

PUBLIC CONTRACTS REVIEW BOARD

Case No. 265

CT/3071/2010 - Adv No CT/141/2010

Service Tender for the Restoration Works to Birgu Landfront Fortifications – BRG 07

This call for tenders was published in the Government Gazette on 9th July 2010. The closing date for this call with an estimated budget of € 399,726 (excluding VAT) was 31st August 2010.

Five (5) tenderers submitted their offers.

MD Joint Venture Ltd filed an objection on 14th December 2010 against the decisions by the Contracts Department to disqualify its offer on being found administratively non-compliant and to recommend tender award to FortRes Joint Venture for the price of €320,256.64, excluding VAT.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Edwin Muscat and Mr. Carmel Esposito as members convened a public hearing on Friday, 11th March 2011 to discuss this objection.

Present for the hearing were:

MD Joint Venture

Dr Franco Galea	Legal Representative
Mr Maurizio Savoca Corona	Representative

FortRes Joint Venture

Dr David Wain	Legal Representative
Ms Denise Xuereb	Representative

Ministry for Resources and Rural Affairs

Dr Victoria Scerri	Legal Representative
--------------------	----------------------

Evaluation Committee

Architect Ray Farrugia	Chairman
Mr Joseph Casaletto	Member
Mr Hermann Bonnici	Member
Architect Amanda Degiovanni	Member
Mr Stephen Serracino Inglott	Member

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

Dr Franco Galea, legal representative of MD Joint Venture, stated that his client had submitted two documents, 'MD 1' which represented an extract of the tender submission in the English language and 'MD 2' which represented the original text in the Italian language, and explained that his client's request not to circulate these documents to third parties was based on the principle that they contained sensitive information and not for any other reason.

Following the above-mentioned explanation, Dr Galea moved on to tackle the three main issues that formed the basis of his appeal.

A) Most of the text under Article 16.1 (e - vi) Volume 1 Section 4, Form 4.13 and 6.1.2(c), particularly under the Technical 'Illustration Report' was unintelligible.

Dr Galea remarked that with regard to the Technical 'Illustration Report', which was accompanied by photographs, it was incomprehensible how the evaluation committee concluded that one could not read it when, at the same time, the same evaluation committee was in a position to submit its remarks thereon especially as to whether the projects submitted were of a similar nature or not. Dr Galea explained that the original submission was in the Italian language and to translate it into the language of procedure, his client made use of a software programme which, unfortunately, did not reproduce a faithful version of the original. Dr Galea added that if the English version of this document was unintelligible then the evaluation committee could have either consulted with the original document in Italian, which, he opined, was not such an alien language to us, or else it could have sought a clarification.

Dr Victoria Scerri, legal representative of the Ministry for Resources and Rural Affairs, the contracting authority, remarked that clause 14.2 of the tender document required that supporting documents submitted in another language were permissible provided they were accompanied by an accurate translation into English.

Architect Amanda Degiovanni, a member of the evaluation committee, remarked that on examining this document it was evident that the original submission was not properly translated into English and the evaluation committee felt that it had to point out this shortcoming even though it was not the reason that led to the appellants' disqualification.

(B) Dossier was not accompanied by a written declaration signed by the bidder confirming that personnel with similar or better qualifications and/or experience would be engaged on this contract to carry out specialized works as specified in the tender document in clause 16.1 (e) (vi) (a).

Dr Galea conceded that albeit no such specific signed declaration was submitted by his client in the joint venture's tender submission, yet he was quick to add that the information

submitted by his client in this respect exceeded the requirements stipulated in the tender document. Dr Galea explained that his client submitted the CVs, which included qualifications and experience, of the personnel attached to the consortium and to its subcontractor that would be involved in the execution of this project. Dr Galea also referred to Form 4.13 'Further Information' (page 45 of the tender document) and argued that, according to its layout and content, the bidder was not requested to sign Form 4.13. The appellants' legal representative maintained that, for evaluation purposes, the contracting authority had all the information it required and even more than was requested in the tender dossier. As a result Dr Galea submitted that, once all the information had already been provided in the original submission, the evaluation committee could have asked his client to submit the signed declaration simply to formalise matters.

Dr David Wain, legal representative of FortRes JV, the recommended tenderer, pointed out that the declaration omitted by the appellants with regard to qualifications and experience of personnel was a mandatory requirement and that was visually demonstrated in the tender document in bold print. He added that the evaluation committee could not overlook the non-submission of mandatory documentation and that the evaluation committee was certainly not expected to deliberate as to whether a mandatory requirement might have been satisfied, in spirit or otherwise, elsewhere in the tender documentation.

