

PUBLIC CONTRACTS APPEALS BOARD

Case No. 245

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

Five (5) tenderers had submitted their offers.

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

C.A.V.V. Allieri JV filed an objection on 29th October 2010 against the intended award of the tender in caption to De La Valette JV.

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

Present for the hearing were:

C.A.V.V. Allieri Joint Venture

Dr. Franco Galea	Legal Representative
Mr. Brian Miller	Senior Manager
Witnesses:-	
Mr. Rosario Agius	
Mr Hans Attard	
Mr. Nyal Xuereb	

De La Valette Joint Venture

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

MRRA – Project Design and Implementation Division

Dr Franca Giordmaina	Legal Representative
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Evaluation Board

Dr Albert Caruana	Chairman
Mr Joseph Casaletto	Secretary
Arch Mireille Fsadni	Member
Mr Mark Azzopardi	Member

After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellants' representative was invited to explain the motive/s of the objection.

Dr Franco Galea, legal representative of C.A.V.V. Allieri Joint Venture, started by raising the following two issues (i) that the PCAB's decision issued on the 17th September 2010 (Case No.223) in connection with the appeal lodged by De La Valette on this same tender was null because the decision was signed by two instead of the three members of the PCAB, given the demise in the meantime of Mr Anthony Pavia, and (ii) that Mr Alfred Triganza, Chairman, and Mr Edwin Muscat, member, should not decide on his client's appeal because they had already expressed an opinion on the merits of the case.

The Chairman PCAB remarked that the decision referred to by the appellants' representative was legally valid because two out of three members constituted a quorum. In order to corroborate this statement the Chairman PCAB made reference to Article 84 (15) of the 2005 Public Contracts Regulations wherein it is stated that decisions *"of the Appeals Board shall preferably be taken on the basis of unanimity. However, majority decisions shall be final and binding with regard to the award of the contract. The Chairman and the other two members shall have one vote each."*

The Chairman PCAB further remarked that it was legally correct for the PCAB to deal with more than one appeal in connection with the same tender lodged at different stages of the tendering process - that did not amount to dealing with the same issue twice - and, the PCAB's Chairman concluded that it was certainly not the first time that the PCAB did just that.

At this point the Chairman asked those present whether, following his intervention, anyone present in the room still had any problem with the members of the Board proceeding with the hearing of this appeal. All those present confirmed that they were agreeing to this Board proceeding with the formal hearing of the appeal lodged by appellant company.

Dr Galea referred to the decision communicated to his client by the Contracts Department on the 20th October 2010 whereby the joint venture was informed that its offer was not the cheapest, technically compliant offer. Dr Galea maintained that his clients' bid was, in fact, the only technically compliant bid while the recommended tenderer, De La Valette JV, had made untruthful declarations in its tender submission which should have led to its outright disqualification. Dr Galea remarked that, apart from the fact that the Valletta Waterfront Project was completed outside the 5 year period stipulated in the tender, which issue had already been decided upon by the PCAB, his client had become aware that this same project had been completed before July 2004. Moreover, Dr Galea declared that other projects submitted by the preferred tenderer to demonstrate one's experience in restoration works were not in fact carried out by any partner constituting De La Valette JV which event was in violation of clauses 4.2 (page 9) and 14.3.2.12 (page 14) - both provisions quite similar in substance. To corroborate his statement Dr Galea proceeded by citing clause 14.3.2.12:

“A dossier of not more than 20 A4 size pages containing description including photographs of at least three restoration intervention projects of masonry structures carried out by bidder/s during the last five years. The value of the 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.”

Dr Galea stated that the recommended tenderer submitted the following works for the purposes of clauses 4.2 and 14.3.2.12 namely, St Cecilia Chapel, Villa Cagliares, Fort Rinella and Valletta Waterfront.

ST CECILIA CHAPEL

Dr Galea conceded that there was no problem with regard to this project because it was carried out by one of the partners of De La Valette JV, i.e. *Baron Group Ltd*.

Architect Mireille Fsadni, a member of the adjudicating board, intervened to remark that, albeit, due to lack of information, this project was not taken into account, yet, she pointed out that the remaining three projects were sufficient for the purposes of clauses 4.2 and 14.3.2.12.

