



Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Reuben Farrugia Legal Representative for Easy Gas Malta Ltd said that the reason given for disqualification, namely as not financially compliant was a misnomer since if, as the Contracting Authority alleges, there are documents missing then it is administratively non compliant, and hence the reason for disqualification is incorrect. The tender requested bids for an annual amount of gas and maintenance, estimated at 36k litres per annum subsequently amended through a clarification to 72k litres for 24 months. Appellants used the original financial bid form quoting a price of 32 Euro cents per litre and there was no need to submit a second bid form as price was already quoted in the original bid form and this was a constant with only the consumption being variable. In a previous case the PCRБ had decided that a 'variable' cannot be cause for exclusion, more so in this case where the tender itself referred to the consumption as an estimate. The tender was based on the unit price and the evaluation committee failed to follow their own tender stipulation in Article 5(D) (ii) of the Instructions to Tenderers. Appellants are perplexed as to how the committee could not extrapolate 36k litres at 32 cents to 72k litres at 32 cents.

Regarding the alleged failure to submit a price for the maintenance agreement Dr Farrugia mentioned that he deplored the fact that the letter of reply to the objection had come from the Chairman of the Evaluation Committee who had no *locus standi* in this appeal rather than from the Contracting Authority and was totally contrary the Public Procurement Regulations. As the Appellants had left the figure for maintenance blank the evaluation committee had decided that this was not valid – a totally gratuitous assumption. A € 0 figure means that Appellants are not charging for that service. The evaluation committee wanted the cheapest price but were turning down a free offer.

Dr Joseph Camilleri Legal Representative of Liquigas Ltd said that the PCRБ and the Courts emphasised the need for rigorous following of tender requirements. At this stage the tender figures are public knowledge. This is not a case of interpreting figures and the Authority would not have issued a clarification if it was not necessary otherwise the sense of proportionality does not apply. The PCRБ's role is to hear the points and arguments made by whichever party. If that is changed then they would be prejudicing the preferred bidder.

Eng Martin Grech (511865M) called as a witness by the Public Contracts Review Board testified on oath that he was the Chairperson of the Evaluation Committee. He confirmed that the first financial bid form stated estimated supply as 36,000 units and that Appellant had submitted only one financial bid form.

In reply to a series of questions witness replied that the tender states 36K units annually and this has not changed, He agreed that the maintenance charge was shown as € 0.00 and the unit price offered never changed.

The Chairman pointed out to the witness that a lump sum cannot have a unit rate as the bid form requested and since there is no lump sum involved then the figure 0.00 means that that item is included in the overall price.

Dr Farrugia said that the witness was expecting the Appellants to substitute the predetermined figure of 0.00 by 0.00. This does not make sense since a unit price for a lump sum is against the principle of the laws of contracts. Appellants followed the scope of the tender and all that had to happen was for the unit price to be multiplied by the actual consumption.

Dr Camilleri said that the tender submission had not followed what was requested. The tender is for supply, delivery, maintenance and spare parts and this latter part seems to have been ignored. One is now presuming that all the facts were known at the time of the bids.

Dr Farrugia said that the Contracting Authority were not even represented at this hearing and it was not correct to state that one is presuming facts since an offer of € 0.00 is not a presumption subject to interpretation but a fact.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by Easy Gas Malta Ltd (hereinafter referred to as the Appellants) on 17<sup>th</sup> July 2020, refers to the claims made by the same Appellants with regard to the tender of reference MTIP/WID/010/2020 listed as case No. 1482 in the records of the Public Contracts Review Board recommended for award by Ministry for Transport (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Reuben Farrugia**

**Appearing for the Contracting Authority: Dr Mark Sammut**

**Appearing for the Recommended Bidder: Dr Joseph Camilleri**

**Whereby, the Appellants contend that:**

**Their objection refers to two main issues as follows:**

- a) Their offer was discarded due to the alleged reason that, they failed to submit the correct Financial Bid Form, appropriately filled in and**
- b) Their offer did not indicate the cost of maintenance agreement as duly stipulated in the financial Bid Form.**

