

PUBLIC CONTRACTS REVIEW BOARD

Case 1696 – 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 Dr Jonathan Thompson and Dr Ryan Falzon on behalf of DF Advocates acting for and on behalf of Epsilon Malta Limited, (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 heard and evaluated the testimony of the witness Mr Markos Bonazountas (Representative of Epsilon Malta Limited) as summoned by Dr Jonathan Thompson acting for Epsilon Malta Limited;

Having heard and evaluated the testimony of the witness Prof Dennis Sarigiannis (Key Expert nominated by Epsilon Malta Limited) as summoned by Dr Jonathan Thompson acting for Epsilon Malta Limited;

Having heard and evaluated the testimony of the witness Mr Mark Spiteri (Representative of The Environment and Resources Authority) as summoned by Dr Paula Axiak acting for the Contracting Authority;

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 March 2022 hereunder-reproduced;

Minutes

Case 1696 – SPD8/2021/020 – 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 Epsilon Malta Ltd filed an appeal against the Environment Resources Authority (ERA) as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 675 was paid.

There were seven (7) bidders.

On the 17th March 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Epsilon Malta Ltd

Dr Jonathan Thompson	Legal Representative
Mr Markos Bonazountas	Representative
Prof Dennis Sarigiannis	Representative
Mr George Sarigiannis	Representative

Contracting Authority – Environment Resources Authority

Dr Paula Axiak	Legal Representative
Ms Nadine Mercieca	Member Evaluation Committee
Ms Ariana Schembri	Member Evaluation Committee
Mr Mark Scerri	Member Evaluation Committee
Ms Nicole Chan	Member Evaluation Committee

Preferred Bidder – ADI Associates Environmental Consultants Ltd

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

Dr Jonathan Thompson Legal Representative for Epsilon Malta Ltd said that a second clarification sent to Appellant elicited a telephone call from the Contracting Authority to the Appellant advising them to reply to that clarification which had been posted on the EPPS as the deadline was due to expire imminently. Following an exchange of e-mails a representative of the Appellant was advised to confirm the contents of the e-mail reply via the EPPS. Attempts to upload the reply on the system by that representative were unsuccessful as access was not granted. Appellant was subsequently advised that it had been disqualified as it failed to reply to the clarification.

Mr Markos Bonazountas (Greek ID Card No X711699) called as a witness by the Appellant testified on oath that he was a Civil Engineer with a Doctorate obtained in Germany,

qualifications from Harvard University and that that he retired as a University Professor in 2012. Since then he has been running Epsilon Malta Ltd which firm had a tie-up with the University of Salonica to submit the tender proposal. He was very familiar with tendering and the EPPS. The first request for a clarification was replied to and after that the firm had not received any further requests for any clarifications and his mobile does not indicate that he had received any calls from the ERA.

At this stage Mr Bonazountas testimony was suspended to allow Professor Dennis Sarigiannis to testify.

Prof Dennis Sannigiannis (Greek ID 8AK 307916) called as a witness by Appellant testified on oath that he collaborated with Epsilon in drafting the technical submissions of the bid. He stated that he had received a telephone call from a representative of ERA who stated that the Authority had been unable to contact Epsilon and as the deadline for a reply to a clarification was close he was urged to send in a reply. He was not aware of the contents of the clarification so he requested that it be put to him by e-mail. He replied to that communication by e-mail but was informed that the reply should be via the EPPS. He could not access the system and on contacting ERA it was suggested to him to reply by e-mail which was done. He advised Mr Bonazountas of his actions and that everything had been done within the tender deadline.

Questioned by Dr Paula Axiak Legal Representative for ERA witness stated that the email reply was sent at 10.00am (Malta time) and replied to in full. He confirmed that prior to that he had been in touch with Ms Nadine Mercieca from the Contracting Authority and received the clarification seven minutes before the close of the tender deadline. It was suggested to him by Ms Mercieca that he had to use the EPPS for his reply. Witness stated he could not confirm if this had been done.

In reply to questions from Dr Axiak, Mr Bonazountas confirmed that the addresses where the clarification had been sent by e-mail was on either of his two addresses.

Mr Mark Spiteri (200384M) called as a witness by the Contracting Authority testified on oath that he was the Operations Manager at ERA and stated that the e-mail addresses for Epsilon on the EPPS were 'central@epsilon Malta.com' and 'ECprojects at Epsilon GR' and communications were sent to both addresses. Clarification requests were sent automatically through the EPPS and he could confirm with a degree of certainty that they were sent to both addresses. Witness had no record to indicate if the emails had been received by addressees.

This concluded the testimonies.

Dr Thompson said that there are doubts if the request for the second clarification had been received and there are doubts if it had ever been submitted. The interested participant who throughout showed great interest to the extent even of appealing, claims that it was not received and it is inconceivable that they would ignore replying to such a minor clarification – hence the balance of probability is in favour of the Appellant. No evidence has been offered that ERA did not receive the Appellant's reply or that the bidder did receive the clarification. One has to ask why the ERA leave it so late to remind Appellant – in the name of open competition no bidder should be excluded on such a point. Epsilon did all it could to reply, albeit not on the EPPS, by sending an e-mail when they could not access the system, and in this situation the deadline should not matter since the clarification was

not received. Whether a reply in e-mail form is acceptable is a moot point and is a question of substance over form. Whilst the Authority is entitled to follow its own regulations the principles of Public Procurement Regulations override them and discretion should have been used as the complaint does not technically change the tender. In PCRB Case 1111 it was established that the principle of proportionality is paramount and should prevail immaterial of the value and size of the tender.

Dr Axiak said that the Authority issued two requests with the second request following exactly the same system procedure but they do not control the EPPS. Euro Dynamics the administrators of the system confirmed by e-mail that Appellant received the email of the 16th December 2021 and that there were no faults in the system. The e-mail reply by Appellant did not fulfil the requirements of the tender and the bid failed.

