

PUBLIC CONTRACTS REVIEW BOARD

Case No. 451

MRRA/W/259/2011/7

Tender for the Restoration of Bastion Walls and Parapett Wall in Mdina Ditch

The tender under reference was published on the 11th May 2012 with a closing date of the 1st June 2012.

The estimated value of the tender is of €103,248.75 (Exclusive of VAT).

Six (6) contractors submitted their bids.

Messrs Mdina Res Joint Venture filed an objection **on 20th June 2012** against the decision of the Ministry for Resources and Rural Affairs to recommend the award of the tender to RSF Joint Venture, since their bid was not considered to be administratively compliant.

The Public Contracts Review Board with Mr Joseph Croker, Acting Chairman, and Mr Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on the 20th August 2012 to discuss the appeal.

Present for the hearing were:

Mdina Res Joint Venture

Dr Christine Belizzi	Legal Representative
Ms Josephine de Maria Casabene	Representative

Vaults Ltd

Dr Paul Lia	Legal Representative
Dr Alessandro Lia	Legal Representative
Ms Yvonne Farrugia	Representative
Mr Ivan Farrugia	Representative

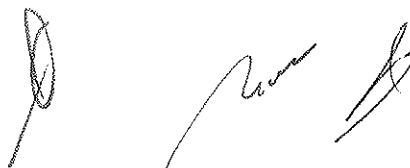
RSF Joint Venture

Mr Clifton Borg	Representative
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Ministry for Resources and Rural Affairs (MRRA)

Evaluation Board

Perit Norbert Gatt	Chairman
Perit Chanelle Busuttill	Member
Mr George Grima	Member
Mr Godwin Bongailas	Member



After the A/Chairman's brief introduction, the appellant was invited to explain the motives of her objection.

Dr Christine Belizzi, for Mdina Res Joint Venture, the appellant, made the following submissions:-

- a. by letter dated 14th June 2012 the contracting authority informed her client that his offer was administratively non-compliant and that the tender was recommended for award to RSF Joint Venture;
- b. the Joint Venture Form published at page 44 of the tender document read as follows:-

*Agreement governing the formation of the Joint Venture/Consortium
(Enclose Joint Venture/Consortium Agreement)*

.....
*Proposed proportion of responsibilities between partners (in %) with
indication of the type of the works to be performed by each**

**The Company acting as the lead partner in a joint
venture/consortium, they must have the ability to carry out at least
50% of the contract works by its own means. If a Company is another
partner in a joint venture/consortium (i.e. not the lead partner) it must
have the ability to carry out at least 10% of the contract works by its
own means.*

- c. her client was informed that the reason for non-compliance concerned clause 1.2.6, i.e. the Joint Venture Form, where it was noted that: *the Lead Partner does not have the ability to carry out at least 50% of the contract works by its own means, and therefore does not comply with the requirement set in said Form;*
- d. her client had apportioned the responsibilities between the joint venture partners as follows:-

40% - C.M. Costruzioni s.r.l.
40% - Attard Bros
20% - Impresa Capece Minutolo
- e. the reason for exclusion referred to the lead partner's 'ability to carry out at least 50% of the contract works' but did not specify that the lead partner 'had to carry out at least 50% of the contract works';
- f. in the tender submission the lead partner in the joint venture, i.e. C.M. Costruzioni s.r.l., had amply demonstrated that 'it had the ability to carry out at least 50% of the contract works by its own means' by presenting the list of past works which by far exceeded the estimate of the tender in question;



- g. therefore sufficient evidence had been produced that the lead partner of the joint venture did have the ability requested;
- h. a clear distinction had to be drawn between 'having the ability to carry out at least 50% of the contract works' and 'shall assume the responsibility to carry out at least 50% of the contract works';
- i. one could not help noting that in this form the lead partner was referred to as 'they' and 'its' in the same sentence; and
- j. if the joint venture form published in the tender document was not properly drawn up or it did not reflect the intentions of the contracting authority, that was the responsibility of the contracting authority and her client should not be penalised for those mistakes.

Perit Norbert Gatt, chairman of the evaluation board, explained that:-

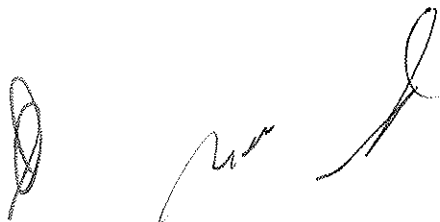
- a. the appellant was not disqualified because of lack of competence or lack of ability on the part of the lead partner to carry out at least 50% of the contract works;
- b. the joint venture form was very specific in requesting the proposed proportion of responsibilities between partners percentagewise and that request was then qualified by the note (*) which, to the contracting authority, meant that the lead partner had to assume responsibility for at least 50% of the contract works while the other partners had each to assume responsibility for at least 10% of the contract works; and
- c. it was evident that the percentages indicated by the appellant did not reflect the instructions laid down in the joint venture form so much so that the lead partner, C.M. Costruzioni s.r.l., was going to assume responsibility for only 40% of the contract works and consequently the evaluation board had no option but to reject the offer.

