

PUBLIC CONTRACTS REVIEW BOARD

Case 1029 – REST 78/2016 – Tender for the Restoration Works at St John Almonier Bastion, Bormla

The Publication Date of the Call for Tenders was 25 November 2016 whilst the Closing Date for Call of Tenders was 23 December 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 119,535.05.

Three (3) Bidders have submitted offers for this Tender.

On 13 February 2017, Vaults Co Ltd filed an Objection against the decision of the Restoration Directorate to award the Tender to Capece Construction for the price of € 99,995.70 (Exclusive of VAT) against a deposit of € 598.

On 13 February 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Vaults Co Ltd

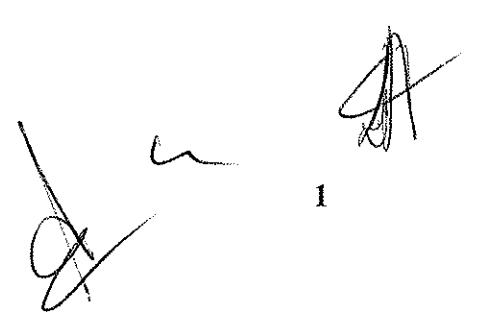
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| Mr Ivan Farrugia | Representative |
| Dr Alessandro Lia | Legal Representative |

Recommended Bidder – Capece Construction Ltd

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| Ms Josephine Casabene | Representative |
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Contracting Authority – Restoration Directorate

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| Architect Chanelle Busuttil | Chairperson, Evaluation Board |
| Mr Keith Muscat | Secretary, Evaluation Board |
| Architect Dorianne Cachia | Member, Evaluation Board |
| Architect Mario Ellul | Member, Evaluation Board |
| Mr Dennis A Attard | Representative |
| Mr Norbert Gatt | Representative |



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Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Alessandro Lia, the Legal Representative for Vaults Ltd, opened by asking the Public Contracts Review Board whether he can summon some witnesses prior to his submissions for which the latter consented.

At this point, Mr Joseph Saliba, a Senior Executive within Jobsplus holding ID Card Number 23759 M was summoned by Vaults Ltd to testify under oath before the Public Contracts Review Board.

Following Mr Saliba's testimony, Dr Alessandro Lia, the Legal Representative for Vaults Ltd summoned his client, Mr Ivan Farrugia, holding ID Card Number 184381 M to testify under oath before the Public Contracts Review Board.

At the end of this testimony, Dr Lia once again requested for another witness, namely the Chairperson of the Evaluation Board. At this point, Architect Chanelle Busutil, holding ID Card Number 388174 M was summoned to testify under oath before the Public Contracts Review Board.

Following Architect Busutil's testimony, Ms Josephine Casabene, on behalf of Capece Construction Ltd submitted that they were technically and eligibly compliant because they have submitted all the documentation as requested. They were committed to this Tender and in the past they have always performed and in due of this Ms Casabene saw no point in the Appellant's claims.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, then asked Architect Busutil whether during their Evaluation they were comfortable with the declarations submitted that the works can be done in accordance with the Technical Specifications of the Tender Document for which the latter agreed.

Mr Ivan Farrugia, on behalf of Vaults Ltd, replied that they held the Restoration Department's Architects whom they have worked together in many circumstances in high esteems but that they have made the Objection against the system. Mr Farrugia beleived that the Evaluation Board was bound by any declaration which any Bidder could have submitted. This is a system which penalised whoever played by the Book like the Appellants were doing.

When a company employs people, the latter tries to do what is possible to work projects on one hand and finishing break even on the other hand so that you can keep working and recovering in future projects. The current system penalises companies like Vaults Ltd who have people ready to work while other companies do not have, or have few persons employed with them and they sub contract everything whilst taking an advantage since he does not have recurrent expenses.

Mr Ivan Farrugia referred then to a press release issued by the European Parliament wherein there was the desire to abolish sub contracting from Tenders because the latter might give way for social abuses. He placed a deposit in order to raise his voice so that the system can be arranged so that companies like the Appellants would not be penalised.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board agreed with the Appellant and added that seminars were being held in Brussels relating the matter since the European Union is working to remove sub contracting and all of its abuses. On the other hand, with how the Regulations are currently formulated, a simple declaration can be enough.

If problems occur at a later stage, then the Contracting Authority can make the necessary remedies but for this case, it was not the issue.