Architect Ray Farrugia, Chairman of the evaluation committee, and Architect Degiovanni insisted that, according to Form 4.13, the bidder had to include a dossier which in turn had to be accompanied by a written declaration with the same wording laid down in bold print in Form 4.13. Mr Farrugia further submitted that this written declaration was a very important document to the contracting authority because it represented a commitment on the part of the tenderer that the job would be carried out by competent personnel.

At this stage the Chairman of the Public Contracts Review Board remarked that mandatory requirements had to be met by bidders and, if anything, in this case the bidder could have backed up its declaration by the submission of CVs indicating the qualifications and experience of personnel.

(C) Three of the projects presented in the dossier were not restoration intervention projects on masonry structures (not of a similar nature)

Dr Galea referred to Clause 16.1 (e) (vi) (page 12 of the tender document) which requested bidders to submit:

“Any other information deemed relevant (Form 4.13 of Volume 1, Section 4) which should include:

*a. A dossier of not more than 20 A4 size pages containing description including photographs of at least four 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 four projects listed shall not be less than €85,000. **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 specialized restoration works as specified in this tender document.”

Dr Galea referred also to the certificate, known as the EURO-SOA Certification OG2, attesting that his client had the necessary experience and qualification in restoration works. Dr Galea explained that, locally, there was no such certification body but in Italy it was mandatory for a contractor to have such a certificate in order to undertake works on behalf of the *Ministero per i Beni e le Attivita' Culturali* which, to a certain extent, was equivalent to the Superintendence of National Heritage. Dr Galea stated that this certificate of competence was renewed and amended from time to time.

Dr Galea contended that the works did not have to be exclusively masonry works and he maintained that in this respect his client had presented a compliant submission. Dr Galea argued that if, for argument's sake, in the opinion of the evaluation committee the three particular projects did not satisfy the tender requirements, the evaluation committee should have also taken into account the projects presented by his client's sub-contractor since the bidder could also rely on the experience of a third party outside the consortium. The appellants' legal advisor claimed that the subcontractor presented projects on masonry structures which even exceeded the value stipulated in the tender, such as, the Norman House, Villa de Piro and a convent, all in Mdina, and Villa Chappelle at St Paul's Bay.

At this stage Architect Degiovanni was summoned to the witness stand and, under oath, gave the following evidence:

- a) the main reason for exclusion was that three of the projects presented by the appellants were not considered as restoration intervention projects on masonry structures as requested in the tender document, namely with regard to:
 - i. restoration of the roof and masonry perimeter of municipal building Villa "La Quiete" in the Municipality of Paese (TV):- from information given, including photographs, the project was mostly concerned with seismic improvements to a timber structure and therefore the nature of these interventions was different from that being specified in this contract and thus could not be considered as a restoration intervention project on masonry structures;
 - ii. renovation and maintenance of coverage and walling of the Municipality of Noventa di Piave (VE):- from the information supplied it was indicated that the supporting structure of this building was made up of timber beams and trusses, whereas the masonry element was composed of brickwork and hence, once again, the nature of these interventions was different from that being specified in this contract and thus could not be considered as a restoration intervention project on masonry structures as specified in the tender document; and
 - iii. restoration of the facades of Building 13, Campus Clover Bonardi at Politecnico of Milan:- the information submitted clearly showed that it was a repair project of a modern reinforced concrete and steel structure which included no masonry works and,

as a result, the nature of these interventions was different from that being specified in this contract.

- b) masonry works represented work on large stone blocks and the photos and information submitted by the appellant joint venture did not reflect this aspect as was requested in the tender document;
- c) the evaluation committee had considered the projects submitted by the sub-contractor but the committee could not overlook the fact that it was the appellant joint venture itself who had decided to include and to present the three projects in question in its dossier, which dossier was a mandatory requirement as per clause 16.1 (e) (vi);
- d) in the tender submission, the appellants did neither indicate nor specify that the sub-contractor was going to execute the restoration works in question and therefore, in the absence of such an indication by the bidder, the sub-contractor could have well been simply the supplier of materials; and
- e) 'pointing' meant the filling in of the gap between stone slabs ('mili tal-fili')

The Chairman of the Public Contracts Review Board observed that, on the basis of the information given, it appeared that the evaluation committee did not consider that the consortium had the requested track record in this type of masonry restoration works and, besides, the role of the sub-contractor had not been properly spelled out in the tender submission except that the subcontractor was to be engaged on pointing works which did not necessarily mean that the subcontractor was going to undertake the other restoration aspects of the contract.

Dr Galea submitted that although Ms Degiovanni had every right to give her interpretation, he was standing by his arguments and by the documentation submitted by his client and left it up to the Public Contracts Review Board to decide on the merits of the issues raised.

