

PUBLIC CONTRACTS REVIEW BOARD

Case 1679 – SPD8/2021/096 – Framework Contract for the Supply and Delivery of Diesel EN 590 (or Equivalent), to the Gozo Waste Transfer Station and Vehicles

7th February 2022

The Board,

Having noted the letter of objection filed by Dr Larry Formosa on behalf of Cosyra Legal acting for and on behalf of Grima Fuel Supplies Limited, (hereinafter referred to as the appellant) filed on the 26th November 2021;

Having also noted the letter of reply filed by Dr Marc Sant on behalf of Wasteserv Malta Ltd (hereinafter referred to as the Contracting Authority) filed on the 6th December 2021;

Having heard and evaluated the testimony of the witness Ms Branica Xuereb (Secretary of the Evaluation Committee) as summoned by Dr Jonathan Mintoff acting for Grima Fuel Supplies Limited;

Having heard and evaluated the testimony of the witness Mr Daniel Tabone (Chairperson of the Evaluation Committee) as summoned by Dr Marc Sant acting for Wasteserv Malta Ltd;

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 1st February 2022 hereunder-reproduced;

Minutes

Case 1679 – SPD8/2021/096 – Framework Contract for the Supply and Delivery of Diesel EN 590 (or Equivalent), to the Gozo Waste transfer Station and Vehicles.

The tender was issued on the 24th September 2021 and the closing date was the 2nd November 2021. The value of the tender, excluding VAT, was € 277,200.

On the 26th November 2021 Grima Fuel Supplies Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to their disqualification on the grounds that their tender was deemed to be financially not compliant and the cancellation of the tender.

A deposit of € 1,386 was paid.

There was only one (1) bidder.

On the 1st February 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Grima Fuel Supplies Ltd

Dr Jonathan Mintoff	Legal Representative
Dr Larry Formosa	Legal Representative
Ms Michelle Camilleri	Representative

Contracting Authority – Wasteserv Malta Ltd

Dr Marc Sant	Legal Representative
Mr Daniel Tabone	Chairperson Evaluation Committee
Mr Anthony Camilleri	Member Evaluation Committee
Ms Branica 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.

Dr Jonathan Mintoff Legal Representative for Grima Fuel Supplies Ltd requested a representative of Enemed Co Ltd to confirm the price of fuel at the time of the tender submission.

Ms Branica Xuereb (139591M) called as a witness by the Appellant testified on oath that she is a Procurement Manager at Wasteserv Malta and was involved in the prepublication of the tender and that the tender requested a percentage discount on the prevailing price of diesel fuel at the time of purchase. In line with Clause 26.9 of the tender witness confirmed that Wasteserv will follow the Regulator's published price for fuel and that the percentage discount would be based on fuel price. Witness agreed that the price shown on the BOQ in the tender was purely indicative.

Mr Daniel Tabone (203197M) called as a witness by the Contracting Authority stated on oath that he is the Chief Operating Officer at Wasteserv and was the Chairperson of the Tender Evaluation Committee (TEC). He stated that there was an inconsistency in the financial bid form and that he TEC had followed the Tender Rule 18.3 in cancelling the tender. The offer was technically but not financially complaint. The financial bid form showed a price of € 304,920 but the ePPS system indicated that the price was € 248,070.51. The request for clarification highlighted this inconsistency leading to cancellation of the tender. Witness confirmed that the percentage discount offered did not change and that this was the input required by the tender – it was merely the values on the bid form and the ePPS that did not tally.

This concluded the testimonies.

Dr Mintoff said that the prices of fuel were public knowledge; however the Appellant was now at a disadvantage as his discount offer was known and this will prejudice him in future offers. The decision in the Cateressence case backed the view that once a price becomes known cancellation is not justified. The tender was based on only one figure as the fuel prices are regulated and nothing changes when there are price changes and therefore there was no reason for cancelling the tender.

Dr Marc Sant Legal Representative for Wasteserv Malta Ltd said that the Authority would rely on the written submissions made. The bid was not financially compliant as the price submitted should have excluded VAT and therefore there was no option but to cancel. The Director of Contracts approved the the decision to cancel the tender. Bidders had missed the opportunity to seek a precontractual remedy.

Dr Larry Formosa also legally representing Grima Fuel Supplies Ltd stated that the figure of the price of fuel was immaterial to the tender as it was only indicative and what mattered was the discount rate offered.

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 1st February 2022.

Having noted the objection filed by Grima Fuel Supplies Limited (hereinafter referred to as the Appellant) on 26th November 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPD8/2021/096 listed as case No. 1679 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Larry Formosa & Dr Jonathan Mintoff

Appearing for the Contracting Authority:

Dr Marc Sant

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

- a) **No Grounds for Cancellation under Articles 18.3(b) of the General Rules Governing Tenders** - The cancellation of the above-captioned call for tender was not according to Law. The Contracting Authority based the cancellation of the tender on Article 18.3(b) of the General Rules Governing Tenders, which article reads as follows:-

“18.3 Cancellation may occur where:

[...]

