

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 729**

**CT 2023/2014**

**Tender for the Supply of Marine Gas Oil DMA According to ISA 8217.**

The tender was published on the 1<sup>st</sup> April 2014. The closing date was the 13<sup>th</sup> May 2014.

The estimated value of the Tender was €5,400,000 (Exclusive of VAT)

Three (3) bidders had submitted bids for this tender.

On the 7<sup>th</sup> August 2014 Cassar Petroleum Services Limited filed an objection under Regulation 83 of the Public Procurement Regulations objecting against the rejection of its offer before the opening of the third financial offer packages.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday the 20<sup>th</sup> August 2014 to discuss the objection.

Present for the hearing were:

### **Cassar Petroleum Services Limited - Appellant**

Mr Darren Marmara`	Chief Executive Officer
Dr Matthew Brincat	Legal Representative

### **Falzon Fuel Services Limited - Interested Party**

Mr Joseph Falzon	Director
Dr Yvanka Vella	Legal Representative

### **Go Fuels Limited - Interested Party**

Mr Chris Cini	Representative
Dr Cedric Mifsud	Legal Representative

### **Gozo Channel Company Limited - Contracting Authority**

Ms Jacqueline Mizzi	Chairperson Evaluation Board
Mr John Muscat	Secretary Evaluation Board
Mr Philip Borg	Member Evaluation Board
Mr Mark Formosa	Member Evaluation Board
Mr Sammy Grech	Member Evaluation Board
Dr Georgine Schembri	Legal Representative

## Department of Contracts

Ms Jacqueline Gili

Director Operations

The Chairman made a brief introduction and asked appellant's representative to make his submissions on the objection.

Dr Matthew Brincat on behalf of the appellant Cassar Petroleum Services Ltd. said that his client's objection is based on Clause 7.1 of the tender regulations that obliged the evaluation board ask appellant to rectify any missing document within two days. This was a mandatory provision and not optional. However the evaluation board instead went on to disqualify appellant's tender. Appellant cannot agree with this and the PCRB should accept the objection and reinstate the appellant's tender into the adjudication process, giving it a chance to submit the missing documents. This tender's award criterion was the price and the contracting authority had to choose the best price and should not have disqualified his client on the wrong submission of a licence copy. Since the appellant was the present supplier to the contracting authority, it was obvious that appellant was fully compliant, and the contracting authority should have known this fact.

The Chairman remarked that the present objection dealt with the non-submission of the bunkering licence by the appellant who instead had submitted a distribution permit.

Mr John Muscat on behalf of the contracting authority explained that the authorization that appellant had submitted defines "fuel released to inland market means fuel released for wholesale in Malta but excluding bunkering." It also stated that the provider is authorized to import, acquire and handle petroleum products and other fuels and to sell in bulk to retailers and excluding final customers. Gozo Channel, the contracting authority is a final customer.

Dr Georgine Schembri on behalf of the contracting authority said that the production of the licence was a tender requirement and bidders had to submit it or be disqualified. Appellant is admitting that the licence was not submitted but is insisting that the contracting authority should have asked appellant to rectify this on the basis of notes to clause 7.1. Examination of these notes shows that there are three notes, note 1 allows rectification; note 2 allows certain clarifications and rectifications and note 3 which states that "no rectification shall be allowed, only clarification of the submitted information may be requested." The licence in question falls under the literature that had to be submitted with the tender as per Section (C) Technical Specifications sub para (ii). This is qualified by (note 3), note 3 applies. Thus no rectification was allowed.

Dr Matthew Brincat for the appellant insists that the supply of fuel to the Gozo Channel is not bunkering. This is because road tankers are used to give this supply. Bunkering, by definition means transferring fuel from ship to ship. Thus contends that the submitted licence was the correct licence in this case. He reiterated that the contracting authority should have asked for clarification. Appellant had submitted the correct licence because to deliver the fuel to the contracting authority road tankers are used and fuel is delivered when the ships are berthed. He insisted that note 3 did not make sense and his client should have been asked for clarification.

Mr Sammy Grech on behalf of the contracting authority, replying to questions by the

Chairman stated that the transferring of fuel to the contracting authority's ships is considered bunkering even though it may be done through barges or road tankers. Most bunkering is done in the port through bowsers. The delivery of fuel to ships is definitely not distribution. Sometimes it is necessary to have the ships receiving fuel out at sea.

Dr Georgine Schembri remarked that the hearing should be limited to the parameters of the letter of objection. Appellant was now raising different questions. The objection did not claim that the licence produced by the appellant was in fact valid. The letter of objection in fact tacitly admitted that the wrong licence had been submitted but insisted that the mistake should have been rectified. Note 3 is clear in that no rectification is allowed.

Dr Matthew Brincat for the appellant insists that Gozo Channel ships are never re-fuelled at sea. The submitted licence covers distribution of fuel to the berthed ships.

Mr Sammy Grech for the contracting authority said that the whole question arose because appellant did not produce the requested licence. Gozo Channel ships can make overseas voyages. The authorities issue different types of licences covering different services. Appellant submitted the wrong licence that allows licensee to make wholesale or retail distribution of fuel but explicitly excludes bunkering.

Dr Cedric Mifsud for Go Fuels Limited defined "bunkering". Bunkering means the supply of fuel to a ship, not necessarily ship to ship. Bunkering can be done through road tankers. To be able to do this, suppliers need to have a licence. The licence submitted by the appellant with his tender covered importation. Another licence from the MRA was needed to make bunkering.