Mr Maurizio Savoca Corona, also representing the appellant joint venture, under oath, explained that:

- a. timber works would invariably involve masonry works;
- b. although his firm might not have carried out masonry (restoration) works in the past five years, the fact was that his firm had been involved in restoration works for 20 years and that it was issued by the Italian authorities with a certificate of competence to undertake any kind of restoration works, e.g. from the *Coliseum* to *Pompei* to *St Peter's Basilica*;
- c. the certification covered the skills of the workforce, equipment, financial standing and so forth which proved that his firm was specialised in this line of work and that it was not an ordinary construction company;

- d. regulation no. 34 of 2000 provided for the issue of certificates to firms to enable them to participate in public tenders and Certificate OG2, issued by the *Ministero per i Beni Culturali*, applied to all the buildings and sites under the responsibility of that ministry;
- e. Certificate OG2 did not specifically refer to limestone restoration works but it referred to:

“.. lo svolgimento di un insieme coordinato di lavorazioni specialistiche necessarie a recuperare, conservare, consolidare, trasformare, ripristinare, ristrutturare, sottoporre a manutenzione gli immobili di interesse storico soggetti a tutela a norma delle disposizioni in materia di beni culturali e ambientali. Riguarda altresì la realizzazione negli immobili di impianti elettromeccanici, elettrici, telefonici ed elettronici e finiture di qualsiasi tipo nonché di eventuali opera connesse, complementari e accessorie”
- f. the important thing was the capacity of the firm to undertake restoration works and it did not matter much if that involved brickwork, as most Roman historic remains did, or limestone.

Dr Galea remarked that this was an EU tender since it involved EU funds and, as a consequence, foreign firms could participate provided that they were appropriately certified in their own country.

The Chairman Public Contracts Review Board opined that paragraph 2 of the Certificate OG2 quoted by Mr Savoca Corona at para. (e) above referred to a whole range of specialised restoration works in a holistic manner which, together, rendered an entity capable of undertaking restoration works.

The Chairman Public Contracts Review Board made a general comment in the sense that it would appear that, locally, we have not yet reviewed our tendering procedures in their entirety to reflect our obligations under EU regulations with the consequence that, as things stood, adjudicating committees were being obliged to abide by tender conditions and specifications which, in practice, could contradict EU norms, e.g. freedom of movement. The Chairman Public Contracts Review Board even questioned the purpose of limiting experience to projects carried out in the previous five years, especially when extensive restoration works of this kind in Malta have only been taken in hand recently with the likelihood that, to a certain extent, we have to rely on foreign firms.

Dr Scerri remarked that the point under discussion was not whether the firm possessed a certificate of competence but whether it had the required experience in this particular kind of restoration works.

Architect Ray Farrugia reminded those present that the evaluation board had to adjudicate on the documentation submitted at the closing time and he wondered why what was being said at the hearing did not form part of the original tender submission in the first instance.

Dr Wain observed that Certificate OG2 was a general certification and it did not necessarily mean that the holder of that certificate had previously carried out restoration works in limestone

which, for the purposes of the appeal, was a mandatory requirement in the tender document – as per clause 6.1.2 (c) which stated that evidence “*of relevant experience in execution of works of a similar nature over the past five years (Form 4.6), including the nature and value of the relevant contracts, as well as works in hand and contractually committed....*”

Dr Wain stated that the evaluation committee had to deliberate on the documentation submitted and pointed out that in its tender submission the appellant joint venture gave no indication that the joint venture would be relying on the sub-contractor for the execution of these restoration works, in which case, subcontracting could not exceed 30% of the total contract value as per Form 4.4 ‘Subcontracting’ at page 33 of the tender document. Dr Wain concluded that during the hearing it had not been demonstrated that the evaluation committee was incorrect in its assessment that three of the four projects presented by the appellants were not similar in nature to the works contemplated in this call for tenders.

Architect Degiovanni reiterated that the projects submitted referred to works on timber, concrete and steel which did not feature in Malta’s fortifications. She added that had the appellants included hard stone or sand stone instead of limestone, the evaluation committee would have, at least, learned that the appellants had experience in the cleaning and preservation of stone works, but the fact was that the tender submission did not indicate anything of the sort.

Mr Hermann Bonnici, a member of the evaluation committee, informed those present that the contracting authority requested similar projects carried out in the previous five years for the purpose of ensuring that the contractor was up to date on modern restoration techniques and products and material in use due to developments that take place in this specialised sector.

