

PUBLIC CONTRACTS REVIEW BOARD

Case 1117 – WSM 51/223/2017 – Tender for the Supply and Delivery of Diesel (EN 590) to Various Wasteserv Sites

The Publication Date of the Call for Tenders was 2 August 2017 whilst the Closing Date for Call of Tenders was 30 August 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 120,000.

Three (3) Bidders have submitted offers for this Tender.

On 5 October 2017, Cassar Petroleum Services Limited filed an Objection against the decision of WasteServ Malta to award the Tender to Falzon Fuel Services Limited for the price of € 116,779.66 (Exclusive of VAT) against a deposit of € 650.

On 4 January 2018, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar 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 Limited

Mr Mark Cassar	Representative
Dr Matthew Brincat	Legal Representative

Recommended Bidder – Falzon Fuel Services Limited

Mr Joseph Falzon	Representative
Dr Yvanka Vella	Legal Representative

Contracting Authority – WasteServ Malta

Mr Martin Casha	Representative
Dr Gavin Gulia	Legal Representative

During this Public Hearing, Dr Anthony Cassar, the Chairman of the Public Contracts Review Board requested the testimony of some WasteServ representatives since he wanted to clarify some questions.

Dr Gavin Gulia, the Legal Representative for WasteServ Malta replied that the only representative present for the Public Hearing was Mr Martin Casha.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited insisted that he wanted to submit further evidence to the Public Contracts Review Board so that the latter can have a clearer picture regarding their Appeal.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board insisted that this Board wanted to hear first the evidence from the WasteServ Representative who had made the Tender prior to continuing with the case.

It was then decided to adjourn the Public Hearing for Thursday 11 January 2018 where the whole Evaluation Board was to be present for further questioning by the Public Contracts Review Board.

Second Hearing

On 11 January 2018, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar 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 Limited

Mr Mark Cassar	Representative
Dr Matthew Brincat	Legal Representative

Recommended Bidder – Falzon Fuel Services Limited

Mr Joseph Falzon	Representative
Dr Yvanka Vella	Legal Representative

Contracting Authority – WasteServ Malta

Mr Kevin d' Ugo	Chairperson, Evaluation Board
Mr Marco Borg	Member, Evaluation Board
Mr Alex Vassallo	Member, Evaluation Board
Ing Ramon Vella	Member, Evaluation Board
Mr Martin Casha	Representative
Dr Gavin Gulia	Legal Representative

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board opened by saying that ideally the Public Hearing will commence by summoning all witnesses called up by all parties if these are in agreement.

Dr Gavin Gulia, the Legal Representative for WasteServ Malta replied by saying that what the Public Contracts Review Board had to consider was whether the Evaluation Board did its job in the correct way.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board whilst agreeing with Dr Gulia's latter statement, added that this Board wanted to know further about the flashpoint question.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited said that his clients were saying that since the parameters were different, the Technical aspect and the product properties had to be discussed.

At this point, Mr Noel Sciortino, a Managing Director within the Inspectorate Malta Limited, holding ID Card 9877 M was summoned by WasteServ Malta, to testify under oath before the Public Contracts Review Board.

In view of the fact that there were some issues which came out from Mr Sciortino's testimony which had to be cleared, prior to the continuation of the latter's examination. This Board requested Mr Sciortino to leave the Hall and wait outside until the examination was made to the other witnesses.

At this point, Mr Anthony Camilleri, a Stores Manager within WasteServ Malta Limited, holding ID Card Number 137366 M was summoned by the Public Contracts Review Board to testify under oath before the same.

Following some questions made by all parties concerned to Mr Camilleri, this Board requested him to leave the Hall and wait outside in case he was needed for further questioning at a later stage.

At this point, Ing Ramon Vella, the Head of Plant & Operations Engineer for WasteServ Malta, who was also a member of the Evaluation Board, holding ID Card Number 281485 M was summoned by the Public Contracts Review Board to testify under oath before the same.

Following Ing Vella's testimony, the Public Contracts Review Board has called back into the Hall, Mr Noel Sciortino for the continuation of his examination under oath.

At the end of Mr Sciortino's testimony, Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that the only pending issue was the interpretation of the minimum and the maximum and there was a reason behind this.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited replied that this was confirmed by one of the Witnesses.

Dr Gavin Gulia, the Legal Representative for WasteServ Malta rebutted that Mr Sciortino confirmed that the Contracting Authority can make its own parameters.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that this could be done depending on the circumstances. On the other hand, this Board needed a technical person to establish why there was this range.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited pointed out that WasteServ was a public entity. He was wondering whether they were pretending an inferior product.

