

## PUBLIC CONTRACTS REVIEW BOARD

### Case No. 332

#### **CT/3081/2010 - Adv. No. CT/A/016/2011**

#### **Tender for the Construction of Visitor Infrastructure (Interpretation Centre, etc) and Landscaping and Restoration Works at the Saint Paul's Catacombs Heritage Park, Rabat, Malta**

This call for tenders was published in the Government Gazette on the 15th April, 2011. The closing date of this tender was on the 26th May, 2011 and its estimated value was €1,987,784 (excl. VAT)

Two (2) tenderers had originally submitted their offers.

FortRes Joint Venture filed an objection on 22<sup>nd</sup> August, 2011 against the decisions taken by the Contracts Department (a) to disqualify its tender submission as administratively not compliant and (b) to cancel the tender.

The Public Contracts Review Board composed of Mr Edwin Muscat as Acting Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Monday 10<sup>th</sup> October, 2011 to discuss this objection

Present for the hearing were:

#### **FortRes Joint Venture (FortRes JV)**

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

#### **Heritage Malta**

Dr Ruth Baldacchino	Legal Representative
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#### ***Evaluation Board***

Ms Suzannah Depasquale	Chairperson
Mr Pierre Micallef	Member
Mr Chris Delia	Member
Mr David Cardona	Member
Mr James Aquilina	Secretary

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

Dr David Wain, legal representative of FortRES Joint Venture, the appellant, stated that by letter dated 10<sup>th</sup> August, 2011, the Department of Contracts informed his client that his tender submission was administratively not compliant and that the tender had been cancelled. He added that two reasons had been given for the disqualification of his client's offer.

#### *First Reason*

Evidence of relevant experience in the form of works of a similar nature performed over the last five years as well as works in hand and contractually committed. The minimum value of projects of a similar nature completed shall be not less than €2.5 million per annum (excl. VAT).

Dr Wain made the following submissions on this issue:

- i. the tender document did not lay down the definition of the term '*works of a similar nature*' and in that absence, one had to refer to the bill of quantities in the tender document which indicated that the works contemplated in the tender were mostly construction and finishing works and only about 5% represented restoration works and therefore this was predominantly a construction project;
- ii. by way of evidence of past completed projects, his client presented various constructions projects as well as restoration works considering that St Paul's Catacombs was a heritage site;
- iii. the value of the works submitted by his client provided ample proof of his experience in this sector to the extent that there were years when the works carried out exceeded that requested in this tender, e.g. €4.5 million in 2006/2007 and €11.5 million in 2007/2008;
- iv. a table was presented at the hearing showing the value of the works performed by his client on an annual basis, which information was extracted from his client's tender submission, and the works carried out by his client by far exceeded the requested €2.5 million per annum;
- v. AX Construction Ltd and Constructors Ltd, two partners in the joint venture, had 35 years experience in the construction industry and had undertaken extensive projects such as hotel construction;
- vi. his client had no difficulty in deducting what constituted '*works of a similar nature*' because the works included in the bills of quantities were very indicative and clear and no need was felt for any clarifications in that respect;
- vii. when dealing with unique national heritage sites, it was not possible to produce evidence of identical projects but what one should have sought was evidence that the contractor had the resources to undertake a multiple trade project;
- viii. the minimum €2.5 million worth of similar works completed annually was not clearly understood as one could interpret it to mean either (a) a €2.5 million project completed every year for the 5-year period, which was considered not reasonable, or (b) €2.5 million worth of works carried out during the past 5-year period irrespective of the completion date of the

- whole project, which interpretation reflected better the capacity of the tenderer and which aspect had been amply satisfied by his client;
- ix. in certain calls for tenders, bidders were even asked to submit their experience, broken down according to the different types of works, e.g. construction, finishing works, landscaping etc;
  - x. FortRes JV included two Italian partners, Impresa Capece Minutolo S.r.l. and C.M. Costruzioni S.r.l. which held certifications/qualifications e.g. OG 1 for civil and industrial works and OG 2, issued by the Italian authorities that allowed them to carry out restoration and maintenance of historical buildings and other big artefacts under the tutelage of the Italian Ministry of Culture, which meant that the joint venture had the resources to undertake the required restoration works as well. Reference was made to PCRB case no. 265 whereat the PCRB held that:

*(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;*

- xi. the adjudicating board reported that when his client's submission was mathematically evaluated by the adjudicating board it turned out that the amount of completed 'works of a similar nature' did not reach the figure of €2.5 million for the five-year period stipulated in article 6;
- xii. the decision to eliminate his client on a mathematical calculation was incorrect and unreasonable and that was also sustained by previous decisions of the PCRB/PCAB when it had ruled that relevant experience was intended as a guideline and that there should be no mathematical appraisal of such provisions as those included in article 6. Particular reference was made to PCAB case no. 223 where it was stated as follows:-

