

PUBLIC CONTRACTS REVIEW BOARD

Case 1769 – SPD8/2022/065 – Call off Number 5 – Supply and Delivery of Diesel (EN590) to all Wasteserv Plants in Malta

16th August 2022

The Board,

Having noted the letter of objection filed by Dr Shazoo Ghaznavi on behalf of Legal Works Consortium acting for and on behalf of Falzon Fuel Services Limited, (hereinafter referred to as the appellant) filed on the 27th June 2022;

Having also noted the letter of reply filed by Dr Marc Sant acting for WasteServ Malta Ltd (hereinafter referred to as the Contracting Authority) filed on the 8th July 2022;

Having also noted the letter of reply filed by Dr Matthew Brincat on behalf of B&C Advocates acting for Cassar Fuel Limited (hereinafter referred to as the Contracting Authority) filed on the 1st July 2022;

Having heard and evaluated the testimony of the witness Mr Paul Fenech (Member of the Evaluation Committee) as summoned by Dr Shazoo Ghaznavi acting for Falzon Fuel Services Limited;

Having heard and evaluated the testimony of the witness Ms Sarah Cassar (Representative of Cassar Fuel Ltd) as summoned by Dr Shazoo Ghaznavi acting for Falzon Fuel Services Limited;

Having heard and evaluated the testimony of the witness Ms Cynthia Mifsud (Representative of Enemed Co. Ltd) as summoned by Dr Shazoo Ghaznavi acting for Falzon Fuel Services Limited;

Having heard and evaluated the testimony of the witness Mr Andre Vella (Representative of Falzon Fuel Services Limited) as summoned by Dr Shazoo Ghaznavi acting for Falzon Fuel Services Limited;

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

Having noted and evaluated the minutes of the Board sittings of the 19th July 2022 and 9th August 2022 hereunder-reproduced.

Minutes

Case 1769 – SPD8/2022/065 – Call-off with Mini-Competition No 5 – Supply and Delivery of Diesel (EN 590) to Wasteserv Plants in Malta.

The tender was issued on the 22nd April 2022 and the closing date was the 4th May 2022. The estimated value of the tender, excluding VAT, was € 128,520.

On the 27th June 2022 Falzon Fuel Services Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not the cheapest bid.

A deposit of € 642.60 was paid.

There were four (4) bids.

On the 19th July 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Falzon Fuel Services Ltd

Dr Shazoo Ghaznavi	Legal Representative
Ms Jessica Formosa	Representative

Contracting Authority – Wasteserv Malta Ltd

Dr Marc Sant	Legal Representative
Mr Anthony Camilleri	Member Evaluation Committee
Mr Paul Fenech	Member Evaluation Committee

Preferred Bidder – Cassar Fuels Ltd

Dr Matthew Brincat	Legal Representative
Ms Sarah Cassar	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and before inviting submissions noted that since the grievances in this case were very similar to those in case 1770 the Board would suggest that the legal arguments made in this case be taken as read when the second case is heard. This was agreed.

Dr Shazoo Ghaznavi Legal Representative for Falzon Fuel Services Ltd stated that this competitive process did not follow the law in that the estimated value of the tender was established at a figure well below the market value mark – in fact some 25% below it. Either an incorrect market research exercise was carried out or the market rates were ignored.

Dr Marc Sant Legal Representative for Wasteserv Malta Ltd said that the Authority carried out market research correctly as evidenced by the fact that three of the bids were within the tender estimated value.

Dr Matthew Brincat said that the international fuel market price is something that is easily available, and it was not a matter of opinion and not something the Authority had any control over. The bids submitted provide the necessary evidence.

Mr Paul Fenech (152787M) called as a witness by the Appellant testified on oath that he was part of the evaluation team and also represents the Contracting Authority. He was part of the team that set

the market value for the tender. This was established by checking the market prices set by Enemed which accurately reflect market conditions on the oil prices in Malta. The Authority did not look at international market prices as they were procuring the product in Malta. This call-off followed exactly the same process that was used in past call-offs.

Questioned by Dr Sant witness confirmed that four bids were received. After checking the technical and economic offers and all parameters of the tender the bid from Cassar Fuels was the most favourable and was within budget. Two other offers were very close to the winning one in price and one was well above budget by some 30%. Once deliveries are made the Authority is entitled to request samples to monitor quality of the product; on occasion by an international tester. A table showing previous call-offs was explained in detail (Authority's letter of reply dated 8th July 2022). Enemalta is a good yardstick for prices but the time factor sometimes makes some difference in prices between the time a tender is issued and the bids received.

