

PUBLIC CONTRACTS REVIEW BOARD

Case 1788 – CT 2313/2021 –Re-issue - Tender for the Management, Operations and Upkeep of Zammit Clapp Residential Home including Environmentally Friendly Materials – Active Ageing and Community Care within the Ministry for Senior Citizens and Active Ageing

27th September 2022

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of Dalli Paris Advocates acting for and on behalf of CareMalta Limited, (hereinafter referred to as the appellant) filed on the 9th May 2022;

Having also noted the letter of reply filed by Dr Mario Mifsud on behalf of Mifsud Advocates acting for Active Ageing and Community Care (hereinafter referred to as the Contracting Authority) filed on the 19th May 2022;

Having also noted the letter of reply filed by Dr Ryan C. Pace acting for Golden Care Limited (hereinafter referred to as the Preferred Bidder) filed on the 19th May 2022;

Having heard and evaluated the testimony of the witness Ms Nadia Cauchi (Chairperson of the Evaluation Committee) as summoned by Dr Matthew Paris acting for CareMalta Limited;

Having heard and evaluated the testimony of the witness Dr Mario Aquilina (Senior Lecturer University of Malta) as summoned by Dr Matthew Paris acting for CareMalta Limited;

Having heard and evaluated the testimony of the witness Mr Noel Borg (Representative of CareMalta Limited) as summoned by Dr Matthew Paris acting for CareMalta Limited;

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

Having noted and evaluated the minutes of the Board sitting of the 19th September 2022 hereunder-reproduced.

Minutes

Case 1788 – CT 2313/2021 – Tender for the Management, Operations and Upkeep of Zammit Clapp Residential Home including Environmentally Friendly Materials – Active Ageing and Community Care within the Ministry for Senior Citizens and Active Ageing

The tender was issued on the 30th September 2021 and the closing date was the 16th November 2021. The estimated value of the tender, excluding VAT, was € 11,928,200.

On the 9th May 2022 CareMalta Ltd filed an appeal against Active Ageing and Community Care within the Ministry for Active Ageing as the Contracting Authority objecting to its disqualification on the grounds that it failed to satisfy the BPQR criterion for award.

A deposit of € 50,000 was paid.

There were four (4) bids.

On the 19th September 2022 the Public Contracts Review Board composed of Mr Kenneth Swain Chairman, Dr Vincent Micallef and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – CareMalta Ltd

Dr Matthew Paris	Legal Representative
Mr Zach Esmail	Representative
Ms Natalie Briffa Farrugia	Representative
Mr Pio Vassallo	Representative
Mr James Schriha	Representative
Mr Noel Borg	Representative
Mr Stephen Borg	Representative

Contracting Authority – Active Ageing and Community Care

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Dr N Mifsud	Legal Representative
Ms Cristina Aquilina	Legal Assistant
Ms Nadia Cauchi	Chairperson Evaluation Committee
Ms Marisa Cassar	Secretary Evaluation committee
Mr Matthew Mangion	Member Evaluation Committee
Mr Mario Farrugia	Member Evaluation Committee
Ms Lindsay Spiteri	Member Evaluation Committee
Ms Mary Grace Balzan	Representative

Preferred Bidder – Golden Care Ltd

Dr Ryan C Pace	Legal Representative
Ms Jackie Camilleri	Representative
Mr Paul Attard	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
------------------------	----------------------

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Matthew Paris Legal Representative for CareMalta Ltd said that prior to making any submissions he was seeking agreement by all parties on certain points namely that Golden Care Ltd was incorporated on 15th January 2019, and was given a Licence to operate as a Residential Social Welfare Services for Older Persons on the 30th September 2019. These dates were agreed by all parties. Dr Paris then requested copy of the request made to the Department of Contracts (DoC) by Ms Nadia Cauchi to which Mr Mark Mizzi, on behalf of the DoC had replied on 29th November 2021 and who had requested such clarification. Further he queried why the DoC reply to him dated 27th May 2022 had

been marked 'without prejudice' which was not only irregular but had also not provided the requested information as it was claimed that such information was confidential. .

Dr Clement Mifsud Bonnici Legal Representative for Active Ageing and Community Care (AACC) pointed out that once an appeal had been lodged competence falls within the PCRB role for the specific reason of following due process – it was irregular procedure to contact the DoC instead. In any case the points raised were irrelevant to the appeal and null. The points being raised were irrelevant to the main contention of the appeal.

