PUBLIC CONTRACTS APPEALS BOARD

Case No. 225

Adv CT /A/ 50/2009 - CT 2510/2009
Works tender for the upgrading, embellishment and landscaping of the Waterfront, Xatt ir-Risq, Birgu

This call for tenders was published in the Government Gazette on 30 October 2009. The closing date for this call for offers was 10 December 2009.

The estimated value of this tender was Euro 2,000,000 (exclusive of VAT).

Five (5) tenderers participated in the said tender.

BBHV Joint Venture filed an objection on the 7 July 2010 after being informed that '*the tender submitted by you was not successful as your offer was not technically compliant'*.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 15 September 2010 to discuss this objection.

Present for the hearing were:

BBHV Joint Venture

Dr. Charisse Ellul LL.D	Legal Representative
Dr. John L. Gauci LL.D	Legal Representative

Bonnici Brothers:
Architect David Bonnici
Mr. Emanuel Bonnici
Architect Ray Sammut

Hal Mann:
Architect Hugh Vella

PaveCon Joint Venture

Dr. Kenneth Grima	Legal Representative
Architect Sandra Magro	
Mr. Anton Schembri	

Ministry for Infrastructure, Transport and Communication

Dr Josette Demicoli	Legal Representative

Adjudicating Board

Mr Hector Chetcuti	Chairperson

Ms Maria Therese Farrugia	Secretary
Ms Henriette Calleja	Evaluator
Architect Damian Vella Linicker	Evaluator
Mr Angelo Camilleri	Evaluator

Department of Contracts

Mr Francis Attard	Director General (Contracts)

Prior to the hearing, the PCAB and those present paid tribute to the memory of Mr Anthony Pavia, who served as a Board member for the past 8 years, by holding a one-minute silence. Mr Pavia passed away on the 8th September 2010.

Dr Kenneth Grima, legal representative of the PaveCon JV, complained about the fact that his client, whose tender was to proceed to the opening of the financial package, after making a specific request to the Department of Contracts, was not provided with a copy of the appellants' letter of objection. Mr Francis Attard, Director General (Contracts) replied by stating that the Public Contracts Regulations, under the Three Package Procedure, did not oblige the Department of Contracts to furnish interested parties with appellants' letter of complaint. However, Dr Grima insisted that, being an interested party, he had a right to participate and comment in these proceedings and, as a consequence, he should be in possession of such letter since, otherwise, he would not be in a position to fulfil his obligations. The Chairman, PCAB said that although, as a praxis, he found no objection to provide such letter of objection to interested parties, however, on the other hand, he could understand the line of action followed by the Director General (Contracts) since he had to abide by the law and not praxis. Furthermore, the PCAB drew the attention of the lawyer that (i) the purpose of this hearing was to evaluate the reasons why a bidder's offer was discarded during an evaluation process and (ii) only in case of an award it was obligatory on the Director General (Contacts) to forward the relative correspondence to recommended tenderer and all persons with a registered interested.

Mr Attard pointed out that Regulation 82 did not specify the right for interested parties to be furnished with the appellants' letter of objection. Dr Grima replied by stating that such a right was natural because, as an interested party, his client should have a right to a fair trial. He sustained that he would only be in a position to comment if the relevant documentation was made available.

Finally, with the concurrence of the appellant's lawyer, it was decided to accede to Dr Grima's request.

At this point the Chairman PCAB, after making a brief introduction about this case and after informing those present as to how the PCAB was going to conduct the hearing, proceeded by inviting the appellants' legal representative to explain the motives of the objection.

Dr John L. Gauci, legal representative of BBHV Joint Venture, started by making reference to the Department of Contracts' letter of exclusion dated 30th June 2010 whereby his clients were informed that their "*offer was not technically compliant*" on the basis of the following two reasons:

- *The programme of works was spread over a period exceeding the 39 works (should read "weeks") mentioned in clarification 1*

- *You have indicated in Form 4.6.7 submitted that you will only have one subcontractor, whereas in the clarification you have indicated otherwise.*

He contended that the two reasons given for his clients' exclusion were unfounded because their offer was in conformity with the tender document.

