PUBLIC CONTRACTS REVIEW BOARD

Case No. 458

WSM/225/2012
Period contract for the Supply and Delivery of Heating Gas Oil

This call for tenders was published in the Government Gazette on the 19th June 2012. The closing date for this call with an estimate of € 0.96 per litre was the 10th July 2012.

Two (2) tenderers submitted their offers.

Falzon Fuel Services Ltd filed an objection on the 25th July 2012 against the decision of Wasteserv Malta Ltd to recommend the award of the tender to Cassar Petroleum Services Ltd for the price of €0.88 per litre.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Tuesday, 25th September 2012 to discuss this objection.

Present for the hearing were:

Falzon Fuel Services Ltd

Dr Yvnaka Mifsud	Legal Representative
Mr Joseph Falzon	Representative
Mr Andew Sacco	Representative
Mr Justin Zammit Fiorentino	Representative

Cassar Petroleum Services Ltd

Dr Matthew Brincat	Legal Representative
Mr Darren Marmara	Representative

WasteServ Malta Ltd

Dr Anton Borg	Legal Representative

Evaluation Board

Ing. Mary Grace Micallef	Member

After the Chairman's brief introduction, the appellant company was invited to explain the motives of his company's objection.

Mr Joseph Falzon, representing Falzon Fuel Services Ltd, the appellant company, submitted that:-

i. by 'Notice of Award' dated 18th July 2012 the contracting authority informed his company that the tender had been recommended for award to Cassar Petroleum Services Ltd at the rate of €0.88 per litre (incl. VAT) since it was the cheaper compliant tender;

ii. whilst the sole importer of gas oil in Malta was *Total*, which used the storage facilities of Enemalta Corporation, yet, the distribution of gas oil was liberalised in the sense that there were various gas oil distributors even though their source was the same, namely, *Total*;

iii. the price quoted by his firm of €0.957/litre was based on the price on the international market, taxes and other charges plus a margin of profit;

iv. on the other hand, when one would check the recommended price of €0.88/litre against the price on the international market, the customs duty and other charges together with the margin of profit it would emerge that the recommended price was too low, as well as unrealistic, because the rate quoted would be less than that on the international market during the tendering period. Furthermore, the price of gas oil kept on increasing after the closing date of the tender;

and

v. all local distributors purchased gas oil from the same supplier at the same price and, as a result, in order to be competitive to win such a contract, bidders had to keep their storage and distribution costs as low as possible.

Ing. Mary Grace Micallef, member of the evaluation board, explained that:-

a. once the price of gas oil tended to change from time to time, the 'Schedule of Rates & Prices' at page 28 of the tender document established the rate of €1.03/litre for heating gas oil supplied and delivered based on Enemalta Corporation/Malta Resources Authority retail price of May 2012 - rather than March indicated under item (1) given NB 1 and that the tender was issued on 19th June;

The NB1 mentioned referred to:

Chapter 379 - Competition Act

9.(2) Without prejudice to the generality of the provisions of subarticle (1), one or more undertakings shall be deemed to abuse of a dominant position, where it or they –

(b) limit production, markets or technical development to the prejudice of consumers;

(3) For the purpose of determining whether the purchase or selling price is excessive or unfair, all relevant factors shall be considered and in particular:

(a) the price charged for the product (in absolute terms);

(b) the percentage increase or increases in the price over the long and short term;

(c) the relationship between the price and the cost of the product;

(d) the period of time for which the price has been charged;

(e) the economic value of the product;

(f) the importance of the product to consumers;

(g) the economic or other risks associated with bringing the product to the market;

(h) the investment of capital and other resources necessary to bring the product to the market;

(i) the expected, probable or possible changes in the market for the product;

and

(j) the price charged for the product by other undertakings in Malta and by the same or other undertakings in other analogous markets.

b. bidders were asked to quote the discount per litre they would offer on the benchmark rate of €1.03/litre and, in this case, the discounts offered were €0.15 by the recommended tenderer resulting in a rate of €0.88/litre and €0.073 by the appellant company resulting in a rate of €0.957/litre;

c. the award criteria indicated at clause 5.1.1 provided that '*The contract shall be awarded to the cheapest priced tender satisfying the administrative and technical criteria'*;

d. the two tenders received were found administratively and technically compliant and, as a result, the tender was recommended for award to the cheapest offer and no other consideration were taken into account by the contracting authority;

and

e. Note 1 of the 'Schedule of Rates and Prices' meant that, for example, in the case of the recommended tenderer, if the Enemalta Corporation/Malta

Resources Authority rate of €1.03/litre indicated at item 1 would increase to, say, €1.10/litre at the date of tender award, then the award rate would be adjusted to €0.95/litre, namely €1.10 less the €0.15 discount which remained constant.