VILLA CAGLIARES

Dr Galea remarked that this project was, in fact, carried out by Lawrence Buhagiar and, to this effect, submitted a certificate dated 28th October 2010 by Architect Joanna Spiteri Staines. He added that the recommended tenderer did not contest this matter of fact so much so that in their letter of reply dated 8th November 2010 the joint venture representatives stated as follows, namely:

“It is not contested that Master Mason Lawrence Buhagiar carried out the works at Villa Cagliares (which sentence continued as follows: and the letter of recommendation by Perit Joanna Spiteri Staines dated 26th March 2010 at no time indicates or tries to create the impression that the works were carried out by an actual signatory to the De La Valette joint venture agreement).”

FORT RINELLA

Dr Galea remarked that the recommended joint venture did not perform any restoration works at Fort Rinella which, as in the case of Villa Cagliares, amounted to a misrepresentation of facts and should have led to the disqualification of the recommended tenderer for not having satisfied the provisions of clauses 4.2 and 14.2.3.12.

Mr Angelo Xuereb, representing De La Valette JV, testified under oath that the works at Fort Rinella had been carried out by mason Lawrence Buhagiar.

VILLA CAGLIARES AND FORT RINELLA

Dr Galea submitted that in Form 4.6.4 of Section 4 Volume 1 (page 53 of the tender document) the bidder had to list the works performed by the bidder and, by listing these two projects, the recommended tenderer had misrepresented the facts. Furthermore, Dr Galea pointed out that, at page 4 of its letter of reply, De La Valette JV remarked that the fact remained that the adjudicating board had accepted Villa Cagliares – and, similarly, Fort Rinella - presumably in terms of Regulation 51 (3) of the Public Contracts Regulations which provided as follows:

“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.”

Dr Galea argued that this provision was not applicable to this case because Reg. 51 (3) was applicable for ‘a particular contract’ and, as a consequence, had to be reproduced in the tender document, which was not the case in this tender. He also pointed out that in the tender submission of the recommended tenderer there was not the undertaking stipulated in Reg. 51 (3).

Dr Franca Giordmaina, legal representative of the contracting authority, remarked that, contrary to what was being claimed by the appellants, the recommended tenderer had furnished in its tender submission an undertaking whereby Master Mason Lawrence Buhagiar authorised De La Valette JV to make use of and reference to his experience in masonry restoration for the purposes of submitting a tender. She added that the same Mr Buhagiar had also accepted to be appointed by De La Valette JV as Master Mason on the project. Dr Giordmaina stated that the adjudicating board had considered that, through his undertaking, Mr Buhagiar had met the requirements set out in the tender whereas another expert of the recommended tenderer, Prof. Gasparoni, was not deemed to have satisfied those same requirements.

Dr David Wain, legal representative of De La Valette JV, remarked that the undertaking by Mr Buhagiar did not emerge at the stage of the appeal but it was entered into on the 8th January 2010. He added that, in the tender submission, his client had clearly indicated that the works at Villa Cagliares and Fort Rinella were carried out by master mason Lawrence Buhagiar and George Borg and that, certainly, did not amount to any misrepresentation, which, apparently, was the basis of the appellants’ objection.

Dr Galea intervened to argue that the fact that Mr Lawrence Buhagiar had accepted to be appointed as master mason on the project did not, in any way, render him a partner in the joint venture for the purposes of clauses 4.2 and 14.3.2.12.

On the other hand, Dr Wain argued that the law *per se* (regulations - LN 177/2005) was applicable at all times and that it did not have to be reproduced in the tender document for it to be rendered applicable. He added that the adjudication board could

opt to make use of Reg. 51 (3) to ascertain that the tenderer had the necessary resources to carry out the contract.

At this point the Chairman PCAB remarked that what had to be established was (a) whether Mr Lawrence Buhagiar, being the master mason of the project but not being a partner in the joint venture, satisfied the requirements set out in clauses 4.2 and 14.2.3.12 and (b) whether the undertaking made by the same Mr Buhagiar satisfied the requirements of Reg. 51 (3).

Dr Albert Caruana, chairman of the adjudicating board, remarked that, in the case of Mason Buhagiar, the adjudicating board had a written declaration whereas in the case of Prof. Gasparoni it had a letter which was not considered sufficient. Dr Caruana added that when the adjudicating board came across the reference by Architect Joanna Spiteri Staines (dated 26/03/10) that mason Mr Lawrence Buhagiar had satisfactorily carried out the works at Villa Cagliares, the adjudication board opted to make use of Reg. 51 (3), even though it was not laid down in the tender document, to enable them to establish the link between mason Mr Lawrence Buhagiar and De La Valette JV.

