PUBLIC CONTRACTS REVIEW BOARD

Case No. 344 (Pre Hearing)

GN/DPS/T/4004/PC1/2011
Tender for the Supply, Delivery and Testing of Shell Argina X40 SAE 40 BN 40 Engine Oil for Enemalta Corporation

This call for tenders was published in the Government Gazette on 17th June 2011. The closing date for this call with an estimated budget of € 1,000,000 was the 20th July 2011.

Four (4) tenderers submitted their offers.

Palm Shipping Agency Ltd filed an objection on the 13th October 2011 against the decision by Enemalta Corporation through the issue of Clarification No. 1 whereby tenderers were (a) informed that "the tender could not be awarded due to a number of shortcomings in the tenders received" and (b) invited "to re-submit (their) offer", which effectively meant the disqualification of his client's tender from the first tendering process.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Friday, 4th November 2011 to discuss this objection.

Present for the hearing were:

Palm Shipping Agency Ltd

Dr Kenneth Grima	Legal Representative
Dr Nicholas Frendo	Legal Representative
Dr Kristina Grima	Legal Representative
Ing Nicholas Bellizzi	Representative
Ing. Konrad Maistre	Representative

Enemalta Corporation

Dr Damian Degiorgio	Legal Representative
Ing. Alan Micallef	Representative
Ing. Ian Stafrace	Representative

Evaluation Board:

Ing. Ivan Bonello	Chairman
Ing. Silvan Mugliett	Member
Ing. Albert Farrugia	Member
Ing. Joseph Mifsud	Member

Contracts Department

Mr Oreste Cassar	Assistant Director

The Chairman explained that the purpose of the meeting was to establish whether the procurement by Enemalta Corporation of the product Shell Argina X40 SAE 40 BN 40 Engine Oil was governed by the Public Procurement Regulations (LN 296 of 2010) or by the Enemalta Act (Chapter 272) and, therefore, whether the appeal lodged by Palm Shipping Agency Ltd with the Public Contracts Review Board was admissible or not.

Dr Damien Degiorgio, representing Enemalta Corporation, questioned whether the Public Contracts Review Board had jurisdiction over this procurement process because the Public Contracts Review Board had already expressed itself on the issue by emails dated 25th October 2011 in the sense that the Public Contracts Review Board had no role to play in the adjudication process of this tender once the oil being purchased was used for the generation of energy. He therefore submitted that the Public Contracts Review Board could not go back on its decision.

The Chairman remarked that, following the email dated 25th October 2011, the Public Contracts Review Board had received further information on this matter and it felt that it was better to meet with the parties concerned and, if necessary, to seek independent expert advice to establish without any shadow of doubt if this tendering process fell within the remit of the Public Contracts Review Board.

Dr Kenneth Grima, representing Palm Shipping Agency, the appellant company, made the following submissions:-

i. the objection of his client concerned the first call for tenders, which had been issued for 6 months but with the possibility of being extended for further 6-month periods provided the difference in the price did not exceed 5%, and in which process his client had submitted the cheapest offer;

ii. subsequently, the original tender document was amended – e.g. contract period was one year - and tenderers were asked to resubmit their offers;

iii. as in the case of any other diesel engine, to run energy generating equipment one required three elements, (a) water or air to cool the system, (b) fuel, e.g. diesel, that was burnt in the process of running the combustion machine which in the end resulted in the discharge of exhaust and (c) oil to lubricate the moving parts of the engine to prevent it from overheating/ceasing; and

iv. it appeared that, according to Enemalta Corporation, water, fuel and oil were all defined as fuel because they were used for the generation of energy.

Dr Damian Degiogio, representing Enemalta Corporation, made the following submissions:

i. the product being purchased through this tender, Shell Argina X40 SAE 40 BN 40 Engine Oil, was in fact lubricating oil;

ii. the procurement procedures that had to be followed by Enemalta Corporation were laid down in the Enemalta Act, which was an 'ad hoc' act, which, *inter alia*, provided as follows:-