Dr Paris said that he has requested the information as the wording was obviously not clear in the first instance such that it needed clarification – it was not as clear as the Contracting Authority was making it out to be. Appellant is the only party here present which does not have the full facts; there is therefore no equality of arms.

Dr Mark Anthony Debono, on behalf of the Department of Contracts said that the letter referred to had been marked as 'without prejudice' simply to safeguard any irregular information referred to. He did not see the relevance of the e-mails requested to the appeal and the other parties views on this point ought to be heard.

The Chairman said that in the context of the appeal the Board does not see a specific reason to halt the process at this stage and while agreeing to the information requested being provided the Board will proceed with the hearing.

[At a later stage in the hearing the Chairman mentioned that a document had been tabled indicating that the request for Clarification 5 had come from Grant Thornton.]

Dr Paris said that it was clear what the appeal was about – there are two points to consider. One is what the tender states in 5(c)(i) and what Clarification 5 answer 5 said. The Appellant's complaint is that the selected winner Golden Care Ltd did not have the necessary experience to be granted the tender as it did not satisfy the requirements for the three years stipulated in each of the mentioned years.

Dr Mifsud Bonnici stated that the Contracting Authority is bound by the PPR and had carried out a transparent process from beginning to end. The tender had been correctly interpreted on the principles of equality and proportionality. The wording was a matter of interpretation and the Authority is interested in plurality of procurement.

Dr Ryan Pace Legal Representative for Golden Care Ltd said that it was clear which way the appeal was heading. The tender was clear in its requirements. The crux is the interpretation of the tender regarding the period that a care home had been managed. The point of the appeal is to reduce competition.

Dr Paris requested the production of witnesses.

Ms Nadia Cauchi (512773M) called as a witness by the Appellant testified on oath that she was the Chairperson of the Evaluation Committee (EC). At the evaluation stage it appeared that a clarification of interpretation of certain wording in the tender was advisable. The EC unanimously agreed to seek the advice of the DoC on the words 'during three years' although she does not recall the exact words of the request. No reference was made to the date of incorporation or licence. The EC followed the advice given which happened to tally with their views. The contents of the clarification note 5 was

taken into consideration. The economic operator in question had experience during the three years stated in the tender.

Dr Mario Aquilina (41381M) called as a witness by the Appellant stated on oath that he is a Senior Lecturer in the English Department of the University of Malta and gave details of his academic experience. He was referred to tender documents and Clarification Note 5.

Dr Mifsud Bonnici requested the suspension of the testimony and stated that the interpretation that mattered was that by the EC. It was insulting to the Contracting Authority and the members of the EC to analyse their interpretation and was not relevant to the appeal. He referred to the Servizi Malta case as the guideline.

Dr Paris claimed that it was necessary to use tools to interpret wording and necessary to have outside advice. It was up to the Board to consider evidence given. On the interpretation of words he referred to Cherubino vs CPSU case.

Dr Mifsud Bonnici pointed out that any interpretation given by witness was only applicable to the Appellant.

Proceeding with his testimony, Dr Aquilina stated that that tender requisite was that Appellant had run an old people's home for three years. In his view 'during' implies continuity. 'Or' should have been used if the alternative was meant.

Mr Noel Borg called to testify by Appellant stated on oath that he was the Chief Operations Officer of CareMalta. He was the first Manager at Zammit Clapp Hospital after it re-opened. The clients there were high-dependency, high risk and vulnerable.

This concluded the testimonies.

Dr Paris said one had to examine the purpose of the tender and the way it was interpreted. Ms Cauchi in her testimony stated that the EC requested clarification of certain points. This in itself was enough to convince the Board how to decide the Appeal without even referring to the complete tender and he invited them to seek a re-evaluation. Unfortunately half stories lead to half replies and it is clear that Mr Mizzi in his reply indicated that he did not even understand the question. Dr Aquilina indicated that what the tender required was clear; namely some experience in all three years – something the preferred bidder did not meet. Experience was mandatory in all three years due to the type of client one is dealing with. The preferred bidder had the possibility of joining up with a third party to fulfill the tender requirements – this was not done and the registration and the licence both indicate that the tender requisite was not met.