Dr Caruana said that in the clarification sought by the adjudicating board it had been pointed out that (i) the letter of reference to one of the projects presented was issued in the name of Lawrence Buhagiar on behalf of one of the companies making up the joint venture, (ii) the other reference in the form of a newspaper article had named Mr Buhagiar but with no connection to any of the partners making up the joint venture and (iii) Mr Buhagiar had been named by the bidder as one of key persons to be deployed on this project and even included him in the organisation chart. On the basis of those observations Dr Caruana, acting on behalf of the adjudication board, requested the bidder to declare whether there was any agreement whereby Mr Buhagiar authorised the joint venture to use his experience in the tender submission. Dr Caruana said that the part of the reply to the adjudication board's request came in the form of the letter of undertaking dated 8th January 2010 entered into by Mr Lawrence Buhagiar and Mr Angelo Xuereb, representing De La Valette JV.

The Chairman PCAB observed that the consortium was made up of its employees at different levels and that, ultimately, it was the expertise of those employees which rendered the consortium capable of undertaking certain specialised works. As an example, the Chairman PCAB mentioned the case of a turnkey contractor which brought together a number of contractors with different skills to execute a project.

Dr Caruana submitted that, in terms of Reg 51 (3), the economic operator could rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. Dr Caruana stated that, with the undertaking between mason Buhagiar and De La Valette JV, the adjudicating board had the comfort that the recommended tenderer was capable of carrying out the requested works.

Dr Giordmaina held the view that the provisions of clause 14.2.3.12 were, in substance, similar to those of Reg. 51 (3) where a bidder, besides relying on one's own experience, could also rely on that of others with whom such bidder would either engage or have an undertaking.

Dr Galea argued that, on closer examination of clause 14.3.2.12, one would deduce that the first part requested the bidder/s to submit the three projects as proof of experience whereas the second part - in bold print - referred to personnel within the joint venture who could carry out these works. He added that it was in the latter case that mason Buhagiar would come into the picture. Dr Galea conceded that, for the purpose of demonstrating experience, a contractor could claim to have carried out works that were actually carried out by one of his sub-contractors.

Dr Wain rebutted that Reg. 51 (3), being part of the laws of Malta, was applicable to this tender, in the absence of a specific clause in the tender document that rendered Reg 51 (3) inapplicable which was not the case.

VALLETTA WATERFRONT

Dr Galea submitted that his client could prove that the restoration works carried out by the recommended tenderer was not completed in July 2004 – which issue had been decided upon by the PCAB at the previous appeal – but was completed as far back as 2003. Dr Galea also mentioned the conflicting dates of completion of works indicted by various sources, namely the:

- i) letter sent by Viset (dated 20th November 2009) where it was stated that *The Constructors Ltd*, which forms part of the joint venture, had completed the works in July 2004; and
- ii) final certificate of payment issued by Messrs Architecture Project to *The Constructors Ltd* (dated 22nd September 2005)

At this stage Dr Galea presented an extract from ‘*The Times*’ indicating that the Valletta Waterfront project was inaugurated in late 2003.

Dr Galea then started calling his witnesses.

Mr Angelo Xuereb, representative of *The Constructors Ltd*, under oath, gave the following evidence:

- the restoration works at the Valletta Waterfront consisted mainly of Pinto Stores;
- the major part of the restoration works were completed in July 2004 but all the works, including the part at the back of the structure, were completed during 2005;
- he was a director of Viset, the entity responsible for the Valletta Waterfront;
- the article that appeared in ‘*The Times*’ on the 17th December 2003 referred to the opening of part of the Waterfront Project and not of the whole project – it often happened that large projects were put into operation in phases; and

- the contract for the reconstruction of that structure damaged during WWII was awarded to *Agius Stoneworks* whereas the contract for restoration works was awarded to his firm, *The Constructors Ltd*.

Mr Rosario Agius, of Agius Stoneworks and part of the C.A.V.V. Allieri Joint Venture, under oath, gave the following evidence:

- the restoration works on the façade of Pinto Stores was completed by *The Constructors Ltd* towards the end of 2003 whereas the construction of part of the façade undertaken by his firm was completed at a later stage;
- his firm had carried out all the works, including construction and restoration, on all the vaults which formed part of the internal structure of Pinto Stores;
- he could not tell when the restoration works carried out by *The Constructors Ltd* at the back of Pinto Stores were completed; and
- he was not charged with the supervision of the works carried out by *The Constructors Ltd* at the Valletta Waterfront

