

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 363

CT/3012/2011 Adv No CT/104/2011

**Tender for Restoration Works to Valletta Landfront Fortifications – VLT 09**

This call for tenders was published in the Government Gazette on 15<sup>th</sup> April 2011. The closing date for offers was 9<sup>th</sup> June 2011.

The estimated value of this tender was € 1,799,857.92 (excl.VAT).

Four (4) tenderers submitted their offers.

Novus Vultus Joint Venture filed an objection on 10<sup>th</sup> October 2011 against the decision of the Contracts Department to disqualify its offer as technically non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Wednesday, 11<sup>th</sup> January 2012 to discuss this objection.

### Novus Vultus Joint Venture

Dr John L Gauci	Legal Representative
Mr Anton Schembri	Representative
Mr Hugh Vella	Representative

### FortRes Joint Venture

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

### Ministry for Resources and Rural Affairs

Dr Franca Giordimaina	Legal Representative
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### Evaluation Board

Perit Ray Farrugia	Chairman
Ms Chanelle Busuttil	Member
Ms Amanda Degiovanni	Member
Mr Stephen Serracino Inglott	Member

### Contracts Department

Mr Jonathan Barbara	Representative
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After the Chairman's brief introduction, the appellant joint venture's representative was invited to explain the motives of the joint venture's objection.

Dr John Gauci, legal representative of Novus Vultus Joint Venture, the appellant joint venture, stated that by letter dated 30th September 2011, the Department of Contracts informed his client that its offer had been adjudicated technically non-compliant for the following reasons:-

“

*(a) 16.1(b) - (iii) - (Vol. 1 Sec 4 Form 4.1): Bidder was requested to rectify his submission by providing a revised preliminary agreement which is to include a clear declaration stating that all partners assume joint and several liability for the execution of the contract in line with the provisions of Article 5.3 of the tender document. Bidder did not respond to this request; and*

*(b) Section 11 (b) of the Tenderer's Declaration forming part of the Tender Form: Declaration issued by the Sales Office of the Contracts Department indicated that bidder did not submit the Proof of Purchase (receipt). Bidder was requested to rectify his submission accordingly but did not respond to such a request.”*

#### **1) NON-RECEIPT OF REQUEST FOR RECTIFICATION**

Dr. Gauci declared that no fax or email from the contracting authority requesting rectification of its tender submission did ever reach his client. He stressed that it was not the case that his client had willingly ignored the request of the contracting authority and went on to request the contracting authority to substantiate its claim in this regard.

Dr Franca Giordimaina, representing the Ministry for Resources and Rural Affairs, stated that this appeal hinged upon the issue of the non-submission by the appellant joint venture of the rectifications requested by the contracting authority and she invited the representative of the Contracts Department to give evidence with regard to the communication of these rectifications to the appellant joint venture.

Mr Jonathan Barbara, representing the Contracts Department, under oath, gave the following evidence:-

- a. it was established practice to communicate requests for clarifications/rectifications to tenderers through fax or email, which details the tenderers were asked to provide in their tender submission;
- b. in this case a fax was sent to the appellant joint venture on the 21<sup>st</sup> July 2011 and the system had generated a positive transmission verification report as has been submitted during the hearing, the details of which matched those given by the appellant joint venture in its tender submission;

- c. once the request was successfully transmitted to the tenderer it was not the practice to send the request also via email;

and

- d. confirmed that the fax transmission report was generated by the fax machine of the Contracts Department and that the department did not receive a confirmation from the appellant joint venture that the latter had received the rectification request but, then again, the department was not expecting one either.

Dr Gauci insisted that the fax transmission report was electronically generated by the machine at the sender's end but the fact remained that the contracting authority did not receive confirmation directly from his client that the latter had indeed received the rectification request.

After having made that point Dr Gauci proceeded to tackle the substance of the request for rectifications.

