

# PUBLIC CONTRACTS REVIEW BOARD

## Case 1030 – CT 2050/2016 – Supply and Delivery of Various Chemicals to the Water Services Corporation

The Publication Date of the Call for Tenders was 10 May 2016 whilst the Closing Date for Call of Tenders was 21 June 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 1,564,451.

Ten (10) Bidders have One Hundred and Twenty One (121) submitted offers for this Tender.

On 30 January 2017, Martin Grima Ltd filed an Objection against the decision taken for Lot 9 by the Water Services Corporation to award this particular Lot in the Tender to WJ Parnis England for the price of € 155,151.50 (Exclusive of VAT) against a deposit of € 4,600.

On 14 March 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

### Appellant – Martin Grima Ltd

Mr Carl Grima	Representative
Mr Martin Grima	Representative
Dr Massimo Vella	Legal Representative

### Recommended Bidder – WJ Parnis England

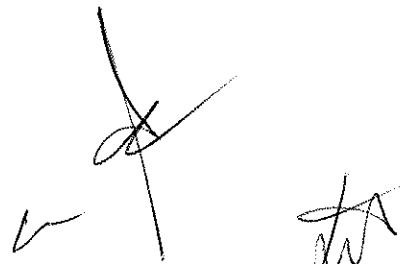
Mr Robin Parnis England	Representative
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### Contracting Authority – Water Services Corporation

Dr Ing Paul Micallef	Chairperson, Evaluation Board
Mr Louis Pullicino	Secretary, Evaluation Board
Ing Gilbert Costa	Member, Evaluation Board
Ing David Sacco	Member, Evaluation Board
Mr David Spiteri	Member, Evaluation Board
Mr Matthew Vella	Member, Evaluation Board
Mr Jonathan Scerri	Representative

### Department of Contracts

Dr Christopher Mizzi	Legal Representative
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Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Massimo Vella, the Legal Representative for Martin Grima Ltd submitted that this was an Objection which was being made on a Tender regarding the Supply and Delivery of Various Chemicals to the Water Services Corporation. This Tender was divided into lots and the Appellants have submitted offers for some of these lots and this Appeal was being made on the decision taken by the Contracting Authority to award Lot 9 to WJ Parnis England.

The Appellants' Legal Representative continued by saying that there was a particular question in the Tender namely,

*"What was the weight of the IBC Container in which the chemical is being supplied?"*

Dr Vella continued by saying that when his clients have read this question, they have understood that the Water Services Corporation was requesting the weight of the container itself. The reply which came back was that the full weight of the container was of 1100kg and that included the product inside the container. The way which the English was placed in the question, could have been understood only in one way as understood by them.

The reply which came back to the Appellants from the Water Services Corporation was that there was a Technical Requirement which indicated that the container had to have the capacity of between 1000 and 1100 kg but there was another question which was answered in another part of the Tender which requested the weight of the container itself and not the weight of the product.



Dr Massimo Vella continued by saying that there was an argument regarding why no clarification was raised by his clients. The latter felt that the Tender was clear enough in its requirements and there was no need for them to request a clarification. The English language raised in the Tender was crystal clear and it was only a question of how it was written the Tender and was understood in this way.

Martin Grima Ltd felt that there were no particular differences between the prices and due also to the fact that they had the best offer for this lot, the Appellants felt that it was not fair for them to be penalised because there was a wording in the contract which was misleading. If the Water Services Corporation wanted something else, they should have explained it in by putting the question in another way which was clear to everybody, continued Dr Massimo Vella.

The Appellants continued by saying that the Contracting Authority raised another argument where there was another lot which had a similar wording. The lots were supposed to be independent from each other. Dr Massimo Vella then referred to the attachments provided with the Reasoned Letter of Reply dated 3 March 2017 wherein the Technical Questionnaire for Lot 5 was presented by Bimaks, who was a foreign supplier who filled in that form.

