

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1420 – MEDE/MPU/JOBS+/007/2019 – Tender for the Provision of Medical Services for Jobsplus Clients in Malta and Gozo**

The tender was published on the 18<sup>th</sup> October 2019 and the closing date of the call for tenders was the 18<sup>th</sup> November 2019. The estimated value of the tender (exclusive of VAT) was € 135,000.

On the 6<sup>th</sup> January 2020 Medics@Work filed an appeal against Jobsplus as the Contracting Authority objecting that they were disqualified on the grounds that they were technically non-compliant. A deposit of € 675 was paid.

There were two (2) bidders.

On 4<sup>th</sup> February 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Medics@Work**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Joseph Portelli Demajo	Representative

#### **Contracting Authority – Jobsplus**

Dr Jonathan Spiteri	Legal Representative
Ms Olivia Farrugia	Chairperson Evaluation Committee
Ms Marvic Bugeja	Secretary Evaluation Board
Ms Marion Avellino	Member Evaluation Committee
Mr Juan Anton Gambina	Member Evaluation Committee
Ms Barbara Cachia	Member Evaluation Committee
Ms Mathea Formosa Gauci	Representative
Mr David Bonello	Representative
Mr Jurgen Grixti	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Medics@Work said that Appellants accept that their offer is not complaint but it offered an opportunity of savings €30,000 to the Contracting Authority. There were three main reservations on Appellants submission – qualifications entered in the technical questionnaire, the number of hours and the failure to submit key experts – this last point can easily be rectified through a clarification.

Appellants qualified certain replies in the technical offer – this was done in line with clause 4.2 paragraph 1 (page 17) which indicates that one weeks time is allowed to set dates for medical reviews. To ensure that the contract was correctly performed Appellants followed this instruction throughout their replies – as this was a condition of the tender Appellants error was more a matter of substance over form.

In the case of the number of hours the Contracting Authority did not impose a cap – it could be anything between 0 and 80 hours, and it was a clear instance where a clarification should have been sought by the evaluation committee to elucidate Appellants’ reply since the objective of a tender is to obtain the cheapest price. Reference was made to PCRB Case 1257 where the financial bid was correct but an additional note was inserted. The principles of proportionality and flexibility need to be applied.

Dr Jonathan Spiteri Legal Representative for Jobsplus stated that the evaluation committee could not close its eyes to shortcomings in tender submissions just because an offer was cheaper. Clause 4.2 only applies for medical reviews and Appellant had added qualifications in clauses that did not even warrant them. As an example clause 23 was cited which stipulated a constant provision of service and was vital to the running of the service. The one week stipulation was limited to a particular clause and was not universal (as for example *vide* clause 18 of the technical specifications). Clarifications in this case would have given an unfair advantage and penalised other bidders. Clarifications should have been sought prior to tendering if any doubts existed.

Ms Olivia Farrugia (84071M) called as a witness by the Public Contracts Review Board testified on oath that she was the Chairperson of the evaluation committee. She stated that the tender document did not specify the need for urgency, and there is one particular clause where a week’s gap was allowed to cover the availability of persons to be interviewed as a group rather than individually. There are occasions however were if a workplace becomes available immediately a person has to be interviewed urgently and a week’s delay would be deleterious.

Dr Mifsud Bonnici again requested flexibility by asking for a re-examination of the tender. Appellants’ offer comprises the service of four doctors and there is no reference to urgency in the tender and there is therefore room for flexibility in such a set-up. Appellant is extending an olive branch to the Contracting Authority. The PCRB with their wide experience and within the parameters of the Public Procurement Regulations might wish to look at the tender again. The

unnecessary qualifications in the replies to the technical offer can be ignored and there are opportunities for clarifications.

Dr Spiteri said that the tender is clear that availability had to be at anytime and the qualifications added by Appellants restrict this and could create problems if a contract is awarded on that basis. In any case that would be unfair on the other party since an olive branch in this case means the loss of a € 200,000 tender to that party.

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

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by Medics@Work (hereinafter referred to as the Appellants) on 6 January 2020, refers to the claims made by the same Appellants with regard to the tender of reference MEDE/MPU/JOBS+/007/2019 listed as case No. 1420 in the records of the Public Contracts Review Board awarded by Jobsplus (herein after referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Clement Mifsud Bonnici**

**Appearing for the Contracting Authority: Dr Jonathan Spiteri**

**Whereby, the Appellants contend that:**

- a) Their offer was rejected due to the fact that, there were three reservations in their submissions referring to the technical offer questionnaire, the number of hours and failure to submit Key Experts' warrants. With**

