

PUBLIC CONTRACTS REVIEW BOARD

Case 2083 – CT2254/2024 – Framework Agreement for the Supply and Delivery of Brand New Fruit and Vegetable Plastic Crates for the Malta Food Agency

9th April 2025

The Board,

Having noted the letter of objection filed by Dr Joshua Grech acting for and on behalf of **Mr Louis Grima**, (hereinafter referred to as the appellant) filed on the 12th September, 2024;

Having also noted the letter of reply filed by Dr John L. Gauci and Dr Mary Rose Micallef acting for and on behalf the Malta Food Agency (hereinafter referred to as the Contracting Authority) filed on the 20th September, 2024;

Having heard and evaluated the testimony of the witness Mr Louis Grima (Appellant) as summoned by Dr Joshua Grech acting for Appellant;

Having heard and evaluated the testimony of the witness Mr Mario Agius (Chairperson of the Technical Evaluation Committee) as summoned by Dr John L Gauci acting for the Contracting Authority;

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 21st January 2025 hereunder-reproduced.

Minutes

Case No 2083 – CT2254/2024 – Supplies - Framework Agreement for the Supply and Delivery of Brand-New Fruit and Vegetable Plastic-Crates for the Malta Food Agency (MFA)

The tender was issued on the 3rd December 2023 and the closing date for Tenders was the 20th February 2024

The estimated value of Tender, excluding VAT was 600,000 euro

A deposit of 3000 euro was paid.

There were six bids

On the 13th March 2025 The Public Contracts Review Board composed of Dr Vincent Micallef as Chairperson, Dr Ana Thomas as Vice Chairperson and Mr Keith Victor Grech as member convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant	Louis Grima
Dr Joshua Grech	Legal Representative
Mr Louis Grima	Company Representative

Contracting Authority - Malta Food Agency

Dr John L. Gauci	Legal Representative
Mr Mario Agius	Chairperson
Mr Clyde Cassar	Evaluator
Ms Nicole Chan	Secretary
Mr Joseph Vella	MFA

Proceedings:

Opening Remarks: The Chairperson commenced the proceedings by inviting the appellant to present their initial submissions.

Appellant's Submissions Dr Joshua Grech.

The appellant submitted two bids for a contract issued by the Malta Food Authority (MFA) for the supply of plastic crates.

Two clarification requests were issued. One was addressed by the appellant. The other requested samples to be supplied within a timeframe that did not adhere to the general conditions.

The sample submission deadline was extended, but the revised timeframe remained non-compliant with the general conditions.

Due to the overseas origin of the crates, the extended deadline was insufficient for the appellant to provide samples.

Both bids were rejected in a single communication, leading to the payment of a single deposit.

The appellant argued that the single rejection letter implied the bids were considered as one.
Chairperson's Intervention:

The Chairperson requested clarification on which bid was under appeal, given the dual submissions.

Appellant's Response:

Dr Joshua Grech reiterated that the single rejection letter necessitated a unified appeal, as the evaluation board had treated the bids as one.

Contracting Authority's Submissions: Dr Gauci

The Contracting Authority asserted that two separate rejection letters were issued, pertaining to bids 205490 and 205491, both dated 20th August 2024.

Document MFA1, the first rejection letter, was presented, citing non-compliance with technical specifications due to the appellant's inclusion of hot point printing (lettering) instead of the specified embossing.

Document MFA 2, a second rejection letter, also dated 20th August 2024, regarding bid 205491 was presented, citing that the bidder did not meet the sample submission deadline.

Dr Gauci insisted that because there were two rejection letters, there should be two separate appeals.

Appellant's Rebuttal:

Dr Joshua Grech stated that the appellant received only the rejection letter dated 3rd September, which addressed both bids.

He argued that had the appellant received the two separate letters of rejection, separate appeals would have been filed.

Dr Grech emphasized that the 3rd September letter used the word "this" bid, rather than "these" bids, indicating a single rejection.

Witness Testimony: Mr Louis Grima

Mr. Grima confirmed submitting two bids from different suppliers.

Clarifications were provided for both bids within the stipulated time.

The initial six-day sample submission deadline was deemed unfeasible.

