

Public Contracts Appeals Board

Case No 283

Adv. No. CT 121/2010

DH/755/2010 ; CT 2138/2010

Tender for the recruitment of Agencies to supply Qualified Nurses, Qualified Pharmacist and Qualified Occupational Therapists

This call for tenders was published in the Government Gazette on the 25th May 2010. The closing date for this call for offers was 15th July 2010 and extended to 26th August 2010.

The estimated value of this tender is Euro 500,000

Five (5) bidders participated in this tender.

On 4th March 2011, Dr Philip Farrugia LLD, on behalf of Raymond Bonavia Company Ltd, filed an objection against the award of this tender to Vira International Placements PVT Ltd (India) and TGS Co Ltd (Malta) for Euro 646,640, after being informed that his client's offer was not successful as it was deemed to be administratively non compliant.

The Public Contracts Appeals Board composed of Mr Edwin Muscat as Chairman and Mr Carmelo Esposito and Mr. Joseph Croker as members convened a public hearing on Friday 29th April 2011 to hear this objection.

Present at this meeting were:

Raymond Bonavia Co. Ltd.

Dr Paul Farrugia

Mr Raymond Bonavia

Legal Representative

Representative

Vira International Placements PVT (India) and TGS Co. Ltd. (Malta) (TGS Ltd)

Mr Anthony V Mifsud

Representative

Health Division - Ministry of Health, the Elderly and Community Care

Evaluation Board

Mr Edward Borg

Ms Alison Anastasi

Mr Joseph Barbieri

Mr Jesmond Sharples

Chairman

Member

Member

Member

Department of Contracts

Mr Francis Attard

Director General

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

Dr Farrugia explained that the Department of Contracts, by means of an email dated 25th February 2011, informed his client that his tender was "deemed to be administratively non compliant, since, although asked to rectify the bid bond's delivery date, this was not rectified." Dr Farrugia claimed that the bid bond submitted by his client was valid until 14th January, 2011 which was the original validity date required by the tender. He added that by letter dated 22nd February, 2011, his client was notified by the Contracts Department that the bid bond which had expired on 14th January 2011 needed to be extended up to the 14th June 2011. Dr Farrugia noted that this letter (dated 22nd February) was posted on the 23rd February and delivered to his client on the 25th February. Thus, the notification to effect the necessary amendment to the bid bond took place a day after the final adjudication of the tender as results from the relative notice posted on the Department of Contract's web portal.

Dr Farrugia then referred to Section 20.1 of the tender document which, inter alia, provided tenderers with the opportunity to rectify within two working days from notification, tender guarantees with an incorrect validity date. He added, that the bid bond submitted by his client as part of their offer had already been extended by the Bank of Valletta up to 14th April 2011 and the Department of Contracts had been informed of this by a letter sent directly by the Bank on 27th December 2010. Therefore, Dr Farrugia claimed, that in actual fact, when the letter stating that the bid bond had to be extended was sent to his client by the Department of Contracts, the bid bond was already valid until the 14th April, 2011.

In conclusion, Dr Farrugia complained that his client had been disqualified from this tender adjudication process without having been given the right to rectify his bid bond within the two days provided by the tender document. This happened because he was notified of relative irregularity the day after the tender was adjudicated.

In reply, Mr Edward Borg, Chairman of the Evaluation Board, stated that following the Department's decision to extend the closing date of this tender to 26th August, 2010, bidders were asked to extend their bid bond accordingly. Eventually, by means of an email dated 14th October 2010, the Contracts Department informed appellant of this administrative shortcoming, namely that "the validity date of your submitted bid bond should read 25th August, 2011." In terms of Article 1.1 of the Instructions to Tenderers, bidders were also given the opportunity to rectify this shortcoming. By email dated 19th October 2010, the contracting authority was instructed by the Contracts Department to note that Raymond Bonavia Ltd had not rectified his administrative shortcoming. On receipt of this email, the evaluating board had no option but to proceed with the evaluation process and decided to discard appellant's offer on the grounds that it was administratively non-compliant.

Dr Farrugia intervened to state that his client did not receive the email dated 14th October 2010 referred to by Mr Borg. He confirmed that the email address was correct but neither Mr F Agius (Mr Bonavia's designated representative) nor Mr Bonavia had ever received that email. Dr Farrugia contended that the communications between the Department and

the tenderers should have been conducted through the post and not by electronic mail. He added that the tender document did not specifically lay down that notification by email was sufficient or acceptable.

The Chairman intervened to state that both the Public Contracts Regulations (L.N. 177 of 2005) as well as the Public Procurement Regulations (L.N. 296 of 2010) provided for the use of electronic means.

At this stage, Mr Raymond Bonavia, the appellant, was asked to confirm under oath, that his firm did not receive the email in question. In taking the oath, Mr Bonavia also claimed that he could not trace that email even through his Internet Service Provider (ISP).

