

PUBLIC CONTRACTS REVIEW BOARD

Case No. 950 – CT 2003/2013/4093: Tender for East Region Major Patching at Tal-Barrani Road, Zejtun.

The Tender was published on the 11th February 2016. The closing date was on the 23rd February 2016. The estimated value of the Tender is €191,053.29 (Exclusive of VAT).

Five (5) bidders had made offers for this Tender.

On the 29th April 2016 Northwind Investments Limited filed an Objection against the decision of the Contracting Authority to declare its Tender financially non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 30th June 2016 to discuss the Objection.

Present for the hearing were:

Northwind Investments Limited:

Mr Carmelo Penza	Representative
Ms Francesca Penza	Representative
Mr Manuel Fenech	Representative
Dr Alex Schembri	Legal Representative

Schembri Infrastructures Limited:

No representatives

Transport Malta:

Mr George Attard	Chairperson Evaluation Board
Ms Chiara Psaila Gauci	Secretary Evaluation Board
Mr Jorge Spiteri	Member Evaluation Board
Mr Ray Stafrace	Representative
Ms Liz Markham	Representative

Department of Contracts:

Dr Chris Mizzi	Legal Representative
Dr Franco Agius	Legal Representative

The Chairman made a brief introduction and invited the Appellant's representative to make his submissions.

Dr Alex Schembri on behalf of Northwind Investments Ltd submitted that:

- i) His client's offer had been the cheapest;
- ii) The Appellant's Tender had been disqualified because no reply to a clarification note asking for confirmation of an arithmetical correction had been given. This correction did not in fact change the fact that the Appellant's offer remained the cheapest;
- iii) Northwind Investments Ltd had not received the email requesting the arithmetical correction sent by the Contracting Authority;

Dr Schembri contended that his client did not receive the confirmation request because the email was stuck in another server and not the spam folder of his computer. He also claimed that such emails asking for confirmation are usually followed by a telephone call, but in this case this was not done.

Mr Manuel Fenech, ID No 372481M, under oath stated that he was a network engineer and was the system administrator. MDAemon is the server used to run clients' emails that are then forwarded through Outlook. The server in question was owned by Northwind. When emails are sent to Northwind domain, these are checked by him through MDAemon for spam and later forwarded to the client.

The witness had recently increased the security level of the mail spam filter because there had been some malware programmes going through the email system. The new level of security had flagged the email arriving from the Contracting Authority as spam so it was withheld.

When Ms Penza, on behalf of Northwind Investments Ltd, had informed him of non-receipt of email he had flagged the email in question as 'not spam' and opened it in order to enable the client to view it. The Appellant had no access to the server and could not see it before witness cleared it. The email had been received by the Appellant's server but could not be seen on Appellant's PC before witness cleared it as not being spam.

Northwind Investment's server is located at Appellant's office but because of the virus threat witness had installed a spam filter on the server that blocked any email flagged as spam. The Contracting Authority's email had been delivered to the Appellant's address and the Contracting Authority had received the delivery report since the address was correct.

The email did not contain any virus but the subject may have triggered the spam filter. The email could not be seen by the Appellant until un-flagged by witness. A user could refuse to send to e-mailer a 'read receipt'.

Mr Carmelo Penza, ID No 9855M under oath testified that he had become aware of the email containing the request for clarification after the disqualification of Appellant's Tender. He suggested that in such cases a telephone call should be made to complement the emails.

Mr George Attard, ID No 757656M, the Chairman of the Evaluation Board, under oath stated

that Northwind Investments Ltd had made an error in the submitted amount asking 17% surcharge instead of the fixed 20% surcharge for emergency evening service provided. The Appellant had changed the cost of the charge for additional services.

This was the arithmetical correction that the Appellant had to confirm.

Dr Franco Agius on behalf of the Department of Contracts pointed out that it was illegal for the Evaluation Board to contact a bidder by telephone during adjudication. He also pointed out that there was a framework agreement and this Tender was one of the works forming part of that agreement.

