

PUBLIC CONTRACTS REVIEW BOARD

Case 1012 – GGH 026/2016 – Call for Quotations with Extended Threshold for the Provision of Care Worker Services at the Gozo General Hospital

The Publication Date of the Call for Tenders was 24 March 2016 whilst the Closing Date for Call of Tenders was 6 April 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 120,000.

Two (2) Bidders have submitted offers for this Tender.

On 28 April 2016, Support Services Ltd filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Omnicare Cooperative for the price of € 7.73 per hour for item 1 and € 0.23 per hour for item 2 up to the threshold of € 120,000 (Exclusive of VAT) against a deposit of € 600.

On 10 January 2017, 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 following the decision of the Hon Court of Appeal on 15 December 2016 to overturn the decision taken on 20 June 2016 by this same Board as differently composed.

The Attendance for this Public Hearing was as follows:

Appellant – Support Services Limited

Mr Charlo Farrugia	Representative
Mr Jesmond Vella	Representative
Dr Joseph Bugeja	Legal Representative

Recommended Bidder – Omnicare Cooperative

No representatives were present for this Public Hearing from Omnicare Cooperative

Contracting Authority – Central Procurement and Supplies Unit

Mr Philip Muscat	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit opened by submitting that in their Reasoned Letter of Reply dated 5 January 2017, despite the fact that this case was sent back to the Public Contracts Review Board by the Hon Court of Appeal, the Contracting Authority was going to ask the former to cancel the Tender as the services requested were not needed anymore. Dr Zrinzo Azzopardi wished the Board to note the fact that this request for cancellation of the Tender was made at the first possible moment.

Dr Joseph Bugeja, the Legal Representative for Support Services Ltd argued that currently there is a similar Tender running whose closing date for bids was 12 January 2017 wherein the same Contracting Authority was asking for care workers in a similar fashion of the one in question.

Dr Stefan Zrinzo Azzopardi on behalf of the Contracting Authority replied that this Tender, which was about an extended quote, was for the Provision of Care Workers for Gozo General Hospital, whose procurement was not under the Government of Malta's jurisdiction since there was a concession agreement with Vitalis.

With regards the new Tender mentioned by the Appellant, Dr Zrinzo Azzopardi wasn't aware of it and was willing to verify about it should the need arises but on the other hand, he was instructed by his clients to say that the latter could not carry on with this Tender due to the fact that a private company is now taking care of the Procurement for Care Workers.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Appellants whether they are in agreement with what Dr Zrinzo Azzopardi has just stated for which Mr Charlo Farrugia, on behalf of Support Services Ltd replied that on 25 October 2016, a Tender was issued for seven lots, two of which included Karen Grech Hospital and the other one Gozo General Hospital who were controlled by Vitalis.

Mr Farrugia continued by arguing that presently they were the incumbents in supplying care workers for Karen Grech Hospital which fell under Vitalis' control. This means that they are being paid by the Government who on the other hand charges Vitalis for the services paid. With the same argument, Gozo General Hospital falls under the same procedure.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Appellants were talking about a past contract since if the Procurement was made through Vitalis, how come this Objection was still standing.

Dr Stefan Zrinzo Azzopardi, on behalf of the Central Procurement and Supplies Unit replied that first and foremost this extended quote was issued on 24 March 2016 referred for a three month period and that the Contracting Authority did not require this service anymore since in the meantime there was a fundamental change in the circumstances.

When the Tender was issued in March 2016, the Government did not enter into a concession agreement with Vitalis. The latter was signed between September and October at a time where this current Tender was at Appeals stage; therefore one could not mention other similar Tenders when discussing this particular Tender argued Dr Zrinzo Azzopardi.

Dr Joseph Bugeja, the Legal Representative for Support Services Ltd, countered that his clients were still requesting the Public Contracts Review Board to issue a decision since he was the only compliant Bidder. Dr Anthony Cassar, the Chairman of the Public Contracts Review Board assured Dr Bugeja that what this Board was going to comply with the request made by the Hon Court of Appeal.

Dr Bugeja continued by saying that the Appellants were requesting that a decision was to be issued based on the original Reasoned Letter of Objection issued by Support Services Ltd. The Appellants were also saying that the fact that Omnicare Cooperative rejected the Tender clearly indicates that they were the only compliant Bidders left.