(b) the economic or technical parameters of the project have been fundamentally altered;”

This contrasts with the reasoning put forward by the Contracting Authority for cancelling this Call for tenders. The reason given for the cancellation of the Call for tenders was due to an inconsistency found in the published financial bid form. The objector humbly contends that this inconsistency does not in any way constitute a change in the economic or technical parameters of the Call.

It transpires that the cancellation of the Call was triggered by the reply given by the Objector to the clarification request of the Contracting Authority. It appears that it was only at this moment that the Contracting Authority realised that there was an inconsistency found in the Financial Bid where both the Current Price of 10 Litres of Diesel EN 590 or equivalent and the Net Discounted Price were given the same price of €1.21. Since the Net Discounted Price per 10 Litres of Diesel based on the current price of €1.21 per Litre of Diesel was "inclusive of taxes & all other charges as applicable but exclusive of VAT", the price indicated by the Contracting Authority should have been that of €1.03.

It is evident that this was a lapsus by the Contracting Authority which could be easily arithmetically corrected and would in no way pose as an obstacle to the financial bid of the tenderers. The crux of the financial bid was the discount tendered by the tenderers. The discount would apply to the current market price of the diesel and therefore the prices found in the Financial Bid were only indicative since in case of fluctuation in the market price the same discount would apply.

It is evident that the Contracting Authority grossly erred in its decision of cancelling the Call on the basis of Article 18.3(b) since the economic or technical parameters of the project have not been fundamentally altered.

- b) **The Inconsistency published in the Financial Bid Form was not enough reason to justify the cancellation of the tender on any other grounds** – As stated above the Contracting Authority's sole ground for cancelling the tender was due to an "inconsistency published in the Financial Bid" which resulted "into inconsistencies towards the Vat element".

The conclusion of the Contracting Authority is manifestly incorrect. Although the Objector agrees that an inconsistency is present in the tender dossier and the same dossier could have been better drafted, this inconsistency does not merit the cancellation of the tender.

The financial bid simply requested the bidder to submit a discount on the market price of the fuel. The discount is in the form of a percentage. The objector's bid was that of a 4% discount.

The discount bid was towards the current market price and therefore would fluctuate during the operation of the contract. The fact that the Contracting Authority mistakenly indicated the price of the fuel inclusive of the VAT (i.e. €1.21 instead of €1.03) does not in any way affect the financial bid since the discount would still apply.

The reason being, that the only unit that was to be provided by any bidder for the above-captioned call for tenders, was a percentage (%) figure, under the column titled “Current Price of 10 Litres of Diesel EN 590 or equivalent (€1.21 x10)”

Thus, bidders for this call for tenders were only expected to offer a discount to the contracting authority on the market price of the fuel, for which the Contracting Authority clearly stated the following in N.B.3:-

"The discount percentage shall remain fixed throughout the whole duration of the contract."

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 6th December 2021 and its verbal submission during the virtual hearing held on 1st February 2022, in that:

- a) Messrs Grima Fuel Supplies Ltd have submitted an offer consisting of a 4% (four percent) discount, that was worked out on the €12.10 (twelve euro and ten euro cents), that tallying to €11.62 (eleven euro and sixty-two euro cents) exclusive of VAT multiplied by the indicated quantity in the dossier, tallying to €292,723.20 (two hundred and ninety two thousand, seven hundred and twenty three euro and twenty euro cents).
- b) However, in the online tender response Messrs Grima Fuel Supplies Ltd stated the amount of €248,070.51 (two hundred forty eight thousand and seventy euro and fifty-one euro cents).
- c) Following these discrepancies the Evaluation Committee requested a clarification from the bidder in order to confirm if the total as stated in the Financial Bid submitted had to be carried forward to the online tender response.

- d) Messrs Grima Fuel Supplies Ltd replied confirming that the total of €292,723.20 (two hundred and ninety two thousand, seven hundred and twenty three euro and twenty euro cents), but clearly indicating that this value is inclusive of VAT.
- e) Whereas in the same clarification reply the bidder confirmed that this value exclusive of VAT is that of €248,070.51 (two hundred forty eight thousand and seventy euro and fifty-one euro cents).
- f) In lieu of this discrepancy the Evaluation Committee noted an inconsistency in the published Financial Bid form, which stated as follows:

"Net Discounted Price per 10 Litres of Diesel based on the current price of €1.21 per Litre of Diesel inclusive of taxes & all other charges as applicable but exclusive of VAT".

- g) However, in reality the €1.21 (one euro and twenty-one euro cents) price of diesel includes the VAT, hence resulting in inconsistencies towards the VAT element.

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.

