

PUBLIC CONTRACTS REVIEW BOARD

Case 1683 – SPD8/2021/020 – Service Tender for the Provision of Expert Assistance to Quantify the Improvement in Air Quality in Malta as a Result of Policy Measures

21st March 2022

The Board,

Having noted the letter of objection filed by Mr Jacques Moussafir acting for and on behalf of Aria Technologies SA, (hereinafter referred to as the appellant) filed on the 14th January 2022;

Having also noted the letter of reply filed by Dr Paula Axiak and Dr Chloe Galea acting for and on behalf of The Environment and Resources Authority (ERA) (hereinafter referred to as the Contracting Authority) filed on the 24th January 2022;

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

Having noted and evaluated the minutes of the Board sitting of the 17th February 2022 hereunder-reproduced;

Minutes

Case 1683 – SPD8/2021/020 – Services tender for the provision of Expert Assistance to Quantify the Improvement in Air Quality in Malta as a result of Policy Measures.

The tender was issued on the 7th May 2021 and the closing date was the 14th June 2021. The value of the tender, excluding VAT, was € 135,000.

On the 14th January 2022 Aria Technologies SA filed an appeal against the Environment and Resources Authority as the Contracting Authority objecting to their disqualification on the grounds that their tender was deemed to be technically not compliant.

A deposit of € 675 was paid.

There were seven (7) bidders.

On the 17th February 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar 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 – Aria Technologies SA

Mr Armand Albergel

Representative

Mr Robert Kelly

Representative

Contracting Authority – Environment and Resources Authority

Dr Paula Axiak	Legal Representative
Mr Daniel Cilia	Chairperson Evaluation Committee
Ms Nicole Chan	Member Evaluation Committee
Mr Mark Scerri	Member Evaluation Committee
Mr Mark Spiteri	Representative

Preferred bidder – Adi Associates Environmental Consultants

Ms Maria Chiara Metallo	Representative
Mr Adrian Mallia	Representative
Ms Rachel Xuereb	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Mr Robert Kelly Representative for Aria Technologies SA said that the appeal was factual and simple. The Contracting Authority requested clarification on certain matters but the ePPS loaded only one document out of several. Appellant contacted the Department of Contracts regarding this and they were given two e-mail addresses to submit the remaining documents and confirmed receipt of the documents before the closing time of the tender. This should have been acceptable since in some instances even a verbal reply to a clarification is sufficient.

Dr Paula Axiak Legal Representative for the Environment and Resources Authority said that the facts as stated are not contested. When the Authority was advised by Appellant that the ePPS system was not functioning correctly they were provided with two email addresses not to deprive them of the chance of participating but on the proviso that the ePPS was actually not functioning. After checking with the official developer of the ePPS it transpired that there was no malfunction in the system and therefore the e-mail submissions were not acceptable.

Mr Kelly stated that this was only a clarification and not the tender submission itself and it was not usual to request replies on clarifications through the ePPS. Problems with the operation of the system seem to be a regular feature.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 17th February 2022.

Having noted the objection filed by Aria Technologies SA (hereinafter referred to as the Appellant) on 14th January 2022, refers to the claims made by the same Appellant with regards to the tender of reference SPD8/2021/020 listed as case No. 1683 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Robert Kelly

Appearing for the Contracting Authority: Dr Paula Axiak

Whereby, the Appellant, in their Letter of Objection, contends that:

- a) It is not true that we failed to provide a response to the rectification letter of ERA within the stipulated deadline. The truth is that the EPPS procurement system was malfunctioning and unable to upload the very large number of documents we were submitting in the morning of September 24th, 2021. For this reason we took contact by email and telephone with the personnel of ERA in charge of the EPPS, who was kind enough to receive by email all the documents in due time.
- b) The first email with our answer to the ERA rectification letter was sent before the deadline to Ms Abigail Sultana at ERA, with copy to Ms Nicole Chan and to the email addresses procurement.era@era.org.mt and to the email addresses procurement.era@era.org.mt and info.contracts@gov.mt.
- c) In the same morning I wrote a second e-mail to Mr David Gatt at the Department of Contracts to warmly thank the personnel in charge of EPPS for their diligence in helping us to submit the documents in due time despite the technical issues with the procurement site.
- d) Considering these dated e-mail documents, the statement that "we failed to provide a response to the rectification letter" is unacceptable for us.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 24th January 2022 and its verbal submission during the virtual hearing held on 17th February 2022, in that:

- a) The service tender for the provision of expert assistance to quantify the improvement in air quality in Malta as a result of policy measures was issued on the 7th May 2021 with a deadline for submissions from interested economic operators of 14th June 2021. In accordance with the General Rules Governing Tenders V4.3, on 16th September 2021, ERA published requests for clarifications/rectifications to several applicants, including the appellant, through the Electronic Public Procurement System (ePPS), with a deadline of 24th September 2021 at 10:00am (GMT+1). The same General Rules V4.3 state that any documentation, requests and responses are to be uploaded by the Contracting Authority or the applicant through the ePPS, which is the official national platform for Procurement.
- b) On the morning of 24th September 2021, before the 10am deadline, the appellant contacted ERA through a phone call alleging that they were having technical issues with the ePPS as they were unable to upload required documentation onto the system. During this call, ERA attempted to assist the applicant so that the response could be uploaded on the ePPS within the applicable timeframe. However, as the applicant was alleging that the system was malfunctioning and in a final attempt to assist the said applicant, ERA suggested that the appellant submits the response by e-mail to the Department of Contracts and ERA in the eventuality that it transpired that the online platform was in fact not functioning correctly at the time. Nonetheless, it must be pointed out that ERA reiterated that the response and documentation would need to be formally sent and uploaded via the ePPS to be considered valid. In fact, in the Technical Rectification Letter dated September 16th 2021 which was sent by ERA to the appellant, it was clearly stated that: "The requested documents in the rectification are to be submitted through the appropriate Electronic Public Procurement (ePPS module)"
- c) At no point during its communication did ERA confirm or assure the appellant that his submission via email will be accepted or approved. Furthermore, the lack of response or additional questions to the appellant's email dated 24th September 9:31am cannot be construed as tacit approval.
- d) Following the allegations of errors in the ePPS, ERA informed the Department of Contracts, who in turn, contacted the official ePPS developer, Eurodyn, in order to ascertain whether there was a malfunction in the platform or otherwise. Upon investigation by Eurodyn, it was confirmed that the user (appellant) did in fact publish one answer for the clarification request with title "SPD08/2021/020 - rectification letter" and it provided three possible reasons which could have resulted in the appellant's failure to upload on the system, namely:
 - An answer for the clarification request is not provided and the EO user clicks on the "Save" button
 - The file the EO user that envisages to upload exceeds the maximum file size, i.e. 75 MB
 - A clarification cannot be published without an answer or an uploaded file.

- e) Therefore, considering the above and as the appellant had in fact succeeded in uploading one document to the ePPS, named "1. Anfossi et al AtmEnv in press 2010" on the 24th September at 3:53am, it could not be concluded that the system itself was malfunctioning.
- f) In similar cases lodged before the Public Contracts Review Board, whereby the applicant was excluded from the tendering processes following alleged technical issues, the Board relied on the evidence brought by the IT experts in determining whether the issue could have been avoided by the applicant. In Case 1476, related to CT 2198/2019, whereby certain files could not be opened by the Contracting Authority due to an error that occurred in the submission of files, it was held that the files were likely corrupted at the original source.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant's grievances, as follows:

- a) This Board will immediately make reference to the General Rules Governing Tenders V4.3 paragraphs 15.1 and 15.2 which state:

*"15.1 When checking and comparing tenders, **the evaluation committee may**, after obtaining approval from the Director General (Contracts)/Departmental Contracts Committee, as the case may be, **ask a tenderer to clarify any aspect of his tender**.*

*15.2 **Such requests and the responses to them must be made through the Government's e-Procurement Platform (www.etenders.gov.mt)**. They may in no circumstances alter or try to change the price or content of the tender, except for rectifications as allowed in terms of what is stipulated in the procurement document or to correct arithmetical errors discovered by the evaluation committee when analysing tenders, in accordance with Clause 17 below."*

The Board opines that these paragraphs are clear and unambiguous in that responses to the clarification requests need to be made through the ePPS platform.
- b) Exceptions to the above should only be made if, and when, there is some sort of technical IT malfunction in the ePPS system, obviously case specific. Such circumstances have occurred in the past and the Department of Contracts ("DoC") would then allow additional time to prospective bidders, mostly through extensions, to submit their replies / responses accordingly. In this specific case, the DoC duly analysed the situation with the service provider Eurodyn, and this investigation resulted that no malfunctions were present in the ePPS system which were as a result of actions done by the Contracting Authority and / or the DoC.

Hence this Board does not uphold Appellant's grievances.

In conclusion this 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 to Adi Associates Environmental Consultants Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Richard Matrenza
Member