Dr Thompson said that it should be noted that no confirmation has been provided that the e-mail had been received, and the one hour's time difference between Greece and Malta should be borne in mind where considering time factors in the replies.

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

Hereby resolves:

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

Having noted the objection filed by Epsilon Malta Limited (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. 1696 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jonathan Thompson

Appearing for the Contracting Authority: Dr Paula Axiak

Whereby, the Appellant, in their Letter of Objection, contends that the grounds for the present objection are clear and manifest and consists in the following:

- a) the Contracting Authority's failure to duly notify the Appellant with the required clarifications, due inter alia, to a possible technical failure in the Platform which thus failed to notify the Appellant that a request for clarifications had been uploaded for the Appellant's attention;
- b) the Contracting Authority's failure, once it realised that the request for clarifications had not been duly notified to the Appellant, to communicate said request to the Appellant qua registered

tenderer in this procedure, but rather proceeded with calling the Key Expert telephonically and instructing said Key Expert to provide the requested replies within a few minutes;

- c) a technical error on the Platform not allowing the Appellant to upload the required documentation before the expiry of the set deadline for submission;
- d) failure by the Contracting Authority to accept the clarifications that were sent to the Contracting Authority in accordance with the said Contracting Authority's instructions and within the arbitrary and disproportionate timeframes set by the Contracting Authority in view of its failure to duly notify the Appellant with the request for clarifications

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 March 2022, in that:

- a) The ERA confirms the facts of the case as presented by the appellant in paragraphs 1 to 4 of its reasoned letter of objection. With respect to paragraph 5 of appellant's reasoned letter of objection, ERA would like to clarify that the second request for clarifications was not made through the appellant's key expert but in accordance with the General Rules Governing Tenders V4.3, whereby on 16th September 2021, the Contracting Authority published requests for clarifications to several applicants, including the appellant, through the Electronic Public Procurement System (ePPS), with a deadline to submit responses by the 24th September 2021 at 10:00am (GMT+1).
- b) Once the request for clarifications is uploaded, the ePPS issues an automatic notification to the applicant by email (followed by daily reminders), and the request also remains visible to the user through the e-platform. Reference is being made to the automatically generated email sent by the system to ERA's representative upon the uploading of the request for clarification on the 16th September 2021 at 15:32 indicating that the request has been posted and that the economic operator (EO) (appellant) was notified. In fact, the email clearly stipulates: "EO notified: EPSILON MALTA LIMITED on email address: central@epsilonmalta.com". The EO would thus have received a similar email notification on the aforementioned email address which would have been provided by the appellant himself in the application process. Notably, ERA would like to point out the fact that other bidders received and responded to this request for clarification, and the appellant himself had also replied to the first request issued through the same system (as stated in paragraph 4 of his reasoned letter of objection).
- c) Thus, it was made sufficiently clear to the appellant that the clarifications could not be formally accepted via email. This also clearly arises out of the guidance documents available to the applicants, namely article 15 of the 'General Rules Governing Tenders V4.3' (dated July 2021) whereby it is clear that:

“15.1 When checking tenders, the evaluation committee may, after obtaining approval from the Director General (Contracts)/Departmental Contracts Committee/Sectorial Procurement Directorate, 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 Procurement Platform (www.etenders.gov.mt). [...]”

- d) Following the alleged malfunction on the ePPS, ERA's procurement office contacted 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 held that: “according to the system logs, the EO "EPSILON MALTA LIMITED" did not proceed to either view the evaluation clarification or to publish an answer for the evaluation clarification request "SPD8/2021/020 - Rectification Letter" of the CT "Service tender for the provision of expert assistance to quantify the improvement in air quality in Malta as a result of policy measures" until the deadline of 24/09/2021 10:00:00.” Therefore, it resulted that rather than there being a problem in the system, the appellant Epsilon had not attempted to log in nor upload any responses before the applicable deadline.

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 consider Appellant’s grievances, as follows:

- a) The Board will initially refer to the testimony under oath of Prof Dennis Sarigiannis. This Board appreciates both the Contracting Authority’s and Prof Sarigiannis’ efforts to have a suitable answer to the 2nd clarification request of the Evaluation Committee within the stipulated deadline. This Board however is not surprised that Prof Sarigiannis could not access the system (ePPS), since he was the ‘Key Expert’ of the prospective bidder and not the representative of the Appellant company who was managing / taking care of the ePPS tender submission.
- b) The crux of the matter rests with section 15 ‘Clarification of Tenders’ of the General Rules Governing Tenders 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.” (Bold emphasis added)*

- c) This Board opines that the General Rules Governing Tenders are very clear in stating “***must be made through the Government’s e-Procurement Platform***”. Any exceptions, if any, are to be allowed in very rare circumstances, if at all. To this effect, this Board notes that the Contracting Authority duly made contact with the ePPS developer / administrator ‘Eurodyn’ who in turn stated, “*according to the system logs, the EO ‘Epsilon Malta Limited’ did not proceed to either view the evaluation clarification or to publish an answer*”.
- d) This Board also notes that system automatically issues daily reminders to economic operators who are issued with clarification and / or rectification requests. Eurodyn did not issue statements that the system was undergoing any sort of malfunction or that these daily emails were ‘undelivered’. The Appellant had also received and duly answered the first round of clarification requests sent earlier. This Board has not been presented with any tangible proof before it that the ePPS system was having technical issues. The correspondence between the Contracting Authority and Eurodyn attests to that. Therefore the clarification process was adopted as per normal procedure.

When considering all of the above, this Board will not uphold the 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

Dr Vincent Micallef
Member