The deadline was extended by four days, but this remained insufficient.

The first bid was rejected due to the inclusion of hot foiling alongside embossing, contrary to the evaluation board's interpretation.

Mr. Grima presented samples demonstrating that hot foiling and embossing were not mutually exclusive.

Mr. Grima refuted the claim that his technical offer eliminated embossing.

Mr. Grima discussed the second bid, and the issue regarding the time constraints for the sample submissions.

Contracting Authority's Examination (Dr Gauci):

Dr Gauci presented the technical offer sheet and food contact documentation.

Dr Gauci highlighted the absence of embossing references in the appellant's clarification responses. Mr. Grima rebutted that there wasn't any reference either in the literature supporting the technical offer to embossing". The literature only referred to hot-foil printing. However, Mr. Grima insisted that by confirming the technical specifications he had also confirmed the embossing. He had not been asked for further clarifications as allowed under note two.

Dr Gauci questioned the appellants 2nd bid with respect to a clarification request sent by the appellant on the 17 January 2024. Such clarification request included appellant's comments relating to the challenges of being able to provide samples within 4 weeks (suggesting 4 months) and that the samples are costly. Mr. Grima explained that, in the meantime, the appellant had found another supplier who could meet the deadlines.

Witness Testimony: Mr Mario Agius:

Mr Agius, Chairperson of the Technical Evaluation Committee (TEC), stated that clarification was sought for both bids.

The TEC interpreted the appellant's response to the first bid clarification as indicating that hot foiling would replace embossing.

Mr Agius presented document MFA1, dated 20th August 2024.

The appellant had, in fact, been asked for a clarification, requesting the bidder to clarify whether the crates had embossing. Mr Agius confirmed that the appellant's clarification response was a reproduction of the original technical data sheet, showing only the hot-foil printing which could be peeled off or wash off.

Mr Agius, with respect to the second bid, acknowledged a mistake in the initial six-day deadline, which was subsequently rectified.

Mr Agius confirmed that all other bidders submitted samples within the revised timeframe.

Mr Agius stated that all communications were vetted by the Contracting Authority.

Mr Agius confirmed that the TEC interpreted the appellant's response to clause "g" (hot foil printing) as excluding embossing.

Mr Agius confirmed the sample submission deadline was incorrect in the first communication.

Appellant's Cross-Examination (Dr Grech)

Dr Grech questioned the TEC's interpretation of the appellant's clarification response. Dr Grech questioned the TEC's failure to seek further clarification on the embossing issue. Mr Agius reiterated his responses stating that there was no reference of embossing in the literature submitted and that since the TEC was unsure a clarification was submitted. The appellant presented the same document without any reference to embossing.

Dr Grech questioned the timeline of the sample submissions in the 2nd bid. Mr Agius confirmed that initially there was a mistake by the contracting authority which was subsequently amended.

Dr Grech then asked the witness if, at that moment (showing the samples presented to the Board), Mr Agius could determine whether or not these comply with the specifications. Mr Agius said that he was still not sure.

Appellant's Final Submission Dr Grech

The Chairperson directed the appellant to clarify their position regarding the single deposit, referencing regulation 262 sub-article 2, since the appellant insisted that the Board should decide on both cases. The appellant stated that, without prejudice, if the appellant had to selected only one bid, he would choose 205491 (second bid) for consideration. The one being rejected because the client was not able to provide samples in time, where his client (the appellant) has not been given the ten working days to be able to submit the sample.

Dr Grech argued that bid 205490 (the first bid) did not exclude embossing and that hot-foil printing was in fact supplementary to and not instead of as assumed by TEC.

Contracting Authority's Final Submission (Dr Gauci):

Dr Gauci argued that

- the appellant should have clarified any ambiguities in their bid.
- that the TEC had given the appellant a chance to clarify, and the appellant had just resent the original document.
- that the right of clarification only applied once.
- that the sample submission deadline was clearly communicated and that other bidders complied.

Dr Gauci stated the contracting authority acted correctly and legally.

Appellant's Final Rebuttal (Dr Grech)

Dr. Grech reiterated the need for the TEC to have sought further clarification on the embossing issue and reiterated that the sample submission deadline was not ten days.