Self-limitation demands that the tender is scrupulously followed and Dr Paris again referred to Case 1665 Cherubino vs CPSU where the decision was based on the interpretation of words. According to the EU Directive there is a distinction between selection criteria and award criteria. Selection is a matter of fail or pass whilst award could be based on price or BPQR where there are a number of criteria. In this case the EC mixed both criteria and one day's experience was treated the same as three years' experience. In Appeal Court Case 296/2013 the argument was on the principles of selection. If the tender was unclear remedy under Regulation 262 could have been used. On the interpretation of words one must refer to the European Court of Human Rights. The EC in this case chose the most far fetched interpretation. The Government in this case is trying to buy a service where experience is extremely important hence the three years requirement.

Dr Mifsud Bonnici said that a one dimensional interpretation of language does not hold water. The EC was correct in their actions and they realised that there could be two interpretations. The Clarification note made it clear that prior or post years' experience is not compliant. If the interpretation is unclear then follow the PPR on proportionality and genuine competition. The objective of the Directive is to encourage competition among SMEs. Proportionality decides the objectives of a tender and the selection criteria plus the experience and ability to perform a contract. Reference was made to the EU document on the selection criteria for SMEs.

Appellant is trying to limit competition, said Dr Mifsud Bonnici. In this case there may not be three years' experience but handling double the number of patients requested in the tender, so the selection criteria are satisfied and their elimination could only lead to a reduction of competition. The incumbent is threatened by the opening of genuine competition and the interpretation of words must not mean eliminating competition. The recommended bidder never asked for any clarification. Reference to ECHR are totally irrelevant in this context.

Dr Pace said that Appellant was expecting the Board to restrict the decision in line with their argument giving the impression that only they were able to interpret the wording of the tender. We have a situation of a professional in the English language indicating to the DoC the use of language. The EC acted responsibly by seeking advice from the DoC how they should be interpreting words. There is no requirement for three full years but simply experience at any time in those three years. Appellant claims in its appeal that the principle of self-limitation was not observed. Should the Board meet the appeal, the PCRB would be going against the terms of the tender and the DoC - totally ignoring self-limitation.

Dr Paris noted that there is plurality in this call and experience was required in all three years.

The Chairman noted that there were no further submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 19th September 2022.

Having noted the objection filed by CareMalta Limited (hereinafter referred to as the Appellant) on 9th May 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2313/2021 listed as case No. 1788 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Michael Paris

Appearing for the Contracting Authority: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Preferred Bidder: Dr Ryan C. Pace

Whereby, the Appellant contends that:

- a) ***Recommended bidder not compliant*** - The Appellant company feels aggrieved by the decision of the evaluation committee, in particular since it failed to adhere to the mandatory requirement of the tender document, noticeably that the bidder shall provide: *“Evidence that the tenderer has managed and maintained one (1) Old People's Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers, (Note 2),”*

Issued in accordance with article 38[5] of S.L. 601.03, the above was further substantiated through the issuance of a clarification, whereby the provision was confirmed in its entirety, and further clarified that:

“Answer 5: The selection criteria in the tender document specifically requesting experience during the years 2018, 2019 and 2020 by the deadline for submission of offers shall remain unchanged. Therefore any quoted experience which does not fall within those parameters shall be deemed as not compliant,”

The above indicated provisions are in accordance and fully respect S.L.601.03, wherein in article 232 it is held that: *“Article 232. Evidence of the economic operators' technical abilities may be provided by one or more of the following means, in accordance with the nature, quantity or importance, and use of the works, supplies or services: (a) by means of the following lists: (i) a list of the principal deliveries effected or the main services provided over, at the most, the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account”*

The appellant company claims that evaluating committee and/or the defendants failed to adhere to the mandatory requirements, and in the process not only breached article 61 of S.L. 601.03, but also acted in contravention of article 6 [Criteria for Award] of the tender document, by its failure to recommend for award Golden Care Limited and in the process illicitly sanctioned a breach. The wording of the requirement is clear and the recommended bidder failed the mandatory experience requirement, in view of the fact that:

Recommended Company incorporated in 2019 - Notwithstanding that the company was incorporated in 2019, and thus is clearly and unequivocally in breach of the 2018 experience tender requirement, the evaluation committee and/or the defendants opted to recommend bidder Golden Care Limited [C-89549];

Evidence provided is only relevant for the period 30.09.2019 - 29.09.2020 The recommended tenderer claimed that, *“Golden care Limited has managed and maintained an Old People's Home with capacity in excess of the minimum required 100 residents over the last three years, as evidenced by the licenses for 235 residents uploaded as part of this submission.”*

