

PUBLIC CONTRACTS APPEALS BOARD

Case No. 200

CT/2177/2009; Advert CT/433/2009; MCH 006/2009 Tender for Nursing Services at Mount Carmel Hospital

This call for tenders was published in the Government Gazette on 20.11.2009. The closing date for this call for offers with an estimated value of Euros 1,049,000 was 12.01.2010.

Two (2) different tenderers submitted their offers.

On 01.03.2010 *Messrs Medicare Services Ltd* filed an objection following the decision of the Contracts Department to disqualify its offer for being considered administratively non-compliant.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members convened a public hearing on 07.05.2010 to discuss this objection.

Medicare Services Ltd (MSL)

Dr Jonathan Spiteri	Legal Representative
Mr Jesmond Cilia	Representative

Health Services Group Ltd (HSGL)

Dr Martin Fenech	Legal Representative
Mr Alan Bonnici	Representative
Mr Philip Bonnici	Representative

Mount Carmel Hospital (MCH)

Mr Josef Borg	Representative
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Evaluation Board

Mr Mario Hili	Chairman
Mr John Degiorgio	Member
Mr Anthony Mifsud	Member
Ms Maria Assunta Bonello	Member

Contracts Department

Mr Francis Attard	Director General
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After the Chairman's brief introduction the appellant Company was invited to explain the motives of the objection.

Dr Jonathan Spiteri, legal representative of Medicare Services Ltd, explained that his client's offer had been rejected having been considered to be administratively non-compliant in view of the following reasons, viz:

- (i) insufficient number of past/present clients;
- (ii) insufficient number of references; *and*
- (iii) when contacted, some of the listed references, three references declared that the tenderer only supplied doctors services to such clients.

At this point Dr Spiteri referred to section 3.1 (a) under the 'Selection Criteria' (page 4) which stated that "*A minimum of 10 past and/or present clients, the duration and value of these contracts and references to substantiate these claims (MCH reserves the right to contact these clients of tenderer for further information).*"

Dr Spiteri stressed that the wording of this tender condition did not specify that the references had to be strictly in the nursing sector but simply referred to 'clients'. He declared that the tender document was the legal instrument that one had to be guided with during evaluation. The appellant Company's legal advisor contended that the information submitted by his client provided the necessary proof in terms of experience and reliability because the ten references submitted covered nursing services, doctor services and care workers. He added that although the 10 references were not limited to nursing services they covered areas connected with medical services.

Dr Spiteri recalled that the contracting authority alleged that, when contacted, certain references stated that the services rendered to them by his client did not include nursing services. Dr Spiteri conceded that the call for tenders was for nursing services but he reiterated that the request for references was not limited to nursing services and, as a result, the fact that some of the references submitted by his client also covered other medical services apart from nursing services should not have rendered his submission non compliant with tender conditions and specifications. Dr Spiteri claimed that the references submitted by his client proved his experience in managing large contracts covering various medical services including nursing services including at Mount Carmel Hospital itself.

The Chairman PCAB expressed the view that since the tender was issued for nursing services, the contracting authority was interested in references for the provision of nursing services and not for doctor or care worker services even though these fell under medical services.

Mr Jesmond Cilia, also representing Medicare Services Ltd, explained his firm had been participating in public tenders for about 12 years and had been awarded various public contracts, e.g. the one at Corradino Correctional Facilities which was considered a high risk service. Mr Cilia added that his tender submission included the list of ten references, the company profile and an extensive list featuring all the employees attached to Medicare Services Ltd, which included nurses, doctors and

care workers. Mr Cilia felt that the list of employees they submitted apparently was to the satisfaction of the contracting authority since it did not raise any complaints in that regard.

Mr Mario Hili, Manager Nursing Services and Chairman of the adjudication board, submitted the following:

- a. the tender in question was issued specifically for nursing services, so much so that other tenders were in the pipeline for the provision of other medical services at MCH;
- b. the nursing services requested involved high risk groups such as asylum seekers and persons attending the Forensic Unit at MCH;
- c. the list of ten references submitted by the appellant Company included a duplicate reference – the Armed Forces of Malta with whom the same appellants had two separate contracts - and even if one were to put that aspect aside, other references, when contacted, were either not aware of the services indicated by the appellants or the services rendered did not involve nursing services but referred to sick leave verification by doctors or other services;
- d. the references given by the other tenderer, Health Services Group Ltd (HSGL), were in respect of nursing services and had been duly verified by the contracting authority;
- e. the contracting authority was concerned with nursing services so much so that section 3.1 (b) ‘Personnel’ under ‘Selection Criteria’ (page 4) stated that *“Tenderers are to provide the names, experience (if any) and a statement that all proposed personnel are in a position to produce the recognized qualification certificate (from the University or any other governing body) showing that they are able to perform nursing duties...”*; and
- f. the contracting authority was satisfied with the list of personnel submitted by the tenderers.

