

PUBLIC CONTRACTS APPEALS BOARD

Case No. 55

RE: CT 2164/2005 – Advert No 125/2005 – MCH 182/03 Nursing Services for the Department of Correctional Services (New Forensic Unit) at Mount Carmel Hospital

Following a formal request sent on 8 March 2005 by Mount Carmel Hospital's CEO to the Director of Contracts, a call for tenders was published in the Government Gazette on the 26 April 2005. The closing date for the call for offers was 9 June 2005.

The global estimated value of the contract was Lm 70,000.

A total of two (2) offers submitted by different tenderers were analysed by an Adjudication Committee.

Following the notification that their Company was not selected, Messrs Medicare Services Ltd submitted a formal reasoned letter of objection against the decision to award the tender in caption to Messrs. Health Services Group Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr. Edwin Muscat acting as members, convened a public hearing on 30 November, 2005 to discuss this objection.

Also present for the hearing were:

Medicare Services Ltd
Dr Peter Caruana Galizia LL.D.
Dr David Grech MD
Mr Jesmond Cilia

Health Services Group Ltd
Mr Godwin Bonnici – Managing Director
Dr Martin Fenech LL.D.

Mount Carmel Hospital
Mr Edward Borg – Chief Executive
Mr Charles Degiorgio

Following the Chairman's brief introduction to this appeal, Medicare Services Ltd's representatives were invited to explain the motive behind their objection.

The appellants' legal advisor, Dr Peter Caruana Galizia, said that both Health Services Group Ltd and his clients had submitted the rates for the provision of nursing services at Mount Carmel Hospital in accordance with the Schedule of the tender document, that is, from Mondays to Saturdays, for Sundays and public holidays and for 'on-call' coverage. He claimed that according to their calculations, the offers submitted by Health Service Group Ltd and Medicare Services Ltd amounted to Lm 57, 070 and Lm 56, 056, respectively. Thus, Dr Caruana Galizia claimed that his clients' offer was Lm 1,014 cheaper. The same lawyer proceeded by drawing the attention of those present that the 'on-call' fees of the two bidders were computed by multiplying their respective quoted rate per hour by 24 hours by 365 days because their interpretation was that they would be on-call/available all the time during the whole year.

The appellants' legal representative said that, apparently, there was some confusion in the definition of the 'on-call' coverage because, during the adjudication process, these were initially requested by Mount Carmel Hospital's Chief Executive to submit further information thereon and then the matter was referred to and dealt with by the Contracts Department. Eventually, his clients explained that the 'on-call' rate applicable was 20c per call and not 'per hour'. Dr Caruana Galizia said that they did not know whether the same information was requested from the other bidder as well. Also, he claimed that they did not even know the contents of their reply, if there was any at all!

The appellants' lawyer insisted that, once the 'on-call' rate was requested in the tender document it was incorrect to exclude it from the calculations. Thus, he contended that, if the 'on-call' rate was not taken into consideration in the selection exercise, then the award was not valid. Moreover, he argued that the 'on-call' rate could not be ignored because, to date, Mount Carmel Hospital's administration has always requested more than two nurses.

Dr Caruana Galizia said that his clients were requesting the issue of a fresh call for tenders because (a) there was lack of transparency in the adjudication process and (b) the offers were not adjudicated on what was requested in the tender document.

Dr David Grech MD said that the 'on-call' hourly rate offered in the tender by Medicare Services Ltd and Health Services Group Ltd was 20c and 60c per hour respectively, and that the tender was awarded after the General Contracts Committee requested the tenderers to define what they meant by 'on-call' coverage.

Dr Grech tabled a copy of an e-mail dated 21 June 2005 sent by Mr Edward Borg (Mount Carmel Hospital) to Mr Jesmond Cilia (Medicare Services Ltd) requesting the Company to furnish information regarding the 'on-call' coverage. Dr Grech said that they objected to Mount Carmel Hospital's CEO highly unusual and irregular request to submit the required information via fax in his office. Subsequently, they were informed by the CEO that the matter was to be taken up by the Department of Contracts. On 8 August 2005 they received a Telefax Message from the Department of Contracts asking them to attend the General Contract Committee meeting on 16 August 2005 to explain the 'on-call' charge. Dr Grech said that, in Mr Borg's presence, Medicare Services Ltd's representatives verbally submitted their clarification regarding the 'on-call' service charge. Such information was, subsequently, also submitted in writing as requested.

Dr Martin Fenech, representing Health Services Group Ltd., commenced his intervention by declaring that there was level playing field because during the adjudication stage, even Health Services Group Ltd were requested to explain the 'on-call' rate and his clients were, also, not aware of Medicare Services Ltd's reply. He said that the General Contracts Committee adjudicated the tender on the basis of the explanations given by both parties.