## 2) JOINT AND SEVERAL LIABILITY FOR THE EXECUTION OF THE CONTRACT

Dr Gauci submitted that:-

- i. the contracting authority was requesting his client to rectify its tender submission by providing a revised preliminary agreement to include a clear declaration stating that all partners assume joint and several liability for the execution of the contract in line with the provisions of Article 5.3 of the tender document;
- ii. his client had presented with the joint venture's tender submission the *Joint Venture Agreement* between Schembri Barbros Limited and Impresa De Feo Antonio Restauri, which provided as follows:-

*'Barbros and De Feo shall collectively and jointly and severally between themselves hereinafter be referred to as the "Members"'*;
- iii. that, in itself, this was ample proof that the members in the joint venture were assuming joint and several liability for the execution of the contract between them.

On her part Dr Giordimaina put forward the following arguments:-

- a. although the appellant joint venture did submit the joint venture agreement it was noted that its contents did not satisfy the contracting authority requirements set out in clause 5.3 of the Instructions to Tenderers and she went on to quote article 10.2 of the joint venture agreement:-



*"This Agreement is exclusively for the benefit of the Members and shall not be construed as conferring, either directly or indirectly, any rights or causes of action upon third parties";*

- b. the joint venture agreement was entered into for the sole benefit of the two parties concerned but excluded third parties and the contracting authority was a third party for the purposes of that agreement;
- c. similarly, articles 12 'Member in Default' and 14 'Liability' of the joint venture agreement were meant to safeguard the interests of the two parties forming this joint venture with regard to the relationship between themselves and not in their relationship with the client, in this case, the Ministry for Resources and Rural Affairs;
- d. clause 5.3 of the tender document stated that:-

*'Tenders submitted by companies forming a joint venture/consortium must also fulfil the following requirements:*

*One partner must be appointed lead partner and that appointment confirmed by submission of powers of attorney signed by legally empowered signatories representing all the individual partners. The tender must include a preliminary agreement or letter of intent stating that all partners assume joint and several liability for the execution of the contract, that the lead partner is authorised to bind, and receive instructions for and on behalf of, all partners, individually and collectively.'*

- e. article 1089 of the Civil Code provided that:

*'Joint and several liability is not presumed. If not declared by law, it must be expressly stipulated.'*

- f. the joint venture agreement referred to the parties being jointly and severally but it did not refer to their liability with regard to claims by third parties;
- and
- g. given the contents and purpose of the joint venture agreement presented by the appellant joint venture, the contracting authority was more than justified to request a clear declaration stating that all partners assume joint and several liability for the execution of the contract, which request remained unanswered.

Dr Gauci put forward the following arguments:-

- i. if, for example, the Italian contractor were to default then government could sue for damages the Maltese partner in the joint venture and then, on the strength of the joint venture agreement, the Maltese partner would sue its Italian partner for damages;

- ii. the joint venture agreement was, by its very nature, meant to regulate the relations between the two parties forming the joint venture whereas the relationship between the contracting authority and the tenderer was regulated by the tender document. The Tenderer's declaration at clause 6 laid down that:-

*'We are making this application in our own right and as partner in the consortium, led by Impresa De Feo Antonio Restauri for this tender. We confirm that we are not tendering for the same contract in any other form. We confirm as a partner in the consortium that all partners are jointly and severally liable by law for the performance of the contract that the lead partner is authorised to bind and receive instructions for and on behalf of each member and all that partners in the joint venture/consortium are bound to remain in the joint venture/consortium for the entire period of the contract's performance.....'*

- iii. the joint venture had submitted two tenderer's declarations, one signed by a representative of the Maltese partner, Schembri Barbos Ltd, and another signed by a representative of the Italian Partner, Impresa De Feo Antonio Restauri but both signed by the representative of the joint venture Novus Vultus – *this was verified at the hearing from the original tender submission;*
- iv. the tenderer's declarations by far satisfied the requirement at Art. 1089 of the Civil Code;  
and
- v. in Maltese law, one could not sue a joint venture because it did not have a legal personality but one could sue its members.