In reply to a question from Dr Brincat witness said that the same method as the present was used for all four previous call-offs which were all awarded to Falzon Fuel Services.

Ms Sarah Cassar (386192M) called to testify by Appellant stated on oath that Enemed will be supplying the fuel to Cassar Fuel at their storage in Qormi. Witness refused to answer further questions which she said were business sensitive.

Dr Ghaznavi then requested a witness from the supplier of fuel to the preferred bidder to testify and there was some discussion as to the relevance of such a witness. Dr Ghaznavi insisted on such a witness being summoned as he had requested.

After a short recess to consider Dr Ghaznavi's request the Chairman said that the Board had noted the request by Appellant for a representative of the suppliers to the preferred bidder to be summoned. The PCRB Secretariat had contacted the preferred bidder who more than once confirmed that representatives of the Company would be attending the hearing together with their legal representative Dr Brincat. In this respect the latest communication was on the 15th July.

This Board is not serene that what is being requested is relevant, since Regulation 40 of the PPR dealing with the aspect of confidentiality makes it very clear that technical and trade secrets that are not in the public domain must be treated as confidential.

According to the Appellant's request the supplier will be requested to give evidence about price breakdowns with regard to the supplies, past, present and future made to the preferred bidder. This transgresses Regulation 40 and is not acceptable. Therefore, this Board is of the view that the hearing can proceed without the testimony of the supplier of the preferred bidder.

The Board will not deny any party the right to produce any witness it wishes and proposes that the hearing will be deferred to Tuesday 2nd August 2022 at 9.00am.

Dr Brincat requested that the following Minute be filed in the records:

'Dr Matthew Brincat on behalf of Cassar Fuel Ltd objects formally to the call for a representative of Enemed to testify as this is in blatant breach of Article 40 as no bidder or preferred bidder should disclose sensitive information. The fact that *a priori* before the hearing the other party is requesting such evidence is in breach of the mentioned article and it is irregular to call as a witness a party that is not involved in this tender'.

There being no further submissions the Chairman declared the hearing deferred.

SECOND HEARING

On the 9th August 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public hearing to further consider this appeal.

The attendance for this public hearing was as follows:

Appellant – Falzon Fuel Services Ltd

Dr Shazoo Ghaznavi	Legal Representative
Mr Joe Falzon	Representative

Contracting Authority – Wasteserv Malta Ltd

Dr Marc Sant	Legal Representative
Mr Carlos Galea	Representative

Preferred Bidder – Cassar Fuels Ltd

Dr Matthew Brincat	Legal Representative
Ms Sarah Cassar	Representative

Interested Party - Enemed Co Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Shazoo Ghaznavi Legal Representative for Falzon Fuel Services Ltd requested the witness from Enemed to give testimony.

Dr Mifsud Bonnici Legal Representative for Enemed Co Ltd referred to the Application tabled on behalf of Enemed pointing out that its representative will give evidence so long as such evidence complies with the standard rules applied by the Board.

Dr Ghaznavi asked for a Minute to be recorded as follows:

‘Dr Ghaznavi on behalf of the Appellant objects to the presence of the legal consultants of the witness being examined and requests that the Board ensures that there is no interference by the same legal consultants as they are not parties to the present proceedings’

Dr Mifsud Bonnici asked for a Minute to be recorded as follows:

‘ Dr Clement Mifsud Bonnici for Enemed Co Ltd notes that this is a public hearing and everyone including the general public is free to attend. No interference shall be made as long as no request for the disclosure of business information or secrets is made by the Appellant. Enemed had to intervene in these proceedings to make sure that no significant harm is caused to it and to competition in the market.’

Ms Cynthia Mifsud(504091M) called to testify by Appellant stated on oath that she is the Commercial Manager at Enemed.

Dr Mifsud Bonnici objected to the first question put to the witness on the grounds that it was commercially sensitive.

The Chairman said that the objection by Dr Mifsud Bonnici is relevant and referred to the ruling he gave in the previous hearing regarding the need to safeguard sensitive and confidential information. Questions must be restricted to this guideline.