Closure:

The Chairperson thanked all participants and declared the hearing closed, stating that the Board would deliberate and issue a decision at a later date. The Board will also decide the issue of the deposit.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 21st January 2025.

Having noted the objection filed by Dr Joshua Grech for and on behalf of Mr Louis Grima (hereinafter referred to as the Appellant) on the 12th September, 2024, refers to the claims made by the same Appellant with regard to the tender of reference CT2254/2024 listed as case No. 2083 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Joshua Grech

Appearing for the Contracting Authority:

Dr John L. Gauci and Dr Mary Rose Micallef

Whereby, the Appellant contends that:

The grievances being brought forward by the objector are both with regards to offers number 205490 and also number 205491 which shall be dealt separately by the objector below;

The bidder has been disqualified with regards to offer number 205490 on the basis that hot-foil printing cannot replace the embossment requirement;

When submitting the rectification letter and the requested documentation, the bidder did not indicate that the hot-foil printing shall be replacing the embossment requirement as requested in the tender document. In fact, as indicated in the literature submitted by the tenderer, 'Malta Food Agency' text hot-foil printed in white, on the 2 long sides' was to be provided.

This, as a matter of fact, does not give any hint that the embossment requirement shall or would have been omitted but rather that in addition to the embossment as indicated in Annex 1 of the Tender Document an added feature of hot-foil printing would be applied. In fact, the tender document shows embossment words of the samples shown, which are similar to the ones which have been submitted in the literature provided by the tenderer. As an added security, the embossment would not only be part of the whole structure of the crate but it would be visible enough with the use of hot-foil printing.

This as a matter of fact does not exclude embossment but rather adds and complements the requirement as established in Section 3 Article 4 of the tender document;

To this effect, the Contracting Authority wrongly concluded that the hot-foil printing would be replacing the embossment requirement and thus nowhere in the reply by the tenderer did he insist that the embossment would not be adhered to;

Moreover, it should be noted that the Contracting Authority did not request any sample in order to verify that the offer being submitted meets the requirements of the tender document and that the offer being brought forward, does in fact include embossment and additionally hot-foil printing which adds to the security and reduces the possibility of tempering. The Contracting Authority was free to request samples as was the case with the other offer, in which case the offeror would have submitted the applicable samples showing that the requirements would have been met in full;

To this effect therefore, the reason by the Contracting Authority to deem the offer as technically non-compliant is not correct and should be revoked;

As regards the other reason given by the Contracting Authority in connection with offer number 205491, as relates to the failure to submit the samples within the stipulated time-frames, the objector submits, that the Contracting Authority, did not give ample and necessary time for the tenderer to submit such samples and this in default of the applicable regulations;

In fact, as the Contracting Authority rightly acknowledged, the submission of samples must be submitted within ten (10) working days from the Contracting Authority's formal request.

It should be noted that the first communication was that these samples should have reached the Contracting Authority by the 23rd April, 2024 from the date of communication (15th April, 2024). This works out at 6 working days. The tenderer in view of such short notice, given that these samples should be requested from abroad and transported to Malta, abandoned the idea of providing the samples since there was not enough

time to request such samples, get them transported to Malta and delivering them to the Contracting Authority;

Eventually, the Contracting Authority acknowledged the default in applied regulations and decided on the 17th April, 2024 that the deadline for the submission of the samples would be the 29th April, 2024.

The time period between the 17th April, 2024 and the 29th April, 2024 still works out at 8 working days, whereas it works out at 10 working days from the original request date (15th April, 2024);

The objector claims that even if the Contracting Authority extended the said time-frame to the 29th April, 2024, it still remained in default of the stipulation as established by the regulation given that the 10 working days should be taken from the formal request and that therefore should have started afresh on the 17th April, 2024.

Furthermore, it should be noted that as explained above, the Contracting Authority still put the tenderer at a handicap by actually giving him 8 working days instead of 10 working days to request the samples from abroad and get them delivered in time. Should the Contracting Authority have applied the established time-frame for samples according to the regulation in force, that is 10 working days from the 17th April, 2024, the tenderer would have had up till the 2nd May, 2024 to get the sample duly delivered in time. This again put the tenderer into an impossibility to request the sample in time and as a matter of fact did not actually submit the samples.