Dr Bugeja added that from the information which he has, the Recommended Bidders were still providing services to Gozo General Hospital. Besides, Support Services Ltd was not willing to pay the consequences for any CPSU oversight regarding the concession given to Vitalis. The Appellants incurred a cost in compiling the Tender and pay Legal Fees while investing a lot for this Tender and the fact that no decision was taken at the right moment went against the Bidders' Legitimate Expectations.

The Appellants committed themselves to ensure that the Tender is to be awarded to them and was reserving the right to take any measures regarding damages warned Dr Joseph Bugeja. The latter continued by quoting the Remedies' Directive 89/655 EC which stipulates that any remedies were to be taken as early as possible and that his clients feel that the fact that the Public Contracts Review Board did not take a decision based on the Reasoned Letter of Objection, hence the filing of an Appeal within the Hon Court of Appeal had lost them a lot of time.

Dr Stefan Zrinzo Azzopardi, on behalf of the Central Procurement and Supplies Unit submitted that he was informed that Omnicare Cooperative was never involved with Gozo General Hospital. He continued by saying that the Public Contracts Review Board had issued a decision on 20 June 2016 after the closing of the Tender on 6 April 2016.

Both the Appellant and the Contracting Authority were informed by the Public Contracts' Review Board that the Recommended Bidders had requested the latter to withdraw their interest in this Tender. In their note, continued Dr Zrinzo Azzopardi, the Contracting Authority argued that given this fact, the latter was ready to award the Tender to the next Bidder; Support Services Ltd who insisted on the Public Hearing to be still held.

Following the Public Hearing, the Public Contracts' Review Board issued a decision wherein the Tender had to be reissued. The Contracting Authority complied with the decision but the Appellants felt the need to re-appeal within the Hon Court of Appeal.

If in the meantime the circumstances have changed, one could never say that the Central Procurement and Supplies Unit did not act correctly with the Appellants, continued Dr Zrinzo Azzopardi since the latter was willing to award the Tender to Support Services Ltd who on the other hand insisted in continuing their Appeals.

The Contracting Authority was willing to reach an agreement with the Appellants but now that the circumstances have changed, the Government was not obliged not to request the cancellation of the Tender after all this time. Dr Zrinzo Azzopardi continued by saying that this was not a question of pre-contractual damages neither as the Tender was issued for a

service to be given. The latter was not done because of the Appellants delaying the procedures and making appeals.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Contracting Authority to confirm that there was a tentative by the Central Procurement and Supplies Unit to reach an agreement with Support Services Ltd for which Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Contracting Authority replied by quoting the Reasoned Letter of Reply dated 12 May 2016 which *inter alia* stated that,

“CPSU submit that the award was based on the fact that the preferred bidder was the cheapest compliant bidder and thus, the objection that has been presented by the objectior company is unfounded in fact and at law.

Notwithstanding the reply being presented, it is to be pointed out that the following the award, Omnicare Cooperative Limited has informed CPSU that it will not enter into an agreement with CPSU and has refused to undertake to provide the services.”

Dr Stefan Zrinzo Azzopardi, on behalf of the Contracting Authority, continued by saying that at that stage his clients could have just signed the contract but instead they had to continue attending for the Appeals as requested by the Appellants.

Mr Charlo Farrugia representing Support Services Limited has admitted that it was true that there was this correspondence which could have led to them being awarded the Tender but when they requested a meeting with the Contracting Authority so that the papers could be exchanged, they had to follow the procedure which stated that it was the latter which had to call the Appellants for this to be done.

In the meantime, given the short time frame which there was, the Appellants had no other option but to file an objection within the Hon Court of Appeal not to lose another date which he had a right for.

Dr Joseph Bugeja, the Legal Representative for Support Services Limited added that the Appeal was made and that the Hon Court of Appeal agreed with his clients and requested the Public Contracts Review Board to take a decision on the basis of the Letter of Objection.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit concluded by saying that this would have been resolved if there weren't all these Appeals. In the meantime, the circumstances have changed and the Government did not need anymore these services.

At this stage, the Public Hearing was closed.