When asked to comment on the claims made by appellants, Mr Francis Attard, Director General (Contracts) confirmed that the relative email was sent by the Department of Contracts on the 14th October 2010 to the email address indicated by appellant in his offer. He also confirmed that (a) the letter dated 22nd February, 2011 was sent by an officer at the Department's section that watched over the validity period of the guarantees with a view to informing bidders to take appropriate action to maintain a valid bid bond. and (b) the letter dated 22nd February 2011 was unrelated to the evaluation process and that it was not issued for the purpose of Section 20.1 of the tender document, as claimed by appellant, so much so that the evaluation process had started months before and the appellant had been instructed to extend his bid bond way back on 14th October 2010, whereas the tender was awarded on the 25th February, 2011, and (c) it was normal practice to communicate with tenderers via email in order to expedite matters and also because the Public Procurement Regulations provided for communications to be made through electronic means (L.N. 296 of 2010—Public Procurement Regulations – Reg 84 (1)).

In reply, Dr Farrugia stated that his client had a letter from his internet service provider attesting that his client had not received the email dated 14th October, 2010. Unfortunately, he was not in a position to produce that letter at the hearing. He added that however, he would not contest written evidence that the Department of Contracts might produce confirming that the said email had, in fact, been delivered to his client.

The Chairman stated that once the hearing had reached this impasse, the Board will be checking with the internet service providers on whether the relative email had in fact been delivered to appellant or not. Eventually, the Board would decide on the result obtained.

At this point, the hearing came to a close.

On the 6th May 2011, the Contracts Department received confirmation from the Malta Information Technology Agency (MITA), the public administration Internet Service Provider, to the effect that the relative email “was sent from our system, however, we cannot be sure if it was actually delivered in the recipient's mailbox. In order to check if it was in fact delivered, you will need to contact melita”.

On the same date, that is, on 6th May, 2011, the Contracts Department received the following statement from Melita plc -appellant's Internet Service Provider - "I refer to your request.....From our records, we confirm that the email was received on our mail server on the 14th October 2010 at 11:50am, but the email was not delivered to the mailbox, as the mailbox was full."

The Board,

- Having noted that the appellant in terms of the reasoned letter of objection dated 4th March 2011 and also through their verbal submissions presented during the public hearing held on 29th April, 2011 had objected to the decision taken by the General Contracts Committee;
- Having considered the submissions forwarded by Dr Farrugia, appellant's legal adviser, particularly his insistence that his client was disqualified from the tender adjudication process without having been given the right to rectify his bid bond within the two working days as provided in the tender document because he was notified of relative irregularity a day after the tender was adjudicated;
- Having taken note of the reply given by Mr Edward Borg, Chairman of the Adjudicating Board, namely (a) that following an extension of closing date of tender, Contracts Department informed appellant by email dated 14th October 2010 that the bid bond should be extended up to 25th August, 2011, and (b), Raymond Bonavia's failure to extend the bid bond as directed, and (c) that once appellant failed to extend the bid bond, the evaluating board decided to discard his offer;
- Having noted (a) Dr Farrugia's declaration that his client had never received the email of the 14th October referred to by Mr Borg and (b) Mr Raymond Bonavia's confirmation of same under oath.
- Having considered the comments made by Mr Francis Attard, the Director General (Contracts) particularly (a) his assertion that the email of the 14th October 2010 had been sent to appellant, and (b) that the letter dated 22nd February, 2011 was unrelated to the evaluation process and that it was not issued for the purposes of Section 20.1 of the tender document, and (c), the Public Procurement Regulations provide for communications to be made by electronic means.
- Having taken note of the email received from Malta Information Technology Agency (MITA the public administration's internet service provider, confirming that the relative email was sent from their system, but they cannot be sure that it was actually delivered to appellant.
- Having taken note of Melita plc's (appellant's ISP) declaration that according to their records, they confirm that the email was received on their mail server on the

14th October, 2010 at 11:50am, but the email was not delivered to appellant's mailbox, as that mailbox was full

Reached the following conclusion, namely, that

1. the main issue in this case centres on whether the email of the 14th October 2010 was sent by Contracts Department and delivered to appellant or not
2. the Board is satisfied that the email was sent by Contracts Department as has been confirmed independently by both the Malta Information Technology Authority, which is the public administration's IT operator and Melita plc, the appellant's internet service provider
3. the Board is satisfied that the relative email was not delivered to appellant, not because the Contracts Department had not honoured its commitments as per instructions to tenderers to inform bidders to rectify their bid bond, but because appellant's failure to maintain properly his mailbox when he allowed it to remain full, thus preventing further email deliveries

In view of points 1 to 3 above, this Board finds against the appellant. As a result, this Board recommends that the deposit submitted by the said appellant should not be reimbursed.

Edwin Muscat
Chairman

Carmel Esposito
Member

Joseph Croker
Member

17 May 2011