Mr Hans Attard, who was previously employed by *The Constructors Ltd* as Construction Manager, under oath, gave the following evidence:

- he modified his declaration which had been submitted with the appellants' letter of objection in the sense that his employment with *The Constructors Ltd* was from August 2005 to April 2009 (as indicated by the recommended tenderer in its letter of reply) and not from September 2004 to April 2009;
- as far as he was aware, the restoration works on the façade of Pinto Stores by *The Constructors Ltd* was completed by the time he took up employment with the same firm in August 2005;
- he was not aware of the final certificate of payment issued by *Messrs Architecture Project* to *The Constructors Ltd* dated 22nd September 2005; and
- his superior was the Construction Director, Mr Richard Xuereb, Mr Angelo Xuereb's son

Mr. Nyal Xuereb, who, between November 2004 and June 2008, was engaged by Architecture Project on a full-time basis to carry out supervisory duties at the Valletta Waterfront, under oath, gave the following evidence:

- he is self employed but was engaged as consultant on this tender by the appellants, C.A.V.V. Allieri Joint Venture;

- no restoration works were carried out by *The Constructors Ltd* at the Valletta Waterfront during his term of employment which started in November 2004;
- it could have been the case that certain final certificates were issued to *The Constructors Ltd* after November 2004 because they might have represented retention money on works already carried out;
- he used to handle all the contracts at the Valletta Waterfront project; and
- despite the fact that payments following certification of works carried out at the Valletta Waterfront used to go through him, he was not aware of the payment issued in September 2005 and authorised by Architect David Drago, who was a partner in *Architecture Project*

At this point Dr Wain presented a document by Architect Drago, dated 10th November 2010, certifying that *The Constructors Ltd* was awarded the restoration works at Pinto Stores and adjacent Forni Stores. Mr Xuereb intervened to state that the latter stores were much smaller structures than Pinto Stores but both stores formed part of the Valletta Waterfront project. Dr Wain continued by stating that works were satisfactorily executed between 2002 and 2005. Dr Wain also pointed out that Mr Nyal Xuereb commenced his employment at the Valletta Waterfront in November 2004 when his client had already provided evidence that they had completed the restoration works in July 2004.

Dr Galea requested that Architect Drago be summoned to (a) testify whether the works at Forni Stores were awarded as a separate contract from the works at Pinto Stores and (b) comment on Viset's declaration indicating July 2004 and his (Architect Drago's) declaration indicating 2005 as the completion date of restoration works carried out by *The Constructors Ltd*.

The Chairman PCAB remarked that, in the tender submission, the recommended tenderer referred to the Valletta Waterfront project, which project incorporated Pinto and Forni Stores. He added that the PCAB had already decided on the completion date of July 2004 and, as a result, the other completion date, 2005, indicated by Architect Drago was irrelevant to the case. The Chairman PCAB declared that, if during its deliberations, the PCAB would find it necessary to reopen the hearing to listen to what Architect Drago had to say on the matter then it would do so.

Dr Wain noted that the appellants had submitted a written declaration by Mr Charles Micallef, ex-foreman with *The Constructors Ltd*, who, nevertheless, had failed to turn up at the hearing. Mr Rosario Agius acknowledged that Mr Micallef was one of his employees whereas Mr Nyal Xuereb conceded that he had helped Mr Micallef in the drafting of the declaration.

Dr Giordamaina called upon the PCAB to appreciate that the documents that had been presented during this appeal were not available to the board during adjudicating stage.

Dr Galea remarked that from the hearing it emerged that, out of the three projects submitted by the recommended tenderer, two, namely Fort Rinella and Villa Cagliares, were carried out by

Mr Lawrence Buhagiar and the third, Valletta Waterfront, was carried out by a partner of the joint venture but in respect of which there was conflicting evidence with regard to the completion date of the restoration works.