- a) The Board initially refers to the reason provided by the Contracting Authority to the Appellant whereby it was stated:

"Messrs Grima Fuel Supplies Ltd have submitted an offer consisting of a 4% discount that was, worked out on the €12.10, tallying to €11.62 exclusive of Vat multiplied by the indicated quantity in the dossier, tallying to €292,723.20. However, in the 'online tender response, Messrs Grima Fuel Supplies Ltd stated the amount of €248,070.51. Following these discrepancies, the Evaluation Committee requested a clarification from this bidder to confirm if the total as stated in the Financial bid had to be carried forward to the online tender response. Messrs Grima Fuel Supplies Ltd replied stating that the total of €292,723.20 is confirmed, but clearly indicating that this value is inclusive of Vat. Whereas in the same clarification reply, the bidder confirmed that this value exclusive of Vat is that of €248.070.51. In lieu of this discrepancy, TEC noted an inconsistency in the published Financial Bid Form, which stated as follow: "Net Discounted Price per 10 Litres of Diesel based on the current price of €1.21 per Litre of Diesel inclusive of taxes & all other charges as applicable but exclusive of VAT". However, in reality, the €1.21 price of diesel includes the VAT, hence resulting in inconsistencies towards the Vat element."

The Board notes that this 'discrepancy' / 'inconsistency' has arisen due to a 'mistake' in the drafting of the Financial Bid Form by the Contracting Authority when in the box entitled "Net Discounted Price per 10 Litres of Diesel based on the current price of €1.21 per Litre of Diesel inclusive of taxes & all other charges as applicable but exclude of VAT", the formula was being worked out on a price which was in fact inclusive of VAT. It is to be noted that the amounts within this 'box' could not be altered by the prospective bidder, now Appellant. What was within the prospective bidder's control and what

was being requested from him, was a percentage discount. This was also confirmed by Ms Branica Xuereb and Mr Daniel Tabone in their testimony under oath.

- b) Reference is made to article 26.9 within Section 2 of the Tender Dossier whereby “*During the execution period of the Contract, any fluctuations in the price of diesel shall be reflected in the price charged. Consequently, the price of the diesel shall be adjusted accordingly and in line with the market prices at the time of ordering the diesel. On the other hand, the discount rate shall remain fixed throughout the whole period of the Contract.*” It is, therefore, this Board’s view that the main element of this tender was the discount percentage to be offered by each prospective bidder, which in fact he did provide.
- c) Reference is now made to the Court of Appeal decision of 27th March 2020 in the names of Cateressence Limited vs Ministeru tal-Intern u Sigurta Nazzjonali et whereby it was stated:

“26. Izda hemm raguni obra aktar gravi li minbhabba fiba d-decizjoni tfalli l- kriterju ta' proporzjonalita u anke dak ta' ragonevolezza.

27. Jekk is-sejba tithassar u sir mill-gdid - u wkoll jekk, flok tithassar, jizdied iz-zmien biex min hu interessat u ghadu ma tefax l-offerto jkun jista' jaghel l-offerta - dan iqieghed lil Cateressence f'sitwazzjoni ta' zvantagg kompetittiv. Ghal xi raguni li ma hargitx cara, u li certament ma ntweriet ebda htiega ghaliba, il- valur tal-offerta ta' Cateressence issa hija maghrufa u ghalbekek issa min jitfa' offerta jaf x'inbi u jista' jaghmel offerta ahjar. Dan ifisser illi effettivament Cateressence ma tistax tirbah il-kuntratt u illi d-decizjoni li tithassar is-sejba u sir mill-gdid, abbinata mad-decizjoni li tinkixef l-offerta ta' Cateressence, hija decizjoni anti-kompetitiva. Dan il-fattur anti-kompetitiv, li certament jikser il-par condicio tal-oblaturi, jeghleb kull vantagg li jista' jinkiseb – u jekk hemm xi vantagg, li ma ntweriex x'inhu - bit-thassir tas-sejba ghal offerti jservi biss biex jaghti vantagg lil min, sa issa, l-offerta tieghu zammha mistura, li certament huwa kontra l-ispirtu tal-ghoti ta' kuntratti pubblici.”

The Board opines that the ‘error’ / ‘mistake’ done by the Contracting Authority in the drafting of the Financial Bid Form is no grave reason for the cancellation of the tender in question. This especially so when one considers 1) the main object of the tender i.e. the discount percentage to be offered which was in fact provided by the Appellant and 2) the fact that now the Appellant’s bid is known to other competitors. Moreover, the Board refers to page 7 of the tender dossier, article 5 (D) (ii) whereby “*a filled-in Financial Bid Form (as per Tender Response Format. (Note 3). **In case of any discrepancy the xml tender structure shall prevail.***” (bold emphasis added)

Therefore, when considering all the above, this Board upholds Appellant’s grievances.

In conclusion this Board;

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' dated 17th October 2021;
- c) To cancel the Letter of Rejection dated 17th November 2021 sent to Grima Fuel Supplies Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Grima Fuel Supplies Ltd in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member