What Dr Vella was emphasising at this point was that in this particular Lot which was contesting, namely Lot 9, when one read the question, *"What was the weight of the IBC Container in which the chemical is being supplied?"*, one was supposed to understand that they requested the weight of the container itself.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that the Technical Specifications were showing the range which the Water Services Corporation was pretending to have with regards to the gross weight.

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Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the words “*gross weight*”, referred to both the chemical and the container together for which Dr Mizzi agreed. The Public Contracts Review Board Chairman queried where did the word “*gross weight*” appeared in the Tender for which the Department of Contracts’ Legal Representative replied that it was mentioned in the Technical Specifications wherein it was requested that the gross weight of the IBC Container was to be between 1000kg and 1100kg.

Dr Christopher Mizzi admitted that the Technical Questionnaire’s wording was not an easy one since that was the English which had to be written for which Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that the English in question meant that they requested the weight of the container.

The Department of Contracts’ Legal Representative continued by saying that the Technical Specifications were talking about gross weight and nowhere in their offer did Martin Grima Ltd submit their gross weight therefore since if the Technical Specifications requested so much gross weight and the Bidder felt that he needed to insert the weight of the container, that would mean that in nowhere in the Tender did the Appellant insert the gross weight appropriately.

The Technical Specifications were requesting that the Gross Weight should be between 1000kg and 1100kg and the Appellant did not insert this anywhere in the document. On the other hand, Dr Mizzi agreed with the Appellants that the English wording of the Tender was difficult.

The Contracting Authority has submitted the Appellant’s Bid for Lot 5 with their Reasoned Letter of Reply dated 3 March 2017 where Martin Grima Ltd has replied by inserting its gross weight.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board proceeded by asking the Appellants whether they have inserted the weight of the chemical and the weight of the container separately for which Mr Carl Grima, representing Martin Grima Ltd, replied that in their submission they had no concerns in submitting the weight of the big container as requested by the Tender Document.

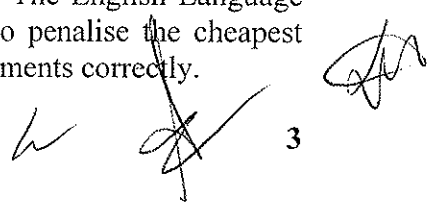
Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that the Tender Document requested the gross weight for which the Appellants’ Legal Representative, Dr Massimo Vella replied that the Technical Specifications required that the container must be able to carry that particular weight. The word gross could not be found anywhere in the Tender Document.

Dr Massimo Vella then proceeded to refer to point c of the Technical Specifications for Lot 9 found in the Tender Document which stated,

*“Hydrogen Peroxide shall be delivered and unloaded in place at the respective Wastewater Treatment Plants in 1000-1100Kg IBC Containers”.*

He continued by emphasising that the word “*gross*”, which the Contracting Authority was using over and over again, was not found anywhere. There was a Technical Questionnaire and the Appellants have replied to it in its entirety.

Dr Massimo Vella continued by saying that his clients’ offer was the best offer and € 16,000 than the next offer but it was misguided by the Tender Document. The English Language written for this Tender was not an easy one and it was not right to penalise the cheapest compliant offer when his clients have replied to all the Tender requirements correctly.

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Dr Christopher Mizzi, the Legal Representative for the Department of Contracts countered that to use the Appellant's words, it was not Martin Grima Ltd who were misguided but in reality all the Bidders were misguided since the question was there for all Bidders. Dr Mizzi also wanted to emphasise that from the Contracting Authority's side it was difficult for them to make a rectification on the Technical Specifications since these fall under Note 3, wherein no rectification was allowed.

Mr Jonathan Scerri, on behalf of the Water Services Corporation, submitted that it was true that the English Language used in this Tender could have been put in a better way but the particular question in the questionnaire made a direct reference to the paragraph from the Tender Document which was previously read, namely Lot 9 of the Technical Specifications which indicated that the weight should have been between 1000kg and 1100kg.

