

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case 1568 – EWA/DT/146/2020 – Provision of Services for an Independent Quality Control System for Energy Audits submitted in compliance to regulation 10 of L.N. of 2014 – Energy and Water Agency.**

31<sup>st</sup> May 2021

The Board,

Having noted the letter of objection filed by Ing Joseph Caruana acting for Tuning Fork Limited, (hereinafter referred to as the appellant) filed on the 4<sup>th</sup> March 2021;

Having also noted the letter of reply filed by Dr Ondine Gaerty and Mr Manuel Sapiano acting for The Energy & Water Agency filed on the 10<sup>th</sup> March 2021;

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 heard and evaluated the testimony of the witness Ing Joseph Caruana who is a Director at Tuning Fork Limited and Appellant on this tender;

Having noted and evaluated the minutes of the Board sittings of the 27<sup>th</sup> May 2021 hereunder-reproduced;

### **Minutes**

**Case 1568 – EWA/DT/146/2020. Tender for the Provision of Services for an Independent Quality Control System for Energy Audits in Compliance to Regulation 10 of L.N. 196 of 2014 – Energy and Water Agency**

The tender was published on (date not stated) and the closing date was the 18<sup>th</sup> January 2020. The value of the tender was € 41,514 (excluding VAT).

On the 4<sup>th</sup> March 2021 Tuning Fork Ltd filed an appeal against The Energy and Water Agency as the Contracting Authority objecting to their disqualification on the grounds that their bid was not compliant due to financial bid form not being submitted.

A deposit of € 400 was paid.

There were two (2) bidders.

On 27<sup>th</sup> May 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

## **Appellant – Tuning Fork Ltd**

Dr Anthony Farrugia  
Eng Joseph Caruana

Legal Representative  
Representative

## **Contracting Authority – The Energy and Water Agency**

Dr Ondine Gaerty  
Mr Mark Perez  
Mr Brandon Felice  
Ms Lorna Taliana  
Ms Anne Marie Grech

Legal Representative  
Representative  
Representative  
Representative  
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 Anthony Farrugia Legal Representative for Tuning Fork Ltd said that the only method of submitting a tender was electronically. This was not very helpful as the system gives no indication if a document has been missed during uploading. A missing document should not lead to a disqualification, more so, since in this case the price offered was the deciding factor. The missing document, the financial bid form, was not vital to the validity of the tender as the final price was indicated elsewhere and the bid form merely indicated a breakdown of that price. A clarification should have been sought as there was no change in the price tendered. The reference by the Contracting Authority to PCRB Case 1445 was not valid as that case dealt with missing technical submissions not financial ones.

Dr Ondine Gaerty Legal Representative for The Energy and Water Agency stated that Appellant was not contesting that the financial bid form was missing from the submissions – both Case 1445 and this case were similar as they both dealt with missing documents which were covered by Note 3 and therefore not subject to rectification. Requesting a missing document is a rectification not clarification. The tender document makes it clear that both the financial offer and the financial bid form were required to be submitted. In PCRB Case 397 of 2012 the Board dealt precisely with this point regarding missing documents. The Contracting Authority was correct in its evaluation.

Dr Farrugia said that the interpretation of words was subjective. Clarification is a request to provide fresh documents – what was missing in the tender was not fresh documents and providing them would not change anything. The online tendering system flags certain missing documents; not flagging anything in this case is because the missing document was not important to the overall determination of the tender.

Dr Gaerty said that although it may be the case that no fresh information was requested in the missing document it was a mandatory requirement to submit it.

Eng Joseph Caruana (672962M) called as a witness by the Appellant stated on oath that the electronic system has obvious shortcomings if it is able to proceed without flagging a missing mandatory document.

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 27<sup>th</sup> May 2021.

Having noted the objection filed by Ing Joseph Caruana acting for Tuning Fork Limited (hereinafter referred to as the Appellant) on 4<sup>th</sup> March 2021, refers to the claims made by the same Appellant with regard to the tender of reference EWA/DT/146/2020 listed as case No. 1568 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Anthony Farrugia

Appearing for the Contracting Authority: Dr Ondine Gaerty

Whereby, the Appellant contends that:

- a) The letter of Rejection dated 28<sup>th</sup> February 2021 states *“Financial Bid Form as requested in Section 1 – INSTRUCTIONS TO TENDERERS 5(d)(ii) was not submitted.”* *“..... EWA (The Energy & Water Agency) should have first asked Tuning Fork Limited to provide the missing informaiton, for clarification, as permitted by the tender rules, within a stipulated reasonable time-frame.”* As per regulation 5(d)(ii) *“In case of any discrepancy between the information provided in the Financial Bid Form and the grand total in the tender response format (xml tender structure) the latter shall prevail”* The Grand Total in the tender response format was submitted clearly hence it should prevail. If the financial bid form was not submitted, EWA should have asked for the missing information for clarification.
- b) Point (3) in the notes to Clause 5, in the tender states that for the financial related information in section 5(d)(ii) *“No rectification shall be allowed. Only clarifications on the submitted information may be requested”*. EWA cannot on the one hand specify that the prevailing value is the one in *“the grand total in the tender response formation”* but at the same time define a submission as non-compliant, without chance for clarification.. The information submitted to EWA pertaining to the information needed in the Financial Bid Form was not available so EWA should have asked for a clarification.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 10<sup>th</sup> March 2021 and its verbal submission during the virtual hearings held on 27<sup>th</sup> May 2021, in that:

- a) The Financial Bid Form was not submitted as demonstrated in the Index generated by the ePPS system.

- b) As per PCRB Case 1455 “Had the Evaluation Committee requested submission of Appellant’s missing documentation it would have amounted to a rectification of Appellants’ original offer, which is strictly not permitted”. Further, the Financial Bid Form as per Section 1 – Instructions to Tenderers 5(d)(ii) falls under note 3, that is no rectification shall be allowed. Hence the Evaluation Committee was not permitted to ask bidder to submit missing Financial Bid Form

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 witness duly summoned, will consider Appellant’s grievances, as follows:

- a) The Board opines that the Financial Bid Form, which was not submitted by the Appellant, falls under ‘note 3’, which states “No rectification shall be allowed. Only clarifications on the submitted information may be requested”. Hence the reference made by the Contracting Authority to PCRB Case 1455 whereby it was stated that *“Had the Evaluation Committee requested submission of Appellants’ missing documentation, it would have amounted to a rectification of Appellants’ original offer, which is strictly not permitted”* does stand in this particular instance. Henceforth, this Board does not uphold Appellant’s grievance.
- b) Moreover, this Board will again emphasise that, it is the responsibility and obligation of the bidder to include, in his offer, all the mandatory documentation as duly stipulated in the tender document. In this particular case, the Appellant failed to abide by this requirement. Therefore even though the EPPS system did not warn the prospective bidder that the Financial Bid Form was not included in his bid, this is still the responsibility of the prospective bidder. This Board does not uphold Appellant’s grievance.

**In conclusion this Board opines that;**

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 to deem the tender as non compliant,  
c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Mr Carmel Esposito**  
Member