With regard to the first ground of exclusion, Dr Gauci sustained that the tender document did not make any reference at all to a completion period of works. He explained that during a site visit the tenderers were informed that it was anticipated that this contract would be spread over a 9 month period. The same lawyer said that they never mentioned 39 weeks. At this stage he quoted the relevant paragraph from Clarification No 1 which read as follows:

> "***ENVISAGED COMPLETION DATE****:*
>
> *A 9 months period is anticipated and was mentioned during the Site Visit – Clarification Meeting to those Tenderers who attended."*

The appellants' legal representative contended that it was clear that the terms "envisaged" and "anticipated" did not imply any compulsory requirement and these were only indicative.

Furthermore, he said that the tender document itself, in Article 32 (page 131 of the tender document), entitled *Period of Performance*, it was stated that:

> *"Performance of the works is expected to take place in accordance with the General Program of works at Volume 5 of these Tender Documents."*

He also pointed out that the *General Programme* of works did not exist as Volume 5 was completely blank. He drew the attention of those present as to the fact that his clients had demanded a clarification by means of a letter dated 23rd November 2009 addressed to the Director of Contracts which, however, remained unanswered.

Dr Gauci said that, nevertheless, BBHV Joint Venture submitted a programme of works wherein they showed that all the works would be completed within 39 weeks. He said that the only items that would be carried out after the lapse of the 39 weeks were the demobilization and cleaning of the site. Dr Gauci explained that Articles 15.4 (c) and (d) of the Special Conditions in the tender document permitted that such works were to take place after the completion of the works since it was specified that:

> *(c) Within three (3) days of the completion of works that Contractor shall notify the Supervisor and organise a Site inspection of the finished works.*
>
> *(d) Within two (2) weeks of the Site Inspection, barring the remedy of any defects, poor workmanship, materials, finishes or other pending items notified to the Contractor in writing, the Contractor shall ensure that the site is cleaned and cleared of all material, debris, waste, plant, machinery or other equipment and shall surrender the site to the Supervisor together with all works and improvements erected thereon.*

The appellants' legal representative said that the tender document itself also stated that, by at least four weeks before commencement of works, the Contractor was obliged to draw up another programme of works and this had to be submitted for the Supervisor's consideration and approval. He said that Articles 11.5 and 15.4 (pages 81 and 128 of the tender document respectively) specified that:

11.5 …..…The Contractor shall draw up and submit for the Supervisor's approval a programme of performance of the contract, in accordance with the detailed rules laid down in the Special Conditions.…..…

15.4 …..The Program of Works shall be submitted by the Contractor not less than four (4) weeks prior to the start of works on the first phase and shall follow the General Programme indicated in the Gantt Charts, attached at Volume 5 of these Tender Documents…..

The appellants' lawyer argued that, in view of the above, he failed to understand how his clients could have been excluded on the basis of the first reason given.

With regard to the second reason of exclusion, Dr Gauci started by making reference to clarification letter dated 18 May 2010 whereby Mr Hector Chetcuti, Chairman of the Evaluation Committee, asked his clients to '*clarify that the subcontractor mentioned in Form 4.6.7 will in fact be carrying out all subcontracting works'*. On 20 May 2010 Mr Mario Bonnici acting on behalf of BBHV Joint Venture replied that '*the subcontractor mentioned in Form 4.6.7 will be carrying out all subcontracting works'*. Dr Gauci said that, on the basis of such a clear confirmation, it could not be understood how his client could have been excluded from the adjudication process.

Dr Gauci pointed out that, after filing their objection, they received a letter from the Department of Contracts informing them that they were amending the second reason of exclusion because they had made a mistake. At this point, the appellants' lawyer quoted *verbatim* from the Director General (Contracts)'s letter dated 16 July 2010 which, *inter alia*, stated:

"Kindly note that the second bullet of the letter, word for word from the Evaluation Committee's report, should have read as follows:

The Resources Schedule Plan submitted by the Bidder indicated three sub-contractors for structural steel works, landscaping and M&E works respectively. Since Structural steel works and M&E tally to around approximately 16% of the value of the works and since the Bidder indicated in Form 4.6.7 in his submission that he will have only one subcontractor carrying out all subcontracting works according to Bidder's answer to clarification, the Committee decided that the Bidder did not give all the requested information as per tender document and thus is technically not compliant."