This was not due to a lack of abidance by the tenderer but since he was compelled to abandon the request as there was not enough time left to make such a request for the samples having lost, as explained, 2 working days. This as a matter of fact did not give him 10 working days from the 17th April, but 8 working days ending on the 29th April.

Thus, even in this case, the reason by the Contracting Authority to deem the offer as technically non-compliant is also not correct and should be revoked.

This Board also noted the **Contracting Authority's** Reasoned Letter of Reply filed on 20th September 2024 and its verbal submission during the hearing held on 21st January 2025, in that:

Preliminary Reply

In its preliminary submissions, the Malta Food Agency (MFA) submits that the objection filed by Mr. Louis Grima is procedurally flawed as the Objector has failed to pay the appropriate deposit for both objections he is contesting. Specifically, the Objector has lodged objections against both offers 205490 and 205491.

However, the deposit of €3,000, as confirmed in the submitted documents, only covers one objection, not both. As per the applicable regulations, a separate deposit must be paid for each objection filed. Accordingly, the failure to comply with this requirement renders the objection concerning offer 205491 inadmissible.

Respondent respectfully requests that the Public Contracts Review Board dismiss the objection relating to offer 205491 on this basis alone.

Reply on the Merits

1. Objection Regarding Offer 205490 (Hot-Foil Printing vs Embossment)

The objector, Mr. Louis Grima, asserts that his bid was wrongly disqualified on the grounds that hot-foil printing was intended as an addition to, and not a replacement of, the embossment requirement.

The Malta Food Agency, as the Contracting Authority, correctly deemed Mr. Grima's offer non-compliant for introducing an unsolicited modification-hot-foil printing-instead of adhering strictly to the embossment requirement as set out in Section 3, Article 4 of the tender document. The tender was unequivocal in its requirement that the crates bear embossment, and no other forms of marking or printing, including hot-foil printing, were requested.

While the objector argues that the tender document did not explicitly prohibit additional features like hot-foil printing, this is irrelevant. The tender specifications must be strictly adhered to, and bidders cannot unilaterally introduce unsolicited modifications, whether as an addition or substitution. As emphasized in recent case law, including the Court of Appeal's judgment in **Polaris Marine Services Co Ltd v. Direttur Generali tal-Kuntratti** (29th August 2023), the contracting authority must strictly enforce the conditions outlined in the tender:

"L-obbligi ta' trasparenza u ta' trattament indaqs jigu nieqsa jekk kemm-il darba l-awtorità kontraenti tista teghleb il-kundizzjonijiet li tkun stabbiliet hija stess fid-dokument tas-sejba.

Tabilhaqq, meta l-awtorità kontraenti tiddefinixxi l-kundizzjonijiet li bi hsiebha timponi fua l-offerenti, hija tillimita rubba fl-eżerizzju tas-setgħa diskrezzjonali tagħha..."

In other words, the authority must apply its established conditions without altering them during the evaluation process. The decision to deem the objector's bid non-compliant is consistent with this legal principle. The introduction of hot-foil printing violates the requirement for strict compliance with the tender conditions.

Furthermore, the objector's argument that the Malta Food Agency should have requested a sample to verify compliance is irrelevant. The Contracting Authority's Evaluation Committee exercised its discretion in determining that no sample was required, given that the bid was technically non-compliant based on the documentation alone. As noted in the rectification process, the objector's response did not satisfactorily address the embossment requirement, as he instead confirmed hot-foil printing without adhering to the embossment specifications (vide Document A attached).

Additionally, the embossment was required as a key security feature to ensure that the crates would have permanent identification markings, reducing the risk of tampering or misuse. The introduction of hot-foil printing undermined this key security requirement and deviated from the core intent of the tender specifications.

For these reasons, the Malta Food Agency respectfully requests that the PCRB reject the objection relating to offer 205190 and uphold the Contracting Authority's decision to deem the bid non-compliant.

