

IN THE PUBLIC CONTRACTS REVIEW BOARD

29th December 2023



Re:- Objection 135 - 022-6079/22 (CPSU 1056/23) Request for Participation for the Provision of Mental Healthcare Beds for the Mental Health Services within the Ministry for Health

Reply of the **Central Procurement and Supplies Unit (CPSU)** on behalf of the Department of Health to the reasoned application lodged by Caring First Limited (the Objector);

On the 7th of November 2023 a request for participation for the Provision of Mental Healthcare Beds for the Mental Health Services within the Ministry for Health was published on the website of CPSU;

3 Offers were submitted, and following an evaluation process a recommendation was made in favour of BBF Operating Ltd (the recommended bidder), being the only technical compliant offer.

The information on the evaluation outcome was communicated to the bidders by means of a letter dated 29th September 2023, where mistakenly the name of the recommended bidder was written in the 2 letters sent to the objector (due to 2 separate offers) as BBF Ltd.

During the Standstill period, the Objector requested the address of the Residency where the beds are being offered and a copy of the licences submitted by the recommended bidder.

In line with similar past occasions, the contracting authority disclosed only the address of the residency where the beds are being offered.

The Objector felt aggrieved and filed its objection based on 3 main grievances.

CPSU humbly disagrees with the grievances and is filing its reply in the same order of the Objector's grievances.

Submissions

On the First Grievance: The Identity of the Original Tenderer cannot change after the bid is submitted

1. CPSU submits that no bid was changed following the opening of submissions;
2. Whilst CPSU acknowledges that the name of the recommended bidder indicated in the schedule of participants was BBF Operating Ltd whilst in the letters it was written down as BBF Limited, the offer was in fact submitted by BBF Operating Limited;
3. Although one letter head of BBF Limited was used as part of the submission, the same document clearly indicates that the operator is BBF Operating Limited, the financial bid form was signed on behalf of BBF Operating Limited and the envelope

in which the offer was submitted also indicated also that the offer is being submitted on behalf of BBF Operating Limited;

4. The recommended economic operator did not change any identity of the original tenderer and the contracting authority did not accept or authorise any change to the original offer. The recommended offer was therefore by BBF Operating Limited and the letter sent to the recommended bidder should have indicated BBF Operating Limited as the recommended bidder;
5. This changes nothing for the objector which was disqualified for not being technically compliant to the license requirement;
6. There is therefore no reason why this first grievance should be upheld now that it has been clarified that no changes to the initial offer were made;

On the Second Grievance: The financial offer submitted by the recommended bidder excessively exceeds the estimated procurement value of the Negotiated Procedure

7. CPSU preliminary submits that the objector lacks the necessary legal interest on this ground of objection since both its offers were rejected due to non-compliance to license requirements, and these rejections were not challenged;
8. Moreover, and without prejudice to the above, CPSU submits that, as the objector stated in its objection, the contracting authority reserves the right to accept offers which exceed the estimated contract value and thus the right to recommend for award an offer which exceed the estimated contract value is a discretion which the contracting authority is vested with;
9. Like all discretions of a public authority, the discretion to recommend for award an offer exceeding the estimated contract value needs to be exercised responsibly and CPSU did exercise this discretion responsibly in a situation where the service was urgently required and the offer recommended for award was the only compliant offer submitted;
10. Moreover, the evaluation committee ensured that sufficient funds were available, and proceeded to make its recommendation accordingly;
11. CPSU submits also that since this is a negotiated procedure, the Contracting Authority has a certain degree of flexibility, which it could exercise at its discretion;
12. Moreover CPSU submits that the estimated contract value is only indicative and there were instances in the past where the PCR rules that the estimated contract value was not even sufficient to cover all the basic wage expenses . In case number 1775 decided in the 19th of August 2022, which is now Res Judicata, this Honourable Board rules that:

The above is all deemed relevant as if one were to add the figure of €10,129,159.27, representing the estimated number of hours at the minimum rate payable to employees (Security Officers) which as already analysed is not being disputed, to the 'revised' €1,210,772.16 'minimum fees' to be paid to the Key Experts, one would notice that the total arrived at amounts to €11,339,931.43, an amount which is above the Estimated Procurement Value of €11,305,384.45 and even more materially higher to the bids of the other two (2) economic operators who

participated in this 10 bidding process. The amount of €11,339,931.43, is only the 'minimum fees / salaries' to be paid to Security Officers and Key Experts and is therefore not including any overheads and / or profitability of the economic operator.

13. In the case above mentioned case, this Honourable Board did not proceed to cancel the call for tenders or the lot in dispute but still gave the chance to the contracting authority to re-evaluate the tenders and possibly of selecting an offer which is higher than the estimated contract value;
14. In the present case in dispute, CPSU was not irresponsible with its recommendation also because, the offers which were rejected due to technical non-compliance, were also considerably higher than the estimated contract value!;
15. For these reasons this second grievance should also be rejected;

On the Third Grievance: The Contracting Authority has not disclosed the recommended bidder's license.