The appellants' lawyer contended that in their offer they had indicated one subcontractor and in reply to a clarification they had confirmed that such works would have been carried out by one subcontractor. He insisted that they never indicated that such works would be carried out by three subcontractors.

Dr Gauci strongly protested about the fact that, after filing a letter of objection and a reasoned letter of objection that were based on the reasons given for the bid being excluded from being evaluated further, his clients had subsequently received another letter that completely changed all the parameters in the first letter of exclusion. He sustained that this was unjust and unacceptable and, for the purpose of this appeal, he invited the PCAB to disregard the

second letter of exclusion dated 16 July 2010 and to consider only the first letter of exclusion dated 30 June 2010.

Dr Josette Demicoli, legal representative of the contracting authority, responded by stating that she did not agree with the interpretation given by the appellants' lawyer that the completion period of 9 months was only indicative and not mandatory. She sustained that although the completion period of works was not indicated in the tender document, this was clearly stated as 9 months when a specific reply was given to a particular question during a site visit held on 13 November 2009 which was also attended by the appellants BBHV Joint Venture. She said that the 9 months, when converted into weeks, would amount to 39 weeks (based on 3 months = 13 weeks). The lawyer claimed that once the 9 month period was clearly indicated, then it could not be argued that this was approximate because the 9 months were fixed, crystallised.

The PCAB intervened to draw her attention that once the 9 month period was "envisaged" then it was not explicit. Furthermore, it was stated that the reply given was not clear because if the 9 months were compulsory, they should not have used the term "envisaged".

Dr Demicoli opined that if the appellants had a doubt about the completion period they should have demanded a clarification. Furthermore, she pointed out that considering the fact that all other tenderers had conformed to this requirement then it could not be argued that it was not clear.

The contracting authority's lawyer said that the appellants' argument that they had complied with the tender's requirements was not completely correct because the same Article 15.4 also specified that the 9 month completion period started from the order to start works. She said that, in its programme of works, BBHV Joint Venture decided to include with the 39 weeks a period of 4 weeks for pre-commencement works.

Dr Demicoli maintained that Article 15.4 should be considered holistically because the appellants' lawyer quoted only part thereof. She said that Article 15.4 (a) under 'Special Conditions' specified that:

> *"Upon issue of the Order to Start Works, the Contractor shall immediately assume his responsibilities and obligations…"*

The same lawyer also contended that the contractor had to carry out the preliminary works from the order to start works and therefore it was unacceptable that such works were included outside the time frame of 9 months.

With regard to the drawing up and presentation of the new programme of works, Dr Demicoli clarified that the contracting authority was not anticipating that the contractor would amend the programme in substance, including the period within which the works had to be completed.

As regards to the second ground of exclusion and the appellants' objection to the issue of an amendment to the second bullet of rejection, Dr Demicoli denied that the reason of exclusion was changed. She explained that, when the reason of exclusion in the Evaluation Committee's report was reproduced in the Department of Contracts' letter that was sent to the

appellants, it was noticed that it did not reflect exactly what was actually written in the said report and, as a result, it was found necessary for a rectification letter to be issued.

The two main witnesses in these proceedings were Mr Hector Chetcuti, Chairman of the Evaluation Committee and Architect Ray Sammut representing the appellant joint venture. Both of them gave their testimony under oath.

On taking the witness stand, Mr Chetcuti gave a brief explanation to clarify what prompted the Director General (Contracts) to send a letter - dated 16 July 2010 - to rectify the second bullet of the exclusion which had been included in his original letter dated 30 June 2010.

Mr Chetcuti said that their report was submitted to the General Contracts Committee for evaluation purposes and for the publication of the results. The Chairman of the Evaluation Committee said that he did not see the contents of the letters that were sent to the participating tenderers, however, when they received a copy of the objection letter, it was noted that the second reason did not reflect what was written in their report. As a result he informed the DG Contracts about the matter and it was decided that the appellant should be informed about the real reason behind the exclusion.

