

PUBLIC CONTRACTS REVIEW BOARD

Case No. 298

CT/3064/2010; CT Adv. 140/2010

Tender for the Restoration Works to Valletta Landfront Fortifications –VLT 11 – Tender for the Restoration of St Michael and St John Counterscarp

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 € 44,541.18 (Excl. VAT) was 31st August 2010.

Five (5) tenderers submitted their offers.

MD Joint Venture filed an objection on 28th February 2011 against the decision by the Contracts Department to disqualify its offer as administratively not compliant and to recommend tender award to FortRes Joint Venture.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Wednesday, 8th June 2011 to discuss this objection.

Present for the hearing were:

MD Joint Venture (MDJV)

Dr Franco Galea	Legal Representative
Mr Maurizio Savoca Corona	Representative

FortRes JV

Dr David Wain	Legal Representative
Ms Denise Xuereb	Representative

Ministry for Resources and Rural Affairs (MRRA)

Dr Victoria Scerri	Legal Adviser
Architect Ray Farruiga	Director General

Evaluation Board:

Dr Albert Caruana	Chairman
Mr Mario Ellul	Member
Ms Mireille Fsadni	Member
Mr Mark Azzopardi	Member
Ms Marlene Said	Secretary

After the Chairman's brief introduction, the appellant joint venture's representative was invited to explain the motives of the joint venture's objection. No objections were raised to the said representative's request for the hearing to be held in English since his client was not Maltese speaking.

Dr Franco Galea, legal representative of MD Joint Venture, the appellant, stated that by letter dated 16th February 2011 his client was informed by the Contracts Department that its offer did not satisfy the criteria laid down in the tender document with regard to (i) Form 4.13 and Clause 16.1 e (vi) and (ii) Form 4.7 and Clause 6.1.2 (a).

Form 4.13 and Clause 16.1 e (vi)

The appellants' legal advisor claimed that no written declaration signed by the bidder was found in the submitted tender confirming that personnel with similar or better qualifications and/or experience will be engaged on this contract to carry out specialised restoration works.

Dr Galea referred the Public Contracts Review Board to a similar matter that was dealt with in Case No. 265 previously decided upon by the same Board.

Dr Galea then made the following submissions, namely:

- i. his client was in possession of a certificate issued by the Italian competent authorities, the *EUROSOA Certification Category OG2*, which attested the experience and qualification of the holder to participate in all tenders of restoration works at EU level;
- ii. he referred to parts of the EU Directive 2004/18/EC – dealing with the Rules of Public Contracts - Chapter I Art. 4, which was applicable EU-wide and which, among other things, stated the following with regard to economic operators, namely

“However, in the case of public service and public works contracts as well as public supply contracts covering in addition services and/or siting and installation operations, legal persons may be required to indicate in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.”;
- iii. his client had duly submitted all the details of the personnel that would be involved in the works contemplated in this tender;
- iv. his client had also complied with sub-articles 4 and 5 of Art. 23 of Chapter IV of the same EU Directive and that anything beyond the requirements of this directive would have been in breach of the EU freedoms concerning labour and services. Dr Galea said that these sub-articles read as follows:-

“4. Where a contracting authority makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

5. Where a contracting authority uses the option laid down in paragraph 3 to prescribe in terms of performance or functional requirements, it may not reject a tender for works, products or services which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer must prove to the satisfaction of the contracting authority and by any appropriate means that the work, product or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.”

- v. he referred to the Judgment of the European Court of Justice of First Instance (First Chamber) 27 September 2002 in the Case T-211/02 - *Tideland Signal Limited against the Commission of the European Communities* which, he claimed, dealt with the failure of the tenderer to adhere to the requirement of the validity period of his offer, where, *inter alia*, it was stated at para. 43 it was stated that:

“the Court holds that the Evaluation Committee's decision to reject the tender without seeking clarification of its intended period of validity was clearly disproportionate and thus vitiated by a manifest error of assessment.”

- vi. a clarification should have been sought on this matter and that would not have amounted to a rectification.

Dr Victoria Scerri, legal representative of the Ministry for Resources and Rural Affairs, argued that the written declaration that was requested from the tenderer carried legal implications which could not be replaced by an attestation of quality. She added that at Form 4.13 (page 45) and Clause 16.1 e (vi) (page 12) of the tender document, the contracting authority requested a written declaration confirming that personnel with similar or better qualifications and /or experience – as

those employed on the restoration projects performed by the tenderer over the past five years - will be engaged on this contract.

On his part, Dr Albert Caruana, chairman of the evaluation board, explained that:

- a) since the evaluation board could not trace the written declaration in the appellant joint venture's tender submission, the General Contracts Committee invited the same appellant to attend its sitting of the 15th February 2011 at the Department of Contracts;
- b) the purpose of the meeting was not that of asking for a clarification, as Dr Galea might have implied, but the purpose was for the appellant joint venture to identify from the sealed tender submission the Form 4.13 of Volume 1, Section 4 which should have been 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 restoration works as specified in the tender document;
- c) this requirement was written in bold print and it was required from the bidder himself;
- d) anything short of the signed declaration requested in the tender document was not acceptable to the evaluation board

Form 4.7 and Clause 6.1.2(a)

Dr Galea referred to the fact that the contracting authority was claiming that, in the case of the appellant joint venture's tender submission, no foreman/supervisor was indicated in the list of personnel.