Dr Gavin Gulia, the Legal Representative for WasteServ Malta countered that the range which they have issued in the Tender, between 50 and 60 degrees was a safe one.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited argued that earlier on there was a confirmation that anything over 55 degrees was correct and therefore there was a further interest to insert a range in the Tender. Dr Brincat was wondering whether the range was inserted to accommodate a particular Bidder.

Dr Gavin Gulia, the Legal Representative for WasteServ Malta noted that previously, Dr Brincat said that the Evaluation Board operated corrected.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited added that the Evaluation Board was told to work within those parameters. It might have been a genuine mistake from the Contracting Authority though.

Dr Gavin Gulia, the Legal Representative for WasteServ Malta argued that if the Appellants were making allegations that this Tender was corrupted, they should have filed their complaints elsewhere not before this Board.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited asked once again why WasteServ Malta has included a range in the Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that this Board wanted to establish the Technical Reasons why the Contracting Authority has put a range in the Tender Document since it was paramount to give importance to safety reasons. He added that this Board wanted to find a technical expert to determine what the range was.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited said that his clients will accept any decisions taken by this Board, however, the Witnesses summoned have confirmed that the greater the range, the safer it is.

Dr Gavin Gulia, the Legal Representative for WasteServ Malta added that it was important for the Public Contracts Review Board to check the whole Tender Document. Even if the Appellants were right, the Evaluation Board has done its work in a fair and transparent way.

Dr Gulia added that if Cassar Petroleum Services Limited had any concerns, they should have filed a Call for Remedies before the Closing Date for Competition. It was not in the interests of WasteServ Malta to waste the time of this Board.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited said that there was no need for this margin. When he read the Tender, he saw that everything was fine. Dr Brincat added that the Public Contracts Review Board has the faculty to correct

genuine mistakes and that it was established that his client's product was a better one and a safer one.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this Board wanted to verbalise something from the person who wrote this Tender.

At this point, Mr Anthony Camilleri, was summoned back into the Hall for further questioning and examination under oath before the Public Contracts Review Board.

Following Mr Camilleri's final examination, Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited said that from what the Technical Witnesses said, it resulted that there was a genuine mistake. From Mr Sciortino's testimony it was counterproductive to issue a range between 55 and 59.

Dr Brincat then referred to the documents which were presented to the Public Contracts Review Board which confirmed that there should be a minimum. He feared that the fact that there was a genuine mistake and that the Tender was assigned to a product that had a Flashpoint of 59 degrees, which was a bare minimum, when his clients were offering a product which had a Flashpoint of 71 degree and was safer.

Dr Gavin Gulia, the Legal Representative for WasteServ Malta referred to Page 15 of the Tender Document which said that the Flashpoint had a lower limit of 55 degrees and an upper limit of 59 degrees. These conditions were those which were offered to the Bidders who were interested to Bid for this Tender. On the other hand, there might have been other Bidders who had products with a flashpoint over that range who could have been interested but unlike the Appellants, refrained from submitting a Bid.

WasteServ Malta could not accept a Bid which went over these specifications because it would cause problems not only to the Contracting Authority itself but also to future Tenders elsewhere.

Dr Gavin Gulia reiterated that if Cassar Petroleum Services Limited saw something which was not correct in the Tender, they should have sought a Call for Remedies before the Closing Date of the Competition. He also referred to Case 885 issued by this same Board in a different composition on 12 January 2016 where it was decided that no Bidder can impose conditions other than those set in the Tender Document.

Dr Matthew Brincat, the Legal Representative for Cassar Petroleum Services Limited requested the Public Contracts Review Board to review the mistake made by WasteServ Malta.

At this stage, the Public Hearing was adjourned to Tuesday 16 January 2018 at 09:00 for the Board's decision to be delivered.

This Board,

Having noted this Objection filed by Cassar Petroleum Services Limited (herein after referred to as the Appellant) on 5 October 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference WSM 51/223/2017 listed as Case No 1117 in the records of the Public Contracts Review Board, awarded by WasteServ Malta (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Matthew Brincat

Appearing for the Contracting Authority: Dr Gavin Gulia

Whereby, the Appellant contends that:

- a) Although their offer included a “Flash Point” index in excess of the dictated range, they had offered a product of a superior quality and much safer than that requested in the Tender Dossier. In this regard, Cassar Petroleum Services Limited insists that their offer should not have been discarded due to the fact that their product’s level of safety was higher than the stipulated range.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 16 October 2017 and its verbal submissions during the Public Hearing held on 4 January 2018, in that:

- a) WasteServ Malta contend that the Evaluation Board had carried out its evaluation of Appellants’ offer in accordance with the procedures, as laid out, in the Public Procurement Regulations. In this regard, Cassar Petroleum Services Limited’s offer exceeded the maximum level of percentage of “*Flash Point*” as requested, so that there was no other option for the Evaluation Board but to deem the Appellants’ Bid as being technically non-compliant.**

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

- 1. Mr Noel Sciortino duly summoned by Cassar Petroleum Services Limited;**
- 2. Mr Anthony Camilleri duly summoned by the Public Contracts Review Board;**
- 3. Ing Ramon Vella duly summoned by the Public Contracts Review Board**

This Board, after having examined the relative documentation concerning this Appeal and heard the submissions made by the interested parties, including the testimonies of the Technical Witnesses duly summoned, opines that there are two main issues which merit consideration namely, Cassar Petroleum Services Limited’s submission with regards to “*Flash Point level*” and the “*Technical Specifications as specified in the Tender Dossier*”.

