

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1569 – CT 2426/2020 Tender for the Provision of Meals to Government Residential Homes for Older Persons.**

#### **Remedy before Closing Date of a Call for Competition**

**31<sup>st</sup> May 2021**

The Board,

Having noted the letter of objection filed by Dr Ronald Aquilina acting for James Caterers Limited, (hereinafter referred to as the appellant) filed on the 4<sup>th</sup> March 2021;

Having also noted the letter of reply filed by Dr Noel Bezzina on behalf of Bezzina Legal acting for the Agency for Active Ageing and Community Care filed on the 8<sup>th</sup> March 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having heard and evaluated the testimony of the witnesses Dr Karen Mugliett (Senior Lecturer in Nutrition at University of Malta) and Ms Christine Busuttil (State Registered Nutrition Therapist) as summoned by Dr Ronald Aquilina acting for James Caterers Limited;

Having heard and evaluated the testimony of the witness Ms Nadia Cauchi as summoned by Dr Noel Bezzina acting for Agency for Active Ageing and Community Care;

Having noted and evaluated the minutes of the Board sittings of the 27<sup>th</sup> May 2021 hereunder-reproduced;

#### **Minutes**

### **Case 1569 – CT 2426/2020. Tender for the Provision of Meals to Government Residential Homes for Older Persons**

#### **Remedy before Closing Date of a Call for Competition**

The tender was published on 10<sup>th</sup> February 2021 and the closing date was the 16<sup>th</sup> March 2020. The value of the tender was € 3,591,490 (excluding VAT).

On the 4<sup>th</sup> March 2021 James Caterers Ltd lodged an application seeking a remedy against the Active Ageing and Community Care as the Contracting Authority in terms of Public Procurement Regulations 262.

A deposit of € 18,000 was paid.

On 27<sup>th</sup> May 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

**Appellant – James Caterers Ltd**

Dr Ronald Aquilina	Legal Representative
Mr Mark Zahra	Representative
Mr Joseph Barbara	Representative

**Contracting Authority – Active Ageing and Community Care**

Dr Noel Bezzina	Legal Representative
Ms Mary Grace Balzan	Representative
Ms Lindsay Spiteri	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Ronald Aquilina Legal Representative for James Caterers Ltd stated that the tender conditions are ambiguous and contradictory. The tender documents stipulate that prospective tenderers must provide a well balanced menu to reduce obesity and fat intake in elderly people. Despite this the tender ties bidders' hands by stating the weight of individual food portions offered in giving residents a choice of three course lunch and dinner plus breakfast and afternoon tea. The combination of these meals at the minimum weights of food proposed makes it impossible for an economic operator to observe the calories intake indicated. There are big differences between these figures even if one adheres to the lowest calories menu.

Dr Noel Bezzina Legal Representative for Active Ageing and Community Care stated that the point of the tender is to offer healthy and nourishing lifestyle foods in satisfying portions and offering a variety of choice within the individual dietary requirements. It is not envisaged that meals of high calorific value are consumed every day. Appellant claims that the food portions are too big to be considered healthy – the tender however does not only specify the minimum requirements but that the portions satisfy the requirements of elderly clients. The Food and Nutrition Action Plan does not prescribe the minimum weight requirements but bidder is at liberty to opt for healthy weights prescribed in the tender. Appellant also makes assumptions regarding the range of meals selected by clients. The food selected is normally chosen on medical advice but this should not restrict choice.

Dr Aquilina said that the tender binds the bidder in what menus they can supply; thus they are bound to supply them as otherwise they are in default of the tender requirements. The composition of the menu is crucial and cannot fluctuate – it is the number of consumers that fluctuates not the quantity or weight of food.

Dr Karen Mugliett (55266M) called as a witness by Appellant testified on oath that she is a Senior Lecturer in Nutrition at the University of Malta and a Nutrition and Wellness Consultant. She confirmed the report filed by Appellant in their letter of reply dated 3<sup>rd</sup> March 2021. She stated that it is clear that the amounts stipulated in the tender when compared to the national dietary guide are excessive. A three course meal twice a day is unhealthy even for a fully healthy individual let alone for

an elderly person who might also have existing health problems. Cakes or muffins should not be on the menu every day; excess weight of pasta stipulated is a death sentence; sweets which are all high in sugar should be avoided.

Ms Christine Busuttil (291700L) called as a witness by Appellant testified on oath that she is a State Registered Nutrition Therapist. She stated that a sample of the proposed menu is equivalent to in excess of 3000 calories per day which is excessive. The European Food and Safety Authority recommend figures like 1984 calories for men and 1614 calories for women for sedentary people in their 70s. The menu proposed does not differentiate between male and female food intake.

