say, a 'Bank Guarantee' time limits were mandatory but in the case under reference the issue concerned 5.5 years of a works project that took 10 years to complete.

Architect Fsadni insisted that an Adjudication Board was not allowed to change the goal posts and that, for fairness sake, they had to abide by what was stipulated in the tender documents.

Dr Franco Galea, legal representative of C.A.V.V. Allieri JV, said that the first page of the tender dossier stipulated that, in submitting a tender, every tenderer accepted in full and without restrictions all conditions governing the contract.

He said that, apart from the clauses mentioned by the legal representative of the Contracting Authority, there was also clause 4.1.5 which was mandatory on all tenderers wherein, *inter alia*, this stipulated that:

“Provided that bidders that cannot prove the satisfactory completion of at least 3 restoration intervention projects on stone/ masonry structures carried out by the bidder/s during the last five years the value of which is not less than €40,000 per project, will be disqualified”

With regard to the appellants’ lawyer’s argument regarding the administrative issue, Dr Galea said that this had no relevance because it was a single package tender.

Dr Galea said that, as far as Professor Gasparoli was concerned, they tried to rely on communication exchanged with the Department of Contracts, but if anything, this satisfied the requirement under Clause 4.2.7 which stated that :

‘They must provide an indication of the technicians and technical bodies whether or not beginning directly to the economic operator’s undertaking, especially those responsible for quality control and those upon whom the contractor can call in order to carry out the work’

At this point, when Dr Galea asked whether the projects indicated were all carried out by the companies forming part of De La Valette JV, Architect Fsadni replied that they had no reason to believe that what was declared in the references was not the truth.

Continuing, Dr Galea said that, if the appellants had any doubt on whether such a project qualified within the stipulated time-frame, they could have sought a clarification and this would have been forwarded to all other bidders.

Dr Wain intervened by stating that there was nothing in the tender document which precluded tenderers from including all projects carried out. However, Dr Galea contended that the most important thing was that the bidders had to provide evidence that they satisfied the requirements of the three projects.

During the proceedings, Dr Galea made reference to para No1 of the Analysis Report wherein it was stated that *‘In fact, Dr Wain lists the four projects and points to the fact that Article 14.3.2.12 did not indicate that the projects indicated in furtherance to the article had to be complete projects, but it mentions “intervention projects on masonry structures carried out by the bidder/s during the past five years” ’* He requested the appellants to clarify their position because if the indicated projects were not complete then their bid should have been disqualified also for this reason. Architect Fsadni confirmed that the accepted projects were all complete and were not works in progress.

Dr Galea said that he still had doubts about the validity of the appellants’ certificates and invited the Appeals Board to analyse them. His attention was drawn by the PCAB that the

objection was about timing and not on technical issues and that they would be deliberating on whether the 4.5 months was to be considered as a substantial deviation for a tender to be rejected irrespective of the value and duration of project. Furthermore, it was stated that the PCAB was not replacing the Adjudication Board.

In his concluding remarks Dr Galea pointed out that it was not the tenderer who had to decide what was arbitrary or mandatory or an acceptable deviation and that the other tenderers submitted their offer in accordance with the requirements of that particular clause of the tender.

Architect Fsadni felt that, for a level playing field and fairness sake, if the goal posts were going to change, they should also re-consider the other tenders because there could be others that were disqualified for the same reason. The PCAB drew her attention that all aggrieved bidders had a right to appeal.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 21 June 2010 and also through their verbal submissions presented during the public hearing held on 6 September 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants’ representatives’ (a) claim that it did not appear that in the tender document it was indicated that the certificates had to be issued by year and month and that had the VISET certificate been issued by year only it would have qualified (b) claim that there was nothing in the tender document which precluded tenderers from including all projects carried out and (c) reference to the fact that the appellant joint venture had included such experts because the document stipulated that it could make use of the experience of other operators provided that it produced their undertaking;
- having also taken note of the contracting authority’s representatives who, *inter alia*, (a) stated that the appellants had submitted four projects, two of which were accepted, one was not completed within the last five years and the other project was not accepted because they did not submit the necessary details as requested in the tender dossier, (b) stated that Clause 4.2.6 (page 9 of the tender document) was mandatory and that bidders were not requested to provide only a list of projects but to provide also relative details, (c) stated that, contrary to what was stated by Dr Wain, the appellants’ offer was rejected on the basis of the fact that they did not satisfy the requirement in the 5th column of the Administrative Compliance Grid (*Proof of the Qualifications/Selection criteria as per Clause 4 of the ITT*) and not because of technical issues, (d) stated that the appellants had indicated other projects (such as *Capua Palace* and *Capua Hospital*) but these could not be considered because they exceeded the completion period of the last five years substantially, (e) contended that as an Adjudicating Board they had to abide by the conditions of the tender, (f) argued that whenever an adjudication board evaluated a bid of a Joint Venture such board would be evaluating the projects carried by the companies forming the Joint Venture and not the capabilities of the key experts and (g) argued that for fairness sake, if the

goal posts were going to change, they should also re-consider the other tenders because there could be others that were disqualified for the same reason;