2. Objection Regarding Offer 205491 (Failure to Submit Samples)

The objector further argues that the Malta Food Agency failed to provide the requisite ten working days for the submission of samples, even after extending the original deadline.

The Malta Food Agency fully complied with the procedural rules for the submission of samples. The original request for samples was issued on April 15th, 2024, with a submission deadline of April 23rd, 2024. Recognising potential timing concerns, the Contracting Authority extended the deadline to April 29th, 2024, thereby providing ten full working days from the initial request. The objector's claim that only eight days were provided is factually incorrect.

Moreover, as evidenced in the record, five other bidders received the same request for sample submissions within the same timeline and successfully delivered their samples within the extended period. This demonstrates that the timeframe provided was both reasonable and sufficient.

The objector also contends that the ten-day period should have started afresh from April 17th, 2024, the date on which the extension was communicated. This argument is based on a misunderstanding of the applicable regulations, which clearly state that the period for submitting samples begins from the date of the original request, i.e., April 15th. The extension to April 29th was a fair and reasonable accommodation, and there was no breach of the procedural rules.

Furthermore, it is important to note that the objector, prior to submitting his offer, indicated on January 17th, 2024 (vide Document B attached), that he might not be able to provide the samples within the required timeframe due to the manufacturing process involved in producing specific moulds for the crates.

This clarification casts serious and founded doubt on the objector's readiness to comply with the tender requirements from the outset, and the eventual failure to submit the samples cannot be attributed to any unfair treatment by the Contracting Authority.

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 as follows in their entirety.

Procedural flaw raised by the Contracting Authority

This appeal was filed by the appellant in relation to two tenders – Offer Number 205490, referred to as (Hot Foil Printing vs Embossment), and Offer Number 205491, (referred to as Failure to Submit Samples). The appellant has raised objections on both offers, seeking a review by the Public Contracts Review Board (PCRB).

It has come to the Board's attention that the appellant paid a deposit of EUR 3,000, which is insufficient in relation to the total deposit required for both offers. The required deposit for both offers, based on the global amount as set by the contracting authority, amounts to EUR 6,000. However, the appellant has only paid EUR 3,000, which is half of the required deposit.

The Board notes that the objection filed by the appellant is flawed due to non-compliance with Regulation 262(2) of the Public Procurement Regulations, Subsidiary Legislation 601.03. Regulation 262(2) stipulates that *“an application for review shall only be valid if accompanied by a deposit equivalent to 0.50% of the estimated value set by the contracting authority for the entire tender or each lot submitted by the tenderer, provided that in no case shall the deposit exceed EUR 50,000”*.

As per Regulation 262(2), it is, therefore, mandatory for the appellant to pay a deposit equal to 0.50% of the estimated value of the entire tender or each lot. Since the appellant has not adhered to this requirement, the Board is compelled to consider the appeal as flawed due to non-compliance with the statutory deposit requirement.

In this context, the Board directed the appellant's legal counsel to determine which offer should be subject to review, given that only one deposit was paid. In response, the appellant has stated disagreement with the Board's position but, nonetheless, requested that the appeal be heard in relation to Offer Number 205491.

The Board shall proceed with the determination of Offer Number 205491, as per the appellant's indication and will abstain from considering Offer Number 205490, as the deposit requirement, under Regulation 262(2), is an *ad validitatem* (validity) condition, and the failure to meet this requirement for both offers renders the appeal defective.

Determination on Offer 205491

By virtue of a letter dated the 3rd September 2024, the tenderer was informed that the tender submitted was not technically compliant in relation to Offer 205491 due to the following reasons:

“The bidder replied to the Rectification letter within the stipulated deadline and the response was deemed satisfactory. However, the bidder did not submit the requested samples as per Section 1 Article 5(c)(iii) of the tender document, thus the bid was deemed to be technically non-compliant”.

Background:

The Contracting Authority (CA) declared the tenderer non-compliant in relation to Offer Number 205491 due to the failure to submit the required samples within the stipulated timeframe. The appellant argues that the Contracting Authority erroneously failed to provide the requisite ten (10) working day period for the submission of these samples. According to the Appellant, the Contracting Authority should have allowed a fresh ten (10) working day period after the error in the initial deadline was identified.