> *"35 (1) Enemalta shall only enter into contracts for the procurement of goods, services or materials, other than petroleum, or for the execution of works, in accordance with the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations* (S.L. 174.06):
>
> *Provided that the Minister may further limit Enemalta's procurement procedures*
>
> *(2) Enemalta shall obtain petroleum in such manner and under such terms and conditions as it may, with the concurrence of the Minister, determine or agree:*
>
> *Provided that this subarticle shall not apply to such operator, concessionaire, manager, agent, independent contractor or other third party as is referred to in article 3(5)."*

iii. that meant that, apart from petroleum products, Enemalta Corporation had to make use of the provisions of L.N. 174 of 2006 in respect of which the appeal procedures outlined in L.N. 296 of 2010 were applicable;

iv. for the purchase of petroleum, Enemalta Corporation had to go by the provisions of Art. 35 of the Enemalta Act and Art. 2 (1) of the same Act which defined "petroleum" as *"all natural hydrocarbons whether in liquid or gaseous form, including crude oil, liquefied petroleum gas and natural gas, and whether in a crude or natural state or in a processed or refined form";*

v. Art. 35 of the Enemalta Act, although enacted in 1977, was amended for the last time by Act XXVII of 2007 to reflect EU norms;

vi. water was not a hydrocarbon but engine oil/lubricants certainly were hydrocarbons; and

vii. tenderers bidding in terms of Art. 35 of the Enemalta Act could have recourse to an appeal not under the Public Procurement Regulations, namely before the Public Contracts Review Board, but in court under the Art. 469 (A) of the Code of Organisation and Civil Procedure.

Dr Grima argued that if one were to include all hydrocarbons, as Enemalta Corporation was implying, then that would comprise such items as polyester garments and any plastic item which by the definition cited by the contracting authority had to be procured by Enemalta Corporation. He insisted that S.L. 174.06 referred to fuels.

Mr Oreste Cassar, Assistant Director at the Contracts Department, under oath, remarked that:-

a. L.N. 296 of 2010 covered general public procurement whereas L.N. 174 of 2006

covered utilities, among them energy, and both legal notices contained certain exclusions in respect of which one was not obliged to issue a call for tenders;

b. from the evidence contained in the file of the Contracts Department, it appeared that Enemalta Corporation had sought the advice of the DG Contracts and once Enemalta Corporation had confirmed that the product that was going to be purchased was required for the generation of energy, the DG Contracts had advised that, in accordance with Reg. 26 (b) of SL 174.06, contracts for the supply of fuels for the production of energy were excluded from the scope of the Regulations.

At this stage the Chairman, Public Contracts Review Board, concluded that, in the short recess requested by the Board at the end of this hearing session, the latter had agreed to seek independent advice on this issue from an independent, professionally and technically equipped source. This Board acknowledges that such action would give more credibility to its ultimate decision which, for all intents and purposes, shall abide by the opinion of this purposely appointed expert and which shall also be considered binding on all parties concerned.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection dated 19th October 2011 and through the verbal submissions made during the hearing held on the 4th November 2011, had objected against the decision by Enemalta Corporation through the issue of Clarification No. 1 whereby tenderers were (a) informed that "the tender could not be awarded due to a number of shortcomings in the tenders received" and (b) invited "to re-submit (their) offer", which effectively meant the disqualification of his client's tender from the first tendering process;

- having noted the appellant company's representatives claims and observations regarding the fact that (a) the objection concerned the first call for tenders, which had been issued for 6 months but with the possibility of being extended for further 6-month periods provided the difference in the price did not exceed 5%, and in which process the appellant company claimed that it had submitted the cheapest offer, (b) eventually, the original tender document was amended – e.g. contract period was one year - and tenderers were asked to resubmit their offers, (c) as in the case of any other diesel engine, to run energy generating equipment one required three elements, (*1*) water or air to cool the system, (*2*) fuel, e.g. diesel, that was burnt in the process of running the combustion machine which in the end resulted in the discharge of exhaust and (*3*) oil to lubricate the moving parts of the engine to prevent it from overheating/ceasing, (d) it appeared that, according to Enemalta Corporation, water, fuel and oil were all defined as fuel because they were used for the generation of energy, (e) if one were to include all hydrocarbons, as Enemalta Corporation was implying, then that would comprise such items as polyester garments and any plastic item which by the definition cited by the contracting authority had to be procured by Enemalta Corporation and (f) S.L. 174.06 referred to fuels;

- having considered the contracting authority's representatives' submissions, namely that (a) the product being purchased through this tender, Shell Argina X40 SAE 40 BN 40 Engine