In addition to the aforesaid statement, it enclosed two [2] licences issued by the Social Care Standards Authority [SCSA] covering the following period: i) 30.09.2019 - 29.09.2020 ii) 12.10.2020 - 30.20.2021 [partially admissible]

In accordance with the clarification, *“quoted experience which does not fall within those parameters shall be deemed as not compliant”*. Thus and thereby, it is amply clear that the decision of the evaluation committee and/or the defendants is in breach of the tender specifications and inter alia article 61 of S.L. 601.03, by selecting a tenderer not in accordance with the relative tender requirements

- b) **Clarity of the tender document** - In no uncertain terms, the tender documents firstly and through the clarification thereafter, clearly crafted a requirement which was clear, unambiguous and directly applicable [without distinction] to all tenderers. When the tender document referred to and requested, *“Evidence that the tenderer has managed and maintained one (1) Old People's Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers.”* The main characteristics of the requirement are highlighted above, and no party may deviate from any of such mandatory requirement. This should not be limited to an opinion or an interpretation - but a mere factual fact-finding exercise by the evaluation committee and/or the contracting authority, based on the submissions made by the individual parties, to confirm or otherwise whether the bidder satisfied all requirements. The contracting authority and/or the evaluation contracting (sic) had one role in all this, to determine if any or all of the tenderer satisfied all the requirements. The use of word 'and' when drafting the years requirements [during the past three (3) years being 2018, 2019 and 2020] and the use of words "during the past three [3] years", makes it crystal clear that the requirement was for the tenderers to have at least three (3) years experience in the specific years indicated. Tenderer Golden Care Limited does not satisfy the requirement of having the necessary experience, and this is based both on publicly available documents, as well as through the documents submitted by itself. Thus and thereby, it is amply clear that the decision of the evaluation committee and/or the defendants is in breach of the tender specifications and inter alia article 61 of S.L. 601.03, by selecting a tenderer not in accordance with the relative tender requirements.
- c) **Doctrine of self-limitation** - The doctrine of self-limitation is an important public procurement principle which has been referred to by this honourable Board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document, this will ensure predictability and transparency. The Appellant company feels aggrieved by the decision of the evaluation committee, in particular since it failed to adhere to the mandatory requirement of the tender document, and in the process breaching this fundamental principle.
- d) **Technical score afforded to CareMalta Limited** - The appellant company contends that the technical score afforded to it, in particular where and when it was not afforded full marks, are unjust and unfounded. CareMalta Limited has submitted equivalent standards, whensoever it was asked to provide a specific standard, and as such, its point reduction should be reviewed and re-

considered by the evaluation committee. The acceptance of equivalent standards and their acceptance in exchange of particular requirements are hallmarks developed through the European Court of Justice, which should and must be considered as such by the defendants.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 19th May 2022 and its verbal submission during the hearing held on 19th September 2022, in that:

- a) The objection revolves around Section 5 being Selection and Awards Requirements: (A) Eligibility Criteria specification, (c) Technical and Professional Ability, Performance of Services of the Specified Type, (i) Evidence that the tenderer has managed and maintained one (1) Old People's Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers. This condition does not establish a minimum amount of time (experience) - but simply experience during the past three years. Therefore and without prejudice to the evaluation process, any amount of experience within the three (3) years is satisfactory. For the sake of clarity the tender does not require three (3) whole and consecutive years experience, but for experience within the said years.
- b) As already pointed out the section in question is part of the Eligibility Criteria. Therefore, the section of the tender document is mandatory in other words either eligible or not. Thus, points are either given a pass (epps score 100%) or a fail (epps score 0%). If an Economic Operator/Bidder fails the Eligibility Criteria, the Evaluation Committee will not be able to move to the next section and continue to evaluate the tender on Technicality. Therefore if one fails the Eligibility Criteria the evaluation process will stop and the Economic Operator's offer will be deemed not to be Administratively complaint(sic). Active Ageing and Community Care also make reference to Article 232 S.L 601.03 which stipulates: *“Article 232. Evidence of the economic operators technical abilities may be provided by one or more of the following means, in accordance with the nature, quality or importance, and use of the works, supplies or services: (a) by means of the following lists: (i) list of the principal deliveries effected or the main services provided over, at the most, the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services deliver or performed more than three years before will be taken into account.”* Therefore in line with the principle *“ubi lex voluit dixit”*, the quoted article is clear as it states ‘at the most’ and not throughout the whole three (3) year. Thus the decision of the Contracting Authority to consider the experience of Golden Care Limited as eligible was correct and within the parameters of the law and to thus carried on to evaluate the said entity's tender.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 19th May 2022 and its verbal submission during the hearing held on 19th September 2022, in that:

- a) **Main grievance** – the Appellant’s interpretation of “*Evidence that the tenderer has managed and maintained one (1) Old People's Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers, (Note 2),*” was “for the tenderers to have at least three years experience in the specific years indicated”. This interpretation is certainly not synonymous with the writings of the tender dossier and of the clarification note / answer as issued by the Director General of the Department of Contracts.
- b) **Self limitation** – Appellant implies that the DoC ‘failed to adhere to the mandatory requirements of the tender document’. It is hereby being submitted that if the evaluation committee had to act on the lines as suggested by the Appellant, that the principle of self limitation would have been broken.
- c) **Technical score afforded to CareMalta Limited -** the criteria for award was the ‘BPQR’. Therefore, by just meeting the minimum requirements you are not ascertained to score the full available points. It is in fact the core principle of BPQR to aid in identifying the bid with best value for money.

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) **Main grievance – non compliance of recommended bidder –**

The main bone of contention in this appeal revolves around the interpretation of paragraph 5(C)(i) of Section 1 of the tender dossier, more specifically “*Evidence that the tenderer has managed and maintained one (1) Old People's Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers, (Note 2),*”.

This Board opines that such a clause / requirement, could possibly have more than one interpretation. Therefore, it is deemed essentially important to analyse how the evaluation committee proceeded in its evaluation when allotting marks for this specific criterion.

It was duly ascertained, also during the testimony under oath of Ms Nadia Cauchi, that even though the evaluation committee had already interpreted such criterion, it still sought the advice of the Director General Department of Contracts (“DoC”). DoC duly replied and provided its interpretation which essentially was in line with that of the evaluation committee.

Argumentation brought forward by Appellant that the request of the Evaluation Committee to the DoC is a ‘half truth / story’ or was in any way mis-leading, is deemed by this Board to be a non-starter. This due to fact that Clarification Note 5 Question 5 confirms that only the experience gathered and obtained during years 2018 – 2020 is to be deemed relevant for evaluation. i.e. experience gathered by tenderers as from inception (of their company) till 31st December 2017 and

as from 1st January 2021 onwards, will not be deemed relevant. Otherwise, it just repeats excerpts of the criteria subject to this appeal with no additional interpretations.

It is also essential to note that public procurement is there to encourage competition amongst the business community. Therefore, is such procedure adopted by the Evaluation Committee to be deemed to go against the principles of Self-Limitation and Proportionality?

The Evaluation Committee sought advice from the Department of Contracts after they realised the possibility that such criteria could be interpreted differently. Such action is deemed completely in line with the role they have been given. Therefore, the decision made (by the Evaluation Committee) and eventual marks allotted is also deemed to be in favour of the principle of proportionality. It is deemed, by this Board, that the Evaluation Committee acted in a transparent and diligent manner throughout.

This also when bearing in mind that a simple search in the Cambridge Dictionary for the word ‘during’ can have different meanings. ‘During’ can have the meaning and / or be used in the following instances: ‘throughout the course of’ and ‘at a particular point in the course of’.

Therefore, this Board ascertains that it would be against the core principles of public procurement if it were to uphold such an appeal.

This grievance of the Appellant is therefore not being upheld.

- b) **Technical score afforded to CareMalta Limited** – The Appellant did not provide any proof to substantiate this grievance. The ‘Criteria for Award’ as per paragraph 6.1 of the Tender dossier (Section1) makes it clear that the tender will be awarded to the tenderer submitting the offer with the Best Price / Quality Ratio (BPQR). It is a well enshrined principle that meeting the minimum criteria will not automatically mean that a tenderer will be provided full marks. This due to the element of ‘leeway’ afforded to evaluation committee to determine whether another bidder would have provided a better technical and / or financial offer. This for the Contracting Authority to meet an objective whereby the best value for money is achieved. Due to no proof being presented, this grievance is not being considered any further.

The Board,

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

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decisions in the recommendation for the award of the different lots as originally made,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Ms Stephanie Scicluna Laiviera
Member