Dr Giordimaina insisted that, apart from the tenderer's declaration, clause 5.3 specifically requested that *"The tender must include a preliminary agreement or letter of intent stating that all partners assume joint and several liability for the execution of the contract...."* She added that the joint venture agreement did not provide this comfort and neither was a letter of intent to this effect submitted as an alternative and the contracting authority should not be expected to disregard the submission of such mandatory documentation. Moreover, Dr Giordimaina reiterated that for the purposes of the Civil Code, the contracting authority could not assume this but it had to be expressly stipulated and that was the purpose of the request for rectification.

Architect Ray Farrugia, chairman of the adjudicating board, remarked that, according to the legal advice obtained by the board, the joint venture agreement or letter of intent, carried a lot of weight with regard to the contractor's liability so much so that if government were to sue the partners in the joint venture those partners could invoke the joint venture agreement which formed part of the contract for these works.

Dr Gauci insisted that the contracting authority was not party to the joint venture agreement and that the tender document – the eventual contract - regulated the contractual obligations between the contracting authority and the contractor.

### 3) PROOF OF PURCHASE

Dr Gauci made the following submissions:-

- a. this issue dealt with the presentation of evidence that his client had purchased the tender document, in other words, that the bidder had paid €360 for the joint venture's copy of the tender document;
- b. his client had effected payment by electronic means – as submitted during the hearing - and for which the Department of Contracts had issued his client with the relative receipt dated 29<sup>th</sup> April 2011 indicating that:

*“The Director General (Contracts) acknowledges receipt of your online payment, indicating that the sum of €360 has been debited (deducted) from your account to pay for the document CT 104\_2011 TENDER”;*

- c. it therefore followed that the Department of Contracts must have been in possession of the receipt it had issued itself and hence he failed to understand the statement that the Sales Office of the Contracts Department indicated that the bidder did not submit the *Proof of Purchase* (receipt);
- d. the *Proof of Purchase* was not one of the mandatory documents listed in the ‘Instructions to Tenderers’ so much so that Clause 16.1 (b) - General/Administrative Information - was limited to the following:-

- i. *Statement on Conditions of Employment;*
- ii. *Power of Attorney;*
- iii. *Data on Joint Venture/Consortium;*

- e. *Proof of Purchase* was referred to in the Tender Form under Tenderer's Declarations clause 11 which stated that:-

*‘Our tender submission has been made in conformity with the Instructions to Tenderers, and in this respect we confirm having included in the appropriate packages as required, the following documentation:*

*General Information - Proof of Purchase (Receipt) and Statement on Conditions of Employment’;*

and

- f. the provision in the Tenderer's Declaration was meant as a kind of confirmation that the bidder was compliant with the ‘Instructions to Tenderers’, which did not include the proof of purchase, and, as a consequence, it did not oblige the bidder to submit a copy of the proof of purchase which, in any case, was already in the possession of the Department of Contracts.

Dr Giordmaina remarked that, once again, had the appellant joint venture answered the rectification request, this issue would have been settled once the appellant joint venture was in possession of the relative receipt.

Dr David Wain, legal representative of the recommended bidder, quoted clause 12 of the Tender Form where the appellant joint venture had made the following declaration:-

*'I acknowledge that the Central Government Authority and/or Contracting Authority shall request rectification in respect of incomplete/non-submitted information pertinent to the documentation listed in Clause 11 (a), 11 (b) and 11 (c) of this Tender Form. We understand that such rectification/s must be submitted with two working days, and will be subject to a non-refundable administrative penalty of €50, and that failure to comply shall result in our offer not being considered any further.'*