Mr Chetcuti said that they had requested the appellants to confirm that the subcontracting works were going to be carried out by one contractor because in Form 4.6.7 'SUB-CONTRACTING' it was indicated that the soft landscaping works were going to be subcontracted to *INTEXT Landscaping* while in the 'Resources Schedule' it was indicated that there were going to be three sub-contractors and not one, that is, one for *electrical and mechanical*, another one for *soft landscaping* and the third for *steel metal works*. He said that, on the basis of the tenderer's confirmation in Form 4.6.7 that all the subcontracting works would be carried out by one subcontractor, they failed to understand who was going to perform the remaining subcontracting works indicated in the Resources Schedule. He pointed out that in Form 4.6.7 every tenderer had to declare against each subcontractor the value of subcontracting works in relation to the total cost of project. He said that they only knew that the percentage of the subcontracting landscaping works was 7% but they did not know the percentages of the other two subcontracting works. Furthermore, he said that, in cases where a sub-contractor was going to carry out more than 10% of the whole project, tenderers were required to submit certain declarations / documentation. Article 3.3 of the Instructions to Tenderers stipulated that:

> *"The eligibility requirements detailed in Sub-Articles 3.1 and 3.2 also apply to all partners in a Joint Venture or Consortium, all Sub-Contractors and all Suppliers to Tenderers. In addition to their own details, documents and certificates, Tenderers must supply all details, documents and certificates required under Sub-Article 3.2 in respect of:*
>
> *i) Every partner in a Joint Venture or Consortium*
> *ii) Every Sub-Contractor providing more than 10% of the value of the Works*
> *iii) Every Supplier providing more than 10% of the value of the Works*
>
> *Sub-Contractors and Suppliers must also satisfy the eligibility requirements specified in Sub-Article 3.1"*

On cross examination by Dr Gauci, Mr Chetcuti confirmed that BBHV Joint Venture did not provide the names of the three sub-contractors but indicated that there were going to be three sub-contractors. The appellants' lawyer said that in the 'Resources Schedule' they did not indicate the number of sub-contractors but the works that were going to be subcontracted, that is, M&E, soft landscaping and steel metal works. Mr Chetcuti remarked that such works had to be carried out by sub-contractors. Dr Gauci responded by stating that, in reply to a specific clarification, his clients had confirmed that such works would be carried out wholly by one sub-contractor.

The Chairman PCAB said that he would interpret the information on the 'Resources Schedule' that the indicated three types of works were going to be sub-contacted and this did not necessarily follow that such works were going to be sub-contracted to three different people. The 'Resources Schedule' did not indicate three sub-contractors but three types of works.

Continuing, Mr Chetcuti said that, on verifying the estimated value of the subcontracted works with available internal statistical information, it was observed that these had exceeded the threshold of 10%. When the PCAB drew his attention that they should not exclude bidders on assumptions once the financial considerations had not yet been evaluated, the Chairman of the Evaluation Committee responded by stating that internal statistical information was used for guidance purposes and this clearly showed that the total value of the works contemplated by the sub-contractor was above 16 %. He maintained that if the appellants did not indicate the three sub-contracting works on the 'Resources Schedule' they would not have excluded the bidder on this ground. However, the Chairman PCAB said that they should have corroborated the assumptions with facts first and should not have relied solely on assumptions because facts could prove otherwise.

When the PCAB drew the attention of Mr Chetcuti that, originally, there were five bidders and after the first report these were scaled down to three and, finally, only one bidder remained, the reply given was that it was the General Contracts Committee that decided and not the Evaluation Committee.

With regard to the first reason given for the appellant's exclusion, that is, the completion period of works exceeded the 39 weeks, the witness said that the 9 months were to be calculated from the order to start works since under Article 15.4 (a) and (b) it was clearly specified that:

> a) *Upon issue of the Order to Start Works, the Contractor shall immediately assume his responsibilities and obligations, take possession of the site within two (2) weeks, commence the mobilization process and endeavour to start such preliminary/ preparatory works on site as may be required and as may be commenced at that stage.*
>
> b) *Within thirty (30) days (6weeks) of the Order to Start Works, the contractor shall submit for approval by the Supervisor (in digital and in hard copy form), a detailed program of works for the whole project, clearly identifying commencement and completion dates for each part of the works in accordance with the General Schedule at Volume 5 of the tender documents, tasks, work packages and other related activities for each of the different phases.*

He claimed that (i) BBHV Joint Venture stated that they would be starting the programme of works from -4 to 39 weeks which amounted to 43 weeks and (ii) the *Gantt Chart* as submitted, indicated that they were assuming that the pre-commencement of works was not part of the performance period.