Dr Fenech insisted that the purpose of this appeal was to reveal Health Services Group Ltd's reply regarding 'on-call' rates and to convince the board that the evaluation process was not transparent. He alleged that the appellants was requesting the re-issue of tender so that they could quote lower rates than those offered by his clients in this tender. Dr Fenech claimed that his clients gave all the necessary details and proved that they were cheaper not only on the rates quoted for Mondays to Saturdays, Sundays and Public Holidays but even in respect of the 'on-call' coverage. At this point he exhibited their letter dated 25 August 2005 sent to the General Contracts Committee.

Dr Fenech said that in paragraph (f) of the said letter, Health Services Group Ltd stated that *'No on-call-charge is applicable if notice is given prior to the 4 hrs notice given between Monday to Saturday or 6 hrs on Sundays & Public Holidays.'* He explained that if the call was made four hours before they would not charge anything for the extra nurse/call while the appellants' lawyer stated that they would charge for every call. As a consequence, Mount Carmel Hospital would only pay the basic rate per hour per nurse. At this stage, Mr Godwin Bonnici intervened and added that in cases where more nurses were required, Health Services Group Ltd's offer would prove to be much cheaper because the appellants' basic rate charged for each nurse was higher than theirs and so the difference in price would be greater.

At this point, Dr Caruana Galizia reiterated that the Department requested the 'on-call' rate so that they would be available on a 24 hour basis and the other party's offer was different from what was, ultimately, not requested in the tender document. He insisted that the tender was not awarded according to the published specifications.

Dr Fenech rebutted the appellants' allegation regarding the irregularity of the tendering process by stating that, if they felt that something was irregular, then, they should have immediately asked the Contracts Department to suspend the process. Furthermore, he contended that the Hospital's authorities had every right to seek clarifications if something was not clear. Dr Fenech said that, apparently, the allegations of irregularities were made simply because they failed to win the contract.

Mr Bonnici declared that on 21 June 2005, Health Service Group Ltd received an e-mail sent by Mr Borg and that the information requested (relating to the 'on-call' charge) in the said e-mail was personally presented to the Hospital's CEO during a meeting held on 25 August 2005.

On cross-examination by the PCAB, Mr Borg testified that he, together with other managers, was involved in the preparation of the tender which was issued by the Department of Contracts. He explained that although no 'ad hoc' board existed at Mount Carmel Hospital the evaluation of this tender was made by himself in consultation with the Manager, Nursing Services, and other staff members. Following this, their recommendations were referred to the General Contracts Committee for their consideration. The Hospital's Chief Executive emphasised that they always followed this procedure in all previous tenders. At this point, the PCAB drew his attention that the *modus operandi* in this regard left much to be desired. As a consequence, Mr Borg was requested to liaise with the Department of Contracts to seek advice on the matter.

Continuing with his testimony, Mr Borg said that the tender was issued for the provision of two nurses on a 24 hour basis. However, bidders were also requested to quote for the 'on-call' coverage because, due to unforeseen circumstances, they might be required to provide additional nurses. He confirmed that Medicare Services Ltd and Health Services Group Ltd offered a rate of 20c and 60c per hour respectively for the 'on-call' coverage. He explained that for each extra nurse they were charged the normal rate plus the 'on-call' rate with effect from reporting for work.

Mr Borg said that in the tender document it was specified that:

*'The following coverage will be required:
Mondays to Saturdays, Sundays and Public Holidays:
Minimum 2 nurses on a 24 hour basis*

Additional nurses may be required and these shall be provided within less than 4 hrs from Monday to Friday and less than 6 hrs on Sundays and Public Holidays.'

He explained that the six (6) hours and four (4) hours were important because the 'on-call' charge was applicable if the contracted agency was not given enough time to provide the additional nurses required. Mr Borg said that tenderers were requested to provide the hourly rate for 'on-call' coverage but it was left to their discretion to indicate how they were going to apply the 'on-call' charge because they were prepared to accept other favourable terms. However, his attention was drawn to the fact that this was not indicated in the tender document.