In accordance with the decision given by the Hon Court of Appeal, whereby it was decided that Case No 944 decided by the Public Contracts Review Board on 20 June 2016 was to be referred back to the latter for

treatment of the Objections raised by Support Services Ltd in their “*Letter of Objection*” dated 27 April 2016, this Board has duly convened all parties concerned and listed this case as Case No 1012 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joseph Bugeja

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Whereby, the Appellant contends that:

- a) The rates quoted by Omnicare Cooperative do not take into account the fact that the Tendered services are to be rendered also during Sundays and Public Holidays. In this regard, Support Services Ltd quoted an average hourly rate of € 8.43 as compared to € 7.96 as quoted by the Recommended Bidder.**

The Appellant also maintains that an estimate of 475 hours were considered to fall on Sundays and Public Holidays and in this regard, Support Services Ltd took this issue into consideration, when submitting his offer.

b) Support Services Ltd also refer to the Circulars 27/2014 and 04/2015 issued by the Department of Contracts on 23 December 2014 and 5 February 2015 respectively wherein the minimum rates to be applicable are stipulated. However, the latter circular does not take into consideration the fact that the rates payable to employees on Sundays and Public Holidays are double the normal rates.

In this regard, Support Services Ltd maintains that the rates quoted by Omnicare Cooperative does not reflect the payment of 475 hours at double the rate, whilst the rates quoted by the Appellant himself included such costs to accommodate working rates for these hours. At the same instance, the Financial Bid form does not cater for the separate rates to be paid on Sundays and Public Holidays.

c) In view of points a) and b) above, Support Services Ltd contend that Omnicare Cooperative's offer was not the most advantageous offer as it failed to include the additional costs to be incurred on Sundays and Public Holidays.

This Board also noted the Contracting Authority's "*Letters of Reply*" dated 12 May 2016 and 5 January 2017 and also its verbal submissions during the Public Hearing held on 10 January 2017, in that:

- a) The Central Procurement and Supplies Unit maintain that the award of the Tender was adjudicated on the basis of the cheapest compliant offer.**

This Board, after having treated the merits of this case, arrived at the following conclusions:

- 1. With regards to Support Services Ltd's First Contention, this Board would not delve into whether Omnicare Cooperative included the rates to be paid on Sundays and Public Holidays, however, this same Board would like to refer to the fact that the latter withdrew its offer on being awarded the Contract, which is indicative of the fact that the Recommended Bidder could not carry out the tendered services at the quoted hourly rate.**

This Board also contends that the different rates paid on Sundays and Public Holidays had to be taken into account when quoting a single rate for the whole period of the Tender.

From events which occurred at award stage, it was evident that the rates quoted by Omnicare Cooperative were not realistic when one

takes into account the 475 hours to be deployed on Sundays & Public Holidays. In this regard, this Board upholds the Appellant's First Contention.

- 2. With regards to the Appellant's Second Contention, this Board, after having examined the relative documentation, confirms that Circular 04/2015 issued by the Department of Contracts on 5 February 2015 does not dictate separate hourly rates for Sundays and Public Holidays. In this regard, this Board recommends that the rates as stipulated in the same Circular should also include separate rates for Sundays and Public Holidays. At the same instance, this Board justifiably notes that the Financial Bid Form requested one hourly rate so that it was the onus of the Bidder to take into account the 475 hours to fall on Sundays and Public Holidays.**

This Board feels that the Financial Bid Form should have requested different rates to be split as to an hourly rate for weekdays and hourly rates for Public Holidays. In this regard, this Board upholds the Appellant's Second Contention.

3. This Board would like to take also into consideration the “*Appellant’s Note*” dated 7 January 2017 and also the Contracting Authority’s Letter dated 5 January 2017, in that:

i) Since the first Public Hearing of this Appeal, unexpected events occurred whereby the Procurement of Services for such Tenders has been taken over by “*Vitalis*”, the Company which has been granted the Concession Agreement for the administration and management of the Gozo General Hospital. In this context, the Tender cannot be processed by the present Contracting Authority. This Board justifiably opines that due to unforeseen circumstances, the Tender under appeal should be cancelled as the procurement of such services is no longer under the responsibility of the Central Procurement and Supplies Unit.

ii) With regards to the damages, this Board does not find any justification for the award of any damages. Support Services Ltd’s claim, that they committed themselves to ensure that the Tender is to be awarded to them, present no logical reason why the expenses incurred on this assumption should be recouped through “*Awarded Damages*”.

In this regard, this Board also notes that the Central Procurement and Supplies Unit was willing to award the Tender to the next compliant Bidder, who was the Appellant himself, however the latter had insisted that the Public Hearing was to proceed anyway. No proof was given by the Appellant that the expenses involved during the whole procedure incurred extraordinary expenses.

In view of the above, this Board re-affirms the fact that the Tender should be cancelled as the Central Procurement and Supplies Unit is no longer authorised to issue such tenders. At the same instance, this Board recommends that in view of points 1 and 2 above, the deposit paid by Support Services Ltd should be fully refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

17 January 2017