

PUBLIC CONTRACTS REVIEW BOARD

Case 1060 – CT 2006/2017 – Supply and Delivery of Heating Gas Oil

The Publication Date of the Call for Tenders was 9 May 2017 whilst the Closing Date for Call of Tenders was originally set for 13 June 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 1,200,000.

On 12 June 2017, Cassar Petroleum Services Ltd filed a Pre-Contractual Objection against WasteServ Malta.

On 4 July 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Cassar Petroleum Services Ltd

Mr Mark Cassar	Representative
Dr Franco Galea	Legal Representative
Dr Lucio Schriha	Legal Representative

Contracting Authority – WasteServ Malta

Mr Martin Casha	Representative
Ing Darren Cutajar	Representative
Mr Kevin D' Ugo	Representative
Dr Victor Scerri	Legal 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 Franco Galea, the Legal Representative for Cassar Petroleum Services Ltd opened by saying that the discussion regarded the Supply of Heating Gas Oil for WasteServ Malta. If one had to see what the Tender and their Letter of Objection dated 12 June 2017 said, WasteServ Malta were going to bind the price with that of Brent Crude Oil which was traded in London.

His clients were concerned that one cannot work the price of Heating Gas Oil on Brent Crude Oil since its price comes out from another platform, the Platts, which is known by everybody in the oil industry and therefore this was the price which everyone had to quote undoubtedly when setting a price for Gas Oil.

Dr Galea continued by saying that he read and understood the contents of the Reasoned Letter of Reply issued by the Department of Contracts and WasteServ Malta on 3 July 2017. The latter, in a clarification issued on 2 June 2017 said that they chose to base their price on the Brent Crude Oil because it is easily accessible and that the source of Gas Oil is Crude Oil.

Dr Galea appreciated this fact but on the other hand, the Appellants feel that there was no correlation with the latter price since although the raw material was crude oil, the prices were different and the platform where this is traded was a separated one where the changes in price might not be the same.

The Appellants' Legal Representative continued by saying that besides for these particular commodities the price comes out through the Platts on an international basis. Whatever comes out from this Pre-Contractual Concern will not only be valid for Cassar Petroleum Services Limited but it will apply to everyone who would be interested in making a bid eventually for this Tender since this was the idea of the same.

Dr Victor Scerri, the Legal Representative for WasteServ Malta submitted that it was the prerogative of his clients to determine the way the change in price is to be calculated and not of the Bidders. His clients were not prejudicating anyone and were keeping everyone in the same level.

There was a correlation between the price of oil and the product which the Contracting Authority needed and therefore WasteServ Malta feels that they had to work with a calculation which is known by everybody and which will be explained by a Technical Witness which they have summoned for this Public Hearing.

Dr Franco Galea, the Legal Representative for Cassar Petroleum Services Ltd countered that his clients did not doubt the fact that it was the Contracting Authority's prerogative to determine the price. The two prices do not go together since there is a process and the Appellant's point was that there was a situation where either Bidders or even the Contracting Authority would be prejudiced depending on how the prices vary.

What the Appellants were requesting, continued Dr Galea, was that WasteServ Malta had to work their prices according to the International Standards.

At this point, Ing Darren Cutajar, a Plant Engineer at WasteServ Malta, holding ID Card Number 276697 M, was summoned by WasteServ Malta to testify before the Public Contracts Review Board.

At the end of Ing Cutajar's testimony, Mr Mark Cassar, a representative of Cassar Petroleum Services holding ID Card Number 540261 M, was summoned by the Appellants to testify before the Public Contracts Review Board.

Following Mr Cassar's testimony, Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that if there were more than one different Platts again this had to be clear since then one had to see which type of Crude Oil one had to use. The Crude Oil as it is made is not specified enough.

Dr Victor Scerri, the Legal Representative for WasteServ Malta replied that Brent Crude Oil was the price of Crude Oil and that it is a platform.

Dr Franco Galea, the Legal Representative for Cassar Petroleum Services Ltd said that although gas oil operates on another platform, there was still no correlation between the Crude Oil and the material which is finally needed, namely Gas Oil. WasteServ Malta had the right to ask for whatever they required but the Public Procurement Regulations requests Contracting Authorities to avoid requests which can lead to unwanted results from both parts.

The Appellant's Legal Representative imagined that both the Ministry for Finance and the Central Bank of Malta had their experts helping them to prepare similar Tenders and that this commodity in Europe is traded by the London Platts.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts argued that there was no proof presented that the Heating Gas Oil and Crude Oil do not go together. The Appellants had to submit proof that the prices vary and the Public Contracts Review Board not only cannot decide in favour of Cassar Petroleum Services Ltd but had to be comforted by the fact that WasteServ Malta was going to treat everyone equally the same.

