

PUBLIC CONTRACTS REVIEW BOARD

Case No. 519

DH/619/2011

Tender for Provision of Care Workers for Sir Paul Boffa Hospital

This call for tenders was published in the Government Gazette on the 16th September 2012. The closing date for this call with an estimated budget of €111,618.64 was the 18th October 2012.

Two (2) tenderers submitted their offers.

Medistar Healthcare Services Ltd filed an objection on the 10th December 2012 against the decision of the Ministry for Health, Care of the Elderly and Community Care to disqualify its offer as administratively non-compliant and to recommend the award to Support Services Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Wednesday, 30th January 2013 to discuss this objection.

Present for the hearing were:

Medistar Healthcare Services Ltd

Mr Jeremy Muscat	Director
Mr Martin Aquilina	Operations Manager

Support Services Ltd

Dr Martin Fenech	Legal Representative
Mr Gaetano Bonnici	Representative
Mr Josef Borg	Representative

Ministry for Health, Care of the Elderly and Community Care

Dr Adrian Mallia	Legal Representative
Ing. Karl Farrugia	Representative

Evaluation Board

Mr Charles Schembri	Chairman
Ms Ninette Grech	Member
Ma Annabel Magro	Member
Ms Lorraine Muscat	Member
Ms Stefanie Abela	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Mr Jeremy Muscat, representing Medistar Healthcare Services Ltd, the appellant company, made the following submissions:

- i. by email/letter dated 3rd December 2012 the appellant company was informed that its offer was adjudicated to be unacceptable for the following reasons:
 - (a) *the experience listed does not comply with what has been requested through the published Selection Criteria clause 6.1.2 moreover the experience listed merely relates to the provision of care worker services and*
 - (b) *the list of staff proposed for the execution of the contract is not compliant in both number of staff and in the standard of education requested through clause 10 of the published technical specifications;*
- ii. one could not help noting that the tender was issued in October 2011 whereas the award/rejection of tenders was communicated in December 2012;
- iii. when this tender was issued in 2011 the appellancy company was already carrying out these services at this same hospital and the appellant company could, therefore, not understand how its offer was being adjudicated unacceptable;

and
- iv. with regard to experience of staff, when the appellant company had taken over the provision of this service at this hospital in May 2011, this firm had bound itself with the Employment and Training Corporation to retain the employees of the previous contractor, namely, Novitas Ltd, with the same employment conditions and it therefore followed that the staff did have the experience required in the tender document.

Dr Adrian Mallia, legal representative of the contracting authority, submitted the following explanations:-

- a. it had to be made clear from the outset that, whatever the outcome of the hearing, the fact was that the appellant company's offer, besides being non-compliant, was not the cheapest, whereas the recommended tender was compliant and the cheapest;
- b. clause 2 of the terms of reference requested the services of 5 (five) care workers on a shift basis;
- c. according to clause 10 of the terms of reference, all the care workers proposed had to have 'O' Level standard or Form 5 school leaving certificate together with anyone of the following, namely (1) one of the three specified MCAST

diploamas or (2) an appropriate ETC course or a two-year care worker certificate by a recognised Health Care provider or (3) had followed a care assistant course of the Department of the Elderly;

- d. it appeared that two of the care workers proposed by the appellant company, namely Mr Ephraim Bezzina and Mr Anthony Mercieca, did not possess the academic requirements set out in the tender document;
- e. the reason behind the non-award of this tender in 2011, apparently, was the non-availability of funds and, although one was justified in criticising the inordinate length of time it took to award this tender, it had to be stressed that the evaluation board had nothing to do with this aspect;

and

- f. clause 6.1.2 requested “*evidence of relevant experience in providing services of a similar nature over the past three (3) years including the nature and monetary value, as well as contracts in hand and contractually committed.*”

Mr Muscat remarked that:-

- i. members of the staff proposed did have certain qualifications and experience but the appellant company did not submit them with its tender submission;
- ii. the company was set up in May 2011 and, although the firm had not been set up and in operation for three years, at the time the tender was issued it did have a number of contracts in hand and those were indicated in its tender submission;

and

- iii. if tender documents were to include the three years experience then it, effectively, meant that start-ups were being precluded from participating in such public tender procedures.

The Chairman Public Contracts Review Board remarked that:-

- a. whatever the reason, it was deplorable that a tender issued in October 2011 was awarded in December 2012;
- b. the evaluation board had to adjudicate on the documentation submitted by the closing date for the submission of tenders;

and

- c. if a tenderer considered the tender conditions and/or specifications discriminatory in one's regard then the tenderer had the opportunity to seek a pre-contractual remedy but, prior to the closing date for the submission of tenders, and not at evaluation stage.

