

PUBLIC CONTRACTS REVIEW BOARD

Case No. 782

MHAS 200/2014

**Tender for the Provision of Service by a Medical Doctor to Work with Asylum Seekers in Closed Detention Centres.
Service**

The tender was published on the 24th October 2014. The closing date for the tender was on the 7th November 2014.

The estimated value of the Tender is €37,440 (Exclusive of VAT).

Two (2) offers had been received for this tender.

On the 29th December 2014 Medicare Services Limited filed a letter of objection against the award of the tender to Dr Ravindra Agarwal.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 17th February 2015 to discuss the objection.

Present for the hearing were:

Medicare Services Limited - Appellant

Dr David Grech	Representative
Dr Frank Cassar	Legal Representative

Dr Ravindra Agarwal - Preferred Bidder

Dr Ravindra Agarwal

Ministry for Home Affairs and National Security - Contracting Authority

Mr Charles Lia	Chairperson Evaluation Board
Ms Josianne Farrugia	Member Evaluation Board
Mr Stephen Vassallo	Member Evaluation Board
Mr Robert Grixti	Representative
Mr Mario Schembri	Representative

The Chairman made a brief introduction and asked appellant's representative to make his submissions.

Dr Frank Cassar on behalf of the appellant explained that appellant had only one point to make – that the preferred bidder was ineligible for this tender since he is a third party national. As such he depends on the work permit that is issued by his employer. He is not an independent contractor in his own right. In fact up to June 2014 he was an employee of the appellant firm. Presently, the preferred bidder was an employee of the government. This means that he depends for his working permit on the government itself. Thus appellant contends that the preferred bidder is not eligible to be awarded the tender.

Mr Robert Grixti, Director Corporate Services with the contracting authority explained that the tender was an open tender, open to everyone. All natural or legal persons were able to apply. The Public Procurement Regulations, Regulation 50 lists the reasons persons may be excluded from the tendering process and Nationality is not one of these. The preferred bidder is not bankrupt; nor has he found guilty of misconduct etc. He said that the contracting authority did not see any particular issue connected to the submitting of the tender by the preferred bidder. He had made some background research with the Department of Citizenship and Expatriate Affairs and it resulted that presently in Malta there is the Single Simplified procedure where work permits are concerned. There are no contractual relation between the contracting authority and the preferred bidder. As soon as the contract is signed the preferred bidder becomes the contractor and he would have to revise the situation with the Department of Citizenship and Expatriate Affairs.

Dr Ravindra Agarwal, the preferred bidder said that he is presently employed at the Gozo Hospital. He would have to resign his present employment, become self-employed and then sign the contract for this tender. He is registered as a doctor.

Dr Frank Cassar contends that at the present time the preferred bidder is ineligible. He is not an economic operator or a legal person.

Mr Robert Grixti reiterated that the instructions to tenderers make provision for natural persons to participate in the tender. He also stated that the preferred bidder was not listed in appellant's tender as being one of the key experts. Therefore there was no issue in his participation. The public procurement regulations allow his participation.

Dr David Grech for the appellant said the law speaks of natural and legal persons. The law speaks about economic operators. An economic operator is defined as someone who can independently engage in an economic activity. The preferred bidder was not an economic operator since his economic activity comes from the work permit. The work permit itself states that if the person who is issued the work permit engages in any other economic activity other than with his employers, then the work permit is rendered null and the person is to be repatriated. Dr Agarwal is not a European National, he comes from India and the terms of his commercial activities in Malta are circumscribed. He cannot be an independent economic operator. When he applied for the tender he was not self-employed but was employed by the Gozo Hospital. A doctor who is employed with the government cannot tender for a service with the same government. He should first resign the post and then apply. He should not be allowed to resign after being awarded the tender as this would be unfair competition to the appellant's company. The preferred bidder was ineligible.

Mr Robert Grixti for the contracting authority explained that the employment licence format had been changed since June 2014. This has been changed to a Single Employment Application. Basically it is now a single permit and provides also for applicants to declare they were going to be self-employed. When he submitted the tender application the preferred bidder was resident in Malta and had a regular employment. On the signing of the contract, he would have become the contractor rather than a tenderer.

Dr Ravindra Agarwal the preferred bidder said that it should be possible to change status from employed to self-employed. This should not make any difference whether he was a third country national or not. He insisted that his contract with the Gozo Hospital was signed after he had submitted his present tender. He was not employed with anyone at the time of tendering.

Dr David Grech for the appellant explained that at the time of signing the contract for the award that would be an infringement of his work permit. If he stops working as per the work permit then he has to leave the country.

At this point the hearing was closed.

This Board,

Having noted the appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 29th December 2014, and also through appellant's verbal submissions during the hearing held on 17th February 2015, had objected to the decision taken by the pertinent authority, in that:

- a) Appellant's main contention was that the preferred bidder was not eligible to tender for the medical service due to the fact that the preferred bidder depends for his working permit on the government itself.**
- b) The preferred bidder is not an economic operator or a legal person.**

Having considered the contracting authority's verbal submissions during the hearing held on 17th February 2015, in that:

- a) The contracting authority confirmed that the present regulations dictated that as soon as the contract for the award is effected with the preferred bidder, the latter must change his status from that of being employed, to that of a 'self employed' person and hence the work permit would be amended accordingly.**
- b) The public procurement regulations allow natural persons to participate in the tender.**
- c) Through the amended 'employment licence format' to a 'single employment application', on the signing of the contract, the preferred bidder becomes an 'economic operator'.**

Reached the following conclusion:

- 1. With regards to appellant's first contention, this Board , after hearing credible submissions made by the contracting authority and after verifying the conditions of the amended '*single employment application*', justifiably confirms that the preferred bidder was eligible to tender. Tender instructions made it vividly clear that '*participation in tendering is open on equal terms to all natural and legal persons of EU any other country in accordance with regulation sixty four (64) of the public procurement regulations*'. This regulation continues to state that '*any bidders are as favourable as operators of third countries*'. In this regard, this Board justifiably opine that the question of work permit is not relevant at the evaluation stage. It is the responsibility of the contracting authority to ensure that once the contract is signed, the preferred bidder is operating in accordance with local employment regulations and other local laws. In this regard, this Board does not uphold appellant's first contention.**
- 2. With regards to appellant's second grievance, this Board cannot accept the fact that the preferred bidder was not a legal person at the time of tendering. The tender document clearly laid out who can tender and this Board justifiably opines that the preferred bidder was within the dictated parameters of 'who can tender' dictum. In this respect, this Board does not uphold appellant's second contention.**

In view of the above, this Board finds against the appellant company and recommends that the deposit paid by appellant should not be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

10 March 2015