Oil, was in fact lubricating oil, (b) the procurement procedures that had to be followed by Enemalta Corporation were laid down in the Enemalta Act, (c) apart from petroleum products, Enemalta Corporation had to make use of the provisions of L.N. 174 of 2006 in respect of which the appeal procedures outlined in L.N. 296 of 2010 were applicable, (d) for the purchase of petroleum, Enemalta Corporation had to go by the provisions of Art. 35 of the Enemalta Act and Art. 2 (1) of the same Act which defined "petroleum" as *"all natural hydrocarbons whether in liquid or gaseous form, including crude oil, liquefied petroleum gas and natural gas, and whether in a crude or natural state or in a processed or refined form"*, (e) Art. 35 of the Enemalta Act, although enacted in 1977, was amended for the last time by Act XXVII of 2007 to reflect EU norms, (f) water was not a hydrocarbon but engine oil/lubricants certainly were hydrocarbons and (g) tenderers bidding in terms of Art. 35 of the Enemalta Act could have recourse to an appeal not under the Public Procurement Regulations, namely before the Public Contracts Review Board, but in court under the Art. 469 (A) of the Code of Organisation and Civil Procedure;

- having also given due consideration to the Contracts Department's representative's intervention during the public hearing wherein it was remarked that (a) *L.N. 296 of 2010* covered general public procurement whereas *L.N. 174 of 2006* covered utilities, among them energy, and both legal notices contained certain exclusions in respect of which one was not obliged to issue a call for tenders and (b) from the evidence contained in the file of the Contracts Department, it appeared that Enemalta Corporation had sought the advice of the DG Contracts and once Enemalta Corporation had confirmed that the product that was going to be purchased was required for the generation of energy, the DG Contracts had advised that, in accordance with *Reg. 26 (b) of SL 174.06*, contracts for the supply of fuels for the production of energy were excluded from the scope of the Regulations;

- having taken full cognisance of the report submitted by the appointed expert, namely, Prof. Alfred J Vella, BSc, MSc, PhD (Colo), C Sci, C Chem, FRSC, which states the following:

QUOTE

Professor Alfred J Vella
BSc, MSc, PhD (Colo), C Sci, C Chem, FRSC
Consulting Chemist and Fire Investigator

21st November 2011

Report on the classification of Engine Oil and Shell Argina X 40 Engine Oil as petroleum products

Objective of report

Writer was asked to provide an opinion as to whether the substances engine oil, in general, and Shell Argina X 40 in particular, fall under the definition of 'petroleum' as this material is described formally in the Laws of Malta.

The Enemalta Act Chapter 272 of the Laws of Malta Art 2(1) states that:

"petroleum means all natural hydrocarbons whether in liquid or gaseous form, including crude oil, liquefied petroleum gas and natural gas, and whether in crude or natural state or in a processed or refined form."

Background information

Engine oil is obtained from a fraction of petroleum which is separated from the crude product by a process of fractional distillation. The raw material so obtained ('base oil') is further modified by a process known as 'refining' which may include chemical treatment of the base oil by processes such as hydrocracking, hydroisomerisation, solvent extraction, etc. and which also generally involves the addition to the chemically treated raw material of substances that are not native to petroleum. These additives include detergents, inorganic minerals (e.g. molybdenum sulfide), corrosion inhibitors and also organic products such as esters and polyalphaolefins (PAOs) which are not found in petroleum.

There are products in use as engine oils which are not derived from the base oils of petroleum and these substances are called 'synthetic oils'. Different types of materials are employed in the manufacture of 'synthetic oils'. These include polyalphaolefins (PAOs), polyol esters and polyalkylene glycols (among others).

Engine oils made from more highly refined petroleum-derived base oils are also termed 'synthetic oils' in certain countries but not in Germany or Japan.

Is engine oil a 'petroleum in a refined or processed state'?

It would appear that those engine oils that are made from the base oils derived from petroleum by fractional distillation followed by further refining using the processes mentioned above would certainly classify as 'petroleum' for the purposes of the Enemalta Act, even though these engine oils contain within them materials that are not found in petroleum but are added to improve the characteristics of the oils.

The so-called 'synthetic engine oils', which are entirely made from materials that are not found native in petroleum, present a more interesting problem. The term 'synthetic' points to the fact that these oils are composed exclusively of substances that are products of manufacture and contain none of the hydrocarbons typical to petroleum. Indeed, some, but not all, of these synthetic oils do *not* even contain hydrocarbons but substances such as glycols, esters and fluorinated ethers (PFPAE = perfluropolyalkyl ethers).