The Chairman PCAB intervened to remark that references had to be evaluated not only in terms of the number given but more importantly in the light as to what they represented, in other words, it did not matter much if instead of 10 one submitted 9 references but what mattered more was the quality and the extent of service that those 9 references represented.

Under oath Mr Hili gave the following evidence:

- (i) the contracting authority did phone up the references given by the appellant Company, except for Corradino Correctional Services and Mater Dei Hospital because he had first-hand experience of those work places;

- (ii) on contacting the Bank of Valletta and the Malta Transport Authority he was informed that they did not make use of nursing services but used the services of doctors to verify sick leave;
- (iii) the contact person indicated at the University of Malta could not be traced whereas the Education Department was reluctant to divulge any information in this regard;
- (iv) the Armed Forces of Malta were provided with doctor services; and
- (v) HSGL provided nursing services to all the references provided, among them, Malta Shipbuilding, Corradino Correctional Services, Malta Hospice, St James Hospital, Marsa Power Station, Delimara Power Station and the Forensic Unit at MCH.

Mr Cilia, under oath, confirmed that with regard to BOV, MTA, UoM, Education Department and the current contract with the AFM (they had a contract for nursing services that had expired) his firm provided sick leave verification services by doctors and/or doctors to sit on medical boards. Mr Cilia did not consider it ethical that the Forensic Unit at MCH provided a reference to his competitor when he was still providing the services to that organisation because he himself had such a reference from the Forensic Unit but refrained from submitting it.

Dr Martin Fenech, representing HSGL, declared that his client had submitted a fully compliant tender submission and that he found nothing unethical in the submission of a reference from the Forensic Unit (MCH) which was a very high risk entity.

At this stage the appellants made reference to another issue, namely that relating to a Court decision, namely, Case No. 102/2009 – The Malta Police vs Mr Gaetano Bonnici.

Dr Spiteri stated that another aspect of his client's appeal concerned the court judgment handed down on the 9th February 2009 against Mr Gaetano Bonnici (ID 970050M) who had been charged that, as the person responsible for Health Services Group Ltd, he had employed foreign worker/s without the necessary work permit and, as a consequence, he was found guilty as charged and fined €2,000.

Dr Spiteri referred to Annex IX 'Exclusion Criteria' which requested, among other things, that tenderers must indicate a 'yes' or 'no' as to whether their organisation had (5) ... *fulfilled its obligations relating to the payment of social security contributions* .. and (6) .. *fulfilled its obligations relating to the payment of taxes* ... The appellants' legal advisor remarked also that this requirement emanated from EU Directive 2004/18/EC. At this point Dr Spiteri pointed out that, although in Case No. 102/2009 the accused was Mr Gaetano Bonnici and the guilty verdict was issued in the name of the same Mr Gaetano Bonnici, the charge at page 2 read that Mr Bonnici was acting as the person responsible for the work of Health Services Group Ltd and that the accused was found guilty as charged.

Dr Spiteri declared that his client was raising this point because if the contracting authority was treating his client by the book, then the contracting authority should

have likewise treated the competing tenderer by the book and found that Health Services Group Ltd had contravened the mandatory provisions laid down at Annex IX, i.e. the non-payment of social security contributions and taxes in respect of persons working without the necessary permits.

Mr Josef Borg, representing the contracting authority (MCH), remarked that the Contracts Department had at no time informed the contracting authority that HSGL was on the black list. He added that HSGL had submitted a clean declaration for the purposes of Annex IX. (page 57).

At this point Dr Fenech requested the floor in order to deplore the attitude displayed by the appellants. He raised the procedural point that, in its defence, the appellant Company should have stuck to the reason on which its bid had been rejected, namely the references, and not indulge into other issues which did not concern the reason for its elimination. Dr Fenech argued that, if anything, the appellants could have raised the court sentence issue at some other stage but certainly not at that stage.

Mr Cilia intervened to inform those present that on the 21st January 2010 his legal counsel had informed the Chairman, Contracts Committee, of Court Case 102/2009 involving HSGL, which letter was acknowledged on the 26th January 2010.

On his part, Mr Borg remarked that the 1st envelope was opened on the 12 January 2010, the adjudication of the 2nd envelope had been concluded on the 3rd February 2010 and that the letter (dated 21./01/10) from the appellant's legal counsel was referred to the adjudication board through covering letter dated 4th February 2010.