Dr Galea stated that his client was not asked for any clarification on this point at the meeting held with the General Contracts Committee on 15th February 2011 at the Department of Contracts because had its representative been asked he would have indicated that at Form 4.7 'Personnel to be employed on this Contract' under 'Architect' and 'Foremen Supervisor' there appeared the names of Mr Maurizio Savoca Corona and Mr Gianluca dalle Fratte.

Dr Caruana intervened to explain that if one were to examine Form 4.7 submitted by the appellant joint venture – also taking into account the format of the standard Form 4.7 provided in the tender - one would notice that the boxes adjacent to *Foremen/Supervisor* were left blank unlike in the case of the other positions, where proper names were given along with relative qualifications and experience. Dr Caruana added that the evaluation board was precluded under Clause 30 (2) from allowing rectifications with regard to this particular missing information.

Dr Galea contended that it was the intention of his client that Mr Maurizio Savoca Corona and Mr Gianluca dalle Fratte were going to perform the roles of architect and foremen/supervisor. He reiterated that his client had abided by the EC Directive by indicating the personnel with all the relevant details against each and, with regard to the issue of mandatory requirements, he referred to Art. 23 (3) of the same EC Directive which, *inter alia*, stated as follows:

“Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

- a) *either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when these do not exist - to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words ‘or equivalent’*

Dr Scerri insisted that, notwithstanding the EC Directive, the tenderer was obliged to adhere to the tender conditions and that the tenderer could not refrain from submitting mandatory information.

Dr Galea, on his part, insisted that his client had (a) abided by European standards, (b) also submitted the Forms provided in the tender document and (c) even produced a certificate which attested that he could perform restoration works at European level.

The Chairman Public Contracts Review Board observed that Form 4.7 submitted by the appellant joint venture did not reflect the ‘intention’ expressed by Dr Galea because Mr Savoca Corona and Mr Dalle Fratte were both listed under the heading ‘Architect’ whereas nobody was indicated for the position of ‘Forman/Supervisor’ so much so that the relative boxes were left blank.

Dr Caruana explained that there were five participating bidders of which three were found administratively not compliant whereas two bidders were found administratively and technically compliant.

Dr David Wain, legal representative of FortRes JV, the recommended tenderer, submitted that:-

- a) apart from the general declaration that had to be signed by the tenderer whereby one undertook to abide by all the tender conditions, the tenderer was also required to submit specific declarations, which were presented in bold print, such as that at Form 4.13 and Clause 16.1 e (vi). Besides, Clause 30.2, among other things, stated that “... *No rectification shall be allowed in respect of the documentation as outlined in sub-clause 16.1 (e), 16.1 (f) and 16.1 (g) of these Instructions to Tenderers. Only clarifications on the submitted information in respect of the latter may be eventually allowed*”;
- b) Case No. 265 CT/3071/10, para. 4 of its conclusion stated that “*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”;

- c) the purpose of that requirement was for the contracting authority to have the peace of mind that the job was going to be performed by qualified and experienced personnel;
- d) the tender requirement at Form 4.13 and Clause 16.1 e (vi) was not in conflict with the EC Directive cited by the appellant’s representative;
- e) unlike Form 4.13 and Clause 16.1 e (vi), which were administrative criteria, Form 4.7 and Clause 6.1.2 (a) dealt with ‘Selection Criteria’ and, as a consequence, the evaluation board could not have gone into that merit since the appellant joint venture was disqualified at the administrative compliance stage.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of their ‘reasoned letter of objection’ dated 28th February 2011 and also through their verbal submissions presented during the hearing held on 8th June 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant firm’s representative’s claims and observations, particularly, the reference made to the fact that (a) the appellant was in possession of a certificate issued by the Italian competent authorities, the *EUROSOA Certification Category OG2*, which attested the experience and qualification of the holder to participate in all tenders of restoration works at EU level, (b) the appellant had duly submitted all the details of the personnel that would be involved in the works contemplated in this tender, (c) the appellant had also complied with sub-articles 4 and 5 of Art. 23 of Chapter IV of the same EU Directive and that anything beyond the requirements of this directive would have been in breach of the EU freedoms concerning labour and services, (d) in a Judgment of the European Court of Justice of First Instance (First Chamber) 27 September 2002 in the Case T-211/02 - *Tideland Signal Limited against the Commission of the European Communities* which dealt with the failure of the tenderer to adhere to the requirement of the validity period of his offer, it was decided that *the “Evaluation Committee’s decision to reject the tender without seeking clarification of its intended period of validity was clearly disproportionate and thus vitiated by a manifest error of assessment”*, (e) a clarification should have been sought on this matter and that would not have amounted to a rectification, (f) the contracting authority was claiming that, in the case of the appellant joint venture’s tender submission, no foreman/supervisor was indicated in the list of personnel, (g) the appellant was not asked for any clarification on this point at the meeting held with the General Contracts Committee on 15th February 2011 at the Department of Contracts because had its representative been asked he would have indicated that at Form 4.7 ‘Personnel to be employed on this Contract’ under ‘Architect’ and ‘Foremen Supervisor’ there appeared the names of Mr Maurizio Savoca Corona and Mr Gianluca dalle Fratte, (h) it was the intention of the appellant that Mr Maurizio Savoca Corona and Mr Gianluca dalle Fratte were going to