1. Cassar Petroleum Services Limited’s Submission

This Board, as had on many occasions, would like to respectfully point out that it is the obligation and duty of the Bidder to ensure that, prior to the submission of his offer, great importance is given to the Tender requirements, in that, he submits the correct information with the Technical Specifications as duly dictated in the Tender Document.

In this particular case, this Board notes that on Page 15, under Section 4 of the Tender Document, there is stipulated a Technical Requirement consisting of a “*Flash Point*” range of a minimum 55° and a maximum of 59°. The Appellants in their submission, indicated a “*Flash Point*” level of 71°, which is outside the range so requested in the Technical

Specifications of this Tender. Quite appropriately, the Evaluation Board dismissed the Appellants' offer as being technically non-compliant. At this particular stage of consideration, this Board fully upholds the Evaluation Board's decision, as the Appellants' were well aware of the parameters of the "*Flash Point*" levels.

This Board had always endorsed the principle that the Tender Document is a contract and that any party to the contract must strictly abide by the conditions as laid out in the Tender Document. On the other hand, this Board would also point out that Cassar Petroleum Services Limited were well aware of the Technical Specifications regarding the "*Flash Point*" range and if they had any doubts or queries relating to this particular technical item, the Appellants had all the opportunities and remedies to seek clarifications prior to the submission of their offer. This Board notes that the Appellants did not avail themselves of such remedies available at law and in this regard, does not uphold Cassar Petroleum Services Limited's contention.

2. Tender Specifications

This Board would justifiably point out that the Technical Specifications in a Tender Document should specify the requested performance and in

addition, the requirement must be specified at the appropriate performance level. However, it must also take into consideration that the Technical Specifications provide for security and health and safety in the implementation of the requested works. The Technical Specifications should be drafted by experts who are familiar with the technology and well versed with the overall environmental impact.

From the submissions made by the drafter of the Technical Specifications, this Board was made aware of the fact that these Specifications were compiled on information obtained from the Internet, duly confirmed as follows:

“Jien min-naħa tiegħi għamilt il-Marketing Research tiegħi fuq l-Internet biex ovvjament ikolli l-ispeċifikazzjonijiet għad-diesel li aħna nagħmlu r-rikjesta għalih. Qabbiltha ma’ hafna siti oħra u minn hemmhekk ġibthom dawk l-ispeċifikazzjonijiet.”

In this regard, this Board was also informed that the compiler of such Technical Specifications was not at all a technical person, as duly confirmed by the person himself, in that:

“Emminni, ngħidlek il-verita’ jien mhux tekniku. Ma nistax ngħid li jien nifhem f’ dawn l-affarijiet meta jien ma nifhimx,”

When the same witness, who prepared the Technical Specifications, was asked if he had consulted with any technical expert, the reply was in the negative.

This Board also noted that, upon checking the information duly obtained from the Internet, this same information was interpreted incorrectly in the Technical Specifications in the Tender Dossier. In this regard, this Board is comfortably convinced that “*safety*” should never be limited to a maximum level but rather to reach at least, a minimum level, as in all circumstances safety should be on a 100 per cent level and not within a range.

This Board, after having considered the merits of this Appeal would respectfully point out that, although this Board’s remit is to establish whether the Evaluation process was carried out in a fair, just and transparent manner, it is the duty of the same Board to delve into any mistakes indicated in the Tender Dossier that would indicate a dubious health and safety issue in the execution of the tendered works and the compilation of the Technical Specifications to be drawn under the

advice of professionally qualified people. In this particular case, this Board was not presented with any credible proof or evidence to justify the flash point range of between 55 and 59 degrees indicated in the tender technical specifications.

In view of the above, this Board

- i. Recommends that this Tender is to be cancelled. WasteServ Malta must also ensure that when the tender is re-issued, the Technical Specifications are compiled by technical people who are well versed on the subject and at the same time, great consideration is to be taken to provide all the safety possible, in the execution of the Tendered Works;**

- ii. Recommends that although Cassar Petroleum Services' Limited's Contention was not upheld in principle; the deposit paid by the latter is to be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

16 January 2018