**This Board also noted the Contracting Authority's 'Letter of reply' dated 27<sup>th</sup> July 2020 and its verbal submissions during the virtual hearing held on 31<sup>st</sup> August 2020, in that:**

- a) The Authority maintains that Appellants' submission did not adhere to the requirements, as duly stipulated in the tender dossier. In this regard, the tender requested the supply and delivery coupled with maintenance and spare parts, however Appellants ignored such requisites, in their Financial Bid Form.**

**This same Board also noted the testimony of the witness namely:**

**Engineer Martin Grech, Chairman of the Evaluation Committee duly summoned by the Public Contracts Review Board.**

**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 Chairman of the Evaluation Committee opines that, the issues that merit consideration refer to:**

- a) Appellants’ Financial Bid Form and
- b) Failure to indicate the maintenance costs in the Financial Bid Form.

**1. Appellants’ Financial Bid Form**

**1.1. The first reason given by the Contracting Authority for Appellants’ offer rejection was that, the latter failed to submit the correct Financial Bid Form in that, it did not take into consideration the contents of the clarification note dated 12<sup>th</sup> May 2020, which read as follows:**

*“No.1 The estimated quantity for “24 month’s supply and delivery of LPG as specified (in Litres)” in the Financial Bid Form should read 72,000 litres instead of 36,000 litres. As per Section 1, clause 1.1 of the Tender Document, the 36,000 litres is estimated annual supply. An amended Financial Bid Form will be uploaded alongside this clarification.”*

**1.2. The Financial Bid Form requested the following information:**

| <i>“Item Description</i> | <i>Estimated Quantity</i> | <i>Unit Cost including Taxes/Charges, other Duties &amp; Discounts <u>but</u> Exclusive of VAT (Delivered Duty Paid DDP)</i> | <i>Total including Taxes/Charges, other Duties &amp; Discounts <u>but</u> Exclusive of VAT (Delivered Duty Paid DDP)</i> | <i>”</i> |
|--------------------------|---------------------------|------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|----------|
|                          |                           | €                                                                                                                            | €                                                                                                                        |          |

**At the same instance, Appellants submitted their Financial Bid form as shown hereunder:**

| <i>Item</i>                                                                                                     | <i>Description</i>                                                     | <i>Estimated Quantity</i> | <i>Unit Cost including Taxes/Charge, other Duties and Discounts but Exclusive of VAT (Delivered Duty Paid DDP)</i> | <i>Total including Taxes/Charges, other Duties and Discounts but Exclusive of VAT (Delivered Duty Paid DDP)</i> |
|-----------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------|---------------------------|--------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|
|                                                                                                                 |                                                                        |                           | €                                                                                                                  | €                                                                                                               |
| 1                                                                                                               | 24 months supply<br>And delivery of<br>LPG as specified<br>(in litres) | 36000                     | 0.32                                                                                                               | €11,520.00                                                                                                      |
| 2                                                                                                               | Maintenance<br>Agreement<br>including any<br>necessary<br>spare parts  | Lump Sum                  |                                                                                                                    | €0.00                                                                                                           |
| <b>GAND TOTAL EXCLUDING VAT – CARRIED FORWARD<br/>TO FINANCIAL SECTION OF ONLINE TENDER<br/>RESPONSE FORMAT</b> |                                                                        |                           |                                                                                                                    | <b>€11,520.00”</b>                                                                                              |

**It is evidently clear that Appellants, in their Financial Bid Form, denoted a quantity of 36,000 litres, instead of 72,000 litres as duly indicated in the clarification note no. 1.**

**1.3. This Board notes that, this is a unit price tender and not a lumpsum one, so that, at this particular stage of consideration, it is being justifiably**

**established that, the quantity is a variant but the unit price is fixed, in that, no matter what the quantity is, the quoted unit price will remain fixed for any quantity of litres which the Authority will request in 24 months.**