perform the roles of architect and foremen/supervisor and (i) mandatory requirements should be compatible with Art. 23 (3) of EU Directive 2004/18/EC – dealing with the Rules of Public Contracts;

- having considered the contracting authority's representative's reference to the fact that (a) the written declaration that was requested from the tenderer carried legal implications which could not be replaced by an attestation of quality, (b) at Form 4.13 (page 45) and Clause 16.1 e (vi) (page 12) of the tender document, the contracting authority requested a written declaration confirming that personnel with similar or better qualifications and /or experience – as those employed on the restoration projects performed by the tenderer over the past five years - will be engaged on this contract, (c) since the evaluation board could not trace the written declaration in the appellant joint venture's tender submission, the General Contracts Committee invited the same appellant to attend its sitting of the 15th February 2011 at the Department of Contracts, (d) the purpose of the meeting was not that of asking for a clarification, as the appellant joint venture's legal representative might have implied, but the purpose was for the said appellant to identify from the sealed tender submission the Form 4.13 of Volume 1, Section 4 which should have been 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 restoration works as specified in the tender document, (e) anything short of the signed declaration requested in the tender document was not acceptable to the evaluation board, (f) if one were to examine Form 4.7 submitted by the appellant joint venture – also taking into account the format of the standard Form 4.7 provided in the tender - one would notice that the boxes adjacent to *Foremen/Supervisor* were left blank unlike in the case of the other positions, where proper names were given along with relative qualifications and experience, (g) the evaluation board was precluded under Clause 30 (2) from allowing rectifications with regard to this particular missing information, (h) notwithstanding the EC Directive, the tenderer was obliged to adhere to the tender conditions and that the tenderer could not refrain from submitting mandatory information and (i) there were five participating bidders of which three were found administratively not compliant whereas two bidders were found administratively and technically compliant;
- having also considered the recommended tenderer's representative's reference to the fact that (a) apart from the general declaration that had to be signed by the tenderer whereby one undertook to abide by all the tender conditions, the tenderer was also required to submit specific declarations, which were presented in bold print, such as that at Form 4.13 and Clause 16.1 e (vi), (b) Case No. 265 CT/3071/10 had already decided upon a similar issue, (c) the tender requirement at Form 4.13 and Clause 16.1 e (vi) was not in conflict with the EC Directive cited by the appellant's representative and (d) unlike Form 4.13 and Clause 16.1 e (vi), which were administrative criteria, Form 4.7 and Clause 6.1.2 (a) dealt with 'Selection Criteria' and, as a consequence, the evaluation board could not have gone into that merit since the appellant joint venture was disqualified at the administrative compliance stage,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that with regard to the issues raised in connection with the submission of Form 4.13 (page 45) and Clause 16.1 e (vi) (page 12) of the tender document wherein the contracting authority requested a written declaration confirming that personnel with similar or better qualifications and /or experience – as those employed on the restoration projects performed by the tenderer over the past five years - will be engaged on this contract, this Board feels that, in the circumstance, the evaluation board was correct in inviting the joint venture’s representative to enable the latter to identify from the sealed tender submission the Form 4.13 of Volume 1, Section 4 which should have been 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 restoration works as specified in the tender document. Unfortunately, the joint venture’s representative was unable to trace such document. The Public Contracts Review Board 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 submission. Furthermore, this Board feels that, in a tendering process, the submission of mandatory documentation has to be taken for what it is and that the points raised by the appellant joint venture in the hearing regarding the interpretation of the quoted EC Directive has to be taken within a context and not as an overriding principle.

2. The Public Contracts Review Board also feels that Form 4.7 submitted by the appellant joint venture did not reflect the ‘intention’ expressed by its representatives during the hearing as, in its tender submission, the joint venture listed both Mr Savoca Corona and Mr Dalle Fratte under the heading ‘Architect’ whereas nobody was indicated for the position of ‘Foreman/Supervisor’ so much so that the relative boxes were left blank. In this Board’s opinion, in this particular instance, there was no need for a clarification to be made by the evaluation board and this could simply be interpreted as an error on the appellant joint venture’s part. This Board argues that one cannot place emphasis enough on the fact that an evaluation board can only evaluate what is submitted by a participating tenderer and that the ultimate responsibility for the correctness of the content submitted should be solely shouldered by the said participating tenderer.

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

Alfred R Triganza
Chairman

Carmel Esposito
Member

Joseph Croker
Member

16 June 2011