Dr Gauci reiterated that, albeit his client had not received the request for rectifications, yet, even if his client had received the rectification request, the same appellant joint venture would have furnished these same explanations which effectively illustrated that in its original tender submission it had already provided what the contracting authority was requesting by way of rectifications.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 9<sup>th</sup> November 2011 and through the verbal submissions made during the hearing held on the 11<sup>th</sup> January 2012, had objected against the decision of the Contracts Department to disqualify its offer as technically non-compliant;
- having noted the appellant joint venture's representatives' claims and observations regarding the fact that (a) albeit the bidder (the appellant joint venture) was requested to rectify that part of its submission of the Tender Form, namely the 'Declaration issued by the Sales Office of the Contracts Department' in view of the fact that it was established that the appellant joint venture did not submit the Proof of Purchase (receipt), yet the tenderer did not respond to such a request, (b) no fax or email from the contracting authority requesting rectification of its tender submission did ever reach the appellant joint venture stressing that it was not the case that the said joint venturers had willingly ignored the request of the contracting authority, (c) the fax transmission report was electronically generated by the machine at the sender's end but the fact remained that the contracting authority did not receive confirmation directly from the appellant joint venturers that the latter had indeed received the rectification request, (d) the contracting authority was requesting the appellant joint venture to rectify its tender submission by providing a revised preliminary agreement to include a clear declaration stating that all partners assume joint and several liability for the execution of the contract in line with the provisions of Article 5.3 of the tender document, (e) the appellants had presented with the joint venture's tender submission the Joint Venture Agreement



between Schembri Barbros Limited and Impresa De Feo Antonio Restauri which, inter alia, stated that “Barbros and De Feo shall collectively and jointly and severally between themselves hereinafter be referred to as the “Members” which, *per se*, provided ample proof that the members in the joint venture were assuming joint and several liability for the execution of the contract between them, (f) if, for example, the Italian contractor were to default then government could sue for damages the Maltese partner in the joint venture and then, on the strength of the joint venture agreement, the Maltese partner would sue its Italian partner for damages, (g) the joint venture agreement was, by its very nature, meant to regulate the relations between the two parties forming the joint venture whereas the relationship between the contracting authority and the tenderer was regulated by the tender document, (h) the tenderer’s declarations by far satisfied the requirement at Art. 1089 of the Civil Code, (i) in Maltese law, one could not sue a joint venture because it did not have a legal personality but one could sue its members, (j) the appellant joint venture had effected payment by electronic means – as submitted during the hearing - and for which the Department of Contracts had issued the relative receipt dated 29<sup>th</sup> April 2011 which cannot but prompt one from arguing that the Department of Contracts must have been in possession of the receipt it had issued itself and hence one would fail to understand the statement that the Sales Office of the Contracts Department indicated that the bidder did not submit the *Proof of Purchase* (receipt) and (k) the *Proof of Purchase* was not one of the mandatory documents listed in the ‘Instructions to Tenderers’;

- having considered the contracting authority’s representative’s submissions, namely that (a) although the appellant joint venture did submit the joint venture agreement it was noted that its contents did not satisfy the contracting authority requirements set out in clause 5.3 of the Instructions to Tenderers in view of the fact that the same agreement stated that “*This Agreement is exclusively for the benefit of the Members and shall not be construed as conferring, either directly or indirectly, any rights or causes of action upon third parties*”, (b) the joint venture agreement was entered into for the sole benefit of the two parties concerned but excluded third parties and the contracting authority was a third party for the purposes of that agreement, (c) articles 12 ‘Member in Default’ and 14 ‘Liability’ of the joint venture agreement were meant to safeguard the interests of the two parties forming this joint venture with regard to the relationship between themselves and not in their relationship with the client, in this case, the Ministry for Resources and Rural Affairs, (d) article 1089 of the Civil Code provided that ‘*Joint and several liability is not presumed. If not declared by law, it must be expressly stipulated*’, (e) the joint venture agreement referred to the parties being jointly and severally but it did not refer to their liability with regard to claims by third parties, (f) given the contents and purpose of the joint venture agreement presented by the appellant joint venture, the contracting authority was more than justified to request a clear declaration stating that all partners assume joint and several liability for the execution of the contract, which request remained unanswered, (g) according to the legal advice obtained by the board, the joint venture agreement or letter of intent, carried a lot of weight with regard to the contractor’s liability so much so that if government were to sue the partners in the joint venture those partners could invoke the joint venture agreement which formed part of the contract for these works and (h) had the appellant joint venture answered the rectification request, this issue would have been settled once the appellant joint venture was in possession to the relative receipt;