Dr Cassar agreed also with the Appellant that there should be an Evaluation of whoever was tendering but the way with which the current regulations are formulated, Bidders had to comply with what the Tender Document states.

Mr Ivan Farrugia, representing Vaults Ltd said that if the Key Experts were employed with the Recommended Bidder, he would have admitted that there was no basis for them to raise their Objections but Vaults Ltd, after some research, found out that the Key Experts mentioned, such as the Builder and the Restoration Technician were not employed with Capece Construction.

The findings of their research continued to sustain the arguments which Vaults Ltd had to file an Objection against the Tender Award since the Builder proposed by Capece Construction Ltd had to go and sign the notification sign by MEPA when he was not even employed, or at least part of a Joint Venture, with them.

Mr Farrugia continued that this was not unfair given the fact that his company had three licensed Builders while another Bidder without even a Builder was awarded the Tender. The same goes for the Restoration Technician. The Appellant, although working with an Architect, did not have the latter registered under his company and this was known to the Restoration Department whilst on the other hand all other workers were registered as employed under Vaults Ltd.



The Appellants continued asking whether this System can be changed since previously Jobsplus Certificates and tools to be used had to be submitted which nowadays was not the case anymore since at the moment, speculators are being favored.

Dr Alessandro Lia, the Legal Representative for Vaults Ltd added that with respect to the questions of eligibility, selection and technical compliance, it was clearly resulted that for the year 2016 up till 7 March 2017, Capece Construction Ltd had only five workers registered as working with them according to Jobsplus excluding Ms Casabene and the Director himself.

These five workers, which did not cover all the trades needed for this Tender, since they are two manual workers, an assistant mason, a labourer and a plaster. Dr Lia also wondered why the Recommended Bidders kept five workers provisionally Terminated under their books, so that twelve workers were appearing to work with them when in reality, for the previous year and a half they had only five workers while at the same time, they had other contracts going on. Capece Construction Ltd cannot suddenly employ eight or whatever number of workers was needed in order for them to satisfy the Tender Requirements, according to the Appellants.

Dr Lia continued explaining that the Restoration Department were resting on the declaration "*Not Applicable*" submitted by the Recommended Bidders and then whatever happens later was not of interest to them. This was not the case since it was exactly what the Tender Document was requesting.

Dr Lia then referred to the Tender Document which said that the maximum amount of Sub-Contracting must not exceed 40% of the total amount of the Tender Value. In this case, the Recommended Bidders, do not have the necessary workers to honour the Contract as was clearly shown during this Public Hearing.

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Finally, with regards to the price, Vaults Ltd offered approximately € 140,000 against the € 99,000 of Capece Construction Ltd and this clearly indicated that the latter was making a false declaration, concluded Dr Alessandro Lia.

At this stage, the Public Hearing was adjourned to Tuesday 28 March 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

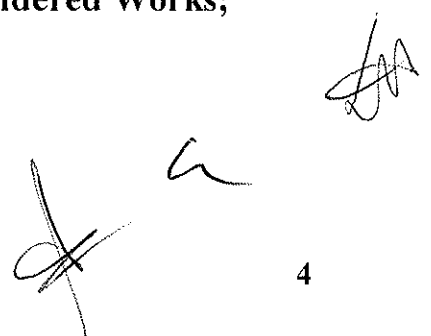
Having noted this Objection filed by Vaults Co Ltd (herein after referred to as the Appellant) on 13 February 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference REST 78/ listed as Case No 1029 in the records of the Public Contracts Review Board, awarded by the Restoration Directorate (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Alessandro Lia

Appearing for the Contracting Authority: Architect Chanelle Busuttil

Whereby, the Appellant contends that:

- a) With the present workforce and resources, Capece Construction Ltd was not technically compliant to carry out the Tendered Works;**



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- b) The Recommended Bidder cannot carry out the works without subcontracting an amount of works which by far exceeds the maximum of 40% as stipulated in the Tender Document

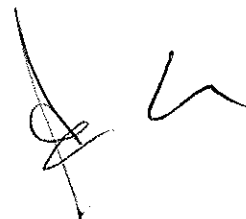
This Board also noted the Contracting Authority's "*Letter of Reply*" dated 13 February 2017 and its verbal submissions during the Public Hearing held on 14 March 2017, in that:

- a) The Restoration Department maintains that Capece Construction submitted all the requested documentation and was the cheapest. Apart from being fully compliant, the Recommended Bidder submitted the necessary declaration that he will carry out the Tendered Works in accordance with the dictated specifications and conditions.