Proceeding with her testimony Ms Mifsud stated that the general price of diesel oil is € 1.21 per litre or € 1.02 excluding VAT but including excise duty – these prices are available on the website. The prices paid by individual economic operators are confidential. Witness stated that she had no knowledge of the international price of diesel but confirmed that the last update of local prices was in June 2020 and that no changes to that price were allowed unless directed by the Government. She further testified that she is not aware if Falzon Fuels asked Enemed to quote them a price or if they had supplied them with any diesel.

Mr Andre ‘Vella (1963M) called as a witness by the Appellant testified on oath that he is the Risk Manager of the Falzon Group. He stated that the international price of oil on 22nd April 2022 was US\$ 1153.25 and on the 3rd May 2022 the settlement price was US\$ 1143.80. The local price on 2nd April 2022 was € 1.24 per litre including excise tax and on the 3rd May it was € 1.29 per litre. The former price would give a value of € 156,718 for the quantity specified in the tender or € 200,650 at a price of € 1.29. The normal storage period of diesel oil is not a long one.

In reply to a question by Dr Matthew Brincat Legal Representative for Cassar Fuels Ltd witness said that he is not aware of the available stocks held by the company nor of the price at which they were bought through hedging.

This concluded the testimonies.

Dr Ghaznavi stated that it was clear from the last witness heard that the price offered was not the market price but the artificial price set by the Government – the offer by Cassar Fuels was at 97 Euro cents a litre which does not reflect the market conditions and at a price which was not available to all players in the market. This leads to one wondering if there is an element of state aid here in subsidised prices. Cassar Fuels cannot claim that they had the fuel stored for a long time and the Evaluation committee should have realised that the offer was abnormally low.

Dr Brincat stated that the price at which a tender is quoted is not necessarily the international price. The fuel might have been obtained from favourable sources and not necessarily at market prices. There is the entrepreneurship aspect in procurement.

Dr Marc Sant Legal Representative for Wasteserv Malta Ltd said that there were no problems with previous call-offs – the table provided indicates the level of variations there can be in call-offs. As for the rest the Authority relies on the written submissions.

Dr Mifsud Bonnici said one must be careful before making allegations on state aid which were not valid as there was no evidence that there was such aid.

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 sittings of the 19th July 2022 and 9th August 2022.

Having noted the objection filed by Falzon Fuel Services Limited (hereinafter referred to as the Appellant) on 27th June 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD8/2022/065 listed as case No. 1769 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Shazoo Ghaznavi

Appearing for the Contracting Authority: Dr Marc Sant

Appearing for the Preferred Bidder: Dr Matthew Brincat

Whereby, the Appellant contends that:

- a) First Grievance - Whereas it must be set out that the estimated procurement value of the Tender was set at clause 1.8, that set out: *“The Estimated Procurement Value for this Call for Tenders has been based on comprehensive research including appropriate financial analysis. In the context of this procurement, the Estimated Procurement Value, based on market research, is that of €128,520 excluding VAT. The purpose of this value shall be the guidance of prospective bidders when submitting their offer and is not to be considered as a binding capping price. Therefore, the published Estimated Procurement Value is not restrictive and final on the Contracting Authority. Economic Operators are free to submit financial offers above or below the Estimated Procurement Value. However, the Contracting Authority reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value.”*

Whereas despite the above affirmation that clearly set out that the Estimated Procurement Value: *“is not to be considered as a binding capping value”* in clause 7D, the Tender document sets out: *“Moreover, should the Recommendation for Award exceed the Estimated Procurement Value as documented on the Tender*

Originator's Form (ToF) of the Specific Call-Off / Mini-Competition, the Mini-Competition Procurement Call shall be cancelled."

Whereas clearly from the above quotes it is evident that the Tender document is in conflict within the parameters being established by the Contracting Authority.

Whereas Clause 1.7 allows and authorises bidders to make offers that may be in excess of the Estimated Procurement Value, Clause 7D expressly prohibits the award of the tender to a bidder whose offer is in excess of the Estimated Tender Value.

Whereas such conflict, in itself, should have led the Contracting Authority to carry out a correction by means of a clarification note, whereby such an anomaly would have been avoided and extinguished.

