

Persol Systems Limited - **Complainant**

Vs.

Controller & Accountant General's Department - **Respondent**

Tender

*Purchase of Integrated Personnel & Payroll Database Back Up - (IPPD3) Software B
(Tender No. ICT No. IPPD/3/2007)*

BACKGROUND

Petition by the Complainant – Persol Systems Ltd. for administrative review against the Respondent, Controller & Accountant-General's Department (CAGD) citing wrongful, improper procedure leading to the award of contract to a preferred bidder, which in Complainant's estimation, raised serious concerns of manipulation, impropriety and bias in the evaluation conducted by the Respondent for the tender mentioned above.

The Complainant participated in the above tender advertised by Respondent in December 2007. Complainant alleged that at the deadline for tender submission, only two companies had submitted tenders (Persol Systems & SISCO Systems). However, on 28th January, 2008 three (3) tenderers instead of two (2) were invited to a post-bid meeting to discuss the method of evaluation, implying that another tender had been accepted and opened after the deadline for submission of tenders, contrary to the provisions of Act 663.

The Complainant also alleged that though it had been agreed at the post-bid meeting that bidders demonstrate their software with text data of up to one (1) million employees, to show that the proposed software could perform all the required functions specified in the Request for Proposals (RFP), this was not done. Rather, the Respondent sought verbal confirmation from the tenderers' clients, as part of the technical evaluation process. This contravened international best practices for conducting a fair technical assessment of custom software. The Complainant argued that technical scores for such a multi-million dollar project could not be premised on verbal discussions, and that a fair technical assessment could only be adequately achieved through a live demonstration environment.

Judging by the acclaimed performance of its payroll software, Complainant felt aggrieved for failing to qualify after the visit to one of its clients, because the Persol payroll software used by that client processed a much higher number of employees than the other two assessed tenderers.

Complainant was of the opinion that the Respondent's excuse of time and cost constraints for rushing through the purchase of such technical customized software was not justified because it was not prudent to pay for the development of software prototypes or additional desired functionality, or to wait on bidders to develop desired functionality. The best option was to install software "as-is" on standard hardware resources specified by the purchasing institution (Respondent).

The Complainant appealed against the evaluation and requested for re-evaluation based on open live demonstrations by all bidders, to ensure transparency, fair technical assessment and quality based selection.

The Respondent denied Complainant's assertion that live demonstration had been evaluation criteria, contending that live demonstration of the custom software had neither been required under the RFP nor had the latter been amended in accordance with section 4.4 of the General Conditions of Contract to include such evaluation criteria. Respondent therefore challenged Complainant to provide evidence to the contrary.

Respondent further denied the following:-

- i. That technical evaluation had been concluded based on verbal confirmation of tenderers clients;
- ii. That technical evaluation and the award had been made based on the client visits;
- iii. That the Respondent had resorted to wrongful and improper procedure to award the contract to a preferred bidder.

Respondent maintained that references requested of tenderers as part of their tender submission were physically verified through the said client visits. Respondent explained that evaluation had been conducted in two stages – Technical and Financial. Based on which the winning tenderer had been selected, a process that was well documented. Finally, Respondent held that contrary to the Complainant's assertion, the third tenderer (Softribe) had submitted its tender prior to the deadline for tender submission, as evidenced by a copy of the signed Tender Submission Form.

ISSUES

- Whether entities are permitted to open tenders submitted after the submission deadline.
- Whether any evaluation criterion was changed as alleged.
- Whether the complaint merited an order for re-evaluation.

APPLICABLE PROVISIONS OF ACT 663

Section 53 (9) - *Submission of Tenders;*

Sections 59 (1) & (2) - *Evaluation of Tender;*

Section 5.9 - *Procurement Manual (September 2007) on Tender Clarifications & Section 5.10 of the Procurement Manual (September 2007), Extension of Tender Closing Date*

CASE DELIBERATION/FINDINGS

1. Opening of tenders submitted after the submission deadline

Though the Complainant implied that a 3rd tender had been accepted and opened after the deadline for tender submission (contrary to Section 53 (9) of the Public Procurement Act, 2003 (Act 663), the Authority established from documentary evidence, that the 3rd tenderer (Softribe) had submitted its

tender before the submission deadline, as evidenced by a signed copy of Tender Submission Form. There was no evidence to show that the Complainant raised the issue of late bid submission at the post-bid clarification meeting.

The Authority found that the Respondent did not contravene section 53 (9) of Act 663 because there was no evidence to the contrary.

From documentary evidence submitted by the Respondent, the Authority was convinced that Softribe had submitted its tender before the deadline, proved by the signed copy of tender submission form. The Complainant did not provide any evidence to the contrary.

2. Whether any evaluation criteria was changed as alleged by the Complainant

The Authority was satisfied from the evidence submitted by Respondent that it had not changed the evaluation criteria. The allegation of change of evaluation criterion from 'live demonstration' to 'verbal confirmations' was not substantiated. The tenderers were all present at the post-bid/clarification meeting, including the Complainant who showed no evidence of having lodged this protest. Moreover, issues brought up for clarification do not per se operate to change set evaluation criteria, unless the Purchaser clearly communicates such intention to all tenderers and extends the tender submission date for tenderers to modify their tenders, as necessary (ref. Sections 5.9 '*Tender Clarifications*' & 5.10 '*Extension of Tender Closing Date*' of the PPA Manual - September 2009). Live demonstration was not part of the evaluation criteria stated in the RFP.

Though the Authority noted the Respondent's letter inviting tenderers to a meeting to demonstrate how their software worked, it was of the opinion that this meeting was more contemplated to enhance the evaluation panel's appreciation of each tenderer's product than to effect any change to the set evaluation criteria. It was accordingly noted that under the relevant procurement rules, pre-established criteria that are material to a tender, cannot be changed at evaluation. The Authority was satisfied that the client visits were simply enhanced forms of 'live demonstration' by which the Respondent practically verified functionality and capability of payroll software sold by the tenderers.

A "live demonstration" was not necessary to achieve a fair technical assessment of the Complainant's tender, because apart from being a criterion, other criteria had been set to determine the experience and capacity of tenderers. The RFP contained the criteria for ascertaining a firm's capacity and experience, and visiting a client only adds to this determination. The Respondent rather enhanced its evaluation process by going out to the clients to ascertain functionality, instead of simply relying on "live demonstrations". In line with Complainant's own arguments, "live demonstrations" could easily veer into software prototype development discussions.

The Authority determined that the Complainant could not insist on a "live demonstration" as a prerequisite for the Respondent to purchase the type of custom software it required.

3. Whether the complaint merited an order for re-evaluation

The Authority found no grounds that merited an order for re-evaluation. From the evaluation documents, the winning tenderer scored highest in both technical and financial assessment.

DECISION

1. On the totality of evidence submitted, the Complainant failed to prove that the tender process was conducted contrary to the provisions of the Public Procurement Act, 2003 (Act 663).
2. The Authority could not grant the Complainant's request for a re-evaluation based on live demonstration because of lack of proof that live demonstration was a set evaluation criterion.