

PUBLIC CONTRACTS REVIEW BOARD

Case No. 622

WSM/68/2013

Period Contract for the Supply and Delivery of Heating Gas Oil.

The tender was published on the 3rd September 2013. The closing date was the 24th September 2013.

The estimated value of the Tender was €120,000 (Exclusive of VAT).

Two (2) bidders had submitted an offer.

On the 3rd October 2013, Cassar Petroleum Services Limited filed an objection against the award of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 29th October 2013 to discuss the appeal.

Present for the hearing were:

Cassar Petroleum Services Limited - Appellant

Mr Darren Marmara	Representative
Dr Matthew Brincat	Legal Representative

San Lucian Oil Company Limited - Preferred Bidder

Mr Joseph Falzon	Representative
Dr Yvanka Vella	Legal Representative

WasteServ Malta Limited - Contracting Authority

Ms Mary Grace Micallef	Member Evaluation board
Dr Victor Scerri	Legal Representative

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

Mr Darren Marmara on behalf of the appellant stated that last April the Department of Contracts had issued another tender for the supply of Gas Oil for the two terminals operated by WasteServ. That tender was to have run for a period of three years and appellant firm had tendered and it resulted that its offer was the cheapest offer. However that tender was still being adjudicated.

WasteServ had in the meantime issued another two tenders for the same commodity. One of these is the present tender under objection, and is for a period of six months. Appellant participated in the present tender under protest because it is felt that the new tender should not have been issued during the period when the previous tender was still being adjudicated. Appellant queried the procedure that would apply in case a bidder won the present tender, which runs for six months, while another bidder was awarded the first tender that runs for three years. Where would the contracting authority obtain its supply? The two tenders were identical; the only difference is the validity period and the terminal for which the supply was intended for.

Mr Marmara stated that in fact the tender issued in April has been awarded to appellant for a three year contract period on the 18th October 2013.

Dr Matthew Brincat on behalf of the appellant queried the sense in the decision of issuing another tender for six months just because the process of evaluation another tender for a three year period was taking too long to evaluate, but this was done by the contracting authority. Dr Brincat remarked that while the first tender took several months to adjudicate, the present tender was issued and adjudicated in just one month.

Dr Victor Scerri on behalf of the contracting authority said that the objection raised by appellant was not relevant to the present award. The objection does not refer to any procedures related to the present tender; it does not question these procedures and adjudication. He continued to explain the reason why the present tender had to be issued. Since the April tender was for a period of three years, the value would have been much greater, and the procedures used in evaluating such tenders tended to be lengthy and time consuming. Therefore it was decided to issue another short term tender in order to ensure that a continuous supply of the commodity was available. Any objection on the award of the present tender should be limited to the procedures followed by the contracting authority during adjudication.

Dr Matthew Brincat for the appellant explained that when a bidder participates in a three year tender, a certain commercial risk is taken on the price offer. When the same bidder participates in a six month tender for the same commodity, the risk is much less. Therefore it is unfair to issue another tender covering the first six months from the three year contract.

Dr Victor Scerri for the contracting authority said that the three year contract is issued "*for a period of thirty six months on an if and when required basis.*" The contract starts when the order is given to start supply. Therefore when the three year tender is adjudicated and the order for supply is issued the receipt of supplies from the six month contract is stopped. WasteServ needed to ensure that it had constant supply without the need of direct orders.

Dr Brincat on behalf of the appellant, replying to a query by the Chairman said that it is not a question of supplies, because the contract does not bind the contracting authority to take a specified quantity of fuel, but an amount as required. He contended that having two overlapping tenders, one for three years and the other for six months, if the price offered for the six month tender is cheaper than it the contracting authority would choose to get supplies from the six month contract. He reiterated that the present tender should never have been issued.

Dr Victor Scerri remarked that the present tender states that it was for a period of six months or until the contract value is reached. If the amount is used within one month then no more fuel could be purchased from the contractor. The original tender was still being evaluated and was taking a long time. It was deemed that a six month tender would be faster, ensuring constant supplies.

Ms Mary Grace Micallef for the contracting authority said that most of the commodity was being used for the generator. On average 45,000 litres of fuel per month are used and these cannot be purchased through a Local Purchase Order but needed to issue a departmental tender which is faster. As a stop gap fuel needs were purchased direct from Enemalta.

The Chairman remarked that it is clear that the two six-month tenders had been issued as stop-gap measures to ensure continuous supply, until the three year tender was finalized.

Dr Victor Scerri reiterated that this hearing had to deal with the present tender only.

Here the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 3rd October 2013 and also through the Appellant's verbal submissions during the hearing held on 29th October 2013, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant had an awarded running tender with the same Authority for the same product, the contract of which has not yet expired.**
- b) The Appellant feels aggrieved that while same is providing supplies in accordance with the tender, the Contracting Authority issued a tender for the same product being provided by the Appellant for a period of six months. The Appellant's present tender's duration has not as yet expired.**
- c) Due to the fact that the newly issued tender was for the short term of six months, whilst the current Appellant's tender was for a much longer period, the Appellant feels that he is at a discriminatory disadvantage with regards to quoted price in both tenders.**

- d) **The short term tender for six months should never have been issued by the Contracting Authority.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 29th October 2013, in that:

- a) **The reason why this 'short term tender' was issued was simply that, due to the fact that the reissue of the same tender on a long term, was a lengthy process and at the same time the Contracting Authority had to ensure continuous supplies of the product until the new tender on a longer term basis is issued.**
- b) **The Contracting Authority was in duty bound to issue an overlapping 'short term' tender so that while the process of issuing a longer term tender, there will be a buffer supply to the Contracting Authority.**

Reached the following conclusions:

- 1. From the submissions made by both the Appellant Company and the Contracting Authority during the hearing held on 29th October 2013, this Board opines that the decision taken by the Contracting Authority to issue a 'short term tender' was justified and pertinent.**
- 2. The Contracting Authority acted diligently as same was in duty bound to ensure continuous flow of supplies of the product being provided by the present tenderer.**
- 3. The fact that the Contracting Authority issued a 'short term' tender does not in any way prejudice the Appellant's commitments in carrying out his obligations in the existing tender.**

In view of the above, the Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

4 December 2013