Dr Matthew Brincat, legal representative of the recommended tenderer, remarked that:-

i. it was not correct for the appellant company to assume that the recommended tenderer had purchased the gas oil between the date of issue and the date of award of this tender because his client could have purchased the gas oil when the price was low and kept it in store to service contracts such as the one under review;

ii. Art. 9 (2) (a) and (3) of the Competition Act (as per Note 1) quoted by the appellant company in its letter of objection were not applicable to the case in hand because his client could have purchased the fuel at a time when prices were very favourable when compared to the price at the time it would be resold;

and

iii. it could be the case that the purpose of the appeal was to delay the award of this tender and, by so doing, the appellant company, which was the current contractor, would prolong its contract for the provision of this fuel.

Mr Darren Marmara', also representing the recommended tenderer, explained that:

a. fuel could be purchased in two ways, namely either 'spot' which meant that one would purchase a supply at one price applicable at the time of purchase or else one could purchase a supply at the average price prevailing over a period of, say, one month, where the former could be riskier but could also be more profitable;

b. it could even be the case that the appellant company had to service many contracts and, as a consequence, its turnover was higher thus depleting its stock of fuel at a faster rate than the company he represents which, not having such a high turnover, could still have in stock gas oil purchased at favourable prices;

c. the offer of a good discount depended mainly on when one bought the fuel and what quantities of fuel purchased at favourable prices were still in storage;

d. it was worth noting that, according to a schedule of prices published by the management of St Vincent De Paule Residence on the 1st July 2012, namely, more or less, one week prior to the closing date of this tender, the appellant company had quoted the price of €0.8695/litre for similar fuel, which rate was about 1Euro cent cheaper than the rate of €0.88/litre quoted by Cassar Petroleum Services Ltd in this tendering procedure and the appellant company was, effectively, awarded that contract;

and

e. one could not help ask how, in that instance, the appellant company considered its rate of €0.8695/litre acceptable but, in this instance, was finding the company he represents' rate of €0.88/litre unacceptable.

Mr Falzon remarked that, in the case of the St Vincent De Paule Residence's contract, his firm could afford to quote such a low price because that contract involved a very limited supply and, therefore, even if one operated it at a loss it would still be a negligible loss.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 25th July 2012 and also through their verbal submissions presented during the hearing held on the 25th September 2012, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by 'Notice of Award' dated 18th July 2012 the contracting authority informed the appellant company that the tender had been recommended for award to Cassar Petroleum Services Ltd at the rate of €0.88 per litre (incl. VAT) since it was the cheaper compliant tender, (b) whilst the sole importer of gas oil in Malta was *Total*, which used the storage facilities of Enemalta Corporation, yet, the distribution of gas oil was liberalised in the sense that there were various gas oil distributors even though their source was the same, namely, *Total,* (c) the price quoted by the appellant company of €0.957/litre was based on the price on the international market, taxes and other charges plus a margin of profit, (d) on the other hand, when one would check the recommended price of €0.88/litre against the price on the international market, the customs duty and other charges together with the margin of profit it would emerge that the recommended price was too low, as well as unrealistic, because the rate quoted would be less than that on the international market during the tendering period, (e) the price of gas oil kept on increasing after the closing date of the tender, (f) all local distributors purchased gas oil from the same supplier at the same price and, as a result, in order to be competitive to win such a contract, bidders had to keep their storage and distribution costs as low as possible and (g) in the case of the St Vincent De Paule Residence's contract, the appellant company could afford to quote such a low price because that contract involved a very limited supply and, therefore, even if one operated it at a loss it would still be a negligible loss;

- having considered the contracting authority's representatives' reference to the fact that (a) once the price of gas oil tended to change from time to time, the 'Schedule of Rates & Prices' at page 28 of the tender document established the rate of €1.03/litre for heating gas oil supplied and delivered based on Enemalta Corporation/Malta Resources Authority retail price of May 2012 - rather than