At this stage Dr Gauci intervened to quote the following from Article 15.4 in order to substantiate his argument that the period of -4 was in conformity with the requirement of the tender document:

> *'The Program of Works shall be submitted by the Contractor not less than four (4) weeks prior to the start of works on the first phase ...'*

Mr Chetcuti rebutted by stating that "*prior to the start of works"* was different from "*prior to the order to start works*" because the first phrase referred to the physical works while the second referred to the document that was to be issued to the contactor upon the signing of the contract.

In reply to specific questions by Dr Gauci, the witness confirmed that:

- according to the Gantt Chart, the appellants had indicated that the programme of works would be submitted within four weeks before start of physical works

- the programme of works was not included in the tender document as indicated in Article 15.4

- the cleaning of the site and the demobilization were going to be carried out after the completion of the project

Further to the second bullet, Mr Chetcuti declared that all participating tenderers had complied with the tender's requirement concerning the submission of the *Programme of Works*.

Mr Chetcuti stated that in the pre-commencement of works the appellants had included the following:

> "Obtain all relevant permits for works, Submit works programme, submit topographical survey of the site to Supervisor, Erect site hoarding and gates fence of site, Mobilise site offices and facilities, Provide water, electricity, telephone, internet services to site offices, and install Project Information Board"

Mr Chetcuti also remarked that the other bidders had included the preparatory or preliminary works within the 39 weeks.

When specifically asked by Dr Gauci to state what did the four weeks prior to the start of works mean, the Chairman of the Evaluation Committee said that they should definitely not be considered over and above the 9 month period of performance.

At this point the Chairman PCAB remarked that he understood that the contracting authority wanted the project to be completed within a period of 9 months. It was also stated that as an

Appeals Board they had to deliberate on whether the 9 month period was '*mandatory'* or '*envisaged*'.

Dr Gauci reiterated that his clients had committed themselves to complete the physical works within 39 weeks.

Dr Grima intervened to state that the contractor was obliged to:

- submit the programme of works four weeks prior to the commencement of works
- carry out such works in accordance with what was indicated on the *Gantt Chart*
- start and complete the project within a period of 39 weeks

He contended that all preparatory works were part of the programme of works and, likewise, the pre-contract was part of the contract. He said that it was imperative for the PCAB to analyse whether the preparatory works were part of the normal contract which had to be carried out within 39 weeks.

Dr Grima said that although, undoubtedly, "envisaged" did not mean "exactly", however, the 39 weeks could not be stretched unlimitedly but by a reasonable period. He claimed that the civil law permitted variances up to 5% and once the 4 weeks as a percentage of the 39 weeks amounted to 10%, then, this could not be considered as "*approximate*" because it was double that established by law.

With regard to the second reason, Dr Grima said that on analysing the information given in Form 4.6.7, he would arrive at the conclusion that there was one sub-contractor who would be carrying out 7% of the project and that this sub-contractor would be carrying out landscaping works. He questioned who was going to carry out the other sub-contracting works once (i) M&E, landscaping works and steel metal works involved 16%-17% of the project and (ii) the sub-contractor and the partners of the joint venture had no experience in M&E and steel structures.

With regard to the rectification letter of exclusion, Dr Grima said that everything could be changed in court provided that the mistake was genuine.

The same lawyer maintained that, in view of the above, the appellants' offer should be discarded.

Mr Chetcuti said that the profile information of the sub-contractor, as submitted by the bidder, did not indicate that they were capable of carrying out steel structures or M&E except for landscaping works.

The second witness, namely Architect Ray Sammut who was representing BBHV Joint Venture, was called by the PCAB to take the stand.

On cross-examination by the PCAB, Architect Sammut testified that their sub-contractor was INTEXT Landscaping who, apart from landscaping, was capable of carrying out various other works, including M&E and steel structures. He said that the 17% mentioned by the Chairman of the evaluation board was an estimate arrived at by their architects to be used for adjudication purposes. The witness contended that these percentages could not be used before and even after the opening of the financial package because (i) they could have different

estimates from different contractors and (ii) if a contractor provided all materials and/or labour, the works carried out by the sub-contractor would be much less. Furthermore, he maintained that the value of works carried out by the sub-contractor could never be worked out precisely from the financial bid.