Writer is of the opinion that such synthetic engine oils, which are composed of non-hydrocarbon material, would not be products of commerce that can be classified as 'petroleum in a refined or processed state' because the definition, at law, is premised on the important requirement that the substances contain hydrocarbons: "petroleum means all *natural hydrocarbons* whether in liquid or gaseous form....".

According to writer, the term 'natural' in the definition is spurious, because there are no hydrocarbons in existence which are deemed by chemical science to be 'unnatural'. Nor is it safe to interpret the term 'natural' as meaning only those hydrocarbons which are found 'in nature' while the rest would be considered as 'synthetic' or 'artificial': this is so because chemical science continuously discovers new substances (including novel hydrocarbons) as well as well-known substances in the diverse natural products which are objects of study of chemists worldwide. So that such a categorization of hydrocarbons would likely be doomed to fail sooner or later.

On the other hand, the word 'hydrocarbon' in the definition is unequivocal and unambiguous and requires that in order for a substance to be called a 'petroleum in a refined or processed state', the substance has to comprise hydrocarbons, albeit in a mixture with other non-hydrocarbon compounds.

So one may firmly conclude that those 'synthetic engine oils' that consist solely of non-hydrocarbon materials, e.g. polyol esters, polyalkylene glycols and fluorinated poly ethers as well as vegetable oil – derived esters (in the so-called 'bio-based engine oils') do not fall within the definition of 'petroleum in a refined or processed state'.

The synthetic oils which are comprised of polyalphaolefins (PAOs) present us with a challenge. These synthetic engine oils *do contain* hydrocarbons, because PAOs are hydrocarbon substances, but these hydrocarbons are not native to petroleum but are products of manufacture of chemical industry. To confound the matter further, such compounds are made from precursors that are themselves made from petroleum.

Perhaps here, one could exploit the word 'natural' in the text of the law to exclude these oils from the definition on the basis that PAOs are, to writer's knowledge, not known to exist naturally in any living substance. But there are risks in doing so as outlined above (perhaps PAOs might be discovered in future as lipid constituents of some naturally-occurring organism, say an exotic plant or a deep sea creature).

The wording of the Enemalta Act can, of course, be modified to eliminate this problem but this is not a solution that addresses the current request.

In the current circumstances, writer is of the view that one can argue that the spirit of the text is to exclude synthetic oils made from polyalphaolefins from the definition of 'petroleum in a refined or processed state' for the following reason: namely that the hydrocarbons found in such engine oils cannot reasonably be considered to be products of petroleum obtainable from this material by the usual techniques of refining and processing; rather, the conversion of petroleum into polyalphaolefins involves far more complicated and profound chemical alteration which techniques are not practiced by the petroleum-refining industry.

Is Shell Argina X 40 engine oil a 'petroleum in a refined or processed state'?

The material mentioned in the tender document is the commercial product named Shell Argina X 40 - SAE 40 BN 40 Engine Oil. Information on this product was obtained by the writer from its Material Safety Data Sheet which was accessed from the following internet site on 21st November 2011: http://www.epc.shell.com/Docs/GSAP_msds_00109703.PDF

According to this source, the composition of the material is described as consisting of "highly refined mineral oils and additives" containing "less than 3% (w/w) of DMSO-extract according to IP 346" and additionally, containing, as a hazardous component of concern, the substance calcium long chain alkylsalicylate at a concentration of between 1 and 10%.

The term '*mineral oil*' is normally understood to refer to a product containing hydrocarbons (usually having carbon atom number per molecule in the range C_{15} to C_{40}) which are not derived from vegetable sources but are found in petroleum and in certain organisms (e.g. various types of bacteria).

In the opinion of writer, in light of the wording used in the Enemalta Act, and considering the information and arguments presented above, the subject of the tender, namely Shell Argina X 40, should unequivocally and unambiguously be considered as a processed and refined product derived from petroleum and hence, for the purposes of said Act, should be regarded as a form of 'petroleum'.

Alfred J Vella

UNQUOTE

the Public Contracts Review Board concludes that it has no legal remit to decide on similar appeals and, as a result, it is not in a position to proceed with its deliberation on the issue/s raised by the appellant company.

In the circumstances, this Board recommends that the deposit paid by the appellant company should be reimbursed.

Alfred R Triganza	Edwin Muscat	Carmel Esposito
Chairman	Member	Member

24th November 2011