- b) Second Grievance - Whereas in the present case the declared value of the Tender was One Hundred Twenty Eight Thousand Five Hundred Twenty Euro (€ 128,520) excluding VAT, the submitted offers all exceeded the estimated value of the Tender. However, as will be established during the hearing of this objection, the estimated value as set out in the Tender document does NOT reflect a realistic and justified value for the requested product at the time when the Tender was issued.

Whereas the manner in which the estimated value for the Tender should be calculated is set out in Regulation 28 of SL 601.03 by taking into consideration any market research at the time of the tender at which the call for the competition is made as confirmed by the Court of Appeal in its Superior Jurisdiction.

Whereas in the present case it should result that the supply being sought by the Tender was subject to an abnormally volatile price, stemming from and also further aggravated by an international crisis that commenced on the 24th of February 2022, which event had the dual effect of a sharp increase in the price of Gas Oil and an additional effect of an overall global shortage in the supply of the same. The Appellant shall present evidence during the sitting and make the necessary submissions to this effect during the hearing of the present objection.

Whereas throughout the *iter* of the present proceedings the Appellant will bring forward evidence to the effect that the prevalent market price when the Tender was issued, that is on 22nd of April 2022, was significantly higher than the Estimated Procurement Value, there by rendering the latter an abnormally low procurement value. Which abnormally low procurement value has the effect of distorting the market.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 8th July 2022 and its verbal submission during the virtual hearings held on 19th July 2022 and 9th August 2022, in that:

- a) Offers received by Evaluation Committee - Four (4) bidders, three (3) submitted offers that were very close to the Estimated Procurement Value. It was only one (1) bidder - the appellant – that submitted an offer that was substantially higher than the Estimated Procurement Value. In the opinion of WSM, this fact in and of itself shows that the offer made by the appellant here was abnormally high. That the financial offers submitted by Cassar Fuel, Ph Borg and Star Fuels were all found to be technically compliant and within budget. That while the financial offer by Falzon Fuel Services Ltd was also found to be technically compliant, it was also 30% over-budget. That the financial offer of the offers that were administratively and technically compliant were compared to the Estimated Procurement Value of Eur 128,520 excluding VAT, as stated in Section 1, Article 1.3 of the tender dossier.
- b) No clarifications requested - That the appellant claims WSM should have issued a clarification note and that this procurement call should have been cancelled, since they argue that the tender document is in conflict within the parameters being established by the Contracting Authority. That WSM is in disagreement with this reasoning and it is confident that the document is very clear. Furthermore, this document was used in previous Call-Offs in which the appellant had participated and a clarification on this matter was never requested by any of the other economic operators or the same appellant. That it is being further reinforced that during the publication of this specific Call-Off, WSM did not receive any request or requests for clarification. Parties in good faith are expected to raise any objections at this specific stage and not await the publication of the results and the decision of the award before deciding whether to object or not.
- c) Abnormally low offers and quality of product - That the appellant is contending that both the Estimated Procurement Value set out by the Contracting Authority AND the offer submitted by the Preferred Bidder in the Tender constitute circumstances that lead to situations that may be deemed abnormally low tenders. That the appellant further remarks that "abnormally low offers are problematic as generally they are too good to be true". The appellant further quotes a decision by this Tribunal which states: "However, it may also be the case that low-priced tenders are 'too good to be true' and will be very poor value for money or will not be delivered." That this claim by the appellant may only be considered as a desperate attempt at clutching at straws at best, since the tender provides for this scenario too - namely, the Technical Specifications (Section 3) expressly say in Point 1.1 that "The Diesel (EN 590) shall be supplied according to the following characteristics/requirements". These characteristics/requirements include, among others, Cetane number, Cetane index, Colour, Sulphur content, Carbon residue and Water content.
- d) Previous Call-Off offers received - That here WSM wishes to present information relating to these previous Call-Offs. One may note that this same method and procedure was used in previous similar calls, even at times when the appellant was the awarded bidder. In previous similar calls evaluation of offers was carried out in line with Clause 1.81 of the published instructions to tenders

while evaluation committees relied on declaration submitted by economic operators confirming that the quality of the fuel supply shall be in line with technical specifications required.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 1st July 2022 and its verbal submission during the virtual hearings held on 19th July 2022 and 9th August 2022, in that:

- a) First Grievance - The main objection brought forward by Falzon Fuel Services Ltd is that Tender Award Price is abnormally low and this is unfounded in fact and at law and should be rejected. This is certainly not the case as the awarded Price is relatively very close to the Estimated Procurement Value based on market research and set at €107,542.37 excl vat. The Estimated Procurement Value is a factor that is easily officially available as it is easily verifiable from the International Price for such fuel at a particular date and time. The Fuel Sector is a very volatile and changing market and is certainly effected by International Events and World markets This said the fuel price is easily available and hence any argument brought forward by the objectors in the sense that it might be abnormally low does hold any legal ground in the context of this particular tender award. We humbly draw attention to this Honourable Board that the main objection filed against this adjudication is the objection to the Price and the false allegation that the tender price award was abnormally low.