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 29th October 2010 and also through their verbal submissions presented during the public hearing held on 6th December 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants’ representatives’ remarks in respect of the fact that (a) their bid was the only technically compliant bid while the recommended tenderer, De La Valette JV, had made untruthful declarations in its tender submission which should have led to its outright disqualification, (b) apart from the fact that the Valletta Waterfront Project was completed outside the 5 year period stipulated in the tender they had become aware that this same project had been completed before July 2004, (c) other projects submitted by the preferred tenderer to demonstrate one’s experience in restoration works were not in fact carried out by any partner constituting De La Valette JV, (d) with regard to St Cecilia Chapel, there was no problem with regard to this project because it was carried out by one of the partners of De La Valette JV, i.e. *Baron Group Ltd*, (e) with regard to Villa Cagliares, this project was, in fact, carried out by Mr Lawrence Buhagiar, (f) with regard to Fort Rinella, once again, this project was carried out by Mr Buhagiar, (g) in spite of the fact that the adjudicating board had accepted Villa Cagliares – and, similarly, Fort Rinella - presumably in terms of Regulation 51 (3) of the Public Contracts Regulations, yet, this provision was not applicable to this case because Reg. 51 (3) was applicable for ‘a particular contract’ and, as a consequence, had to be reproduced in the tender document, which was not the case in this tender, (h) in the tender submission of the recommended tenderer there was not the undertaking stipulated in Reg. 51 (3), (i) that the fact that Mr Lawrence Buhagiar had accepted to be appointed as master mason on the project did not, in any way, render him a partner in the joint venture for the purposes of clauses 4.2 and 14.3.2.12, (j) on closer examination of clause 14.3.2.12, one would deduce that the first part requested the bidder/s to submit the three projects as proof of experience whereas the second part - in bold print - referred to personnel within the joint venture who could carry out these works adding that it was in the latter case that mason Buhagiar would come into the picture, (k) with regard to Valletta Waterfront, they could prove that the restoration works carried out by the recommended tenderer was not completed in July 2004 – which issue had been decided upon by the PCAB at the previous appeal – but was completed as far back as 2003, mentioning in the process a letter sent by Viset and the final certificate of payment issued by Messrs Architecture Project to *The Constructors Ltd*, (l) even *The Times* had indicated that the Valletta Waterfront project was inaugurated in late 2003, (m) the restoration works on the façade of Pinto Stores was completed by *The Constructors Ltd* towards the end of 2003 whereas the construction of part of

the façade undertaken by Agius Stoneworks was completed at a later stage, (n) Agius Stoneworks had carried out all the works, including construction and restoration, on all the vaults which formed part of the internal structure of Pinto Stores, (o) they could not tell when the restoration works carried out by *The Constructors Ltd* at the back of Pinto Stores were completed and (p) Mr Agius was not charged with the supervision of the works carried out by *The Constructors Ltd* at the Valletta Waterfront;

- having also considered Mr Hans Attard's testimony wherein, *inter alia*, (a) as far as he was aware, the restoration works on the façade of Pinto Stores by *The Constructors Ltd* was completed by the time he took up employment with the same firm in August 2005, (b) he stated that he was not aware of the final certificate of payment issued by *Messrs Architecture Project* to *The Constructors Ltd* dated 22nd September 2005 and (c) he stated that, during the said employment, his superior was the Construction Director, Mr Richard Xuereb, Mr Angelo Xuereb's son;
- having also reflected on the testimony given by Mr Nyal Xuereb, especially, (a) the fact that whilst, between November 2004 and June 2008, was engaged by *Architecture Project* on a full-time basis to carry out supervisory duties at the Valletta Waterfront, yet now he is self-employed and, amongst other things, he was engaged as consultant on this tender by the appellants, C.A.V.V. Allieri Joint Venture, (b) his claim that no restoration works were carried out by *The Constructors Ltd* at the Valletta Waterfront during his term of employment which started in November 2004, (c) the fact that it could have been the case that certain final certificates were issued to *The Constructors Ltd* after November 2004 because they might have represented retention money on works already carried out, (d) his claim that he used to handle all the contracts at the Valletta Waterfront project and (e) his claim that despite the fact that payments following certification of works carried out at the Valletta Waterfront used to go through him, he was not aware of the payment issued in September 2005 and authorised by Architect David Drago, who was a partner in *Architecture Project*;
- having also taken note of the contracting authority's representatives' (a) remark that, contrary to what was being claimed by the appellants, the recommended tenderer had furnished in its tender submission an undertaking whereby Master Mason Lawrence Buhagiar authorised De La Valette JV to make use of and reference to his experience in masonry restoration for the purposes of submitting a tender and that, through his undertaking, Mr Buhagiar had met the requirements set out in the tender, (b) claim that Mr Buhagiar had also accepted to be appointed by De La Valette JV as Master Mason on the project, (c) statement that when the adjudicating board came across the reference by Architect Joanna Spiteri Staines (dated 26/03/10) that mason Mr Lawrence Buhagiar had satisfactorily carried out the works at Villa Cagliares, the adjudication board opted to make use of Reg. 51 (3), even though it was not laid down in the tender document, to enable them to establish the link between mason Mr Lawrence Buhagiar and De La Valette JV, (d) submission that, in terms of Reg 51 (3), the economic operator could rely on the capacities of other entities, regardless of the legal nature of the links which it has with them,

