

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1770 – SPD8/2022/078 – Call off Number 8 – Supply and Delivery of Heating Fuel Oil for Wasteserv Malta**

**16<sup>th</sup> 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 27<sup>th</sup> 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 8<sup>th</sup> 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 1<sup>st</sup> July 2022;

Having heard and evaluated the testimony of the witness Mr Charlon Buttigieg (Chairperson 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 Mr Ryan Cauchi (Representative of Wasteserv) 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 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 sitting of the 19<sup>th</sup> July 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1770 – SPD8/2022/078 – Call-off with Mini-Competition No 8 – Supply and Delivery of Heating Fuel Oil to Wasteserv Malta.**

The tender was issued on the 18<sup>th</sup> May 2022 and the closing date was the 30<sup>th</sup> May 2022. The estimated value of the tender, excluding VAT, was € 107,542.37

On the 27<sup>th</sup> 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 not the cheapest bid.

A deposit of € 537.71 was paid.

There were three (3) bids.

On the 19<sup>th</sup> 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 Charlon Buttigieg	Chairperson Evaluation Committee
Mr Nathan Zammit	Member Evaluation Committee
Ms Salome Catania	Member Evaluation Committee
Ms Branica Xuereb	Representative

**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 reminded the parties that legal arguments made in case 1769 were to be taken as read in this case.

Dr Shazoo Ghaznavi Legal Representative for Falzon Fuel Services Ltd referred to his previous submissions on market values but there was a further element in this appeal. The Contracting Authority decided to ignore their own requirements and the Evaluation Committee went beyond their powers.

Both Dr Marc Sant Legal Representative for Wasteserv and Dr Matthew Brincat Legal Representative for Cassar Fuel Ltd stated that they reiterated their submissions in Case 1679.

Mr Charlon Buttigieg (262888M) called as a witness by the Appellant testified on oath that he was the Chairperson of the Evaluation Committee which consisted of three members apart from himself and the Secretary. He stated that since this was a call-off the technical requirements had already been verified and approved; once the tender is approved the call-offs and their participants cannot be changed. The estimated value of the call-off is worked out one month before and since there were

fluctuations in the price by the time the bids were entered extra funding had to be requested. The lowest offer was 8% higher than the estimated value whereas in the previous call-off (No 7) the offer was 20% above budget. Witness explained the workings of previous call off values as listed in the Authority's letter of reply (dated 6<sup>th</sup> July 2022). The main tender, value € 1.080,000, was not increased and the call-offs were within this figure although exceeded in the mini-competitions. The terms of reference (TOF) referred to in Clause 7 of the tender referred to the main tender not the call-offs and was not required for every call-off.

Questioned by Dr Sant witness stated that there were three offers on the call-off. The Evaluation Committee realised that there were fluctuations in the market price and requested extra funding for this call-off which was still available from the tender overall budget. The cheapest offer was selected and there were no clarifications sought on this call-off. Regarding the claim of abnormally low prices bidders are bound by the rules of the main tender and all offers approximated tender values.

Mr Ryan Cauchi (65492M) called as a witness by Appellant testified on oath that he is the Facilities Manager at Wasteserv and was in overall charge of the tender and had prepared the estimated value of the main tender. He had not consulted the international fuel market.

Questioned by Dr Sant witness stated that the procedure followed in this case was exactly as the previous call-offs. Estimates were requested and in calls 1 to 6 the price was stable but in call-off 7 there was a drastic change due to the war in Ukraine. None of the bidders had sought clarifications. Deliveries of call-offs were usually split into lots with samples tested and if felt necessary by an independent tester.

In reply to a question by Dr Ghaznavi witness stated that Enemed were not involved in providing heating oils.

Ms Sarah Cassar (386192M) called as a witness by the Appellant said that she was not prepared to answer questions on commercially sensitive matters. She further stated that the fuel to be supplied in this tender was in storage; that she was not aware of the international price of heating oils and the fuel referred to in this tender was not EN590.

Dr Ghaznavi complained that this was not commercially confidential information – he was merely trying to establish who was the supplier of the fuel.

The Chairman reiterated that the Board will only allow questions that are not of a confidential nature.