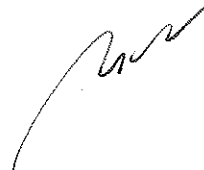




- having considered Mr Jonathon Barbara's submissions, particularly that (a) it was established practice to communicate requests for clarifications/rectifications to tenderers through fax or email, which details the tenderers were asked to provide in their tender submission, (b) in this case a fax was sent to the appellant joint venture on the 21<sup>st</sup> July 2011 and the system had generated a positive transmission verification report as has been submitted during the hearing, the details of which matched those given by the appellant joint venture in its tender submission and (c) once the request was successfully transmitted to the tenderer it was not the practice to send the request also via email,

reached the following conclusions:

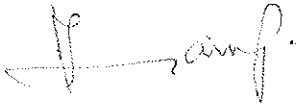
1. The Public Contracts Review Board agrees in principle that the joint venture agreement was primarily entered into for the sole benefit of the two parties concerned but it excluded third parties and the contracting authority which was a third party for the purposes of that agreement. Similarly, this Board concurs with the view that articles 12 'Member in Default' and 14 'Liability' of the joint venture agreement were meant to safeguard the interests of the two parties forming this joint venture with regard to the relationship between themselves and not in their relationship with the client, in this case, the Ministry for Resources and Rural Affairs.
2. The Public Contracts Review Board whilst (a) being fully cognizant of the fact that the appellant joint venture was requested to rectify its submission by providing a revised preliminary agreement which was meant to include a clear declaration stating that all partners assume joint and several liability for the execution of the contract in line with the provisions of Article 5.3 of the tender document which rectification was, allegedly, never replied to by the appellants, is also (b) fully aware of the fact that the appellants had presented with the joint venture's tender submission the Joint Venture Agreement between Schembri Barbros Limited and Impresa De Feo Antonio Restauri which, *inter alia*, stated that "Barbros and De Feo shall collectively and jointly and severally between themselves hereinafter be referred to as the "Members" which, *per se*, provided ample proof that the members in the joint venture were assuming joint and several liability for the execution of the contract between them.
3. This Board acknowledges the fact that in the Maltese law, one could not sue a joint venture because it did not have a legal personality but one could sue its members.
4. The Public Contracts Review Board agrees with the appellant company's claim, namely that the joint venture agreement was, by its very nature, meant to regulate the relations between the two parties forming the joint venture whereas the relationship between the contracting authority and the tenderer was regulated by the tender document.
5. The Public Contracts Review Board acknowledges that the joint venture agreement was "exclusively for the benefit of the Members" and should "not be construed as conferring, either directly or indirectly, any rights or causes of action upon third parties". This Board also acknowledges the fact that article 1089 of the Civil Code provides that "*Joint and several liability is not presumed. If not declared by law, it must be expressly stipulated*".



This Board observes that, had the appellant joint venture answered the rectification request, this issue would have been settled, as the appellant joint venture was in possession of the relative receipt. Yet, notwithstanding, having taken all into consideration, this Board cannot ignore the fact that the appellants had presented with their tender submission the Joint Venture Agreement between Schembri Barbros Limited and Impresa De Feo Antonio Restauri which, *inter alia*, stated that "Barbros and De Feo shall collectively and jointly and severally between themselves hereinafter be referred to as the "Members" and this Board considers that such statement *per se* as an expression purposely stipulated and which, as a consequence, precludes the notion of presumption.

6. The Public Contracts Review Board opines that, with regard to the issue of 'proof of purchase', during the hearing the contracting authority's representatives have agreed with the counter-arguments brought forward by the appellant joint venture, Novus Vultus Joint Venture.

In view of the above this Board finds in favour of the appellant joint venture and recommends that the (a) bid, as submitted by the said appellant joint venture, be reinstated in the evaluation process and (b) deposit paid by the latter to file the objection should be reimbursed.



Alfred R Triganza  
Chairman



Carmel J Esposito  
Member



Joseph Croker  
Member

7 February 2012