*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. (page 4);*

*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.*

### *Second Reason*

Dr Wain continued that the second reason for the disqualification of his client's offer concerned Article 6.1.2 - Joint Venture criteria – where the lead partner should have carried out at least one works contract of a similar nature of not less than €1.5 million (exc. VAT). Bidder was found not compliant in view of the fact that all the projects listed by the lead partner exceeding €1.5 million were not similar in nature and not of direct relevance to the works requested in the tender.

On this issue, Dr Wain submitted the following:-

- a. if one were to consider 'The Palace' project, which included €7 million in construction works over 18 months and €14 million worth of finishing works over 12 months during 2006 and 2007, this project would already have exceeded by far the proof requested in the tender document by way of capacity of the lead partner;
- b. his client was also in the course of executing the New Parliament project at the entrance of Valletta which entailed extensive construction works together with restoration works on the Opera House remains;
- c. that particular provision in the tender document was meant as a guideline to the adjudication board in appraising the bidder's capacity;
- d. the provision requesting the lead partner to prove his own capacity was, to a certain extent, contradicting the provisions of the Public Procurement Regulations 51(3), reproduced in clause 6.1.2 of the tender document, which stated 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.*
- e. without prejudice to Reg. 51 (3), the lead partner of the joint venture had more than demonstrated his capacity to undertake this project.

Mr Angelo Xuereb, on behalf of FortRes JV and CEO of AX Construction Ltd, the lead partner, submitted the following remarks:-

- a. a company gains experience in the construction industry not over a five year period but over a much longer period of time and evidence as to whether a company performed consistently well or not would emerge over the years by either expanding its operations or downsizing and/or winding up;
- b. AX Construction Co had been in this sector for over 35 years and had undertaken a number of large scale construction projects, such as the Valletta Waterfront Project, the restoration of Pinto Stores, the Palace and Victoria hotels, St James Hospital, the restoration of fortifications and Palazzo Capua . Only recently, BOVIS International, a leading international project management company, had entrusted his company with the erection of the new Parliament building in Valletta;

- c. clause 6.1.2 had to be interpreted with caution, otherwise one may conclude that a tenderer that completed 3 projects, worth €2.5 million, over a 5 year period, with each one being completed within 1 year period, possessed more experience and resources than, say, a bidder that completed one €15 million project over a 3-year period or than a contractor who carried out a €100 million project over the last five years but still had to do some finishing works in the sixth year; and
- d. each project had to be executed according to the distinctive nature of the site and the nature of the works involved as per tender specifications and according to the demands of the client, which aspects were an integral part of project management, in which area, his company, being the lead partner, had considerable experience.

Dr Ruth Baldacchino, on behalf of Heritage Malta, made the following submissions:

- i. St Paul's Catacombs was an ancient archaeological site and therefore quite different from any other construction site. Hence, the tender document had to reflect this state of fact;
- ii. the works mainly consisted of the erection of a lightweight steel structure over this archaeological site and she cited the Hypogeum and Mnajdra Temples as comparable sites in terms of works carried out on archaeologically sensitive sites;
- iii. the experience provided by the appellant was different from that requested in the tender document and one had to keep in mind that this tender was also open to foreign bidders;
- iv. the fact that only two bidders participated in this call for tenders perhaps, demonstrated the complexity of the task and/or the lack of local expertise in this type of works;
- v. the appellant did not attend the clarification and site meeting held on the 26<sup>th</sup> April 2011;
- vi. even if one were to set aside the issue of whether the works presented were or were not of a similar nature, from the list of projects presented by the appellant, the adjudicating board could not quantify the exact amount of works carried out on an annual basis since most of the projects spanned over a number of years, not to mention the fact that some of the works were undertaken prior to the past 5-year period, i.e. prior to 2006; and
- vii. in this call for tenders, Heritage Malta was aiming for high standards as a starting point. However, if no bidders qualified, then the Authority would have to review the tender conditions.