Dr Ghaznavi requested the following Minute to be recorded:

' Dr Ghaznavi on behalf of Falzon Fuel Services Ltd objects to the fact that the preferred bidder is refusing to disclose the identity of the entity from whom the preferred bidder is acquiring the fuel oil in question and reaffirms that the identity of a supplier of goods to be furnished in a tender similar to that of today is not protected under Regulation 40(2)(d).'

Mr Andre Vella (198379M) called as a witness by the Appellant stated under oath that his role as Exposure Manager was to ensure that the Company was not exposed to any undue risks. He was not involved in the heating oil tender. Directed to a particular date he stated that on that day, 18<sup>th</sup> May, the price of heating oil fluctuated but the benchmark was visible to all. The closing price on that day was 1066.6 and the tender was published on that day at a price of 1.21 cents per litre. The price on the 27<sup>th</sup> May, the nearest working day to the 30<sup>th</sup> was 1.28 cents per litre.

This concluded the testimonies.

Dr Ghaznavi said that there are two main issues to be considered. The estimated value of the tender at € 117,542 does not reflect either the date of issue of the tender nor the date of the decision – the offers all exceeded this price and when all bids are either over or under the estimated value questions have to be asked. There are Court judgements dealing with situations where an offer can be below the market price.

Secondly, said Dr Ghaznavi, the Evaluation Committee is bound by conditions in the tender and in the PPRs. A specific condition is that if the offer is above the TOF the mini call has to be cancelled. In his evidence Mr Buttigieg claimed that the TOF does not apply in the case of call-offs as one relies on the TOF of the main tender and that the Committee was following past procedures – if something is wrong it should not be repeated. According to Clause 7.2 of the tender the call-off should have been cancelled.

Dr Brincat said that the points made in the letter of reply are reiterated. Clause 7 is part of a larger tender which involved several other calls. Falzon Fuel Services did not object to the previous six calls which they won – why are they objecting to this one?

Dr Sant said that explanations had been given on how tender values were arrived at and on the call-off values. There were no objections prior to this award and no appeals on past calls which Appellant won. The budget allocation was in order and the quoted price was near the estimated tender value despite fluctuations over that month. This appeal is frivolous and should be refused.

Dr Ghaznavi stated that the TOF refers specifically to the call-off not to the tender overall. The market value cannot just be the Maltese market as that would bar foreign competition. The price should be based on international prices as Malta is reliant on outside suppliers. The Evaluation Committee failed to evaluate on the tender terms.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 19<sup>th</sup> July 2022.

Having noted the objection filed by Falzon Fuel Services Limited (hereinafter referred to as the Appellant) on 27<sup>th</sup> June 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD8/2022/078 listed as case No. 1770 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 €107,542.37 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.

Whereas clause 7D, clearly sets out that if the Recommendation for Award exceeds 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 in terms of Clause 7D, the present procurement call should have been cancelled, and the Contracting Authority and / or the Department of Contracts did not have the facility, ability or power to issue the recommendation dated 15th of June 2022, since it was evident on 30th of May 2022, that the all three bids that were received by the contracting Authority exceeded that Estimated Contract Value.

- b) Second Grievance - Whereas in the present case the declared value of the Tender was One Hundred Seven Thousand Five Hundred Forty Two Euro and Thirty Seven Euro Cents (€ 107,542.37) excluding VAT, the submitted offers all exceeded the estimated value of the Tender. Furthermore, 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 Heating Fuel 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 18<sup>th</sup> of May 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 8<sup>th</sup> July 2022 and its verbal submission during the virtual hearing held on 19<sup>th</sup> July 2022, in that:

- a) Offers received by Evaluation Committee - That the appellant is claiming that this procurement procedure should be cancelled since all the financial offers submitted exceeded the value of the estimated budget. That WSM seeks to clarify the following, namely that three offers were received. That the Evaluation Committee evaluated these offers and recommended one offer for award in line with Clause 1.8 of the published Instructions to Tenderers while confirming that the price quoted is fair and reasonable. The Evaluation Committee also ensured that the necessary funds are available. That, following the above, the Evaluation Committee recommended that this Call-Off is awarded to Cassar Fuel Limited for the amount of EUR 118,170 exclusive of VAT, since it was the cheapest administratively and technically compliant tender offer received. The financial offer is at a rate of €1,313 per 1000 litres for a maximum of 90 000 litres.
- 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 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 since the Technical Specifications (Section 3) expressly say in Point 1.1 that *“The Heating Fuel Oil shall be supplied according to the following specifications.”* These specifications include, among others, Cetane Index, Sulphur content % and water content mg/kg. That apart from the above, the Evaluation Committee too has all the safeguards necessary to ascertain that the offer which is being recommended is indeed technically compliant through declarations submitted by economic operators as part of the offer submitted. That this claim by the appellant does not hold water since there are safeguards in place that ensure the quality of the material being supplied to WSM. For example, every time a delivery is made on site, a sealed sample from the bowser making the delivery is provided and a visual inspection is carried out. If any doubt remains about the quality of the fuel oil provided, the sample may also be taken to an external laboratory to undergo further testing.
- 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 1<sup>st</sup> July 2022 and its verbal submission during the virtual hearing held on 19<sup>th</sup> July 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 €107,542.37.

Tender Award Value was €118,170

Objectors Tender Price was €130,050

Star Fuels Ltd was €133,500

- b) The Price of the Tender was a Price Award adjudicator Sole criteria. All tenderers chose to present a tender price higher than that of the Estimated Procurement Price however the adjudication was correct as the Awarded Tender was the one that was closer to the Estimated Procurement Value albeit being also higher. Both other tenderers were much much higher than the Tender Award or the Estimated Procurement Value. This should be the main basis for disqualifying 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 30<sup>th</sup> May 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.
- c) 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 now consider Appellant's grievances.

The Board opines that there are two main issues to be considered.

1. The issue raised on how the estimated tender value was calculated and
  2. Clause 7D of the Tender document mini call
- a) ***Estimated tender value*** – The Appellant is arguing that the estimated tender value of €107,542.37 does not reflect a realistic and justified value. Moreover, the appellant reiterates that when the estimated procurement value was to be determined, by the Contracting 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 sought by 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 30<sup>th</sup> June 2021 whereby “*Dawn it-tlett aggrawji li abbażi tagħhom il-kumpanija appellate Credorax Ltd ppreżenat l-appell tagħha jirrigwardjaw materji illi kienu jeżistu sa mil-bidu nett tal-procedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taht ir-Regolament 262 . Dawn l-ilmenti kellhom jittressqu qabel id-data tal-għeluq ta’ sejba għall-kompetizzjoni u mhux, bhal fil-każ tal-llum, wara dik id-data, u sabansitra wara d-decizjoni dwar l-għoti tal-kuntratt.*”

Another argument which was brought forward by the representatives of the Contracting Authority, and which this Board fully concurs with, is that for the estimated value, the Contracting Authority made contact with the three (3) operators which are participating in this framework tendering procedure and its respective call offs.

It is only these (3) successful operators which can put in bids for these mini call-offs. Hence, this Board opines, that the market research was done on the full possible population available. It would have been irrelevant to make reference to the international markets, when only these 3 operators can put in their bids.

Hence, this Board does not uphold this grievance of the Appellant.

- b) ***Clause 7D – ‘possible conflict?’*** –

Facts are as follows:

- i. Clause 1.8 of the tender dossier states “*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 €107,542.37*

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.” (bold & underline emphasis added)

- ii. Clause 7D states “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.**” (bold & underline emphasis added)

Reference is made to the testimony under oath of Mr Charlon Buttigieg whereby “The main tender, value €1,080,000, was not increased and the call-offs were within this figure although exceeded in the mini-competitions. The tender originator’s form (TOF) referred to in Clause 7 of the tender referred to the main tender not the call-offs and was not required for every call-off”

This Board agrees that there might possibly be a slight element of ambiguity whereby if one were to analyse Clause 7D on its own, one can get the impression that there is a ‘ToF’ prepared for each specific call-off. However, if the whole tender document is read in context, one can note that the estimated procurement value of each mini call-off is non-binding on the Contracting Authority and that only one ‘ToF’ is prepared for the whole framework tender procedure. Therefore, what is most important and binding is that the whole budget of €1,080,000 is not to be exceeded. That is what, in this Board’s opinion, is binding on the Contracting Authority. If this is exceeded then the specific call-off is to be cancelled. This has not happened.

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**

**Mr Lawrence Ancilleri**

**Mr Richard Matrenza**

**Chairman**

**Member**

**Member**