Dr Bellizzi noted that the contracting authority acknowledged that the lead partner did have the ability to carry out at least 50% of the contract works and he therefore satisfied the requirements laid down in the joint venture form. She insisted that in order to reflect the argument put forward by Perit Gatt, the contracting authority should have requested in the joint venture form a declaration that the lead partner 'would assume responsibility for or would carry out at least 50% of the contract works' and not to declare his 'ability to carry out at least 50% of the contract works'.

The A/Chairman Public Contracts Review Board noted that the wording used in the joint venture form might not be the most suitable.

Perit Gatt remarked that:-

- i. the joint venture form was a standard template in the tender document as provided by the Contracts Department;

The image shows three handwritten signatures or initials in black ink. The first is a circular scribble, the second is a series of connected loops, and the third is a more complex, flowing signature.

- ii. if the joint venture form was not interpreted in the manner that he had just explained then the joint venture form was practically useless because the bidder's ability was assessed by means of other documentation, e.g. the list of past works performed; and
- iii. it was important to establish which of the partners in the joint venture was the lead partner because the lead partner had a particular role to play in the overall execution of the works.

Dr Alessandro Lia, for Vaults Ltd, an interested party, submitted that:-

- a. he agreed with the way the contracting authority interpreted the joint venture form in the sense that in essence it requested the responsibility in percentages of each partner in the joint venture with regard to the execution of this contract and then that was qualified by indicating the minimum percentages required in the case of the lead partner and the other partner/s;
- b. this form did not concern the bidder's past performance or his technical capacity but it concerned the execution of this particular contract by each partner constituting the joint venture; and
- c. clause 5.1.1 provided that the award criteria was the cheapest priced tender satisfying the administrative and technical criteria and since the appellant's joint venture form did not satisfy tender requirements then that offer was administrative non-compliant and it should be disqualified.

Dr Bellizzi concluded that this was a matter of interpretation and insisted that the form called for the lead partner's ability to carry out at least 50% of the contract works and not a declaration that the lead partner was going to carry out at least 50% of the contract works.

At this point the meeting was brought to a close.

This Board,

- having noted that Messrs Mdina Res JV had by letter dated 19th June 2012 and during this hearing objected to the decision taken by the Contracting Authority to disqualify them since their bid was considered to be administratively non-compliant;
- having noted the argument brought forward by the appellant's representative that while article 1.2.6 of the tender document required the lead partner of a Joint Venture to demonstrate that he had the ability to carry out at least 50% of the project by its own means, something which her client amply demonstrated, it did not specifically require the lead partner to carry out a minimum of 50% of the works;
- having also noted the Contracting Authority's counter argument that the tender document was a standard document as provided by the Department of Contracts;

- having also noted that according to the Contracting Authority the article should be read in its totality and should be interpreted as requiring that the lead partner should take at least 50% responsibility of the works to be carried out and that the appellant was not disqualified because he lacked the ability to carry out the minimum percentage of the works involved but because he failed to accept responsibility as lead partner for a minimum of 50% of the works;
- having also given cognizance to Dr Lia's remark that the Joint Venture form concerned the apportionment of responsibility of each participant for the works to be carried out and not to demonstrate past performance;

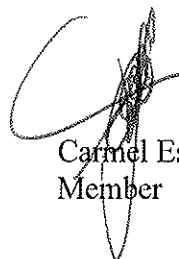
came to the following conclusions:

1. The Public Contracts Review Board recognises the validity of the appellant's interpretation of clause 1.2.6 whereby it may be understood that the lead partner was only required to demonstrate his ability to carry out a minimum of 50% of the works without necessarily undertaking to actually carry out this percentage of the works;
2. The Board also recognises the Authority's counter argument that the Joint Venture declaration would be useless if interpreted in the appellant's way since it was the lead partner as the designation implies who should shoulder responsibility for the major part of the project;
3. The Board is also aware that the way the article is worded may give rise to ambiguous interpretation and strongly recommends that it is amended to render it more clear.

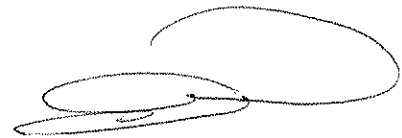
In view of the above, the Public Contracts Review Board finds against the appellant; however, since the wording in the tender document may have given rise to ambiguous interpretations, recommends that the deposit paid by the appellant be reimbursed in full.



Joseph Croker
A/Chairman



Carmel Esposito
Member



Paul Mifsud
Member

10 September 2012.