The Chairman remarked that the Board understood that the email had been sent by the Contracting Authority and that it had arrived at the Appellant's server but however could not be read.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 29 April 2016 and also through their verbal submission during the Public Hearing held on 30 June 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) **Northwind Investments Ltd maintains that its offer was discarded due to the simple fact that they did not reply to a clarification regarding an arithmetical error. In this regard, the Appellant contends that he was not in a position to note the receipt of this clarification and this happened through no fault of his but because his IT System did not allow for such a notification as the server of the system recognise the E-Mail as Scam;**

- b) The Appellant also contends that the remittance of the Clarification should have been followed up by a Telephone Call as was usually done in the past.**

Having considered the Contracting Authority's "*Letter of Reply*" dated 22 June 2016 and also their submissions during the Hearing held on 30 June 2016, in that:

- a) Transport Malta maintains that it had sent the clarification and, as can be confirmed, this was received on the server of the Appellant. It is not the Contracting Authority's concern that Northwind Investments Ltd had an IT Problem in their System.**

In this regard, the Contracting Authority contends that it had fulfilled its duties in accordance with the proper and prudent procedure to arrive at a Transparent and just Evaluation Process;

- b) The Contracting Authority contends that it is not mandatory on its part to follow up the remittance of the Clarification by a Telephone call. In fact, during the Evaluation Process, no contact with any bidder is permitted.**

Reached the following conclusions:

- 1. With regards to Northwind Investment Ltd's First Grievance, this Board, after having examined the documentation relating to this Appeal and having heard all the submissions made by all parties concerned during the Public Hearing, justifiably opines that the main issue of this Appeal is the "*Remittance and Receipt*" issue.**

First of all this Board, through credible testimony made under oath by the Network Engineer, has established that the Transport Malta did in fact send the Clarification Note on 22 April 2016. It was also confirmed that the latter had also sent the e-mail to the correct address and also, through submissions made by Mr Manuel Fenech, it was confirmed that the e-mail has arrived at the Appellant's Server.

In this regard, this Board justifiably asserts that the Contracting Authority acted in the proper manner in accordance with the Public Procurement Regulations.

However, this Board credibly notes from the Engineer's letter on behalf of Link Systems Ltd, who were the server providers to

Northwind Investments Ltd, that due to the fact that the e-mail regarding the clarification was stuck in the “*Spam Trap*” of the mail server, the e-mail could not be received or read by the Appellant on his Computer Inbox.

The Hinge Point of this Appeal is whether Northwind Investments Ltd was in a position to reply to the Clarification in the specified period. This Board opines, after having been re-assured by Mr Manuel Fenech, representing Link Systems Ltd, the server providers, that the Appellants could not read the e-mail regarding the Clarification, at the stage when such an e-mail had to be read and replied accordingly within the specific Time Frame.

This Board also notes that the Appellant was aware that such an e-mail was sent by the Contracting Authority and not replied after receipt of the “*Letter of Rejection*” dated 19 April 2016, so that the sequence of events justify the Contents of Link Systems Ltd dated 27 April 2016.

In this regard, this Board opines that although the Contracting Authority acted in a diligent manner during the Evaluation Process, Northwind Investments Ltd was not in a position to note that a

Clarification, through an e-mail was sent by the Contracting Authority for which a reply was to be given within a stipulated period of time. The Appellant Company was made aware that such an e-mail was sent via the “*Letter of Rejection*” dated 27 April 2016.

Without throwing any bad impression on the Evaluation Board and the procedure adopted by the latter, which has already been confirmed by this Board; the latter upholds the Appellant’s First Grievance.

- 2. With regards to the Appellant’s Second Grievance, this Board would confirm that it is not Transport Malta’s obligation to follow sent e-mails to prospective bidders by way of a Telephone. In fact, the Evaluation Board is strictly forbidden to enter into any type of contacts with the Bidders during Evaluation Stage. In this respect, this Board does not uphold the Appellant’s Second Grievance.**

In view of the above, this Board recommends that:

- a) The Appellant’s Bid is to be re-integrated in the Evaluation Process;**

**b) The Deposit paid by the Northwind Investments Ltd for this Appeal
is to be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

5 July 2016