

The Chairman  
Public Contracts Review Board  
Notre Dame Ravelin  
Floriana  
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Today 27<sup>th</sup> July 2023

Reference: WSM NP 89/23

**Reply of WasteServ Ltd to the Appeal of Star Fuels Ltd. dated 20<sup>th</sup> July 2023 re: "WSM NP 89/23 - Negotiated Procedure for the Supply and Delivery of Heating Fuel/Gas Oil for the Thermal Treatment Facility Incinerator Plant at Marsa"**

Respectfully submits:

1. At the outset the Contracting Authority asks the honourable board to hear this case with urgency. Delay in effecting this tender is forcing the Contracting Authority to purchase the same product at a higher price through a direct order to ensure the continuous supply of Heating Fuel/Gas Oil at the Thermal Treatment Facility. Operations at the Malta Thermal Treatment Facility are necessary at a national level and cannot be disrupted.
2. The objection in question concerns a negotiated procedure for the procurement of Heating Fuel/Gas Oil in the amount of two hundred and fifty thousand (250,000) Litres to be used in the Thermal Treatment Facility (Incinerator) Plant at Marsa.
3. The estimated procurement value was of €235,169 exc. VAT and four tenders were submitted for the following values being:

a. Ph Borg Ltd	€208,750.00 exc. VAT
b. Falzon Fuel Services ltd	€222,250.00 exc. VAT
c. Star Fuels Ltd	€231,250.00 exc. VAT
d. Cassar Fuel Ltd	€233,000.00 exc. VAT
4. The offer recommended for award was that of €208,750 exc. VAT (Ph Borg Ltd) while the appellant's offer for the provision of goods was for the amount of €231,250 exc. VAT. For all good intents and purposes it is being stated that the offer submitted by Falzon Fuel Services was disqualified because the offer was held to be technically non-compliant.

5. As per letter dated 10th July 2023 the appellant was informed that his quote was the second cheapest after that of €208,750 that was offered by the recommended economic operator and hence the appellant company's offer was not being accepted.
6. The recommended bidder's price was 11.2% lower than the estimated procurement value, 6.7% lower than the average four bids submitted and 6.9% lower than the average of the three bids considered. In view of the aforementioned the Contracting Authority disagrees with the appellant and concludes that the appellant is clutching at straws in order to have the tendering process annulled.

**I. Recommended offer is not an abnormally low price**

7. That for there to be an abnormally low price, the price that is offered must be substantially or concerningly lower than the recommended bid. Any price lower than the average prices submitted or lower than the expected market value price does not amount to an abnormally low price. In this case the recommended offer cannot be considered as abnormally low as the difference between the recommended bid and averages submitted as well as estimated procurement value are not substantially nor abnormally higher than the recommended bid.
8. When the Contracting Authority considered the technical and financial offers received to determine whether the financial offer of recommended bid was an abnormally low one or not, the conclusions obtained were that the price submitted could not be considered as abnormally lower.
9. Moreover, independent to the aforementioned, the Contracting Authority asserts that the price of the goods being procured is a highly volatile one. This is because there are many economic operators in the market. Moreover, it is a practice that in this line of business economic operators often hedge prices when fuel is low until they find a better price for their stock.

**II. Due diligence carried out**

10. That the Contracting Authority stands firm by its assertion that the figures submitted by the recommended bidder did not require any additional investigation on the ground that they cannot be said to be abnormally low as explained. Without prejudice to this fact the Contracting Authority submits that during its due diligence process it investigated the applicants to rule out irregularities which the tenderers could have employed in order to secure a cheaper offer.
11. In particular, the tenderers were requested to provide:

- a. Produce a valid road license;
- b. Produce certification that vehicles are enrolled with transport Malta;
- c. Provide the necessary permits issued by REWS;

Through this documentation the Contracting Authority is ruling out other possible irregularities or unlawful practices that enable any of the operators to provide the product at a cheaper price.

### **III. “Too good to be true” or suspicion of “poor value for money”**

12. That while there is no definition of abnormally low value in neither the Public Procurement Regulations (S.L. 601.03) nor in the Public Procurement Directive (Directive 2014/24/EU), many authorities adopted the “too good to be true test” or the reasonable suspicion of “poor value of money” test. The Contracting Authority could have never considered the bids submitted to be too good to be true given that the prices submitted were relatively close to the average and not so distant from the estimated procurement value.
13. In regard to the poor value for money test the contracting authority likewise could not have come to the conclusion that there was a chance that the product provided is poor value for money. All tenderers were required to show that they have the necessary certificates and licenses to carry out this tender. Hence the Contracting Authority could have never concluded that a poor value for money will be provided simply on account of being the lowest bidder amongst 3 other bidders.

### **IV. Regulation 243 of Public Procurement Regulations**

14. That in its appeal Star Fuels Ltd contends that the Contracting Authority should have queried the recommended bidder on the ground of regulation 243 of the Public Procurement regulations. The Contracting Authority refers to the fact that regulation 243 is only applicable where it is objectively determined that the prices quoted are abnormally low. If none of the tenderers provide an abnormally low price the Contracting Authority is not required to query further the tenderer. In this present case none of the tenderers submitted a price that was significantly lower than the average tendered price or price that was significantly lower than the estimated procurement value, hence the Contracting Authority was under no legal obligation to query any of the bidders for submitting an abnormally low price.

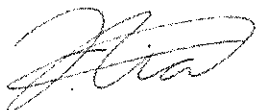
### **Guarantee of quality of product**

15. This tender concerns the provision of fuel/heating oil. The nature of the good in question makes it difficult, if not impossible, for the Contracting Authority to be given a poor quality of service and it remains bound to receive such service.
16. Paragraphs 4.17 et. seq. of the call for tender oblige the bidders to provide a minimum sample of 500ml from each consignment they deliver to the Contracting Authority. Hence each consignment can be tested to ensure that the product supplied reaches the technical criteria and is not an inferior product.
17. Independent to the sample given, the same call for tender specifies that the Contracting Authority may carry out other tests on supplies at a third-party laboratory in order to ensure that product meets technical specifications. Should the Contracting Authority determine that the product given was not of the qualities required the bidder is bound by the contract to make good for damages which includes the cleaning of the fuel tanks where such fuel has been stored within a short period of time<sup>1</sup>. This demonstrates that even if by a stretch of imagination the recommended bid can be considered as an abnormally low one, there are few matters which the Contracting Authority can query about concerning the hypothetically abnormally low price.

### **Conclusion**

18. In this case the Contracting Authority could not have in any way come to the conclusion that the price was abnormally low given that it was close to the prices submitted by other tenderers, not distant from the expected procurement value and the product's price can easily be hedged. Moreover, the Contracting Authority made sure that the economic operators had the necessary licenses and permits.

Therefore, in view of the aforementioned and for reasons that may be adducted at law at the sitting to be set up by the Public Contracts Review Board, the Contracting Authority humbly submits that the same Board should proceed to reject the appeal filed by the appellant and declare that the deposit submitted in conjunction with the same objection to be forfeited.



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<sup>1</sup> Paragraph 4.18, Call for tender (Dossier)

**List of Witnesses**

1. Representative from Contracting Authority involved in the procurement;
2. Members of the Evaluation Committee;
3. Representatives of the recommended bidder;
4. Representatives of the appealing bidder;
5. All relevant witnesses who are by law competent to provide evidence;