Dr Fenech maintained that the appellant Company should have limited itself to convincing the contracting authority that its offer was a valid one and that it should have refrained from casting doubt as to whether HSGL's offer was compliant or not. Furthermore, continued Dr Fenech, with regard to the court sentence involving Mr Gaetano Bonnici, he

- a. asked from where did it emerge that Mr Gaetano Bonnici was a director or a shareholder of HSGL and if HSGL was among the blacklisted contractors;
- b. pointed out that in this case 'The Police' charged 'Mr Gaetano Bonnici' and not HSGL and in fact the guilty verdict was issued in the name of Mr Bonnici and not in representation of HSGL. He added that the Police could have easily taken action against Mr Gaetano Bonnici in his own name and in representation of HSGL but apparently the Police chose not to do that;
- c. claimed that the statements in terms of Annex IX were requesting a confirmation as to whether a firm had any outstanding dues with regard to the payment of social security contributions and taxes and the fact was that his client certainly did not have any outstanding matters of these kinds at the time he submitted this tender;
- d. submitted that the verdict on page 3 read 'issib lill-imputat hati tal-akkuzi miġjuba fil-konfront tiegħu u tikkundannah' and recalled that the accused was Mr Gaetano Bonnici as indicated on page 1 of the Court proceedings and, therefore, the Court did not convict Mr Bonnici on behalf of HSGL.

The Chairman PCAB, while noting the points mentioned by Dr Fenech, remarked that the Court found the accused guilty as charged and that the charge read '*bħala persuna responsabbli mix-xoħol ta' Health Services Group Ltd*'.

Dr Fenech also stated that the Court had also decided '*illi dwar it-talba tal-Pulizija sabiex jiġu revokati l-liċenzi li kellu l-imputat sabiex jopera n-negozju tiegħu l-Qorti tqis illi l-ebda prova ma tressqet dwar l-imsemmija liċenzi oltre l-fatt li l-imputat ammetta mal-ewwel għall-akkuzi miġjuba fil-kontront tiegħu*' which Dr Fenech interpreted in the sense that Mr Bonnici had no trading licence in his name. He declared that Mr Gaetano Bonnici was not the representative or an employee or a shareholder of HSLG from the time this tender was submitted till that day.

Dr Spiteri stated that, according to the charge brought by the Police, Ms Stojanovic was employed with HSGL and that Mr Gaetano Bonnici was the person responsible for the work of HSGL. Dr Spiteri made it clear that he had introduced this shortcoming on the part of HSGL in his appeal to draw the attention of the contracting authority that all tenderers had to receive equal treatment.

Mr Anthony Pavia, a PCAB member, observed that it appeared that the letter sent by the appellant Company dated 21st January 2010 to the Contracts Department was not acted upon neither by the Contracts Department nor by the adjudication board.

Mr Francis Attard, Director General (Contracts), gave the following evidence under oath, stating namely that

- a. it was usual practice that any information received by the Contracts Department relevant to a call for tenders would be passed on to the adjudication board for its consideration in the evaluation process;
- b. the Public Contracts Regulations did not provide for the blacklisting of contractors as yet but such a mechanism was going to be introduced in the near future;
- c. the appellants' letter dated 21.01.10 was discussed at General Contracts Committee level and no action thereon was deemed necessary because one had to draw a distinction between an individual person and a limited liability company;
- d. in the case of contracts with a value that exceeded €0.5 million, the economic operator was being requested to submit letters from the Court and from tax departments that attributed no offence to that operator; and
- e. a tenderer had the right to appeal against any aspect of a decision taken by the contracting authority at the end of each stage of the tendering process.

Dr Spiteri then introduced the concept of 'the lifting of the corporate veil' and a discussion ensued. He declared that the wife of Mr Bonnici was the director and main shareholder of HSGL and, as a result, there existed a direct link between Mr Bonnici and HSGL. Dr Spiteri argued that, contrary to what Dr Fenech had claimed, the charge was part and parcel of the court sentence and it followed that there was a direct link between Mr Bonnici and HSGL.

On the other hand, Dr Fenech, after reiterating that there was no link between Mr Bonnici and HSGL, explained that the application of ‘the lifting of the corporate veil’ was meant to prevent directors and shareholders from committing fraudulent acts and then hide behind the corporate structure of the company.

In concluding, Dr Spiteri reiterated that his main contention was that section 3.1 (a) under ‘Selection Criteria’ did not lay down that the ten past and/or present clients had to relate exclusively to nursing services and hence his client’s bid should be reintegrated in the tendering process and that the award of the tender would then be decided upon after the opening of the 3rd envelope which contained the prices.

