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20th July 2023
The Secretary
Public Contracts Review Board
Notre Dame Ditch
Floriana

Reasoned Letter of Objection

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, Malta (the "Tender Procedure")

Dear Sir, Madam,

1. Introduction

- 1.1 We are instructed by Star Fuels Ltd (hereinafter referred to as "**Star Fuels**") in connection with the Tender Procedure issued by the Central Procurement and Supplies Unit (CPSU) (the "**Contracting Authority**").
- 1.2 Reference is made to the letter dated 10th July 2023 (the "**Letter**") sent by WasteServ Malta Ltd (the "**Contracting Authority**") to Star Fuels (please see copy attached hereto as 'Annex A') *inter alia* informing it that its offer "*has ranked as the second (2nd) cheapest compliant offer*" and that the "*negotiated procedure was recommended for award to TID 000192849 for €208,750 excluding VAT, this being the cheapest compliant offer*".
- 1.3 Based on the Opened Tender Details (a copy of which is attached hereto as 'Annex B'), TID 000192849 is confirmed to be Ph Borg Ltd (the "**Recommended Bidder**").
- 1.4 Our client respectfully considers the award to the Recommended Bidder to be wrong, both in fact and at law.
- 1.5 In accordance with the Public Procurement Regulations, 2016 (S.L.601.03) (the "**PPR**"), our client hereby submits its appeal by means of this objection before the Public Contracts Review Board (the "**Board**") which shall set out hereunder the reasons therefor (this "**Objection**"). A bank transfer for a deposit of €1,176 has been made (please see evidence of payment attached hereto as 'Annex C').



2. Factual Background

- 2.1 The sole award criterion for this Tender Procedure was the price, with the contract being awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria (as stated in Article 5.1 under Section 1 – Instructions to Bidders of the tender document for the Tender Procedure (the “Tender Document”).
- 2.2 The estimated procurement value for this Tender Procedure was €235,169 excluding VAT (as stated in section 1.3 of the Tender Document).
- 2.3 According to the Letter, the tender was recommended for award to the Recommended Bidder for the amount of €208,750 excluding VAT.
- 2.4 Star Fuel’s offer was for the amount of €231,250 excluding VAT (see the Opened Tender Details attached hereto as ‘Annex B’).
- 2.5 Two other offers were submitted – those of Falzon Fuel Services Limited, for the amount of €222,250 excluding VAT, and of Cassar Fuel Limited, for the amount of €233,000 excluding VAT (see the Opened Tender Details attached hereto as ‘Annex B’). Since the Letter stated that Star Fuel’s offer ranked as the second (2nd) cheapest compliant offer, it is understood that Falzon Fuel Services Limited’s offer, which was cheaper than Star Fuel’s offer, was found to be technically non-compliant.

3. Tender Document

- 3.1 As set out under Section 3 – Terms of Reference / Specifications of the Tender Document, Article 1, the scope of the Tender Procedure is the supply and delivery of Heating Fuel/Gas Oil for the Thermal Treatment Facility Incinerator Plant at Marsa, Malta. The place of acceptance of the supplies shall be at the Thermal Treatment Facility Incinerator Plant at Marsa, Malta, and the quantity required is of two hundred fifty thousand litres (250,000) litres.
- 3.2 The mentioned Section 3, in Article 5 thereof, sets out (in a table) the specifications applicable to the fuel oil in question, while Article 6 specifies that the fuel oil shall conform to all Maltese and European legislation and standards.
- 3.3 Section 2 - Conditions of the Tender Document lays out, particularly under Article 4: General Obligations, the conditions applicable to the transportation and delivery of the fuel oil. This section, together with the others set out above in this Section 3 of this Objection, display the need for the appropriate vehicles and well-trained personnel in order for the delivery to be properly carried out.

4. Legal Principles

- 4.1 The Treaty on the Functioning of the European Union (the “TFEU”), with a view to fostering a common internal market and ensuring free movement of goods and services, required that



Member States comply with the principles of proportionality, transparency, equal treatment and non-discrimination.