March indicated under item (1) given NB 1 and that the tender was issued on 19th June, (b) bidders were asked to quote the discount per litre they would offer on the benchmark rate of €1.03/litre and, in this case, the discounts offered were €0.15 by the recommended tenderer resulting in a rate of €0.88/litre and €0.073 by the appellant company resulting in a rate of €0.957/litre, (c) the award criteria indicated at clause 5.1.1 provided that '*The contract shall be awarded to the cheapest priced tender satisfying the administrative and technical criteria'*, (d) the two tenders received were found administratively and technically compliant and, as a result, the tender was recommended for award to the cheapest offer and no other consideration was taken into account by the contracting authority and (e) Note 1 of the 'Schedule of Rates and Prices' meant that, for example, in the case of the recommended tenderer, if the Enemalta Corporation/Malta Resources Authority rate of €1.03/litre indicated at item 1 would increase to, say, €1.10/litre at the date of tender award, then the award rate would be adjusted to €0.95/litre, namely €1.10 less the €0.15 discount which remained constant;

- having also considered the recommended tenderer's representatives' reference to the fact that (a) it was not correct for the appellant company to assume that the recommended tenderer had purchased the gas oil between the date of issue and the date of award of this tender because the recommended tenderer could have purchased the gas oil when the price was low and kept it in store to service contracts such as the one under review, (b) Art. 9 (2) (a) and (3) of the Competition Act (as per Note 1) quoted by the appellant company in its letter of objection were not applicable to the case in hand because the recommended tenderer could have purchased the fuel at a time when prices were very favourable when compared to the price at the time it would be resold, (c) it could be the case that the purpose of the appeal was to delay the award of this tender and, by so doing, the appellant company, which was the current contractor, would prolong its contract for the provision of this fuel, (d) fuel could be purchased in two ways, namely either 'spot' which meant that one would purchase a supply at one price applicable at the time of purchase or else one could purchase a supply at the average price prevailing over a period of, say, one month, where the former could be riskier but could also be more profitable, (e) it could even be the case that the appellant company had to service many contracts and, as a consequence, its turnover was higher thus depleting its stock of fuel at a faster rate than the company one represents which, not having such a high turnover, could still have in stock gas oil purchased at favourable prices, (f) the offer of a good discount depended mainly on when one bought the fuel and what quantities of fuel purchased at favourable prices were still in storage, (g) it was worth noting that, according to a schedule of prices published by the management of St Vincent De Paule Residence on the 1st July 2012, namely, more or less, one week prior to the closing date of this tender, the appellant company had quoted the price of €0.8695/litre for similar fuel, which rate was about 1Euro cent cheaper than the rate of €0.88/litre quoted by Cassar Petroleum Services Ltd in this tendering procedure and the appellant company was, effectively, awarded that contract and (h) one could not help ask how, in that instance, the appellant company considered its rate of €0.8695/litre acceptable but, in the tender under review, was finding the rate of €0.88/litre provided by the recommended tenderer as unacceptable,

reached the following conclusions, namely:

1. The Public Contracts Review Board agrees with the recommended tenderer's stand wherein the latter argued that it was not correct for the appellant company to assume that the recommended tenderer had purchased the gas oil between the date of issue and the date of award of this tender because the said recommended tenderer could have purchased the gas oil when the price was low and kept it in store to service contracts such as the one under review.

2. The Public Contracts Review Board feels that the offer of a good discount depended mainly on when one bought the fuel and what quantities of fuel purchased at favourable prices were still in storage.

3. This Board has considered the contradictory statement made by the appellant company's representative relating to why, in a similar tender which had already been awarded, his company felt it opportune to quote a very low rate per litre thus securing the said award and, in agreement with the recommended tenderer's viewpoint expressed during the hearing, one could not help ask how, in that instance, the appellant company considered its rate of €0.8695/litre acceptable but, in so far as the tender under review is concerned, was finding the recommended tenderer's rate of €0.88/litre unacceptable.

In view of the above this Board finds against the appellant company and recommends that the said company is not reimbursed with the deposit paid for the appeal to be lodged.

Alfred R Triganza	Joseph Croker	Carmel Esposito
Chairman	Member	Member

2nd October 2012