*The PCRБ noted that the Hypogeum and Mnajdra projects were carried out prior to the 5-year period referred to in clause 6.1.2 and therefore these projects would not have qualified in terms of experience. It further noted that large projects normally took more than one year to complete and hence the tender conditions were rather too restrictive in this regard*

Dr Baldacchino was followed by Dr Wain, who on behalf of appellants, made the following observations:

- (a) it was granted that St Paul's Catacombs was a heritage site of prime importance, however, the tender was not about the restoration of the catacombs but about the erection of a lightweight steel structure over it which consisted of a modern structure. As such, it did not differ from one erected

- elsewhere apart from taking the necessary precautions not to damage this underground site;
- (b) it was very unlikely that there were any contractors that had carried out €2.5 million worth of works annually over 3 years out of the past 5 years on similar sites; and
- (c) it was true that this call for tenders was open to overseas bidders but evidently it did not attract any foreign bidders.

Ms Denise Xuereb, on behalf of the appellant, explained that the tender submission consisted of six bound volumes of information and that she filled in the forms that formed the tender document. She added that the table presented at the hearing by Dr Wain was extracted from the information already available in their tender submission.

Ms Suzanne Depasquale, chairperson of the adjudicating board and an archaeologist by profession, under oath, gave the following evidence:-

- i. the manner in which the appellant presented his past experience by way of projects carried out and the timeframe within which these projects were executed rendered the task of the adjudication board almost impossible in determining the quantum of the works executed in each of the previous 5-year period for the purposes of clause 6.1.2;
- ii. the fact that the appellant felt the need to submit another table at the hearing with regard to past projects carried out was in itself proof that the information presented in the tender submission was not all that clear;
- iii. the appellant's shortcomings with regard to experience were not related solely to the 'works of a similar nature' requirement but also to the amount of works that had to be carried out each year over the previous five-year period, i.e €2.5 million per annum, something which the adjudicating board could not arrive at given the way the appellant presented the information .
- iv. the following works submitted by the appellant qualified as 'works of a similar nature':- restoration works at Kalkara and Vittoriosa; restoration of Villa Cagliares; restoration of Valletta Waterfront; restoration of private residence; M & E firefighting and finishing works at The Palace Hotel; restoration of fortifications and, in Italy, the restoration of St Benedict Convent, Norman Castle, Ospedale Psichiatrico, Villa Palladio, ancient Medical School in Salerno and a XVII Century Building – in some cases it was not clear if historical structures were involved;
- v. according to the bill of quantities of the tender document, the works requested were classified as follows:- 37% steel works; M&E 28%; 15% construction works; 11% landscaping and 8.26 % restoration works;
- vi. 'The Palace' project, which consisted of €14m worth of M&E and finishing works carried out in one year had been taken into account but, according to the tender conditions, that project could not substitute the €2.5 million worth of completed works per annum for 5 years, even if the latter would add up to €12.5 million (€2.5 x 5); and
- vii. most of the civil works indicated by the appellant concerned factories, hotels and housing projects, whereas the site in question was an underground archaeological site.

At this point, Dr Wain intervened to express the following views:

- a. there seemed to be a conflict within clause 6.1.2 in the sense that (a) at one stage it provided for the submission of works worth €2.5m each of which had to be 'completed' within one year (per annum) over the previous 5-year period and (b) the submission of 3 completed projects in the last 5 years;
- b. the provisions of clause 6.1.2 were meant as guidelines for the adjudicating board to assess the bidder's capacity but they were certainly not meant to serve as a strict mathematical calculation and he therefore asked what difference did it make in terms of bidder's capacity to submit, say, the Palace Project, worth €14million, completed in one year, instead of five projects, each worth €2.5 million, completed over a 5-year period. If anything, the former was a better proof of the bidder's capacity;
- c. the excessive emphasis laid on the restoration aspect of this project was incomprehensible when considering that this aspect constituted a mere 8% of the total value of the contract. Even so, his client had submitted several projects that involved restoration works; and
- d. it was still not clear to him how the adjudicating board interpreted the term '*works of a similar nature*' or if it had interpreted it in a correct and proportional manner.

Ms Depasquale, chairperson of the adjudicating board, reiterated that the adjudicating board had to stick to the tender conditions which were drawn up by the technical personnel of Heritage Malta - none of whom were present at the hearing - and vetted by the Department of Contracts. She conceded that the adjudicating board applied the tender conditions in a restrictive manner.

Mr Angelo Xuereb concluded with the following comments:

- i. from what had been submitted in the tender document and from what had been stated at the hearing, it clearly emerged that the joint venture was more than qualified in terms of experience in construction, M&E and finishing works. The same thing could be said in respect of restoration works;
- ii. the adjudicating board had to evaluate the tender submissions in proportion to nature of all the works involved and not concentrate solely on restoration works which consisted only of 8% of the total works;
- iii. each project had to be managed according to its particular requirements. Here, he drew a comparison with the new Parliament building which the lead partner of the joint venture was involved in. This project consisted of the building of a massive modern structure and also included the restoration of the remains of the Opera House; and
- iv. project management was a professional skill which one developed over time.