In reply to a specific question by Dr Grima, Architect Sammut said that the percentage of the steel structures, M&E and landscaping would be less than 10%, however, they indicated 7% for landscaping.

The PCAB intervened to draw the attention of the witness that, in view of the fact that in the *Resources Sheet* it was indicated that the sub-contractor would be carrying out M&E, landscaping and steel metal works, they should not have included only soft landscaping works in Form 4.6.7. Furthermore, it was pointed out that in the same form under *Experience in similar work (details to be specified)* it was stated *'See Form 4.6.12. Further Information* and in the latter form reference was only made to 'Landscaping'. It was stated that both forms should have incorporated the three sub-contracting works.

Architect Sammut sustained that electrical and steel structure (canopy) were part of the landscaping and, as a result, the 7% included the value of all sub-contracting works. He said that, in architecture, *landscape* could also include a *steel structure*. The witness explained that in the 'Resources Schedule' they indicated the three tasks that would be carried out by the sub-contractor. He admitted that, most probably, the fact that they indicated only soft landscaping works in Form 4.6.7 was somehow misleading and this could have been the reason why the Evaluation Board requested such clarification by means of letter dated 18 May 2010 wherein it was stated that:

> *"In view that Form 4.6.7 submitted as part of your bid indicates INTEXT Landscaping as the sole sub-contractor that you will be engaging if awarded the contract and considering that the resource schedule submitted as part of Form 4.6.3 makes reference to the subcontracting of three elements of the works (landscaping, Mechanical & Electrical and steel structures), please clarify that the subcontractor mentioned in Form 4.6.7 will in fact by carrying out all subcontracting works."*

The same witness said that in their reply of the 20 May 2010 they confirmed that the three tasks would be carried out by the same sub-contractor, namely INTEXT.

Dr Gauci intervened to state that, if the Board had any doubts about INTEXT's experience in similar works, they should have asked specific questions about the matter. Architect Sammut added that they could have been asked to provide further evidence regarding the sub-contractor's capabilities in carrying out M&E and Steel Structure works.

Mr Chetcuti rebutted that they could not ask bidders to submit further information.

However, Dr Gauci said that they could have sought clarifications on information submitted and if they were asked to state whether they had experience on M&E they would have answered in the affirmative. On his part, the Chairman of the Evaluation Board claimed that the copy of registrations of employees with the Employment and Training Corporation (ETC) that was submitted with their offer did not indicate that they had steel experts, welders or

electricians. Architect Sammut claimed that this was not a criterion because such employees were all registered as labourers.

Mr Chetcuti placed emphasis on the fact that steel works were extremely relevant for this project because the steel structure (canopy) was going to have an impact on the whole project and required a specialized job.

Dr Gauci said that the documents submitted showed that parts of the subcontracting works were going to be supplemented by the partners of the joint venture. Architect Sammut added that these were indicated under *Own workforce* within *Labour Resources* of the *Resources Schedule*.

The PCAB drew the attention of the appellants' representatives that the onus of submitting relevant and appropriate information and clarifications was on the bidders because

- it was they who had to convince the Evaluation Board that the sub-contractor was capable of carrying out such works and that the M&E works and Steel Metal Works did not exceed the 3% (considering the fact that (i) the 7% was attributed to soft landscaping works and (ii) if the sub-contracting works exceeded the 10% they had to corroborate this with further documentation to comply with the tender conditions); and

- the Evaluation Board had to adjudicate on documentation submitted.

The Chairman PCAB said that in view of the manner in which the submission was presented he understood that the M&E and Steed Metal Works were not going to be carried out by the sub-contractor but by the partners of the joint venture.