Dr Franco Galea, the Legal Representative for Cassar Petroleum Services Ltd said that if the Public Contracts Review Board had the facility to ask for a Technical Advice if he was not comfortable with the evidence which was currently submitted by both sides. This was agreed by both Dr Victor Scerri and Dr Christopher Mizzi.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the latter was going to seek Technical Advice and then a Second Public Hearing will be convened to further discuss the matter.

At this stage, the Public Hearing was adjourned to a later date to be announced by the Public Contracts Review Board.

Second Hearing

On 3 August 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Cassar Petroleum Services Ltd

Mr Mark Cassar	Representative
Dr Franco Galea	Legal Representative
Dr Lucio Sciriha	Legal Representative

Contracting Authority – WasteServ Malta

Mr Martin Casha	Representative
Ing Darren Cutajar	Representative
Dr Victor Scerri	Legal Representative

Department of Contracts

Dr Christopher Mizzi	Legal Representative
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The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, opened by saying that this Second Public Hearing was convened in order for all parties to ask any questions which were needed to be asked to the Expert, which was appointed by the Public Contracts Review Board, to consult the latter on the matter.

At this point, Ing Philip Borg, the Chief Executive Officer of Enemed Malta, holding ID Card number 335662 M, was summoned to testify under oath, before the Public Contracts Review Board.

Following Ing Borg's testimony, Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, remarked that the question was about whether the extra expenses for subscription were sustainable or not.

Dr Franco Galea, the Legal Representative for Cassar Petroleum Services Ltd, argued that if WasteServ Malta was a private entity, they could say that it was their risk or otherwise but when it comes to Public Procurement, one was talking about public funds. The Witness clearly stated that the risk for him as a buyer was larger.

Dr Galea was sure that there are two Public Entities, the Ministry for Finance and the Central Bank and now Enemed who are subscribed to the PLATTS. Therefore, if the Government has access to the latter, there is no need for his clients to take the risk.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, submitted that the Witness could not confirm whether the information can be available to all departments of the Public Sector, hence at this point one couldn't know what are PLATTS restrictions.

If the Tender Document imposes that it has to be the prospective Bidder who had to provide all documentation, this had to be factored in the offer submitted, since he was paying for the PLATTS. There will always be a mark up in the price either because of the subscription or in the supplier's contingency.

The Expert's Graph is magnified in a way that the variations between the PLATTS and the price of crude oil are way much larger and therefore one had to see the things in their own perspective.

Dr Mizzi continued explaining that with regards to the Public Procurement, the Public Contracts Review Board had to see whether the conditions laid out in the Tender Document were going to hinder the competition between different Bidders, which was not the case. The problem was that WasteServ Malta was going to pay more than they were planning to. For a company like the Contracting Authority, the price offered was an expensive one.

There were reasons why the Tender was issued in that way and if the Public Contracts Review Board was satisfied that the competition was not going to be tarnished in any way that a Bidder might have an advantage, the Tender Specifications should stay as they are at the moment.

Dr Franco Galea, the Legal Representative for Cassar Petroleum Services Ltd, said that the Pre-Contractual Concern was not restricted to unfair competition only but there was a long list which could preclude a situation where a concern can be filed. The whole point was that

in the previous Public Hearing, WasteServ Malta's engineer was sincere enough to admit that he was not competent in the sector and tried to find a common denominator. From this Public Hearing, it resulted that in that particular market, crude oil and raw materials only were sold

The person who was responsible to buy oil for the whole of Malta had submitted under oath that all trading with regards to oil is being done through the PLATTS system. It was not a mark-up question but it was the best practice to buy oil from the PLATTS system. The expert was honestly saying that the end user was risking to trade at a loss.

The Pre-Contractual Concern is contemplated clearly in the Public Procurement Regulations and in this instance, the Public Contracts Review Board had to intervene, direct and correct these conditions.

Dr Victor Scerri, the Legal Representative for WasteServ Malta, said that the members of the Public Contracts Review Board know enough how the system works in the Civil Service. The system cannot be simplified. The index which his clients gave counts for everyone. The Contracting Authority was going to give a price at the beginning and any variation will be valid for everybody.

WasteServ Malta would need between 40 and 50 tons per month and the Public Contracts Review Board had to consider whether it was feasible for the Contracting Authority to enter into an extra yearly expense of € 24,000 in order to gain € 5 from each product. In this case, the subscription is too expensive for the Contracting Authority.

At this stage, the Public Hearing was adjourned to Thursday 10 August 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.

