

PUBLIC CONTRACTS REVIEW BOARD

Case 1742 – CFT009-0807/21 (CPSU0714/21) – Tender for the Supply and Installation of Vinyl and Thresholds

20th June 2022

The Board,

Having noted the letter of objection filed by Dr Peter Fenech on behalf of Iuris Advocates acting for and on behalf of Mark Schembri and Sons Ltd, (hereinafter referred to as the appellant) filed on the 5th May 2022;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 16th May 2022;

Having heard and evaluated the testimony of the witness Mr Mark Schembri (Representative of Mark Schembri and Sons Ltd) as summoned by Dr Peter Fenech acting for Mark Schembri and Sons Ltd;

Having heard and evaluated the testimony of the witness Mr Jesmond Darmanin (Service provider to Mark Schembri and Sons Ltd) as summoned by Dr Peter Fenech acting for Mark Schembri and Sons Ltd;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 15th June 2022 hereunder-reproduced.

Minutes

Case 1742 – CFT 009-0807/21 – Tender for the Supply and Installation of Vinyl and Thresholds

The tender was issued on the 7th September 2021 and the closing date was the 1st October 2021. The value of the tender, excluding VAT, was € 130,652.80

On the 5th May 2022 Mark Schembri & Sons Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not technically compliant.

A deposit of € 655 was paid.

There were two (2) bids.

On the 15th June 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mark Schembri & Sons Ltd

Dr Peter Fenech	Legal Representative
Mr Joseph Gherxi	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Ms Karen Scicluna	Chairperson Evaluation Committee
Mr Hristov Hristo Ivanov	Secretary Evaluation Committee
Eng Patrick Borg Cardona	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Peter Fenech Legal Representative for Mark Schembri & Sons Ltd said that this appeal hinged on the disqualification on the lack of receipt of an e-mail communication despite the fact that Appellant’s bid was fully compliant. The fact that Appellant failed to reply to an email does not entitle the Contracting Authority to decide that the bid was not compliant.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit stated that this appeal was simple – the failure of the Appellant to reply to an e-mail seeking an extension of the validity of their offer meant the Authority could not consider the bid any further; whether it was compliant or otherwise.

Mr Mark Schembri (424962M) called as a witness by the Appellant testified on oath that he verbally enquired about the state of the tender and was directed to messages on the EPPS system. On checking the system he traced several emails which he had not seen before.

Mr Jesmond Darmanin (19483M) called as a witness by the Appellant testified on oath that he ran a company providing website services and systems. He stated that he was requested by Mark Schembri to find out why he was not receiving e-mails. On checking witness found out that e-cloud was blocking e-mails through a spam filter due to a heavy load of messages – quite a normal practice (Doc1 SML 1 in the letter of appeal). This system was triggered automatically.

Questioned by Dr Camilleri witness said that the spam filter was part of the system used by Appellant not by the Department of Contracts and that evidence existed of the e-mails in the spam folder.

Dr Fenech said there must be certainty that e-mails sent were received. It was not right that Appellant was not allowed to participate in the tender when the bid was compliant and the

unfortunate triggering of a virus should not affect the outcome. Justice demands the continuation of the process.

Dr Camilleri said that the system operates online and everything should be done on that basis. The Authority sends a large amount of e-mails on a daily basis and the Appellant should have been alerted that something was wrong when the e-mail ceased coming in. Why should the bidder not be excluded when he had failed to reply to a simple request. The General Rules on Tenders back the decision taken and if these Regulations had not been followed it would have elicited complaints from other participants. The failure was on Appellant's part.

Dr Fenech said that since the e-mail was not replied to there should have been a follow-up by the Authority – this was not a case of trying to take an unfair advantage but simply a case of remedying an injustice.

Dr Camilleri re-iterated that it was up to the Appellant to ensure that e-mails were checked – it was not a question of natural justice but of Public Procurement Regulations.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 15th June 2022.

Having noted the objection filed by Mark Schembri and Sons Ltd (hereinafter referred to as the Appellant) on 5th May 2022, refers to the claims made by the same Appellant with regard to the tender of reference CFT009-0807/21 (CPSU0714/21) listed as case No. 1742 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Peter Fenech

Appearing for the Contracting Authority: Dr Leon Camilleri

Whereby, the Appellant contends that:

- a) Towards the end of December 2021, specifically on the 18th, during a call with Mater Dei personnel in relation to the status of vinyl flooring works at Mater Dei, as per an existing contract agreement (Reference CA-19-2115-009-22), it transpired that a clarification had been issued on the e-Tendering platform which related to the tender in question (Reference CHI009-007), and that Mark Schembri and Sons Ltd. had been disqualified as a consequence of their failure to reply. The clarification requested interested parties to *“confirm extension of the validity of your offer with further 8 weeks - new validity is to be considered 1 March 2022.”*
- b) Seeing that this clarification was never notified to Mark Schembri and Sons Ltd. by way of email from Malta -Procurement as is the standard practice, an immediate investigation was carried out in to the matter. After a telephone conversation with the IT Department within the Department of Contracts, it transpired that the clarification was not in fact sent to their email. This was subsequently confirmed by an external IT consultant who informed the appellants that *“the e-tenders emails were blocked by the cloud-based spam filter, and therefore, they were not reaching your mailbox. The volume of emails sent by the Tendering system, commonly triggers such filters.”* Following this unjust and legally incorrect disqualification, the Appellant is hereby filing this appeal. Such objection is based on the fact that Mark Schembri and Sons Ltd. cannot be held responsible for a technical and information error that was beyond their control. It is abundantly clear that the clarification was not addressed solely because personnel in my client's employ couldn't be made aware that such a request had been instructed. This especially when taking into consideration the simplicity of the requested clarification, coupled with the fact that Mark Schembri and Sons Ltd. had been requesting updates on the tender progress for several months from Mater Dei personnel. Additionally, it should also be pointed out that as to the tender in caption, the offer is indeed technically compliant.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 16th May 2022 and its verbal submission during the virtual hearing held on 15th June 2022, in that:

- a) The objector is alleging that it was not receiving electronic public procurement system (e-PPS) notifications by email and should not suffer the rejection due to this alleged reason. The objector alleges the email was not sent to the objector (allegedly confirming with the IT Department) however in the same paragraph quotes an independent IT consultant that the email did not reach the inbox of the objector due a cloud based spam filter.
- b) The independent IT consultant told the objector that the representative of the objector (sic) that. *“The -tenders emails were blocked by the cloud-based spam filter, and therefore, they were not reaching your mailbox. The volume of emails sent by the Tendering system, commonly triggers such filters”* The cloud based spam filter is a feature which relates to the email of the objector and is not in any way related to the IT system of the Department of Contracts. Since the e-PPS emails have been blocked by the spam filter, it is

a certification that the email has it has (sic) in actual fact been sent by the e-PPS systems, as will be further explained during the sitting.

- c) In fact the reply from European Dynamics, the company responsible for the e-PPS system, the below feedback was received. *“According to our technical investigation it seems that the automated e-mail notification regarding the Evaluation clarification request, has been successfully sent to the e-mail address info@msa.com.mt, which is associated with the user Mark Schembri from the EO “Mark Schembri and Sons Ltd”, on 09/12/2021 at 08:35. Furthermore, the e-mails regarding the clarification deadline reminder has been successfully sent to the e-mail address info@msa.com.mt, which is associated with the user Mark Schembri from the EO “Mark Schembri and Sons Ltd”, on 10/12/2021 at 01:08, on 11/12/2021 at 01:06, on 12/12/2021 at 01:06, on 13/12/2021 at 01:06, on 14/12/2021 at 01:06, on 15/12/2021 at 01:06 and on 16/12/2021 at 01:05.”*
- d) Moreover and without prejudice to the above, the objector could always check the status of the progress of their bid from the -Tenders web site.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant’s grievances.

- a) Initially this Board will make reference to the General Rules Governing Tenders sections which it deems relevant to this appeal:
- i. Section 10 states: *“The Central Government Authority/Ministerial Procurement Unit/ Contracting Authority may, at its own discretion, extend the deadline for submission of tenders to give Economic Operators sufficient time to take clarification notes into account when preparing their tenders. Economic Operators will be notified with any such extension **through the issuing of a clarification note.**”* (bold emphasis added). Therefore, this Board opines that the rules listed for clarifications also apply to such extensions.
 - ii. Section 16, in various instances, lists and notes that replies to clarification notes are to be done within five (5) working days from notification.
- b) Reference is now made to the testimony under oath of Mr Jesmond Darmanin who confirmed that the spam filter, which caused such emails not to be seen and / or read by the appellant in time, was part of the system used by the appellant and not provided and / or owned by the Department of Contracts. Evidence that such emails were sent by the ePPS system resides in the spam folder.
- c) Such testimony referred in (b) above is also corroborated by document ‘DOK CPSU 1’, whereby the system administrator of ePPS confirmed that such emails were successfully sent to the appellant company.
- d) This Board opines that such issue rests on the IT infrastructure of the appellant company. Given that there were other means by which the appellant could have confirmed the existence of such

clarification notes, such as directly logging into the website / system of ePPS, arguments brought about by appellant regarding natural justice are deemed to be irrelevant.

Hence, this Board does not uphold the Appellant's grievance.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member