On his part, Dr Fenech remarked that (i) the appellant Company was admitting that its tender submission was deficient with regard to the references submitted, (ii) the Director General of Contracts had confirmed that the letter of the 21st January 2010 regarding Court Case 102/2009 had been taken into consideration by the General Contracts Committee, (iii) Mr Gaetano Bonnici did not represent HSGL in any way and (iv) since his client had abided by all tender specifications and conditions then it was reasonable to expect that his client would be awarded this contract.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 01.03.2010 and also through their verbal submissions presented during the public hearing held on 07.05.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of Dr Spiteri’s arguments raised in connection with (a) the reasons given to his client as to why his company was considered as being administratively non-compliant, especially the fact that the company in question provided a list containing insufficient number of past/present clients and insufficient number of references, (b) the fact that the wording of section 3.1 (a) under the ‘Selection Criteria’ (page 4) did not specify that the references had to be strictly in the nursing sector but simply referred to ‘clients’, (c) the fact that the references submitted by his client proved the latter company’s experience in managing large contracts covering various medical services including nursing services including at Mount Carmel Hospital itself and (d) the fact that a court judgment handed down on the 9th February 2009 found against Mr Gaetano Bonnici fining the latter €2,000 - as the person responsible for Health Services Group Ltd he had employed foreign worker/s without the necessary work permit - should have sufficed for the adjudication board to, equally, disqualify the other tenderer on grounds of administrative non-compliance;
- having also taken note of Dr Spiteri’s admission that although the 10 references submitted by his company were not limited solely to nursing services but they covered areas connected with medical services;

- having heard Mr Hili's submissions which, *inter alia*, referred to the fact that (a) the tender in question was issued specifically for nursing services, so much so that other tenders were in the pipeline for the provision of other medical services at MCH, (b) when references provided by the appellant company were contacted, these were either not aware of the services indicated by the appellants or the services rendered did not involve nursing services but referred to sick leave verification by doctors or other services and (c) the references given by the other tenderer, Health Services Group Ltd (HSG), were in respect of nursing services and had been duly verified by the contracting authority;
- having taken into consideration Mr Cilia's (a) confirmation under oath regarding the fact that with regard to BOV, MTA, UoM, Education Department and the current contract with the AFM (they had a contract for nursing services that had expired) his firm provided sick leave verification services by doctors and/or doctors to sit on medical boards and (b) statement that that on the 21st January 2010 his legal counsel had informed the Chairman, Contracts Committee, of Court Case 102/2009 involving HSG, which letter was acknowledged on the 26th January 2010, a letter which, according to Mr Borg, was referred to the adjudication board through covering letter dated 4th February 2010;
- having also taken note of Dr Fenech's points raised in relation to the fact that (a) the appellant Company should have stuck to the reason on which its bid had been rejected, namely the references, and not indulge into other issues which did not concern the reason for its elimination, (b) it emerges from nowhere that Mr Gaetano Bonnici was a director or a shareholder of HSG and that HSG was among the blacklisted contractors, (c) 'The Police' charged 'Mr Gaetano Bonnici' and not HSG and, in fact, the guilty verdict was issued in the name of Mr Bonnici and not in representation of HSG, (d) the statements in terms of Annex IX were requesting a confirmation as to whether a firm had any outstanding dues with regard to the payment of social security contributions and taxes and the fact was that his client certainly did not have any outstanding matters of these kinds at the time he submitted this tender and (e) the lifting of the corporate veil was meant to prevent directors and shareholders from committing fraudulent acts and then hide behind the corporate structure of the company and had nothing with the case under review as the appellant's legal advisor was suggesting;
- having also considered the points raised by Mr Attard who, *inter alia*, stated that (a) the Public Contracts Regulations did not provide for the blacklisting of contractors as yet but such a mechanism was going to be introduced in the near future and (b) the appellants' letter dated 21.01.10 was discussed at General Contracts Committee level and no action thereon was deemed necessary because one had to draw a distinction between an individual person and a limited liability company,

reached the following conclusions, namely:

1. The PCAB feels that since the tender was issued for nursing services, the contracting authority was interested in references for the provision of nursing services and not for doctor or care worker services even though these fell under medical services. As a matter of fact the Tender Document was clear enough stating in section 3.1 (b) 'Personnel' under 'Selection Criteria' (page 4) that *"Tenderers are to provide the names, experience (if any) and a statement that all proposed personnel are in a position to produce the recognized qualification certificate (from the University or any other governing body) showing that they are able to perform nursing duties..."*.
2. The PCAB argues that the contracting authority provided enough evidence to demonstrate as to what it was really after when issuing this call.
3. The PCAB also feels that the DG Contracts' evidence was clear enough regarding the fact that (a) the Public Contracts Regulations did not provide for the blacklisting of contractors as yet but such a mechanism was going to be introduced in the near future and (b) the appellants' letter dated 21.01.10 was discussed at General Contracts Committee level and no action thereon was deemed necessary because one had to draw a distinction between an individual person and a limited liability company. The PCAB concurs with both conclusions reached by the General Contracts Committee.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

18 May 2010