The Evaluation Board was faced with a questionnaire which had a value which did not fall under the Technical Specifications. If the Evaluation Board wanted to seek a clarification regarding the matter, the only way with which he could have changed this was through a rectification which was not possible. The Evaluation Board has worked according to the General Rules Governing Tenders. Mr Scerri asked everybody concerned not to allow economic factors to enter in the question since the Water Services Corporation has always tried to take the best possible offer.

Dr Massimo Vella, the Legal Representative for Martin Grima Ltd submitted that with regards to the clarifications and rectifications arguments raised by the Water Services Corporation, one was assuming that the Tender was clear and that a mistake was made and there was the need for something in the Bid submitted to be arranged.

If the wording used in the Tender, as it happened in this case, was misleading, the Bidders should have been granted the opportunity to arrange their submissions and give the Contracting Authority in question what was requested by the latter since when opportunities for rectifications are available, that would only mean that the Tender was 100% clear and that the mistake was of the Bidders.

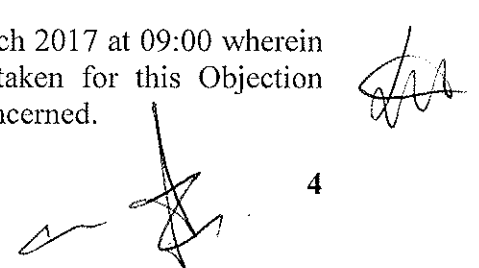
In this case, when the mistake was made in the Tender Document, these rules were not applicable and Bidders should have been given the opportunity to submit any rectifications needed in the parameters of the Tender Document concluded Dr Massimo Vella on behalf of Martin Grima Ltd.

Mr Jonathan Scerri, representing the Water Services Corporation, pointed out that the wording used in the Tender Document was correct and that the issues were raised for the wording used in the Technical Specifications but on the other hand the questionnaire was another way for the Bidders to submit any information which was not found in the original Technical Literature Submitted.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the Questionnaire was another type of clarification and hence was part of the Tender Document.

Mr Jonathan Scerri, on behalf of the Water Services Corporation replied that the Questionnaire falls under the Technical Offer which in return falls under Note 3, hence denying any clarification or rectification opportunities to the Bidders.

At this stage, the Public Hearing was adjourned to Tuesday 28 March 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.



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**This Board,**

**Having noted this Objection filed by Martin Grima Ltd (herein after referred to as the Appellant) on 30 January 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2050/2016 listed as Case No 1030 in the records of the Public Contracts Review Board, awarded by the Water Services Corporation (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Massimo Vella**




**Appearing for the Contracting Authority: Dr Christopher Mizzi**

**Whereby, the Appellant contends that:**

- a) The reason for rejecting his offer was that as per the Technical Specifications stipulated in Lot 9 Clause (c),**

***“The Chemical shall be delivered in IBC Containers of 1000-1100 kg”***

**On the other hand, the Water Services Corporation was alleging that the Appellant’s Offer was 60kg. In this regard, the Appellants refer**

to the Technical Questionnaire to which the client responded directly to the question, in that, the weight of the container of the chemical was 60kg.

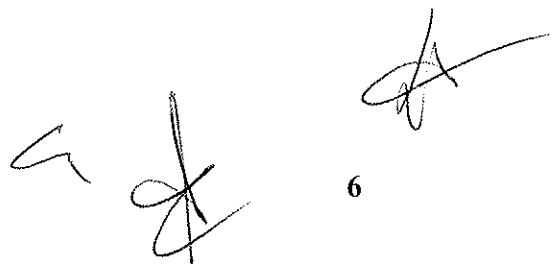
Martin Grima Ltd maintains that it is evidently clear that the Contracting Authority misinterpreted their reply which meant that the Gross Weight was 60kg which was not the case.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 3 March 2017 and its verbal submissions during the Public Hearing held on 14 March 2017, in that:

- a) The Water Services Corporation maintains that the Technical Specifications referred to gross weight and the Appellant did not submit such information. In fact, the only data submitted was the weight of the container.

The Questionnaire was sent to all Bidders and the Contracting Authority was not in a position to rectify since the Technical Specifications fall under Note 3, wherein no rectification is allowed.