The Contracting Authority, in its response, acknowledged the oversight and confirmed that the ten (10) working day period was not duly provided. However, the Contracting Authority rectified this issue by extending the original deadline for submission of the samples.

Chronology of Events:

- **Initial Communication from Contracting Authority:**

On 15th April 2024, the Contracting Authority communicated that the samples should have been submitted by the 23rd April 2024, providing only six (6) working days for submission.

- **Acknowledgement of Deficiency:**

On 17th April 2024, the Contracting Authority acknowledged the error in not providing the requisite ten (10) working days for submission and decided to extend the deadline to 29th April 2024, thus granting a total of ten (10) working days, starting from the original request date.

Appellant's Argument:

The appellant asserts that the ten (10) working days should have started afresh from the date of the extension and not from the original request date of 15th April 2024. In this regard, the appellant contends that the Contracting Authority's extension merely extended the deadline but did not properly address the failure to provide the full ten (10) working days from the start.

The Board, however, notes that this clarification request was made well in advance of the request for samples and is not directly relevant to the current issue of the extension of the deadline.

Board's Analysis:

The core issue before the Board is whether the Contracting Authority, by extending the original deadline, provided the tenderer with a valid ten (10) working day period for the submission of the samples, or whether the ten (10) working days should have started afresh from the date of the extension.

In the view of the Board, the Contracting Authority's extension on 17th April, 2024 effectively remedied the initial failure to provide the requisite ten (10) working days. The Contracting Authority's decision to extend the deadline to 29th April, 2024 was an acknowledgment of the mistake and provided the tenderer with the full ten (10) working days, which were already due from the original communication.

It is the Board's opinion that the tenderer should have been aware of the original deadline and, even if the Contracting Authority had made an error in not initially providing the full ten (10) working days, the extension granted by the Contracting Authority effectively consolidated the necessary timeframe for compliance. The Board finds that the tenderer had the opportunity to submit the samples within the ten (10) working day period, and there was no reason why the tenderer could not have adhered to the extended deadline if the necessary preparations were made in advance. Moreover, as evidenced in the record, five other bidders received the same request for sample submissions within the same timeline and successfully delivered their samples within the extended period. This clearly demonstrates that the timeframe provided was both reasonable and sufficient and crystal clear to all partakers in the competitive bid.

Additionally, the Board refers to a clarification request submitted on 17th January, 2024 at 08:00:35, wherein the tenderer, *ab initio*, **pointed out the difficulties in providing the requested samples due to the need to manufacture specific moulds, which are costly and time-consuming to produce.** The tenderer requested the removal of the sample requirement or, alternatively, a revision of the delivery period to four (4) months for the first consignment instead of four (4) weeks. In the opinion of the Board, this clearly shows the reluctance on part of the tenderer to adhere with the tender requirements even if no error in timeframes was present at the time, which, as already stated above, such error was acknowledged and rectified accordingly.

Board's Conclusion:

After careful consideration of the facts and the arguments presented, the Board concludes that the Contracting Authority, did, in fact, provide the tenderer with the full ten (10) working days for the submission of the samples, as required by the applicable Regulations. The Board further concludes that the extension provided by the Contracting Authority was a reasonable and corrective measure to address the initial oversight.

In light of the above, the Board finds that the Appellant's argument, which contends that the ten (10) working day period should have started afresh, is not persuasive. The extension granted by the Contracting Authority, which effectively provided the necessary time for submission, was sufficient, and the tenderer should have adhered to this deadline.

As such, the Board upholds the decision of the Contracting Authority to declare the tenderer non-compliant with Offer Number 205491 due to the failure to submit the required samples within the stipulated time frame.

Therefore, this Board does not uphold Appellant's grievances and is hereby being dismissed.

The Board,

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

- a. Not to uphold Appellant's Letter of Objection and contentions;
- b. Confirms the decision of the Evaluation Committee in its entirety;
- c. Directs that the deposit paid by Appellant not to be reimbursed.

Dr Vincent Micallef
Chairman

Mr Keith Victor Grech
Member

Dr Ana Thomas
Member