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 22<sup>nd</sup> August, 2011 and also through their verbal submissions presented during the public hearing held on 10th October, 2011 had objected to the decision taken by the General Contracts Committee
- having taken note of Dr David Wain's (appellant's legal adviser) claims and observations, particularly, (a) that his client's tender submission was administratively not compliant because (i) he failed to give evidence of relevant experience in works of a similar nature over the past five years, and (ii) because the lead partner of the Joint Venture should have carried out at least one works contract of a similar nature of not less than €1.5million, and (iii) because of a mathematical calculation, that concluded that the amount of completed works of a similar nature did not amount to €2.5 million, (b)the tender document did not give a definition of "works of a similar nature" and as a result, his client had to refer to the bill of quantities in the tender document to obtain an indication of the contemplated works. He realised that these works referred mostly to construction, mechanical and engineering and finishing works, and only some 5% to restoration works. Hence, his client had no difficulty in deducting what constituted works of a similar nature because the bill of quantities were very indicative and clear and he felt no need to seek further clarification, and (c) his client presented evidence of major construction projects as well as restoration works on heritage sites . The value of these projects exceeded that which was requested in the tender document, and (d) his client had over thirty five years experience in the construction industry, during which time he had gained invaluable work experience and proved that he was capable of carrying out major works, and (e) the joint venture he was representing, included two Italian partners who held certifications/qualifications attesting that they had the necessary experience and qualifications to carry our restoration works on heritage sites, and (f) that the lead partner had constructed The Palace project at a cost of €7.0 million on construction works and €14.0 million on finishing works. Besides, currently, the lead partner is erecting the New Parliament building which entails construction, M&E works together with restoration works on the Opera House remains. That should have been proof enough of his client's capacity and experience, and (g) he acknowledged that St Paul's Catacombs was a prime heritage site, however, the tender was not about the restoration of the catacombs per se, but about the erection of a modern lightweight steel structure over it
- having taken note of the submissions made by Mr Angelo Xuereb on behalf of FortRes Joint Venture and CEO of AX Construction Ltd, the lead partner of the Joint Venture, particularly, (a) his company's vast experience which was gained over a period of thirty five years of construction works that included large projects such as the Valletta Waterfront, The Palace and Victoria hotels, St James Hospital, the restoration of fortifications and Palazzo Capua and is currently entrusted with the building of the new Parliament, and (b) the importance of interpreting clause 6.1.2 of the tender document with care, otherwise the scope of this clause, namely, proof of capacity/experience of a bidder could be distorted, and (c) the importance that each project had to be carried out in accordance with the nature of

the site and the works involved as well as to the demands of the client. These aspects were an integral part of project management, in which area he had considerable experience.

- having taken note of the submissions made by Dr Ruth Baldacchino on behalf of Heritage Malta, particularly, that (a) St Paul's Catacombs were a unique site and therefore completely different from any other construction site. Hence, the tender document had to reflect this state of fact, and (b) the works mainly consisted of the erection of a lightweight steel structure over this sensitive site and she cited the Hypogeum and Mnajdra Temples as comparable sites, and (c) the experience provided by appellant did not meet that requested in the tender document, and (d) this tender was also open to foreign bidders, and (e) the fact that only two bidders participated in this call for tenders demonstrated the complexity of the task and the lack of local expertise in this type of work, and (f) appellant did not attend the clarification and site meeting held on the 26<sup>th</sup> April, and (g) even if one were to ignore the issue of whether the works presented by appellant were of a similar nature or not, the adjudicating board found it difficult to quantify the exact amount of works that were carried out on an annual basis, because most of the projects spanned over a number of years. Moreover, some of the projects that were presented by appellants were carried out prior to the past five years.
- having taken note of the evidence given by Ms Suzanne Depasquale, chairperson of the adjudicating board, who under oath submitted that: (a) the manner in which the appellant presented his past experience by way of projects and the timeframes within which these projects were executed, made it very difficult for the adjudicating board to determine the value of works executed in each of the previous five years, and (b) appellant's shortcomings with regard to experience were not related only to the "works of a similar nature" requirement but also to the amount of works that should have been carried out each year in the previous five years, and (c) not all the projects submitted by appellant qualified as works of a similar nature, and (d) according to the bill of quantities, the works requested were classified as follows: 37% steel works, 28% M&E, 15% construction works, 11% landscaping and 8.26% restoration works, and (e) "The Palace" project which included €14 million worth of M&E and finishing works was taken into account, but according to tender conditions that project could not substitute the provision of €2.5 million worth of completed works per annum for five years, and (f) most of the civil works indicated by appellant concerned factories, hotels and housing projects, whereas the site in question was an underground archaeological site, and (g) to a comment by appellant's legal adviser to the effect that it was not clear how the adjudicating board interpreted the term works of a similar nature, Ms Depasquale reiterated that the board stuck to the tender conditions and conceded that the same board applied these conditions in a restrictive manner.