Dr Martin Fenech, legal representative of the recommended tenderer, submitted that:-

- i. the appeal was both frivolous and vexatious because it was lodged for the purpose of delaying further the award of this tender because, in the meantime, the appellant company was still providing this service to the detriment of the recommended tenderer;
- ii. the appeal was a non-starter because the appellant company did not qualify as a bidder and, moreover, Medistar Healthcare Services Ltd could not, at this stage, claim experience which the said company did not possess at tendering stage and experience was an important element in the provision of health care services;

and

- iii. the fact was that the recommended tenderer had submitted the cheapest compliant tender.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 7th December 2012 and also through its representatives verbal submissions presented during the hearing held on the 30th January 2013, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email/letter dated 3rd December 2012 the appellant company was informed that its offer was adjudicated to be unacceptable for the following reasons, namely *(1) the experience listed does not comply with what has been requested through the published Selection Criteria clause 6.1.2 moreover the experience listed merely relates to the provision of care worker services and (2) the list of staff proposed for the execution of the contract is not compliant in both number of staff and in the standard of education requested through clause 10 of the published technical specifications*, (b) one could not help noting that the tender was issued in October 2011 whereas the award/rejection of tenders was communicated in December 2012, (c) when this tender was issued in 2011 the appellancy company was already carrying out these services at this same hospital and the appellant company could, therefore, not understand how its offer was being adjudicated unacceptable, (d) with regard to experience of staff, when the appellant company had taken over the provision of this service at this hospital in May 2011, this firm had bound itself with the Employment and Training Corporation to retain the employees of the previous contractor, namely, Novitas Ltd, with the same employment conditions and it therefore followed that the staff did have the experience required in the tender document, (e) members of the staff proposed did have certain qualifications and experience but the appellant company did not submit them with its tender submission, (f) the company was set up in May 2011 and, although the firm had not been set up and in operation for three years, at the

time the tender was issued it did have a number of contracts in hand and those were indicated in its tender submission and (g) if tender documents were to include the three years experience then it, effectively, meant that start-ups were being precluded from participating in such public tender procedures,

- having considered the contracting authority's representative's reference to the fact that (a) it had to be made clear from the outset that, whatever the outcome of the hearing, the fact was that the appellant company's offer, besides being non-compliant, was not the cheapest, whereas the recommended tender was compliant and the cheapest, (b) clause 2 of the terms of reference requested the services of 5 (five) care workers on a shift basis, (c) according to clause 10 of the terms of reference, all the care workers proposed had to have 'O' Level standard or Form 5 school leaving certificate together with anyone of the following, namely (1) one of the three specified MCAST diplomas or (2) an appropriate ETC course or a two-year care worker certificate by a recognised Health Care provider or (3) had followed a care assistant course of the Department of the Elderly, (d) it appeared that two of the care workers proposed by the appellant company, namely Mr Ephraim Bezzina and Mr Anthony Mercieca, did not possess the academic requirements set out in the tender document, (e) the reason behind the non-award of this tender in 2011, apparently, was the non-availability of funds and, although one was justified in criticising the inordinate length of time it took to award this tender, it had to be stressed that the evaluation board had nothing to do with this aspect and (f) clause 6.1.2 requested "*evidence of relevant experience in providing services of a similar nature over the past three (3) years including the nature and monetary value, as well as contracts in hand and contractually committed.*";
- having also considered the recommended tenderer's reference to the fact that, (a) the appeal was both frivolous and vexatious because it was lodged for the purpose of delaying further the award of this tender because, in the meantime, the appellant company was still providing this service to the detriment of the recommended tenderer, (b) the appeal was a non-starter because the appellant company did not qualify as a bidder and, moreover, Medistar Healthcare Services Ltd could not, at this stage, claim experience which the said company did not possess at tendering stage and experience was an important element in the provision of health care services and (c) the fact was that the recommended tenderer had submitted the cheapest compliant tender,

reached the following conclusions, namely:

1. The Public Contracts Review Board observes that, whatever the reason, it was deplorable that a tender issued in October 2011 was awarded in December 2012.
2. The Public Contracts Review Board contends that, whilst clause 2 of the terms of reference requested the services of 5 (five) care workers on a shift basis, yet it was established that two of the care workers proposed by the appellant company, namely Mr Ephraim Bezzina and Mr Anthony Mercieca, did not possess the academic requirements set out in the tender document.
3. The Public Contracts Review Board has taken full cognisance of the fact that during the hearing the appellant company's representative remarked that, albeit

members of the staff proposed did have certain qualifications and experience, yet the said appellant company did not submit them with its tender submission and, as it was very often stated in similar circumstances by this Board, the evaluation board had to adjudicate on the documentation submitted by the closing date for the submission of tenders.

4. This Board, whilst concurring with the appellant company's observation that if tender documents were to include the three years experience then it, effectively, meant that start-ups were being precluded from participating in such public tender procedures, yet, in this particular instance, it was also true that if a tenderer considered the tender conditions and/or specifications discriminatory in one's regard then the tenderer had the opportunity to seek a pre-contractual remedy but this had to take place prior to the closing date for the submission of tenders, and not at the evaluation stage.
5. This Board feels that this appeal was a non-starter because the appellant company did not qualify as a bidder and, moreover, Medistar Healthcare Services Ltd could not, at this stage, claim experience which the said company did not possess at tendering stage.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmel Esposito
Member

6 February 2013