This Board, after having treated the merits of this case, arrived at the following conclusions:






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1. With regards the Grievance raised by Martin Grima Ltd, this Board, after having examined the relevant documentation and heard submissions by all parties concerned, opines that the whole issue of this Appeal is the relevant questionnaire.

Clarifications are made, as and when the information submitted in the original documentation is not clear enough for the Evaluation Board to carry on with their Evaluation Procedure. At the same instance, this Board would reaffirm that any clarification or rectification which is allowable and made, forms part of the Tender Document.

In this particular case, a clarification was sought by the Water Services Corporation specifically requesting "*the weight of the IBC Container in which the chemical is to be supplied*". This Board notes that a direct and specific reply was submitted by Martin Grima Ltd and the weight of the container was established to be 60kg.

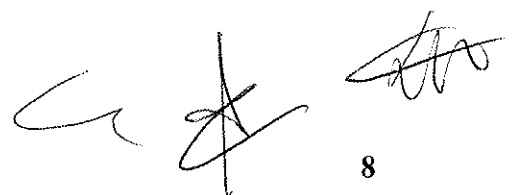
In this regard, this Board credibly establishes that the reply submitted by the Appellants should have satisfied the information requested by the Contracting Authority. This Board also took into consideration the fact that even the Water Services Corporation admitted that the clarification sent could have been much clearer.

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b) With regards to the issue of “*Gross Weight Indication*” as raised by the Water Services Corporation, in that the required answer had to refer to the Gross weight of the IBC Container, this Board would respectfully refer to the exact wording of the questionnaire wherein although Clause C refers to the Gross Weight of the IBC Container, which this Board is understanding to imply, “*The Total Weight of the Chemical and the Container*”. The same questionnaire is requesting the weight of the container only.

This Board opines that the “*Gross Weight*” issue should not be an important factor in submitting the requested information for the clarification. In this regard, this Board is not convinced that Martin Grima Ltd’s offer should be rejected on this issue.

On the other hand, this Board would like to justifiably emphasize the importance of the use of the proper wording when submitting questions for clarification purposes and in this regard, this Board is firmly convinced that the questionnaire was clear enough of what was requested by the Contracting Authority and at the same instance, this Board is also convinced that the correct and proper reply was submitted by Martin Grima Ltd



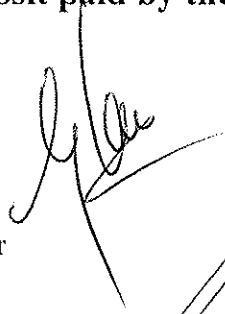
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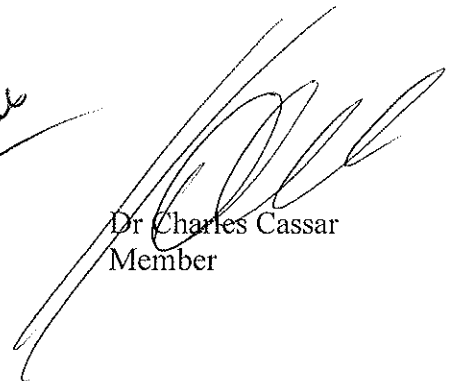
**In view of the above, this Board finds in favour of Martin Grima Ltd and recommends that:**

- i) The decision to award the Tender to WJ Parnis England is to be revoked;**
  
- ii) Martin Grima Ltd's offer is to be re-integrated in the Evaluation Process, which is to be made anew;**
  
- iii) The deposit paid by the Appellants should be reimbursed in full.**

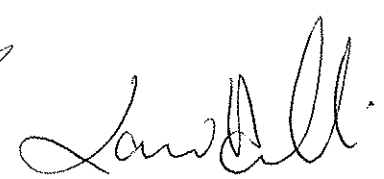
Dr Anthony Cassar  
Chairman



Dr Charles Cassar  
Member



Mr Lawrence Ancilleri  
Member



*28 March 2017*