When the PCAB asked the witness to state whether the hourly rate for the 'on-call' coverage was considered as a fixed cost or a variable cost, Mr Borg replied that the 'on-call' rate was charged only if additional nurses were required and with effect from reporting for work. He said that during the adjudication process they found it very difficult to quantify the 'on-call' coverage because there were many variables involved. As a consequence, in an attempt to quantify the 'on-call' coverage in financial terms, he asked the following questions (as quoted *verbatim* hereunder) to the tenderers:

- *should extra staff be required, how long should the period of notice be before the on-call charge becomes effective (reply should be given in hours)?;*
- *the duration, in hours, during which the on-call coverage charge remains applicable;*
- *is the on-call rate quoted in your tender applicable only to the first nurse or to all other extra nurses required?*

Dr Borg testified that he had requested the two bidders to submit their reply in a sealed envelope and to deposit them in a tender box by not later than Friday 24 June 2005 12 o'clock noon. He said that, at first, Medicare Services Ltd appeared to be satisfied with this procedure because, on 22 June 2005, Mr Jesmond Cilia sent an e-mail wherein he thanked him for the transparent method he had chosen to conduct the issue and also asked him to be present for the opening session. Dr Caruana Galizia intervened to point out that, according to the e-mail sent on 21 June 2005, they were requested to fax the requested information to his office.

Continuing, Mr Borg testified that, the day after, they received correspondence from Medicare Services Ltd informing him that they were protesting against the submission of clarifications to his office because this was highly irregular. He immediately informed the two tenderers to withhold the information requested until further notice because he needed to refer the matter to the Department of Contracts. Mr Borg explained how he attended a General Contracts Committee's meeting wherein it was explained that, on the basis of what was submitted, it was very difficult to evaluate the 'on-call' coverage. Subsequently, the tenderers and himself appeared before the General Contracts Committee in order for the bidders to explain how they intended to apply the 'on-call' charges. Also, the tenderers submitted their clarifications in writing as requested. He declared that the two contenders were not aware of each others' clarification reply as the meetings with Medicare Services Ltd and Health Services Group Ltd were held on different dates (16th and 25th August 2005, respectively).

After being granted permission to divulge other information considered pertinent to the proceedings, Mr Borg said that Medicare Services Ltd's representatives explained that the 'on-call' rate applicable would be 20c for each extra nurse called in and this for the first hour only while, Health Services Group Ltd's representative explained that the 'on-call' charge would solely be applicable for a nurse, irrespective of the number of additional nurses required. However, this charge was applicable if the 'on-call' was requested within a notice period of four hours during weekdays and six hours during Sundays and Public Holidays respectively.

On cross-examination by Dr Fenech, Mr Borg said that in view of these divergent views and other unknown factors (for example, number of calls and additional nurses required) related to the 'on-call' coverage, the General Contracts Committee decided to base their recommendation on the first two elements only, that is, exclusive of the 'on-call' coverage.

During the proceedings, in reply to a specific question by the PCAB, Mr Borg said that it was the Health Services Group Ltd's letter dated 14 June 2005 which was submitted to the Department of Contracts after the closing date of tender that instigated him to raise the issue of the 'on-call' coverage because it was stated that *'I would like to clarify that our quotation of 60c per hour is the rate after the requested two established nurses and irrelevant of how many nurses are supplied. This thus, is not to be understood that the rate is per nurse.'*

Also, on the PCAB's request, Mr Bonnici declared under oath that they were instigated to write that letter because, in the tender under reference, the 'on-call' coverage was requested per hour whilst in the previous tender bidders were requested to quote a rate per hour per nurse. His attention was drawn by the PCAB that the matter should have either been clarified with the Department of Contracts at tendering stage or else the letter should have been sent with their submission.

Furthermore, Mr Bonnici confirmed that, in spite of the fact that the clarification meetings with both tenderers were held on different dates, they were neither given any information nor influenced by the other party's reply. He testified that they did not even know that the General Contracts Committee had requested the same information from the other party.

In his concluding remarks, Dr Caruana Galizia reiterated that the adjudication process was not transparent and that their offer was cheaper. He contended that the 'on-call' coverage was not a variable charge because the rate per hour and the number of hours and days were known. He insisted that it was irregular to request tenderers to submit the 'on-call' rate and then exclude this element from the calculations. He argued that, if the adjudicating committee wanted to evaluate the tender without taking into account the 'on-call' rate, they should re-

issue the tender accordingly. The appellants' lawyer said that, once Mr Borg declared that they always required more than two nurses, it would make better sense if the basic number of nurses were increased. Finally, Dr Caruana Galizia pointed out that Medicare Services Group Ltd were offering something that was not requested in the tender document.

Dr David Grech said that they were not only stating that their offer was cheaper but that the process was vitiated.