- having also taken cognizance of the fact that (a) Architect Fsadni stated that the PCAB was correct to remark that in their first adjudicating report they had recommended the award of the tender to De La Valette JV and that this was due to the fact that such an offer was considered acceptable albeit they had also reported the fact that one of the projects was not completed within the last five years as it expired by 4.5 months and (b) Dr Giordmaina stated that the Department of Contracts had, subsequently, informed the Adjudicating Board that, once this offer was not in strict compliance with the requirements of the tender dossier, then it could not be considered as valid;
- having also heard Dr Galea's intervention, particularly that relating to (a) the fact that he maintained that in the tender document it was specifically requested that the certificate had to include the date, value and site of works and, as a consequence, this showed that the date was important, (b) the fact that the first page of the tender dossier stipulated that, in submitting a tender, every tenderer accepted in full and without restrictions all conditions governing the contract, (c) the fact that, if the appellants had any doubt on whether such a project qualified within the stipulated time-frame, they could have sought a clarification and this would have been forwarded to all other bidders and (d) the fact that it was not the tenderer who had to decide what was arbitrary or mandatory or an acceptable deviation and that the other tenderers submitted their offer in accordance with the requirements of that particular clause of the tender,

reached the following conclusions, namely:

1. The PCAB feels that members of an adjudicating board should be more pragmatic (as well as be guided in a similar way by the pertinent administrative authority) and make themselves in a position to take responsible decisions (a) within the context of the 'spirit' of the parameters governing certain specifications found in a tender document and (b) the overall substantiality of the detail one places focus on *vis-a-vis* the entire picture. Certain time frames, such as that listed in Clause 4.2.6 relating to works carried out over the past five years, are primarily meant to serve solely as a guideline. In other words, a less than a handful of months here or a less than a handful of months there are not going to make a difference, especially when one was asked to provide evidence of projects the value of which "*shall not be less than €40,000*" and a participating tenderer, in this case the appellant joint venture, provided evidence of a project worth €592,410. It is inconceivable for the PCAB to accept that an adjudication board, in its search to establish the financial and operational solidity of a participating tenderer, ends up being more focused on the mere fact that a project, as presented, has exceeded the arbitrary 'guideline' set (5 years) by a less than a handful of months rather than the financial strength or the technical and operational expertise of the bidder.
2. The PCAB seems rather confused as to how tenderers participating in this tender were expected to present projects whose value should not have been less than €40,000 – considered by the PCAB to be rather low - considering that the estimated value of this tender in question is Euro 273,947 (excluding VAT)!

3. The PCAB opines that time frames, as contemplated in a tender document, should be strictly adhered to when it comes to issues like ‘bank guarantees’, dates of documents and certificates presented and so forth. This Board argues that there is a difference between a time frame intended to serve as a guideline – not scientifically arrived at - and a time frame aimed at serving as a ‘cut off’ date with no reason for the adjudicating process to be flexible at all. Whilst (a) ‘guidelines’ should serve adjudicators as further proof of a tenderers’ submission, (b) ancillary proof via third party evidence or officially supported listing of personal financial commitments are requested to support operational and financial commitment being entered into as well as a bidders’ financial standing (financial statements, bank statements, guarantees, bid bonds, etc.). There is no doubt that, in the latter’s case, rigidly observed ‘cut off’ dates / specific deadlines are important as these would be considering all submissions *at par* and reflecting a ‘snap shot’ scenario at a specific moment in time applicable to all parties’ concerned.
4. The PCAB, whilst in full agreement with the point raised by an interested party’s representative wherein, *inter alia*, it was argued that it is not the tenderer who has to decide what is arbitrary or mandatory or an acceptable deviation, yet, one has to acknowledge that the argument would have remained valid had the tenderer reneged on submitting proof. In this instance the PCAB argues against the scope behind excluding a tenderer’s submission for exceeding a guideline arrived at in an arbitrary manner and which is, supposedly, solely introduced to facilitate an adjudicating process.

As a consequence of (1) to (4) above this Board finds in favour of the appellants and recommends that the appellants’ submission be evaluated further.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

17 September 2010

Addendum

Albeit Mr Anthony Pavia, one of the PCAB’s members had already verbally agreed with the other members on the way the PCAB had to proceed with its decision relevant to this particular case, yet, unfortunately, Mr Pavia passed away on the 8th September 2010 whilst this decision was still being drafted.