Estimated Procurement Value was €128,520.00

Tender Award Value was €122,724.00

Objectors Tender Price was €166,320.00

Ph Borg Ltd was €122,850.00

Star Fuels Ltd was €128,268.00

The Price of the Tender was a Price Award adjudicator Sole criteria. Seeing the tendered prices among the tenderers shows one sole factor that the objector was exorbitantly high when compared to the other tenderers that were all close to the Estimated Procurement Value. This should be the main basis for disqualification and refusing the appeal by Falzon Fuel Services Limited. The appeal falls very short and fails drastically to prove why the tender award price should be considered abnormally low. It is in fact very successful in showing this Honourable Board that its tender price was exorbitantly and abnormally high considering the fact that all tenderers used the base price (Prevalent Market Price) as at 22nd April 2022.

Hence all arguments related to correct market Price and Estimated Procurement Value and the fact that Price Award to Cassar Fuel Ltd as being abnormally low should be refused and declined as they are certainly unjustified in this particular case.

- b) Second Grievance - The objection fails to consider and outline that the fuel sector is experiencing a very volatile period and market fluctuations are a common day occurrence. The scope of the Tender is to assure that Wastserv procures fuel at rates that are stable and the most advantageous

to its consumption needs and hence the tender aims to achieve the best possible rate to acquire such fuel.

Fuel Distributors such as the objectors and the Awarded Tenderer have stocks and facilities to store such fuel. All tenderers do not disclose for obvious commercial reasons and regular competition the date when such stocks are purchased for future supply and trading. Hence all tenderers tender a relative competitive price according to when and at what price they would have purchased such fuel. If they would have purchased a particular quantity of stock at a competitive price lower than that of its competitors this would certainly explain why the Tender Price was the most advantageous price and consequently its award and adjudication makes commercial and market sense.

The scope of the tender is assuring the best Price within market competitiveness. This Honourable Board should have no difficulty in confirming that Tender Award was correct in fact and at law and all arguments of objectors should be refused.

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) ***Estimated tender value*** – The Appellant is arguing that the estimated tender value of €122,724 does not reflect a realistic and justified value. Moreover, the appellant reiterates that when the estimated procurement value was determined, by the Contacting Authority, reference should have been made to the international market.

This Board opines that such estimated tender value was known to all economic operators as from the start of this mini call-off procedure. Hence why has no clarification and / or call for remedies been forthcoming from the appellant in such regard? Therefore, this action should have been lodged at the very beginning of the public call for tenders as provided in Truevo Payments Limited vs Direttur tal-Kuntratti et decided on 30th June 2021 whereby “*Dawn it-tlett aggrawji li abbażi taghhom il-kumpanija appellate Credorax Ltd ppreżenat l-appell taghha jirrigwardjaw materji illi kienu jeżistu sa mil-bidu nett tal-procedura in kwistjoni, u ghal dawn l-ilmenti kienu jeżistu rimedji that ir-Regolament 252[262 ???]. Dawn l-ilmenti kellhom jitressqu qabel id-data tal-gheluq ta’ sejra għall-kompetizzjoni u mhux, bhal fil-każ tallum, wara dik id-data, u sabansitra wara d-decizjoni dwar l-ghoti tal-kuntratt.*”

Moreover, this Board also considered that out of the four (4) economic operators who participated in this tendering procedure, three (3) of them submitted bid which were lower than the estimated procurement value. Therefore, this Board does not believe that such value was arrived at by using a wrong methodology

- b) ***Clause 7D – ‘possible conflict?’*** – The Board notes that the Tender award value is less than the Estimated Procurement Value, therefore this point is deemed irrelevant to proceedings.

Hence, this Board does not uphold appellant’s grievances.

The 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 decisions in the recommendation for the award of the different lots as originally made,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member