- 4.2 The Tender Procedure is governed by the PPR, the national law which transposes Directive 2014/24/EU (the “**Directive**”). The PPR and the Directive seek to ensure that public purchases are made in a transparent manner so as to ensure fair competition (respecting the principles of equal treatment and non-discrimination) and that contracting authorities get the best value for taxpayers' money.
- 4.3 The Directive, in Recital 103, states:
- Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions. [emphasis added]*
- 4.4 Abnormally low tenders are regulated in terms of Article 69 of the Directive. This has been transposed into the PPR through regulation 243, which imposes a positive obligation on a contracting authority to require tenderers to explain their tenders when their offers to be abnormally low.
- 4.5 Neither the Directive, nor the PPR define “abnormally low”.
- 4.6 Identifying, investigating, and (if necessary) rejecting abnormally low tenders is a means of ensuring a level playing field and adhering by the principle of equal treatment above-mentioned.
- 4.7 A contracting authority must evaluate whether the offer is economically sustainable and can be performed in accordance with the tender requirements and the applicable legal obligations, or whether the offer is abnormally low. This will require an assessment as to whether the bidder misunderstood the requirements set out in the relevant tender document, whether it has underestimated the risks associated with the contract, whether it has considered all social, labour and environmental laws, whether it is benefiting from any illegal state aid or whether it is a commercial strategy of the tenderer.
- 4.8 European Commission “Guidance on the participation of third-country bidders and goods in the EU procurement market” (2019/C 271/02) (the “**Commission Guidance**”) and Brief 35, Public Procurement, September 2016 – Abnormally Low Tenders, published by SIGMA, Creating Change Together (A joint initiative of the OECD and the EU, principally financed by the EU) (the “**Sigma Guidance**”) refer to several ways of seeking to establish whether a tender appears abnormally low, including:



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- i. an assessment of the price of the tender and the object of the contract;
- ii. an assessment of the difference between the price of the tender and the average price of all tenders;
- iii. an assessment of the difference between the price of the tender and the contracting authority's own estimated value of the procurement;
- iv. a valid method can also be to refer to the difference between the lowest and second lowest tenders;
- v. a combination of all or some of the above-mentioned methods is applied.

4.9 In order to identify whether or not a tender is abnormally low, the tender must be assessed to establish whether:

- i. it appears that the tenderer took all material factors into account;
- ii. the tender seems to be properly and reasonably calculated;
- iii. the tenderer's proposal is realistic and achievable for the price offered.

4.10 If it is not possible to ascertain the above, or the contracting authority is still not comfortable to exclude the possibility that the tender is abnormally low, it should investigate further through a request for further information. Regulation 243(2) of the PPR provides a non-exhaustive list of what information can be requested. Therefore, the contracting authority may, as a general rule, ask the tenderer to demonstrate the soundness of the technical, economic and legal assumptions and, or practices underlying the tender. It would typically do so by requesting, *inter alia*:

- i. details of the elements in the tender suspected of anomaly, which gave rise to doubts, considering also the requirements of the tender and the ability of the tenderer to fulfil all the requirements of the Tender Document, including socially responsible and green public procurement requirements, at the price offered;
- ii. information on all issues Contracting Authority considers relevant for the assessment of the level of the price proposed;
- iii. information on aspects of the economics of the manufacturing process, including the basis for the offered price, the technical solutions or the originality of the tender;
- iv. information to ensure that the tenderer complies with applicable obligations in the fields of environmental, social and labour law established by EU law and national law, or by the international environmental, social and labour law provisions.

4.11 The tenderer whose offer appears to be abnormally low must provide all the evidence necessary to provide a sufficient explanation. This may include detailed information accompanied by appropriate documentation on the production process, facilities, social conditions, certificates, environmental standards, etc. The reasons provided to justify the viability of the tender must



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comply with the terms of the initial tender. In this regard, a contracting authority must not limit itself to requesting declarations that the tenderer intends to comply with those obligations, the Guidance states.

4.12 In the investigation process, the contracting authority may ask additional questions, especially to assess whether the information provided is authentic. The tenderer may also be asked to provide further details on questions and aspects which the contracting authority has not identified in its initial request but which have emerged as a result of the assessment of the information provided.