reached the following conclusions, namely:

1. The Public Contract Review Board considers the *EURO-SOA OG 2* certificate issued by the Italian Ministero per I Beni Culturali attesting that the two Italian partners of FortRes Joint Venture have the experience and qualifications in restoration works as valid and acceptable once this certificate is authenticated by the local authorities.

2. During the hearing, it emerged that the project in question consisted of 37% steel works, 28% M&E, 15% construction works, 11 % landscaping and 8.26% restoration works. From the foregoing one concludes that too much emphasis was laid on the restoration aspect of this project, considering that that aspect constituted only 8% of total volume of the contract. In fact, the project consisted of the erection of a light weight steel structure, and as such, it did not differ from one erected elsewhere, apart from taking the necessary precaution not to damage the underground site. The PCRB understands Heritage Malta's preoccupation that this sensitive and unique site merited the utmost protection and respect. However, the Board feels that the adjudicating board went a bit too far in the interpretation of certain clauses of the tender document, particularly, clause 6. In fact, during the hearing, the chairperson of the adjudicating board is reported to have conceded that the board stuck to the tender conditions and applied same in a restrictive manner. The PCRB feels that, in this occasion, the provisions of this clause should have been used as a guideline to identify contractors with the capacity and experience to carry out this project.
3. With regard to "projects of a similar nature", the PCRB noted that no definitions were given to this term in the tender document. When during the hearing, the representatives of Heritage Malta were asked to define or give examples of what was meant by that term, they cited the works carried out at the Hypogeum and Mnajdra Temples. However, had any of the bidders offered these projects, he would have been disqualified in terms of experience because those works were carried out prior to the five year period provided in Clause 6.1.2. The Board understands that there are not so many sites in Malta similar to the ones mentioned above. Although Heritage Malta representatives insisted that the tender was open to foreign bidders, none submitted a bid. The PCRB wondered how the adjudicating board would have evaluated any project that a foreign bidder would have offered in this respect.
4. During the hearing, the PCRB learnt that appellants were one of the foremost construction companies in Malta. In their submission, appellants declared that they had carried out an extensive number of large scale projects, from the construction of hotels to the rehabilitation of historical monuments. During the hearing, it was also stated that, currently, they were involved in the construction of the new parliament and the rehabilitation of the Opera House site in Valletta. Appellants offered these and other projects, whose value was considerable, as proof of their capacity and experience to carry out major projects. During the hearing, appellants also admitted that they did not attend to the on site meeting organised by Heritage Malta, because from the bill of quantities provided in the tender document, they did not find any problem in arriving at a reasoned interpretation of the required works.
5. The appellants concluded that the works in question predominantly constituted a construction project, and included in their bid, projects that were similar in varying degrees, to that which was required by Heritage Malta, that is projects with varying contents of steel , M&E , construction , landscaping, and restoration works. Following the hearing, the PCRB was satisfied that appellants have the capacity and experience to undertake major construction projects.

6. Another reason why appellant's offer was rejected concerned the mathematical calculations which the adjudicating board carried out on the projects offered by appellant. Following this exercise, that board decided that appellant failed in virtue of clause 6, because he failed to provide evidence of relevant experience in executing works of a similar nature over the past five years. The adjudicating board decided that the minimum value of projects of a similar nature completed were less than €2.5 million per annum. Furthermore, appellant failed to comply to Clause 6 where the lead partner in a joint venture was expected to provide proof that he had carried out at least one project of a similar nature of not less than €1.5 million.
7. In this respect, the PCRБ noted that the tender document did not provide an indication on how the mathematical calculations/evaluations were to be computed. Moreover, during the hearing, Heritage Malta representatives failed to explain how the calculations on the projects offered by appellant were computed or in which of the five years, appellant met or failed to meet the required threshold as set in clause 6.

In view of the above, the Board finds in favour of the appellant and decides that his bid be reinstated in the tender procedure.

The Board also recommends that the deposit paid by the appellants should be refunded.

Edwin Muscat  
A/Chairman

Carmel Esposito  
Member

Joseph Croker  
Member

*31<sup>st</sup> October 2011*