Architect Sammut maintained that:

(i) they had submitted all information that was requested in the tender document;

(ii) most of the input would be provided from own resources (according to their financial calculations the joint venture could do 93% and the sub-contractor 7% of the value of works);

(iii) the contracting authority's benchmark of 16%-17% was arrived at on the assumption that such works would be resourced wholly by the contractor; and

(iv) they submitted a confirmation precisely as requested by the Chairman of the Evaluation Committee in his clarification letter, otherwise, their offer might have been disqualified if they provided more information than requested

Dr Gauci insisted that:

(i) they had confirmed that all sub-contracting works to be carried out by INTEXT was 7% and, as a result, they did not need to corroborate this with further documentation

(ii) the sub-contractor was not going to carry out all M&E and steel metal works since such works were to be carried out with the assistance of the partners of the joint venture by providing material and labour;

(iii) all doubts about the sub-contractor were clarified by appellant who confirmed that INTEXT '*will be carrying out all subcontracting works'*;

(iv) if the evaluation board wanted his clients to clarify specific issues they should not have requested just a confirmation.

In reply to a specific question by the PCAB, the Chairman of the Evaluation Committee confirmed that the tenderer who proceeded to the financial stage was administratively and technically fully compliant.

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 12 July 2010 and also through their verbal submissions presented during the public hearing held on 15 September 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants' representatives (a) claim that the contents of the Department of Contracts' letter dated 30th June 2010 wherein two reasons for the exclusion of the appellants' bid were highlighted were unfounded because their offer was in conformity with the tender document, (b) claim that whilst the tender document did not make any reference at all to a completion period of works, during a site visit, the tenderers were informed that it was anticipated that this contract would be spread over a 9 month period, (c) claim that they never mentioned 39 weeks, (d) contend that it was clear that the terms "envisaged" and "anticipated" did not imply any compulsory requirement and these were only indicative, (e) statement that BBHV Joint Venture submitted a programme of works wherein they showed that all the works would be completed within 39 weeks, (f) contention that in their offer they had indicated one subcontractor and in reply to a clarification they had confirmed that such works would have been carried out by one subcontractor, (g) protest about the fact that, after filing a letter of objection and a reasoned letter of objection that were based on the reasons given for the bid being excluded from being evaluated further, they had subsequently received another letter that completely changed all the parameters in the first letter of exclusion, (h) statement wherein it was stated that in the 'Resources Schedule' they did not indicate the number of sub-contractors but the works that were going to be subcontracted, that is, M&E, soft landscaping and steel metal works and that, in reply to a specific clarification, they had confirmed that such works would be carried out wholly by one sub-contractor, (i) claim that the period of -4 weeks was in conformity with the requirement of the tender document, (j) claim that their sub-contractor was INTEXT Landscaping which, apart from landscaping, was capable of carrying out various other works, including M&E and steel structures, (k) claim that the 17% mentioned by the Chairman of the evaluation board was an estimate arrived at by their architects to be used for adjudication purposes and that these percentages could not be used before and even after the opening of the financial

package because (1) they could have different estimates from different contractors and (2) if a contractor provided all materials and/or labour, the works carried out by the sub-contractor would be much less;

- having also taken note of the points raised during the hearing by the contracting authority, in particular the fact that (a) although the completion period of works was not indicated in the tender document, this was clearly stated as 9 months - which amount to 39 weeks - when a specific reply was given to a particular question during a site visit held on 13 November 2009 which was also attended to by the appellants BBHV Joint Venture, (b) considering the fact that all other tenderers had conformed to this requirement then it could not be argued that it was not clear, (c) in its programme of works, BBHV Joint Venture decided to include with the 39 weeks a period of 4 weeks for pre-commencement works, (d) the contractor had to carry out the preliminary works from the order to start works and therefore it was unacceptable that such works were included outside the time frame of 9 months, (e) with regards to the second ground of exclusion the contracting authority denied that the reason of exclusion was changed explaining that, when the reason of exclusion in the Evaluation Committee's report was reproduced in the Department of Contracts' letter that was sent to the appellants, it was noticed that it did not reflect exactly what was actually written in the said report and, as a result, it was found necessary for a rectification letter to be issued, (f) whilst in Form 4.6.7 every tenderer had to declare against each subcontractor the value of subcontracting works in relation to the total cost of project, yet, with regards to the appellants, the evaluation board only knew that the percentage of the subcontracting landscaping works was 7% but they did not know the percentages of the other two subcontracting works and, considering that in cases where a sub-contractor was going to carry out more than 10% of the whole project, tenderers were required to submit certain declarations / documentation, the Board felt that the bidder, in this case the appellant joint venture, was infringing the specifications of the said tender, (g) albeit internal statistical information was used for guidance purposes only, yet this clearly showed that the total value of the works contemplated by the sub-contractor was above 16 %, namely much more than the 10% threshold, (h) the BBHV Joint Venture stated that they would be starting the programme of works from -4 to 39 weeks which amounted to 43 weeks, (i) the *Gantt Chart*, as submitted by the appellants, indicated that the latter were assuming that the pre-commencement of works was not part of the performance period, (j) the other bidders had included the preparatory or preliminary works within the 39 weeks and (k) the profile information of the sub-contractor, as submitted by the bidder, did not indicate that they were capable of carrying out steel structures or M&E except for landscaping works;