4.13 The following is a list of questions the Commission Guidance contemplates:

- i. How was the price calculated?
- ii. How did the bidder arrive at a specific price for a specific item?
- iii. Does the price allow fulfilling all the legal and contractual requirements?
- iv. Does the price allow fulfilling all required labour and environmental standards?
- v. How is the tender financed?
- i. Is the calculation sound?

4.14 The Court of Justice of the European Union (the “CJEU”) has considered the matter of abnormally low tenders in a number of its decisions, the following being just a few.

4.14.1.1 Cases C-285/99 and C-286/99, Impresa Lombardini SpA

In this case, with respect to the Directive provision on abnormally low tenders, the CJEU held:

*It is apparent from the very wording of that provision, drafted in imperative terms, that the contracting authority is **under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders.** It is therefore not possible to regard the requirements inherent in the inter partes nature of the procedure for examining abnormally low tenders, within the meaning of Article 30(4) of the Directive, as having been complied with unless all the steps thus described have been successively accomplished. [emphasis added]*



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4.14.1.2 Case T392/15, European Dynamics Luxembourg and Others v European Union Agency for Railways

The CJEU held that, whilst the concept of ‘abnormally low tender’ is not defined, it has been held that the abnormally low nature of a tender must be assessed by reference to the composition of the tender and the services at issue.

The CJEU confirmed that the first step is determining whether the tenders submitted contain evidence likely to arouse suspicion that they might be abnormally low, such as where the price proposed in a tender submitted is considerably less than that of the other tenders submitted or the normal market price.

4.15 The Court of Appeal of Malta (the “Court”) has recently considered the matter in Appeal No. 126/2021/1 and No. 127/2021/1, X Clean Limited (C-69875) v. Active Ageing and Community; Department of Contracts; and Dibaw Services. In this case, the Court overturned the decision of the Board and concluded that:

- i. it is more logical to compare the price offered by the tenderer with the contracting authority’s estimate, rather than the price of the highest offer, since the former is based on market research conducted by the contracting authority;
- ii. whether an offer appears abnormally low or not is a technical assessment. This however does not mean that the Court should not consider whether such assessment was in line with the law.
- iii. considering that a tender is abnormally low does not automatically mean that the offer should be disqualified; however, when the difference is substantial enough it requires the contracting authority to request information and assess that information;
- iv. it referred to Case T-74/15 considered by the CJEU in relation to the obligation to provide reasons, stating:

It should be added that requiring the contracting authority to present the grounds on the basis of which an offer was not considered to be abnormally low does not require it to disclose precise information on the technical and financial aspects of that tender, such as the prices offered or the resources that the successful bidder proposes to use in order to provide the services that it offers. In order to provide a sufficient statement of reasons for that aspect of the selected tender, the contracting authority must set out the reasoning on the basis of which, on the one hand, it concluded that, because of its principally financial characteristics, such an offer complied with the national legislation of the country in which the services were to be carried out in respect of the remuneration of staff, contribution to the social security scheme and compliance with occupational safety and health standards and, on the other, it determined that the proposed price included all the costs arising from the technical aspects of the selected tender. [emphasis added]