**1.4. Although, one might argue that, Appellants did not state the denoted estimated quantity of litres, as duly requested in clarification note no. 1, consideration must also be directed toward the fact that, as the tender clearly denotes, the quantity is an estimated quantity, the supply of which can vary over the 24 month period, hence, the estimated quantity is to be considered as the ‘Variant Factor’ in this particular procurement and it is the “Unit Price Per Litre” which determines the most advantageous offer to the Authority; obviously after the offer is assessed for administrative and technical compliance.**

**1.5. This Board would respectfully point out that, the ‘Constant Factor’, in this case, i.e. the ‘Unit Price per Litre’, must be given its due importance in determining the most advantageous offer. At the same instance, as this Board, has concluded in previous cases, the Authority should endeavour to save an advantageous offer without giving any advantage to the particular bidder. In this particular case, Appellants were well aware (through Clarification Note No. 1) that, the estimated quantity for the period of 24 months was in the region of 72,000 litres and in their**

**Financial Bid Form, there was no qualification indicating that the unit price will change in accordance with the quantity of litres consumed. At this particular stage of evaluation, the Evaluation Committee should have applied the principle of proportionality. This Board would point out that, a variable factor denoted in a tender document, should not represent grounds for the exclusion or rejection of an offer.**

**2. Non-Inclusion of Maintenance Costs**

- 2.1. With regard to Appellants' second grievance in that, their offer was discarded due to the fact that they failed to indicate the maintenance costs in their submitted Financial Bid Form, this Board would, again, refer to the Financial Bid Form wherein, it is clearly stated that such an offer must be made by the bidder as a 'Lump Sum', so that, there is no particular stipulated unit rate for such maintenance and upkeep costs.**
- 2.2. This Board was made aware that, since this line contained an embedded formula, the bidder had to include a price under the column depicting 'Unit Cost' and the total would be worked out for the particular item.**
- 2.3. Respectfully, this Board would point out that, it is not logical for the Bidder to indicate a lump sum under the column of unit cost. It would be more appropriate and arithmetically fitting, if the bidder includes the lump sum under the 'Total' column.**

**2.4. With regard to the Authority's claim that the bidder failed to include maintenance costs in his offer, this Board opines that, since the bidder did not change the total column, which reads '0', then it is obvious that Appellants will either not charge for such services or else that such costs are included in the 'Unit Price Per Litre' so quoted.**

**2.5. This Board would also point out that, if the Evaluation Committee was in doubt as to whether Appellants are offering the maintenance service for free, same Committee could have requested a confirmation to that effect, without adjusting or rectifying Appellants' offer.**

**In conclusion, this Board opines that:**

- a) The fact that Appellants' Financial Bid Form denoted an estimated quantity of 36,000 litres instead of 72,000 does not render a justifiable reason to discard Appellants' offer, as the estimated quantity is a variant.**
- b) The tender was a 'Unit Price' tender and Appellants' offer indicated a 'Unit Price' per litre for the whole period of the tender, so that, no matter what the quantity of litres the Authority requests, the Unit Price will remain the same throughout the 24 month period.**
- c) A proportionate effort should have been made by the Evaluation Committee to save an advantageous offer, whilst adhering to the principles of proportionality, transparency and equal treatment.**

- d) The fact that Appellants, in their Financial Bid Form, did not include an amount (Lump Sum) to cover maintenance costs, but retained the Lump Sum of €0 under the total column, does not justify the rejection of their offer. Such circumstance denotes that no charge is being made for such costs.**
- e) If the Evaluation Committee had doubts as to whether Appellants' maintenance service is offered for free, same Committee should have requested a confirmation which, in the end would have been opportune and proper, prior to rejecting the offer.**
- f) The 'Reasoned Letter of Reply' should originate from the Contracting Authority and not from the Evaluation Committee, which is not party to this appeal.**

**In view of the above, this Board,**

- i. does not uphold the Contracting Authority's decision in the award of the tender,**
- ii. upholds Appellants' contentions,**
- iii. directs that a re-evaluation process be carried out, taking into consideration this Board's findings,**
- iv. directs that Appellants' offer be integrated in the evaluation process,**
- v. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*10<sup>th</sup> September 2020*