(e) reference to the fact that, with the undertaking between mason Buhagiar and De La Valette JV, the adjudicating board had the comfort that the recommended tenderer was capable of carrying out the requested works and (f) viewpoint that the provisions of clause 14.2.3.12 were, in substance, similar to those of Reg. 51 (3) where a bidder, besides relying on one's own experience, could also rely on that of others with whom such bidder would either engage or have an undertaking;

- having duly considered De La Valette JV's representatives' (a) claim that the works at Fort Rinella had been carried out by mason Lawrence Buhagiar, (b) remark that in their tender submission they had clearly indicated that the works at Villa Cagliares and Fort Rinella were carried out by master mason Lawrence Buhagiar and George Borg claiming that, certainly, that did not amount to any misrepresentation, which, apparently, was the basis of the appellants' objection, (c) claim that the law *per se* (regulations - LN 177/2005) was applicable at all times and that it did not have to be reproduced in the tender document for it to be rendered applicable, (d) claim that the adjudication board could opt to make use of Reg. 51 (3) to ascertain that the tenderer had the necessary resources to carry out the contract, (e) claim that the restoration works at the Valletta Waterfront consisted mainly of Pinto Stores, (f) the major part of the restoration works were completed in July 2004 but all the works, including the part at the back of the structure, were completed during 2005, (g) the article that appeared in '*The Times*' on the 17th December 2003 referred to the opening of part of the Waterfront Project and not of the whole project, (h) the contract for the reconstruction of that structure damaged during WWII was awarded to *Agius Stoneworks* whereas the contract for restoration works was awarded to *The Constructors Ltd*, (i) presentation of a document by Architect Drago, dated 10th November 2010, certifying that *The Constructors Ltd* had been awarded the restoration works at Pinto Stores and adjacent Forni Stores, (j) claim that, albeit Forni Stores were much smaller structures than Pinto Stores, yet both stores formed part of the Valletta Waterfront project and (k) claim that Mr Nyal Xuereb commenced his employment at the Valletta Waterfront in November 2004 when *The Constructors Ltd* had already provided evidence that they had completed the restoration works in July 2004;
- having also reflected on the appellants' representatives' request for Architect Drago to be summoned to (a) testify whether the works at Forni Stores were awarded as a separate contract from the works at Pinto Stores and (b) comment on Viset's declaration indicating July 2004 and his (Architect Drago's) declaration indicating 2005 as the completion date of restoration works carried out by *The Constructors Ltd*;

reached the following conclusions, namely:

1. The PCAB opines that a consortium, or a company for all that matters, is made up of its employees at different levels and that, ultimately, it is the expertise of all employees which renders such consortium or company capable of undertaking certain specialised works. This Board acknowledges that this line of reasoning should suffice to provide a contracting authority with the right level of comfort.

2. The PCAB also opines that Mr Lawrence Buhagiar, being the master mason of the project but not being a partner in the joint venture, still satisfied the requirements set out in clauses 4.2 and 14.2.3.12, especially, in consideration of the undertaking made by the same Mr Buhagiar to corroborate the submission made with the tendering company's offer thus satisfying the requirements of Reg. 51 (3). As a consequence, this Board finds nothing wrong as regards the fact that, out of the projects mentioned by the recommended tenderer, Mr Buhagiar had carried out two, namely Fort Rinella and Villa Cagliares.
3. This Board feels that the provision of an extract from '*The Times*' indicating that the Valletta Waterfront project was inaugurated in late 2003 does not provide any formal proof. This Board considers that the appellant joint venture had enough time to gather more credible evidence than the ones presented. As a consequence, this Board considers the request made at this stage by the appellant joint venture's representatives to summon Architect Drago as witness in a future hearing as unnecessary as the written document drafted by the latter and submitted by the recommended tenderer's representatives during the hearing provides sufficient formal proof to enable adequate deliberation by this Board.
4. Furthermore, this Board regards the submissions made by the appellant joint venture, in writing and during the hearing, as providing no additional significant evidence that the conclusions reached by the adjudicating board were, in any way, based on erroneous premises.

As a consequence of (1) to (4) above this Board finds against appellants.

In view of the above and in terms of the Public Contracts Regulations, LN 296 of 2010, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

16 December 2010