- 4.16 This decision of the Court departs from the Board's previous position, expressed in a number of its decisions in the past, that the Board should not question the matter of price. We note the Court's position has been reflected in more recent decisions of the Board, such as that in Case 1540 - MF112/2020 – Procurement of Card Services, where the Board considered the abnormally-low argument presented before it and on the basis of the facts presented to it concluded that the evaluation committee's assessment (with respect to the pricing of an offer that was *prima facie* abnormally low) amounted to "no more than mere assumptions or guess work", thus upholding the appellant's grievance on this point.
5. **Award to the Recommended Bidder**
- 5.1 As above-said, the estimated procurement value for this Tender Procedure was €235,169 excluding VAT. The Recommended Bidder's offer, on the other hand, was for of €208,750 excluding VAT.
- 5.2 The Recommended Bidder's offer, therefore, is €26,419 cheaper than the estimated procurement value. While this may not appear striking at first, this means that the Recommended Bidder's offer is almost 12% cheaper than the estimated procurement value, a substantial difference when one considers the subject-matter of the Tender Procedure, as shall be explained.
- 5.3 The Recommended Bidder's offer is also significantly lower than the average of the three (3) other offers – it is circa 9% cheaper than the average price of all bids.
- 5.4 These differences are significant due to the fact that the Tender Procedure relates to the supply and delivery of Heating Fuel/Gas Oil, the base cost of which is the same for all purchasers in Malta (and, therefore, for all the bidders).
- 5.5 When one considers the closing market price of the Heating Fuel/Gas Oil on the day prior to the date of submission of offers, the Recommended Bidder's offer is such as to result in a loss of circa €0.04 per litre, had the supply of the oil to the Contracting Authority been required on that same day and assuming that the Recommended Bidder has zero (0) costs in procuring and supplying the Heating Fuel/Gas Oil. The market price has since then continued to rise, and may yet continue to rise; a reality that the Recommended Bidder ought to have been well aware of when submitting its offer.
- 5.6 The required quantity for this contract is, as above-said, 250,000 litres, making the foreseeable loss substantial.
- 5.7 It is important to highlight that the loss above-mentioned is calculated purely on the bases of the price per litre offered by the Recommended Bidder and the market price per litre applicable on closing the day prior to the deadline for submission of tenders. The loss indicated in figures, therefore, does not take into consideration any purchase premium and any costs related to the loading, transporting and delivering of the fuel oil in accordance with the Tender Document (including vehicle upkeep costs, fuel costs relating to said vehicles, staff wages etc.), nor the related insurance and other administrative costs. The final loss to the Recommended Bidder,



when taking this into consideration, would thus be significantly higher than the amounts indicated in Section 5.5 of this Objection.

- 5.8 It is reiterated that the base price is set by the international market and is the same for all purchasers. Therefore, it should have immediately appeared to the evaluation committee/Contracting Authority that the Recommended Bidder's offer is *abnormally low*.
- 5.9 The Contracting Authority should have therefore sought explanations from the Recommended bidder to, as a minimum, establish whether its offer is based on technically, economically or legally unsound assumptions or practices. Indeed, the Contracting Authority would have an obligation to disqualify any tender if it establishes, for example, that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law (including in the fields of social, labour or environmental law or international labour law provisions).
- 5.10 This case is strikingly similar to Case 1540 – MF112/2020 relating to the procurement of card services. Just like in that case there were certain costs which were the same for all suppliers of such services – the rate charged by the card itself, being Visa or MasterCard (the scheme) – the bidders of the fuel required in this Tender Procedure have a fixed costs which is the Price based on Platts CIF MED High Genova Lavera. Similarly, just like in the card services case the bidders compete on premium over and above what Visa or MasterCard charge all service providers, in the supply of fuel required in the Tender Procedure the suppliers compete on the premium (which ought to cover their costs).
- 5.11 On the basis of the above, there is no doubt that this offer is, at least *prima facie*, abnormally low.
- 5.12 Therefore, on the basis of the legislation, decisions and guidance set out under Section 4 of this Objection, the evaluation committee/Contracting Authority was obliged to examine whether this offer is economically sustainable and allows for proper performance in accordance with the law and the tender requirements. Such an assessment should be thorough, and include the assessments set out under Section 4 above.
- 5.13 Star Fuels submits that it is necessary, both in terms of the PPR and in the public interest, to examine whether a proper assessment of the Recommended Bidder's offer was made by the Contracting Authority, as is incumbent on the Contracting Authority by law and the decisions of the CJEU and the Court (as delineated under Section 4 of this Objection). It is in the Board's remit and duty to carry out such an examination, as highlighted in the Court's decision in the *X Clean Limited* case (as set out in Section 4.15 of this Objection).
- 5.14 This will ensure that the principles of transparency, fairness and equal treatment are preserved.



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6. Conclusion

6.1 In view of the above, Star Fuels Limited respectfully requests the Board to:

- (i) cancel and revoke the award;
- (ii) confirm that the Recommended Bidder submitted a tender which is abnormally low and which ought to be disqualified; and
- (iii) order the Contracting Authority to award the contract forming the subject-matter of this objection to Star Fuels Limited, as the cheapest technically compliant bidder.

6.2 Without prejudice to any further submissions that Star Fuels Ltd may be allowed to make during the proceedings relating to the appeal forming the subject-matter of this Objection.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Steve Decesare', written over a horizontal line.