Dr Martin Fenech started his concluding remarks by stating that it was clear that the rates submitted by Health Services Group Ltd for the 1st and 2nd element were cheaper than those quoted by the appellants and that in the clarification meeting it was explained that the 'on-call' would practically be provided free of charge. He was of the opinion that the CEO acted correctly when he referred the matter to the General Contracts Committee after realising that he could not communicate with the tenderers. Dr Fenech said that from the CEO's testimony it transpired that it was difficult for the General Contracts Committee to quantify the 'on-call' coverage. Also, it was declared that none of the companies knew that the General Contracts Committee held clarification meetings with both parties and that no information was disclosed to the other party. Thus, the matter was clarified through a democratic process without favouring anybody. Health Services Group Ltd's legal advisor said that, after hearing the explanations of both parties, the General Contracts Committee realised that his clients' offer was even cheaper than that of Medicare Services Ltd in all aspects and so awarded the contract to Health Services Group Ltd. He concluded by stating that the adjudication process was transparent, that nothing was irregular and that the appellants were requesting the relevant authority to re-issue the tender simply because they were not awarded the contract.

At this stage, the public hearing was concluded and the PCAB proceeded with its deliberations before reaching its decision.

The Board,

- having noted that appellants, in terms of their 'reasoned letter of objection' as well as through their verbal submissions presented during the public hearing held on the 30th November, 2005, had objected to the decision taken by the General Contracts Committee;
- having considered appellants' claims that (a) they had submitted the rates for the provision of nursing services at Mount Carmel Hospital in accordance with the Schedule of the tender document; (b) their offer was Lm 1,014 cheaper; (c) there was some confusion in the definition of the 'on-call' coverage; and (d) the tender was not awarded according to the published specifications;
- having taken note of appellants' remark that once the 'on-call' rate was requested in the tender document it was incorrect to exclude it from the calculations;
- having heard the awarded tenderer's legal representative claim that (a) there was a level playing field and (b) the General Contracts Committee adjudicated the tender on the basis of the explanations given by both parties;
- having observed the chaotic manner in which proceedings were attended to, albeit desperate attempts were made to safeguard transparency;

- having noted Dr Fenech's explanations regarding the fact that, whilst, according to him, as regards the offer submitted by his clients, if a 'call' is made to his clients by hospital officials four hours prior to nursing services being actually required, the latter would not incur any additional charge, yet, as confirmed by the appellants' lawyer himself, the appellants would be charging the contracting party for every call;
- having considered Dr Fenech's remark regarding the fact that if the appellants felt that something was irregular, then, they should have immediately asked the Contracts Department to suspend the evaluation and adjudication process;
- having considered the fact that the process of clarification regarding the 'on call' coverage was instigated by a letter from Health Services Group Ltd which may have been intended as a clarification of the original offer but could also be interpreted to have changed such offer substantially;
- having established that with regards to any clarification relating to the 'on-call' coverage, Mr Bonnici should have sought such clarifications with the Department of Contracts prior to submission of tender;
- having examined these contestations in conjunction with (a) the specific requirements as stated in the tender documents and (b) the respective terms and specifications offered by the appellants in their tender;

reached the following conclusions:

- The contracting entity's '*modus operandi*' with regards to the evaluation and adjudication process of this tender left much to be desired as 'inter alia' (a) according to Mr Borg, tenderers were requested to provide the hourly rate for 'on-call' coverage but it was left to their discretion to indicate how they were going to apply the 'on-call' charge and this despite the fact that such a condition was not originally indicated in the tender document; and (b) according to appellants' legal representative, his clients were first asked to fax requested information but were subsequently asked to withhold the information requested until further notice because Mr Borg needed to refer the matter to the Department of Contracts;
- The fact that the tender was originally issued for the provision of two nurses on a 24 hour basis (even though bidders were also requested to quote for the 'on-call' coverage because, due to unforeseen circumstances, they might be required to provide additional nurses) and then the Contracts Committee decided that their ultimate decision should be solely based on the first two elements, that is, exclusive of the 'on-call' coverage, has to be considered as a change in original terms and conditions;
- Albeit it could agree with Dr Fenech's claim that it was difficult for the General Contracts Committee to quantify the 'on-call' coverage, yet this Board feels that this should have been considered '*ab initio*' and not during such a pivotal stage in the adjudication process. Furthermore, this Board could also, for argument's sake, concur with Dr Fenech's claims that the clarification meetings with both parties were conducted in a highly democratic and equitable manner. However, this Board cannot renege on its responsibilities and feels that the '*modus operandi*' resorted to in this instance could very much lead anyone to doubt the lack of seriousness shown, thus, possibly, giving rise to uncalled for suspicious observations by third parties.

In view of these findings, this Board finds in favour of appellants and whilst nullifying this tender, it also recommends that this tender be re-issued, this time containing more clearly defined parameters thus avoiding unequivocal terms and conditions and guaranteeing a level playing field amongst all possible participants.

Furthermore, this Board recommends that the contracting party and the Department of Contracts work closer together in order to ensure that evaluation and adjudication proceedings follow customary, well known, operational praxis.

The Board has also concluded that the deposit paid by the appellants in conjunction with this appeal should therefore be refunded.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

29 December 2005