

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1902 – 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**

**16<sup>th</sup> August 2023**

The Board,

Having noted the letter of objection filed Dr Katya A. Gatt and Dr Steve Decesare on behalf of Camilleri Preziosi Advocates acting for and on behalf of Star Fuels Ltd, (hereinafter referred to as the appellant) filed on the 20<sup>th</sup> July 2023;

Having also noted the letter of reply filed by Dr John Axiak acting for Wasteserv Limited (hereinafter referred to as the Contracting Authority) filed on the 27<sup>th</sup> July 2023;

Having heard and evaluated the testimony of the witness Mr Helder Rocha (Chairperson of the Evaluation Committee) as summoned by Dr Steve Decesare acting for Star Fuels Ltd;

Having heard and evaluated the testimony of the witness Mr Helder Rocha (Chairperson of the Evaluation Committee) as summoned by Dr John Axiak acting for Wasteserv Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 8<sup>th</sup> August 2023 hereunder-reproduced.

### **Minutes**

#### **Case 1902 – 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 was issued on the 11<sup>th</sup> May 2023 and the closing date was the 25<sup>th</sup> May 2023. The estimated value of the tender, excluding VAT, was € 235,169.

On the 20<sup>th</sup> July 2023 Star Fuels Ltd filed an appeal against Wasteserve Malta Ltd as the Contracting Authority objecting to the award which it considers to be abnormally low.

A deposit of € 1176 was paid.

There were four (4) bids.

On the 8th August 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Star Fuels Ltd**

Dr Steve Decesare Legal Representative  
Mr Michael Debono Representative

**Contracting Authority – Wasteserv Malta Ltd**

Dr John Axiak Legal Representative  
Dr Pearl Agius Legal Representative  
Mr Helder Rocha Chairperson Evaluation Committee  
Mr Ryan Mark Cachia Evaluator  
Mr Ryan Cauchi Evaluator  
Mr Nathan Zammit Evaluator  
Ms Branica Xuereb Representative

**Preferred Bidder – PH Borg Ltd**

Dr Josette Sultana Legal Representative (Online)  
Mr Luke Borg Representative (Online)

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions asked the preferred bidder if it still intended to not accept the award.

Dr Josette Sultana Legal Representative for PH Borg Ltd said that a decision has not yet been made.

Dr Steve Decesare Legal Representative for Star Fuels Ltd said that the Appellant claims that the winning bid was abnormally low and the Contracting Authority had an obligation to investigate such an offer. He then requested witnesses to be heard.

Mr Helder Rocha (301244A) called to testify by the Appellant stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC) and that the tender had been correctly evaluated by its three voting members. The estimated value of the tender, which includes the research aspect, related to the current market price of the product. He stated that he was not aware of what the excise duty on a litre of gas oil was. When it was pointed out to witness that the preferred bidder's offer was lower than the combined price of gas oil (56c) and excise duty (33c) he replied that the oil industry uses storage facilities and the preferred bidder might have bought at a lower price than the one quoted. Witness stated that the TEC did not consider the bid to be abnormally low and it had allowed a 15% threshold to judge if any bid was abnormally low. The difference between the bids overall was 12.6%, and between the first and second bidder it was only 6.4%. When it was pointed out to witness that the price differences should not have included excise tax he stated that it was not the role of the TEC to enter into these calculations but to assess the bids. The Authority, according to the witness, was currently buying gas oil by direct order from Star Fuels at the same price as it offered in the tender.

In reply to a question from Dr John Axiak, Legal Representative for the Contracting Authority witness said that all costs were included in the tender indicated value.

Mr Helder Rocha recalled to testify by the Contracting Authority, and still on oath, related the process carried out in the evaluation of the tender. He tabled a document (Doc 1) listing the percentage differences between the bids which he termed insignificant in terms of abnormally low bids. He agreed that the 15% yardstick adopted by the TEC was subjective but stated that the technical specification of the tender captured exactly the requirement. There was no alternative product to gas oil for their purpose.

Dr Sultana said that the preferred bidders had no submissions to make.

Dr Decesare said that there are three components in the price of fuel – purchase price, duty and premium to recover costs and profit. The preferred bidder's offer does not even cover the purchase price and duty. If one worked the ratios eliminating duty then the estimated difference between the first two bids would be 18% and 19% with the others. The TEC should have sought further information on the winning bid. The direct orders issued refer to the bid price.