Steve Decesare

A handwritten signature in black ink, appearing to read 'Katya A. Gatt', written over a horizontal line.

Katya A. Gatt



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ACCOUNTANTS

List of Witnesses

1. All members of the evaluation committee which recommended the award to the Recommended Bidder.
2. Personnel of the Contracting Authority involved in connection with the Tender Procedure.
3. Representatives of the Recommended Bidder who were involved in connection with the Tender Procedure.
4. Representatives of Star Fuels Ltd who were involved in connection with the Tender Procedure.

10th July 2023

Star Fuels Ltd
TID 000192895

REFERENCE: NP WSM 89/23

SUBJECT: NEGOTIATED PROCEDURE FOR THE SUPPLY AND DELIVERY OF HEATING FUEL/GAS OIL FOR THE THERMAL TREATMENT FACILITY INCINERATOR PLANT AT MARSALA, MALTA

Dear Sir/Madam,

Thank you for participating in the above-mentioned negotiated procedure. However, I regret to inform you that the offer submitted by your company has ranked as the second (2nd) cheapest compliant offer.

The negotiated procedure was recommended for award to TID 000192849 for €208,750 excluding VAT, this being the cheapest compliant offer. If you intend to object to this decision, the Public Procurement Regulations allow for an official objection which in this case has to be lodged electronically with the Public Contracts Review Board by sending an email on: info.pcrb@gov.mt by noon of Thursday 20th July 2023 against a deposit of €1,176.

Payments are to be made through bank transfer in terms of the following details:

Name of Account Holder	Cashier Malta Government
Name of Bank	Central Bank of Malta
Address of Bank	Castille Place, Valletta
Account Number	40001EUR-CMG5-001-H
BIC	MALT MT
IBAN Code	MT55MALT011000040001EURCMG5001H
Bank Code	01100

Although we have not been able to make use of your services on this occasion, I trust that you will continue to take an active interest in our initiatives.

Yours sincerely,

The Evaluation Committee

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CFT TITLE: 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, MALTA (Status: Evaluation)

CFT CA UNIQUE ID: WSM NP 89/23
NUMBER OF ENVELOPES: 1
DATE OF PUBLICATION/INVITATION: 11/05/2023 14:22
CLOSING DATE: 25/05/2023 11:30
OPENING DATE: 25/05/2023 12:00

SORT: ENVELOPE (A-Z) ▾

Single	Falzon Fuel Services Limited	192898	222250.00
Single	Star Fuels Ltd	192895	231250.00
Single	Cassar Fuel Limited	192886	233000.00
Single	Ph Borg Ltd	192849	208750.00

Recommendation Attachment

SORT: EVAL ROUND (A-Z) ▾

1	2023/07/10 09:57:41	Download
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Amnez 15



Bank of Valletta p.l.c
 Registration Number: C 2833
 Registered Office: 58 Zachary Street, Valletta VLT 1130 - Malta

Pay third party

Printed by: Mr. Michael Debono
 Printed on: 19/07/2023 - 11:43
 Document ID: 16809513

Transaction details

Payer's name: Borg Debono Limited

Beneficiary name: CASHIER MALTA GOVERNMENT

Relation: Administrative Services

Reason: Other

Payment details: OBJECTION NP WSM 89/23 TID 000192895

Currency: EUR - Euro

Beneficiary IBAN/Account: MT55MALT011000040001EURCMG5001H

Beneficiary IBAN/Account type: Valid IBAN of country - Malta

Bank name: Other bank

Bank address / Bank's BIC: Let the bank apply the beneficiary bank BIC

Beneficiary address: No

From account: 4001152104 6 (EUR)

Charges should be paid by: Shared - I pay BOV charges, CASHIER MALTA GOVERNMENT pays the beneficiary bank charges

Amount: EUR 1,176.00

BOV to transfer the money: as soon as possible

Receiving bank to get the money as: normal priority payment

Saved template: no

Additional information

Credit amount: EUR 1,176.00

Debited amount (excluding charges): EUR 1,176.00

Estimated amount to be withdrawn from account: EUR 1,180.00

Transaction charge: EUR 4.00

Transaction result

Status: Your instructions have been processed successfully.

Transaction ID: 129688598