In this regard, the Contracting Authority insists that it had carried out the Evaluation Process in a fair and just manner and conformed with the Public Procurement Regulations.

This same Board also noted the Testimonies of the witnesses namely:

- i) Mr Joseph Saliba, Senior Executive, Jobsplus;



ii) Mr Ivan Farrugia, Vaults Ltd;

iii) Architect Chanelle Busuttil, Chairperson, Evaluation Board

who were duly summoned by Vaults Ltd.

This Board has also noted the documents submitted by Mr Joseph Saliba which consisted of:

- i) Documentation relating to the Registered Employees within Capece Construction Ltd, the Recommended Bidders for this case.**

This Board, after having treated the merits of this case, arrived at the following conclusions:




- 1. With regards to Vaults Ltd's First and Second Grievances, this Board, after having examined the relevant documentation and heard credible submissions from the Witnesses duly summoned, would like to respectfully opine that the Tender Document stipulated that a declaration was to be submitted by all Bidders wherein, the latter were to bind themselves to carry out the Tendered Works in accordance with the Technical Specifications and conditions as dictated in the Tender Document.**



One of these conditions was that the sub-contracting must not exceed 40% of the works to be carried out. In this particular case, Capece Construction Ltd declared that no sub contracting will be made and therefore, they will carry out the Tendered works according to the Technical Specifications and all other conditions.

In this regard, this Board would like to refer to the Circular 19/2013 issued by the Department of Contracts on 16 December 2013 wherein for Tenders below € 500,000, the experience criteria has been eliminated. However, as said in the same circular, there are other criteria that may be utilised to ascertain the Technical Capacity of economic operators.

In this regard, this Board refers to the condition of sub contracting, in that not more than 40% of the works is allowed. In this particular instance, although Capece Construction Ltd signed the necessary declaration that they will not sub contract, the Evaluation Board could have verified whether the latter were capable to fulfil their obligations as they have declared.



This Board opines that although the declaration should suffice, the Evaluation Board should exercise more due diligence when assessing the viability of the Technical Capabilities of the Bidder.

In this case, the Declaration was signed by the Recommended Bidder and in so far as compliance is concerned, at this stage, the Evaluation Process was carried out in accordance with the proper procedure as stipulated in the Public Procurement Regulations.

However, it is the responsibility and obligation of the Restoration Department to ensure that Capece Construction Ltd executes the Tendered works without any subcontracting, as duly declared by the same, to the satisfaction of the Department.

- 2. This Board noted with interest the credible comments and submissions made by Vaults Ltd. However, as stated during the Public Hearing, this Board's jurisdiction is to assess and determine whether the Evaluation process was carried out in a fair and just manner.**

In this regard, this Board opines that the correct procedure was adopted by the Evaluation Board, in that the declaration submitted by Capece Construction Ltd, had to be taken into account and



considered as acceptance and compliance with the Technical Specifications and conditions as dictated in the Tender Document.

In arriving at its decision, this Board took also into consideration the fact that, should Capece Construction Ltd fail to abide by its declaring obligations, there are other remedies to rectify or alleviate the situation.

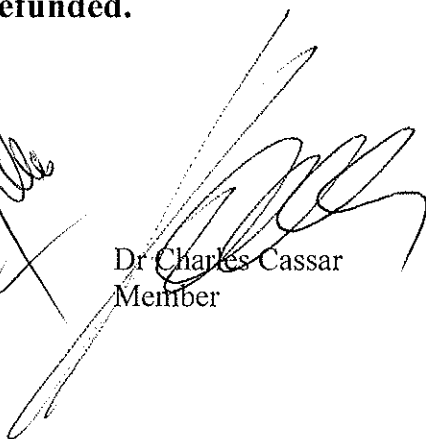
On the other hand, this Board would like to emphasize the importance of the Technical Capacity Assessment which should be carried out by the Evaluation Board to avoid such events from happening.

In view of the above, this Board confirms the Restoration Department's decision to award the Tender to Capece Construction Ltd. However, due to certain circumstances, this Board recommends that the deposit paid by Vaults Ltd should be refunded.

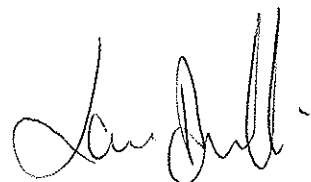
Dr Anthony Cassar
Chairman



Dr Charles Cassar
Member



Mr Lawrence Ancilleri
Member



28 March 2017