Ms Jacqueline Gili on behalf of the Department of Contracts said that all types of licences issued by the MRA can be seen from its website. There are three types of licences covering fuel supplies. One for bunkering from ship to ship, another for supply by truck and another for fuel pumps. The licence submitted by the appellant with the tender was not one of these. Other bidders had submitted the correct licences. The licence submitted by appellant does not feature in the MRA website as one of those required to distribute fuel.

Dr Matthew Brincat for the appellant explained that the Malta Resources Authority segregates operations in order to be able to exercise control and issues different licences, in fact, covering the fuel sector the authority issues more than three types of licences. These are similar to each other but are not all the same. His client possesses all the types of licence issued by the MRA and can produce all these. An all in one licence is not possible to produce.

Mr Darren Marmara for the appellant said that the tender is presently at the second stage of adjudication. The price factor in this tender is the deciding factor, and this is tackled at the third stage of adjudication. Appellant is not asking to be awarded the tender but to be given a chance to participate in the third stage. Appellant wanted to be allowed to submit the correct licence through clarification since it was unfair to disqualify appellant's tender at this stage.

Mr Sammy Grech for the contracting authority replying to a question by the Chairman said that the licence submitted by appellant did not satisfy the requirements for distribution since it clearly excluded bunkering. Before this tender the contracting authority had issued two calls for quotations. The present appellant had tendered for the first call but had been

excluded for the same reason as the present tender. Appellant had not objected at that time. For the second call however, appellant had produced the correct licences and had been successful in winning the award.

Dr Georgine Schembri for the contracting authority said that the tender would be awarded to the cheapest compliant tenderer. If appellant possessed the necessary licence then it should have been submitted with the tender.

Mr Chris Cini on behalf of Go Fuels Limited stated that the MRA issued special licences for each type of bunkering. There are different licences covering fuel supply by road tanker, by barge and so on. The tender made it clear that only those who could supply fuel with road tankers could submit offers. This is explained in section G Bunkers Delivery on Board of the tender document, page 20 wherein it is stated that supplies had to be done through bowsers. Unless a bidder did not possess bowsers or a licence covering bowsers, the bidder could not tender. The licences themselves specify the method of delivery to be used for the supply of fuel. In the present case, a licence covering only barge delivery would be non-compliant. The licence submitted by appellant does not cover bunkering at all. It covers importation of fuel.

At this point the hearing was closed.

**This Board,**

**Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 5<sup>th</sup> August 2014 and also through Appellant's verbal submissions during the hearing held on 20<sup>th</sup> August 2014, had objected to the decision taken by the pertinent Authority, in that:**

- a) **Appellant contends that his offer was discarded due to the fact that he did not submit the 'Bunkering' licence. In this regard, Appellant claims that in accordance with clause 7.1 of the tender document, the Contracting Authority had at its disposal two working days to clarify or rectify any missing documentation. The Contracting Authority did not apply remedial action.**
- b) **Appellant also contends that since the 'award criteria' of this tender was the price, it was in the best interests of the Authority to seek clarifications / rectifications as per clause 7.1 of the tender document.**
- c) **Appellant requests this Board to be given the opportunity to submit the 'Bunkering' licence and be reintegrated in the evaluation process.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on the 20<sup>th</sup> August 2014, in that:**

- a) **The Contracting Authority maintains that the submission of the 'Bunkering' licence was a mandatory requirement as dictated in the tender document. In this respect, Appellant did not abide by this requirement.**

- b) The Contracting Authority contends that the submission of the ‘Bunkering’ licence fell under Section (C) Technical Specifications sub paragraph (ii) which is regulated by Clause 7.3 and not Clause 7.1 of the same tender document.

Reached the following conclusions:

1. With regards to the Appellant’s first contention, that the Contracting Authority should have acted in accordance with Clause 7.1 of the tender document, this Board opines that the requested ‘Bunkering’ licence in question falls under the literature that had to be submitted with the tender as per Section (C) Technical Specifications sub paragraph (ii) and hence is regulated by Clause 7.3 and not 7.1. Clause 7.3 clearly states that ‘no rectification is allowed’. It was credibly established that Appellant did not submit the mandatory ‘Bunkering’ licence so that since this requirement is regulated by Clause 7.3, this Board upholds the Contracting Authority’s contention that , the same Authority could not ask for clarifications / rectification on missing documentation.
2. This Board is aware that the ‘award criteria’ was the price, however, the Appellant Company was also aware from the very beginning and prior to the actual submission of the tender document, that tenderers had to submit a ‘Bunkering’ licence. This Board also took into account the very fact that the ‘price criteria’ could not be considered by the Contracting Authority due to the simple fact that the price offered by the Appellant in his bid could not be known , as this is revealed in the last stage of the Evaluation process. In this regard, this Board opines that the process of evaluation of tenders had to be respected at all levels and thus this same Board does not uphold the Appellant’s contention that since the ‘award criteria’ was the price, Appellant’s offer should be reintegrated. This Board notes that Appellant failed to comply with a mandatory requirement of the tender document and hence, the ‘price’ element cannot justify the non submission of the requested ‘Bunkering’ licence.
3. This Board would also like to stress the fact that, mandatory requirements dictated in a tender document are not capriciously included, on the contrary. They are stipulated by the Contracting Authority to ensure that the successful Bidder is fully compliant in all respects, possesses the necessary licences to execute the tendered works and operates according to the local regulations.

In view of the above, this Board finds against the Appellant Company however, in the circumstances this same Board recommends that the deposit paid by Appellant should be reimbursed.

Dr. Anthony Cassar  
Chairman  
*9<sup>th</sup> September 2014*

Dr. Charles Cassar  
Member

Mr. Lawrence Ancilleri  
Member