- having also taken cognizance of Dr Grima's (a) contention that all preparatory works were part of the programme of works and, likewise, the pre-contract was part of the contract, (b) remark that albeit the term "envisaged" did not mean "exactly", yet, the 39 weeks could not be stretched in an unlimited manner but by a reasonable period and (c) argument wherein he said that in view of the fact that on analysing the information given in Form 4.6.7, one had to conclude that there was one sub-contractor who would be carrying out 7% of the project and that this sub-contractor would be carrying out soft landscaping works, yet this also gives rise to a few queries as, for example, who was going to carry out the other sub-contracting works once (1) M&E, landscaping works and steel metal works involved 16%-17% of the project and

(2) the sub-contractor and the partners of the joint venture had no experience in M&E and steel structures,

reached the following conclusions, namely:

1. The PCAB opines that once the 9 month period was "envisaged" then it was not *explicit* and that the reply given was not clear because if the 9 months were compulsory, the contracting authority should not have used the term "envisaged".

2. The PCAB interprets the information on the 'Resources Schedule' as stating that the three types of works indicated were going to be sub-contacted and not that these would have been, necessarily, going to be sub-contracted to three different people / entities.

3. The PCAB would have, *prima facie*, been inclined to consider that the evaluation board should have first corroborated the assumptions with facts and should not have relied solely on assumptions because facts could prove otherwise. However, following further deliberation, the PCAB feels that, likewise, one cannot rely on the arguments raised during the hearing by the appellants' representatives considering that the same appellants stated that the percentage of the steel structures, M&E and landscaping would be less than 10% when in their submission they had indicated 7% solely for landscaping, casting serious doubts as to how one could expect that steel structures and M&E would be absorbed within the 3% balance requirement to fall within the threshold contemplated in the tender document.

4. The PCAB opines that the very fact that (a) since in the *Resources Sheet* it was indicated that the sub-contractor would be carrying out M&E, landscaping and steel metal works, the appellants should not have included only soft landscaping works in Form 4.6.7 and (b) in the same form under *Experience in similar work (details to be specified)* it was stated *'See Form 4.6.12. Further Information'* wherein reference was only made to 'Landscaping', tends to more than clarify that, within the realms of the tender's requirements, the appellant joint venture was referring to landscaping works to be carried out by the designated sub-contractor throughout without considering M&E and steel structures. The PCAB feels that clarifications would have been preferred but, in this instance, the onus was on the bidder to elucidate the evaluation board and not for the latter to seek clarification on facts which had to be read and examined as they were submitted by bidder. The PCAB argues that the supporting document gave no evidence that the sub-contractor chosen by the appellants is indeed capable of carrying all the works (*landscaping, Mechanical & Electrical and steel structures*).

5. The PCAB feels that the claim made by the appellant joint venture as to the fact that (a) electrical and steel structure (canopy) were part of the landscaping and, as a result, the 7% included the value of all sub-contracting works and (b) in architecture, *landscape* could also include a *steel structure*, fails to convince the same PCAB about its validity and this in view of the fact that no bidder challenged the way the template form was presented in the tender document and, as a result, the PCAB has to question why were steel structure, M&E and landscaping referred to separately even one is to assume that these refer to the same thing.

As a consequence of (1) to (5) above this Board finds against the appellant joint venture.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza	Edwin Muscat	Carmel J Esposito
Chairman	Member	Member

4 October 2010