This Board,

Having noted this Pre-Contractual Objection filed by Cassar Petroleum Services Ltd (herein after referred to as the Appellant) on 12 June 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2006/2017 listed as Case No 1060 in the records of the Public Contracts Review Board, issued by WasteServ Malta (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Franco Galea

Dr Lucio Sciriha

Appearing for the Contracting Authority: Dr Christopher Mizzi

Dr Victor Scerri

Whereby, the Appellant contends that:

- a) **His main concern is that the Contracting Authority dictated that it will bind the price with that of “*Brent Crude Oil*”, which was traded in London Oil, whilst, in actual fact, and in good practice, such prices for “*Heating Gas Oil*”, are quoted under the PLATT’s system internationally.**

In this regard, Cassar Petroleum Services Ltd maintains that using the PLATT’s system would decrease the exposure for risks of price fluctuations during the period of supply. In the Appellant’s opinion, this dictated system might also hinder competition.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 3 July 2017 and its verbal submissions during the Public Hearings held on 4 July 2017 and on 3 August 2017, in that:

- a) WasteServ Malta contends that the dictated basis for pricing of “*Heating Gas Oil*” as stated in the Tender Document, does not, in any way, limit the scope of competition and at the same instance; there exists a level playing field for all prospective Bidders.**

The Contracting Authority also insist that, under the circumstances, the fee which was being requested for subscribing to PLATTS does not justify the element of risk factor which they were taking.

This same Board also noted the Testimonies of the witness namely:

- a) Ing Darren Cutajar duly summoned by WasteServ Malta;**
- b) Mr Mark Cassar duly summoned by Cassar Petroleum Services Ltd;**
- c) Ing Philip Borg duly summoned by the Public Contracts Review Board**

This Board has also taken note of the technical report submitted by Ing Philip Borg.

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

- 1. This Board would like to emphasize the fact that since this concern is of a specialised technical nature, weighted reliance was placed on the expert's report with the latter being appointed by this Board to assist in its deliberations.**

It must be also said that the appointed expert is a qualified Mechanical Engineer who has vast experience in the procurement of oil for the Government of Malta.

This Board opines that the overall issue at stake is the choice of price index to be used in the supply of "*Heating Gas Oil*" and as to whether this index should be gauged under the PLATTS system or the price of "*Brent Crude Oil*".

According to the expert's testimony and report, the main advantage is using the index under the PLATTS system is that of curbing the risk factor of price fluctuation over a period of time. From

submissions made, it has also been established that when buying frequently and in substantial quantities, this system ensures stability and reduces the risks of price fluctuations and is also considered as the good practice in such trading activity.

In this particular case, the Tender Document dictated that the price index which was to be utilised is the “*Brent Crude Oil*” one and from submissions made by WasteServ Malta, it was clearly established that the only reasons why the PLATTS system was not suggested in the Tender Document, was simply due to the exorbitant subscription fee which the Contracting Authority had to pay and which amounted to € 2,000 per month which in this particular circumstance, due to the quantity and frequency of the purchases, is not a worthwhile investment.

This Board noted that WasteServ Malta will purchase the commodity in quantities of 40 to 50 tons per month and also notes that, in this type of trading activity, such quantities are considered to be small; hence the subscription for the utilisation of PLATTS index will not merit its value in this type of situation. This issue was confirmed by the expert, who during his testimony under oath before this Board said,

“Għax għal Kumpanija li għandha, xirja ta’ darba fix-xahar hija sostanzjali, għal kumpanija bhalna, li l-hin kollu nixtru, din hija neċessita””.

From the above testimonies and submissions, this Board is credibly convinced that since the quantities and frequencies of the purchase of *“Heating Gas Oil”* is 40 to 50 tons per month, which is considered as a minor purchase of such a product, the additional expense of subscription amounting to € 24,000 per annum, does not justify any possible risk of price fluctuations.

In this regard, this Board, although it asserts that the PLATTS system of price indexing is the best of practice and provides more safeguards, in this particular case, due to the volume and frequency of the purchase as dictated in the Tender Document, this same Board upholds the decision taken by WasteServ Malta to base its price index on *“Brent Crude Oil”*.

This Board has also considered the fact that, in this line of activity, purchases based on the price index of *“Brent Crude Oil”*, can also be made so that the condition dictated in the Tender Document does not

make it impossible for any Bidder to quote and at the same instance, it is to be noted that the conditions stipulated in the latter apply to all Bidders so that there is a Level Playing Field for all participants and in no way such a condition would limit the scope of competition.

- 2. During the submissions of one of the witnesses, this Board was justifiably indicated the fact that the Tender Document did not lay down sufficient Technical Specifications to denote the type of “*Crude Oil*” on which the index price is to be based.**

In this regard, although this Board does not have the remit to consider the compilation of the Technical Specifications in a Tender, would respectfully advise that such Technical Specifications should be formulated in such a way so that the Bidder is well informed and aware on the type of “*Crude Oil*” on which the price index will be based.

This Technical Amplification would avoid future misunderstandings and litigations and any such additional information, if so required, should be effected through clarification notices.

`In view of the above, this Board, although it affirms that the PLATTS system is more secure against price fluctuations and is considered as “*best practice*”, in this particular case and under these specific circumstances, taking into account the volume and frequency of the supply, upholds the decision taken by WasteServ Malta to apply the price index of “*Brent Crude Oil*”.

At the same instance, this Board respectfully recommends that the same Contracting Authority is to seek professional advice in the drafting of any amplification to the Technical Specifications in the Tender Document, if necessary.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

10 August 2017