**regard to the last two items, a clarification from the Contracting Authority would have clarified any misunderstanding that had arisen on Appellants' submission. In this respect, the conditions added to the questionnaire, were in conformity with clause 4.2 (1) of the technical specifications of the tender document, so that a re-examination of Appellants' offer would be more appropriate and more beneficial to the Authority.**

**This Board also noted the Contracting Authority's 'Letter of reply' dated 27 January 2020 and its verbal submissions during the hearing held on 4 February 2020, in that:**

- a) The Authority maintains that, it had carried out the evaluation process in line with the basic principles in Public Procurement and any clarifications sought by the Evaluation Committee, at that particular stage of the tendering process, would have amounted to a rectification. At the same instance, Appellants' questionnaire was submitted with reservations on various items listed therein, so that, the Evaluation Committee had no other option but to deem Appellants' offer as technically non-compliant.**

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

**Ms Olivia Farrugia duly summoned by the Public Contracts Review Board.**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned opines that, the issues that merit consideration are Appellants' submission with regard to the technical questionnaire and the applicability of clarifications in this particular case.**

- 1. First and foremost, this Board would respectfully point out that, the questionnaire stipulated that the tenderer had to indicate his reply by denoting a 'Yes' or a 'No'. Such documentation forms an integral part of the tender dossier and the conditions stipulated therein cannot be altered or dictated by the economic operator.**
- 2. In this particular case, this Board would refer to items 14, 20, 21, 23 and 25 of the technical questionnaire where Appellants' had to denote their reply by writing a 'Yes' or a 'No' to the relative question. In this regard, this Board notes that, for these items, Appellants qualified their reply by stating that "Subject to Request being made 1 Week in Advance", so that, by adding such a reservation, Appellants are actually conditioning their reply, which is not acceptable. In this respect, this Board would point out**

**that if Appellants disagreed or wanted a change in the conditions laid out in the tender dossier, they had remedies to seek, prior to the submission of their offer.**

- 3. This Board noted Appellants' claim that such a reservation was made to comply with clause 4.2.1, which states that:**

*“1. To confirm dates set for medical reviews in one (1) week time after receiving said dates by the Contracting Authority”*

**In this regard, this Board would point out that, apart from the fact that reservations or qualifications cannot be added to the stipulated form of reply, the above-mentioned clause must surely not apply to item No. 23 of the questionnaire. Moreover, it is quite clear that the above-mentioned 4.2 (1) clause was not applicable to any of the items mentioned in the questionnaire.**

- 4. From the credible testimony of Ms Olivia Farrugia, this Board was made aware that, there are occasions where a person has to be interviewed urgently so that a week's delay would be deleterious. In this regard, this Board opines that clause 4.2 (1) did not necessitate the inclusion of a reservation on the other items marked by Appellants in their questionnaire.**

**5. With regard to Appellants' claim that the Evaluation Committee should have sought clarifications in respect of 'Number of Hours' and 'Key Experts', this Board would point out that clarifications should not be used to rectify shortcomings in the original submissions of a tenderer. At the same instance, this Board opines that if the Evaluation Committee requested clarification, at this particular stage of tendering process, the Authority would have created an unjust disadvantage to other competing bids.**

**6. With regard to the number of hours, this Board would refer to article 3.1 (Page 16 of Tender Document) wherein it is clearly being stipulated that:**

*“3.1 – Assumptions Underlying the Project Intervention*

*The Contracting Authority is envisaging that the service is required from zero (0) to eighty 80 hours per month. However, there may be instances when the number of service hours per month is exceeded due to exigencies of the Contracting Authority. Otherwise, no further assumptions have been made by the Contracting Authority.”*

**In this regard, Appellants in their submissions, made a condition that 'The rate is €70 per hour per doctor for a minimum of two hours per**

**session.** Such a condition is in breach of the required service from 0 to 80 hours and a clarification in this instance is definitely not justified.

- 7. This Board would also point out that Appellants failed to submit the requested warrants of the Key Experts so that, a clarification in this instance, would not justifiably be appropriate, especially on missing documentation.**

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

- a) The technical questionnaire formed an integral part of the technical specifications of the tender dossier so that, strict conformity to the conditions stipulated therein had to be adhered to.**
- b) Appellants failed to adhere to the instructions given in the technical questionnaire by qualifying their replies to items 14, 20, 21, 23 and 25.**
- c) With regard to the number of hours as stipulated in clause 3.1. (Assumptions Underlying the Project Intervention), Appellants qualified their reply by reserving a minimum of 2 hours.**

**d) With regard to documentation relating to Key Experts, Appellants failed to submit the warrants of the medical personnel to execute the tendering services.**

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

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision in the award of the tender,**
- iii. directs that the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Richard A Matrenza  
Member

*13 February 2020*