Dr Axiak said that the law does not define 'abnormally low' so comparisons are usually used. The actual difference between the bids varies from 6% to 10%. Appellant did not provide a breakdown of its calculations. It did not even occur to the TEC that this might be a case of an abnormally low bid. There were very few factors to look into in this tender.

Dr Decesare asked that it be noted that contrary to what had just been stated he had provided detailed calculations of costs.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 8<sup>th</sup> August 2023.

Having noted the objection filed by Star Fuels Ltd (hereinafter referred to as the Appellant) on 20<sup>th</sup> July 2023, refers to the claims made by the same Appellant with regard to the tender of reference WSM NP 89/23 listed as case No. 1902 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Steve Decesare

Appearing for the Contracting Authority: Dr John Axiak

Appearing for the Preferred Bidder: Dr Josette Sultana

Whereby, the Appellant contends that:

- a) 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. 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. 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. 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).

- b) 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. The required quantity for this contract is, as above-said, 250,000 litres, making the foreseeable loss substantial.
- c) It is important to highlight that the loss above-mentioned is calculated purely on the bases (sic) 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.
- d) 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. 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).
- e) 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. 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).

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 27<sup>th</sup> July 2023 and its verbal submission during the hearing held on 8<sup>th</sup> August 2023, in that:

- a) Recommended offer is not an abnormally low price -
  - i. 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.
  - ii. 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.
  - iii. 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.
- b) Due diligence carried out -
  - i. 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.
  - ii. In particular, the tenderers were requested to provide: - • Produce a valid road license (sic); • Produce certification that vehicles are enrolled with transport Malta; • Provide the necessary permits issued by REWS;
  - iii. 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.

- c) "Too good to be true" or suspicion of "poor value for money" -
- i. 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 (Directive2014/24/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.
  - ii. 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 (sic) 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.
- d) Regulation 243 of Public Procurement Regulations -
- i. 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 were 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.
- e) Guarantee of quality of product -
- i. 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.
  - ii. 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.
  - iii. 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. 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.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witness duly summoned, will now consider Appellant's grievances.

- a) Reference is made to regulation 243 (1) of the Public Procurement Regulations ("PPR") which states that "*Contracting authorities **shall** require economic operators to explain the price or costs proposed in the tender where tenders **appear** to be abnormally low in relation to the works, supplies or services*" (bold & underline emphasis added)
- b) Thereby, it is this Board's opinion that the obligation and duty imposed on Contracting Authorities to require an explanation from economic operators is only triggered once the respective bid appears to be abnormally low.
- c) Henceforth, this Board agrees only in part with argumentation brought forward by the appellant that "*the Contracting Authority had an obligation to investigate such an offer*". Such obligation arises only if the "appearance" test is duly satisfied.
- d) Therefore, the main bone of contention and the analysis that needs to be carried out is on whether such 'appearance test' was duly performed by the Evaluation Committee.
- e) Reference is now made to the testimony under oath of Mr Helder Rocha who presented a document (Doc 1) listing the percentage difference between the bids received, also compared to the Estimated Procurement Value. Even though, by his own admission he stated that the general 15% yardstick adopted by the Evaluation Committee was somewhat subjective, he duly proved that there was adequate reasons on why the Evaluation Committee duly assessed that the bid by PH Borg Ltd did not appear to be abnormally low.
- f) When this Board, also notes that all four (4) bidders who participated in this tendering procedure, all submitted bids which were below the Estimated Procurement Value, the reasons provided by Mr Helder Rocha, on the work carried out during the Financial Evaluation Stage, is deemed satisfactory by this Board.
- g) Therefore, once the Evaluation Committee, duly assessed PH Borg's bid on the issue of 'appearance of abnormally low' (or otherwise), this Board opines that the Contracting Authority duly followed the procedures that were required of them which emanate from the PPR.
- h) Finally, on the argument that such financial analysis should have been performed 'excluding Excise Duty'. When considering that the tender document nowhere makes reference to such costs and is

thereby to be included in the overall cost of the product to be delivered as per relevant legislation, it is deemed that the Evaluation Committee duly observed the principle of Self Limitation.

Hence, this Board does not uphold the Appellant's grievances.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
**Chairman**

**Dr Charles Cassar**  
**Member**

**Mr Richard Matrenza**  
**Member**