Dr Mugliett resuming her testimony said that the recommended amount for persons up to 65 years old is less than that suggested in the tender. As examples she mentioned;

- Fruit portions should be 80 grms per serving – menu suggests 160 grms
- Pasta per diet guidelines should be 80 grms uncooked – menu stipulates double that amount
- Red meat according to the menu stated at 250 grms – guidelines say only two servings per week with each portion only 80 grms
- Cereals proposed at 150 grms have a dietary guideline of 30 to 40 grms.

With regard to Transfats witness explained that these are a risk to health. The EU Directive suggests that baked and processed food should only have a maximum of 2 grms transfats per 100 grams of food. The sweets listed in the menu fly in the face of this Directive. On a cumulative level transfats are highly dangerous to health.

Questioned by Dr Bezzina witness said that a caterer cannot control the amount of transfat without incurring excessive costs. The sweet dishes specified in the menu on a daily basis should not be recommended; emphasis should be on dishes like vegetable soups in lieu of pasta and vegetable salads as alternative options.

Ms Nadia Cauchi (512773M) called as a witness by the Contracting Authority testified on oath that she is an Assistant Director of the Residential Homes. She was not involved in the drafting of the tender but reviewed it when she took up her appointment. The tender recommendations on quantities are the outcome of meeting clients' complaints that they are not satisfied with the size portions they currently are provided with. The tender did not set out to indicate nutritional values although medical advice is followed in the choice of types of food.

In reply to questions from Dr Aquilina witness stated that she is not qualified as a nutritionist and that no nutritionist was consulted in preparing the tender. When clients selected meals there was no reference to the quantity of meal components and thus if only one course was selected the full cost of the meal was still charged to the Authority.

Dr Aquilina in his closing submissions said that he was surprised that there was no input by a nutritionist in preparing the tender. Perusing the tender leads one to believe that there was not much thought or consideration in formulating it. There is a great excess of calories compared to health directives with no distinction between male and female requirements. It is impossible to meet the Nutritional Policy guidelines but the caterer's hands are tied down by the tender requirements leading to a non-healthy menu.

Dr Bezzina said that the Appellant contends that the requirement is the minimum weight without going into the nutritional value, but the choice of foods offered including the level of fats is up to the contractor to set out and it follows the individuals' medical and dietitian advice with options available.

The reasoning behind the tender is to give clients a choice and it is up to the caterer to offer healthy options.

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

End of Minutes

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**Hereby resolves:**

The board refers to the minutes of the Board sitting of the 27<sup>th</sup> May 2021.

Having noted this 'Call for Remedy' filed by Dr Ronald Aquilina acting for James Caterers Limited (hereinafter referred to as the Appellant) on 4<sup>th</sup> March 2021, refers to the claims made by the same Appellant with regard to the tender of reference CT 2426/2020 listed as case No. 1569 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ronald Aquilina

Appearing for the Contracting Authority: Dr Noel Bezzina

Whereby, the Appellant contends that:

- a) *The Tender contains ambiguous terms and as drafted will be impossible to perform.*
  - i. The Appellant contends that the tender imposes on prospective tenderers, and rightly so, the obligation to prepare well-balanced menus. However, on analysing the Tender specifications and minimum weights prescribed / menu requirements set out in the Tender, it becomes apparent that the requirements are incompatible with a healthy diet in that the resulting energy intake would be significantly excessive for males and even more so for females.
  - ii. Having 3 courses for lunch and dinner (with a total of 3 desserts a day) is excessive for sedentary, inactive persons. This is either going to encourage inactive older persons to overeat or there is going to be a lot of wastage of food. The minimum weights and the number of meals / components thereof required by the Contracting Authority in the Tender, therefore, exceed by far both national and international standards and guidelines.
  - iii. Any menu prepared in accordance with Tender express requirements will result in excessive energy intake.

- iv. The Tender fails to make any distinction between males and females even though it has been recognised worldwide that males and females have different energy intake needs.
- b) The Tender as drafted will or will likely violate a particular law if it is continued
  - i. Article 1 of Commission Regulation (EU) 2019/649 of the 24<sup>th</sup> April, 2019 provides that “The content of trans fats, other than trans fats naturally occurring in fat of animal origin, in food intended for the final consumer and food intended for supply to retail, shall not exceed 2 grams per 100 grams of fat.” Article 4 of the same regulation further provides that “Food which does not comply with this Regulation may continue to be placed on the market until 1 April 2021.”
  - ii. A substantial number of meals in the Tender are baked or processed foods which contain fat or are cooked in fat. This will or will likely lead to the presence of trans fats in excess of 2 grams per 100 grams of fat, in breach of the captioned Regulation.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 8<sup>th</sup> March 2021 and its verbal submissions during the virtual hearing held on 27<sup>th</sup> May 2021, in that:

- a) Tender was drafted with the following reasonings:
  - i. Aims to acclimate residents towards healthier eating patterns.
  - ii. Intends to ensure residents have a variety of food choices and can enjoy a diverse and varied diet while observing dietary requirements.
  - iii. Technical specifications and requirements formulated in a manner to foster open competition.
- b) The Tender contains ambiguous terms and as drafted will be impossible to perform. –
  - i. In the opinion of the Contracting Authority the tender document contains clear requirements. While the document stipulates minimum weight requirements or weight ranges for each portion of food, it does not however lay down or prescribe any further requirements with respect to the nutritional facts and food content. The Tender document does not prescribe any specific set of nutritional values or any measurements/percentages of food content, but it merely prescribes the total portion weight. Therefore, it is up to the prospective bidder to determine the specific nutritional values in each portion of food.
  - ii. On the assumptions that menus prescribed in the Tender Document exceed the daily caloric requirements, the tender document does not prescribe any specific calorie requirements and any prospective bidder may submit proposed menus which adhere to national dietary guidelines. While certain foods may be high in calories, the applicant is assuming that each resident will order and opt for higher calorie meals and also that each resident will order the whole menu which includes breakfast, two 3 course meals and

afternoon tea. This reasoning as submitted by the appellant rules out scenarios where residents may order less food or opt for low calorie food, which is not the case.

- c) *The Tender as drafted will or will likely violate a particular law if it is continued* – Tender document does not contain or prescribe any requirements as to the trans-fat % content in food portions, therefore, it cannot be or will likely be in breach of the said Regulation. Moreover, the prospective bidder has to ensure compliance with such regulation especially considering that the Tender Document does not stipulate any specific requirements with respect to nutritional content.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider Appellant's grievances, as follows:

a) *The Tender contains ambiguous terms and as drafted will be impossible to perform*

With regards to the Appellant's main and first grievance, the Board makes reference to the following points:

- i. The main arguments raised were that the Tender document is requesting 'minimum weights / portions' for each specific meal in the breakfast, lunch, afternoon tea and dinner categories and did not request any specific nutritional values, something which is essential for 'Healthy Ageing', but that these were left to the prospective bidders to formulate;
- ii. The Board notes that the Contracting Authority did not engage any experts in the field when drafting the tender document and the minimum weights requested have not been scientifically researched. This as per testimony under oath of witness Ms Nadia Cauchi. On the other hand, the Board makes reference to the testimony under oath of witnesses Dr Karen Mugliett and Ms Christine Busuttill, who are experts in their respective field, in that, even if a prospective bidder were to formulate a menu based on the more 'healthy' options listed in the tender document, it would still result in a substantial increase in the calorie intake which is accepted as 'healthy' for a male. The situation is even more serious for females, in that their daily caloric intake needs to be less than that of a man;
- iii. The tender fails to distinguish between different caloric intakes of males and females and is only requesting a minimum amount of weight for the particular ingredients, irrespective of gender;
- iv. Reference is made to the 'Dietary Guidelines For Maltese Adults' and the 'minimum weights / portions' as requested in the Tender document whereby it is being noted that in the vast majority of 'ingredients' listed in the Tender document, the recommended portions in the Dietary Guidelines are substantially lower than those requested.

After considering all the above points, the Board upholds Appellant's first grievance.

***b) The Tender as drafted will or will likely violate a particular law if it is continued***

The Board notes that the Tender document does not contain or prescribe any requirements as to the trans-fat % content in food portions. Moreover, even in the counter examination of witnesses it transcribes that different cooking methods would lead to different results vis-a-vis trans-fat % content in food portions.

In Dr Mugliett's and Ms Busuttill's report it is stated "a substantial number of foods in the tender document are baked or processed foods which contain fat or are cooked in fat. This means there is a risk that these foods will also contain trans fats which is the worst type of fat one can eat." Finally the Board is of the opinion that the prospective bidder has to ensure compliance with such regulation when formulating the menu which is in accordance with the 'Food and Nutrition Policy & Action Plan for Malta 2015 – 2020' and 'Dietary Guidelines For Maltese Adults'.

**In conclusion this Board opines that;**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant's concern that the tender is impracticable to perform;
- b) Directs the Contracting Authority to cancel the tender;
- c) Should the Contracting Authority re-issue the tender to do so only after either
  - i. taking written advice from engaged experts in the field of nutrition with special emphasis on Active Ageing or
  - ii. having within the team drafting the tender document a member who is an expert in the field of nutrition with special emphasis on Active Ageing
- d) after taking all due consideration of the circumstances and outcome of this 'Call for Remedy', directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Mr Carmel Esposito**  
Member