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 14 December 2010 and also through their verbal submissions presented during the hearing held on 11th March 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company’s representatives’ claims and observations, particularly, the references made to the fact that (a) with regard to the Technical ‘Illustration Report’, which was accompanied by photographs, it was incomprehensible how the evaluation committee concluded that one could not read it – *the appellants made use of a software programme which, unfortunately, did not reproduce a faithful version of the original* - when, at the same time, the same evaluation committee was in a position to submit its remarks thereon especially as to whether the projects submitted were of a similar nature or not, (b) albeit no written declaration signed by the bidder confirming that personnel with similar or better qualifications and/or experience would be engaged on this contract to carry out specialized works as specified in the tender document in clause 16.1 (e) (vi) (a) was submitted by the appellants in the tender submission, yet the information submitted by the same joint venture in this respect exceeded the requirements stipulated in

the tender document, (c) the appellant joint venture submitted the CVs, which included qualifications and experience, of the personnel attached to the consortium and to its subcontractor that would be involved in the execution of this project, (d) the certificate, known as the EURO-SOA Certification OG2, attested that the appellant joint venture had the necessary experience and qualification in restoration works, (e) locally, there was no such certification body such as the EURO-SOA but in Italy it was mandatory for a contractor to have such a certificate in order to undertake works on behalf of the *Ministero per i Beni e le Attivita' Culturali* which, to a certain extent, was equivalent to the Superintendence of National Heritage, (f) the appellants' subcontractor presented projects on masonry structures which even exceeded the value stipulated in the tender, such as, the Norman House, Villa de Piro and a convent, all in Mdina, and Villa Chappelle at St Paul's Bay, (g) timber works would invariably involve masonry works, (h) albeit the appellants might not have carried out masonry (restoration) works in the past five years, the fact was that the Italian firm had been involved in restoration works for 20 years and that it was regularly issued by the Italian authorities with a certificate of competence - *the certification covered the skills of the workforce, equipment, financial standing and so forth* - to undertake any kind of restoration works, e.g. from the *Coliseum to Pompei to St Peter's Basilica* and (i) Certificate OG2 did not specifically refer to limestone restoration works but to a whole range of specialised restoration works in a holistic manner;

- having considered the contracting authority's representative's reference to the fact that (a) albeit the original submission was not properly translated into English yet it was not the reason that led to the appellants' disqualification, (b) the bidder had to include a dossier which in turn had to be accompanied by a written declaration with the same wording laid down in bold print in Form 4.13, (c) one could not doubt the real scope behind the written declaration being mandatory considering the fact that it represented a commitment on the part of the tenderer that the job would be carried out by competent personnel, (d) the main reason for exclusion was that three of the projects presented by the appellants were not considered as restoration intervention projects on masonry structures as requested in the tender document, (e) masonry works represented work on large stone blocks and the photos and information submitted by the appellant joint venture did not reflect this aspect as was requested in the tender document, (f) in the tender submission, the appellants did neither indicate nor specify that the sub-contractor was going to execute the restoration works in question and therefore, in the absence of such an indication by the bidder, the sub-contractor could have well been simply the supplier of materials, (g) the point under discussion was not whether the appellant joint venture possessed a certificate of competence but whether it had the required experience in this particular kind of restoration works and (h) had the appellants included hard stone or sand stone instead of limestone, the evaluation committee would have, at least, learned that the appellants had experience in the cleaning and preservation of stone works, but the fact was that the tender submission did not indicate anything of the sort;
- having considered comments and claims made by other interested parties including Dr Wain's (a) emphasis on the fact that the declaration omitted by the appellants with regard to qualifications and experience of personnel was a mandatory requirement and (b) claim that

in its tender submission the appellant joint venture gave no indication that the joint venture would be relying on the sub-contractor for the execution of these restoration works,

reached the following conclusions, namely:

1. The Public Contracts Review Board considers that the unintelligibility issue of the translated document, as corroborated by Architect Degiorgio herself, was not an issue with regards to the evaluation and adjudication process.
2. The Public Contracts Review Board considers the EURO-SOA Certification OG2 attesting that the appellant joint venture had the necessary experience and qualification in restoration works as valid and acceptable once this is authenticated by local authorities.
3. The Public Contracts Review Board, however, agrees with the evaluation committee for deciding that the role of the sub-contractor had not been properly spelled out in the tender submission except that the subcontractor was to be engaged on pointing works which did not necessarily mean that the subcontractor was going to undertake the other restoration aspects of the contract.
4. More importantly, the Public Contracts Review Board also opines that it cannot overlook the non-submission of mandatory documentation and that the evaluation committee was certainly not expected to deliberate as to whether a mandatory requirement might have been satisfied, in spirit or otherwise, elsewhere in the tender documentation, especially when one considers the fact that the written declaration which was mandatory represented a commitment on the part of the tenderer that the job would be carried out by competent personnel.

In view of the above this Board finds against the appellant company and also recommends that the deposit paid by the appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

17 March 2011