16. The Contracting Authority did not disclose the recommended bidder's license, however this does not prejudice in any way the objector's position in this appeal;
17. The Contracting Authority did however disclose the address of the facility where the beds are being offered and through this information one could confirm with the website of the Superintendent of Public Health that the premises where the beds offered are located, are licensed. A copy of this publicly available list of licensed hospitals and facilities is being attached and marked as Dok CPSU 1¹;
18. The Objector could therefore easily confirm that the premises are indeed licensed as requested by the tender document and therefore the information disclosed was sufficient for the Objector's purposes;
19. Moreover and without prejudice to the above, the license, which is not public could potentially include confidential information and thus the recommended bidder should be given the opportunity to object to the disclosure of the license;
20. The judgment Varec SA vs Belgian State delivered by the Court of Justice of the European Union (third chamber) on the 14th of February 2008 gives a clear guidance on the disclosure of certain documents of a potential commercially sensitive nature:

It follows that, in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.

The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal

¹ [Hospitals \(gov.mt\)](https://www.gov.mt) as at 28/12/2023

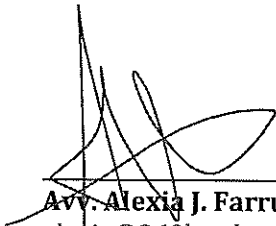
protection and the rights of defence of the parties to the dispute (see, by analogy, Case C-438/04 Mobistar [2006] ECR I-6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.

21. Without Prejudice to the above stated, CPSU will disclose the license if ordered to do so by this Honourable Board, even if this order is given through a preliminary decision before the hearing of the case after taking consideration of the position of all the parties;

CPSU hereby reserves its right to present further evidence and submission both written and orally to further their submissions in relation to the said application throughout the hearings.

In view of the above, the objection lodged by the objector ought to be rejected in full, whilst the decision of the Evaluation Board confirmed, and the relevant deposit forfeited.

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Hospitals

Public Hospital

Name

Address

Sptar Ġenerali ta' Ghawdex

Triq Ġhajn Qatet, Ir-Rabat, Ghawdex

Sptar Mater Dei

Triq Dun Karm, L-Imsida

Sptar Monte Carmeli

Triq L-Imdina, H'Attard

Private Hospital

Name

Address

Da Vinci Hospital

Triq il-Kan Karmenu Pirotta, Birkirkara

Good Samaritan Hospital

Triq Sir Luigi Preziosi, San Pawl il-Baħar

St James Capua Hospital

Triq Ġorġ Borg Olivier, Tas-Sliema

St James Hospital Zejtun

3, Triq tal-Fotba, Iż-Żejtun

St Thomas Hospital

Triq il-Belt Valletta, H'al Qormi

Mental Health Facilities

Name

Address

Casa Hope

Triq il-Knisja, Paola

Casa Maria

Triq Manwel Dimech, Tas-Sliema

Casal Nuovo

Triq Mater Boni Consilii, Paola

Dar Frangisk

34, Triq il-Princep Albertu, Il-Marsa

Dar il-Kantuniera

1, Triq id-29 ta' Awwissu 1679, L-Għarb, Ghawdex

Dar Imelda & Paul

Triq il-Papa Ġwanni XXIII, Birkirkara

Dar Kenn Għal Saħħtek	Triq Dar il-Kaptan, L-Imtarfa
Dar Victoria	34, Triq il-Princep Albertu, Il-Marsa
Forensic Unit (Male Section)	Sptar Monte Carmeli, Triq L-Imdina, F'Attard
Long Stay Psych. Ward	Sptar Ġenerali ta' Ghawdex, Triq Ghajn Qatet, Ir-Rabat, Ghawdex
Richmond Foundation	Paola Hostel, Triq Fhal Tarxien, Paola
Richmond Foundation	Villa Chelsea, 33, Triq il-Knisja l-Qadima, Birkirkara
Richmond Foundation	Attard Hostel, Rubery, 4, Triq il-Gibba, F'Attard
Richmond Foundation	Qormi Hostel, Il-Merill, 15, Triq il-Ghasel, Fhal Qormi
Richmond Foundation	Mosta Hostel, 1B, Triq id-Durumblat, Il-Mosta
Richmond Foundation	Kids in Development, Triq Villambrosa, Il-Famrun
Richmond Foundation	Kappara Hostel, Ground Floor, 46 Triq Wied Ghollieqa, Il-Kappara, San Ġwann
Richmond Foundation	Mosta Hostel Annex 1B, Triq id-Durumblat, Il-Mosta
Richmond Foundation	Kappara Hostel, 1st Floor, 46A, Triq Wied Ghollieqa, Il-Kappara, San Ġwann
Short Stay Psych. Ward	Sptar Ġenerali ta' Ghawdex, Triq Ghajn Qatet, Ir-Rabat, Ghawdex
St Thomas Community Living	1st Floor, Triq il-Baħħara, Marsaskala

Rehabilitation Hospitals

Name	Address
Dar Kenn Għal Saħħtek	Triq Dar il-Kaptan, L-Imtarfa
Karen Grech Rehabilitation Hospital	Pjazza San Luqa, Gwardamanga, Tal-Pietà

Oncology Centres

Name	Address
Sir Anthony Mamo Oncology Centre	Triq Dun Karm, L-Imnsida

Long Term Care Facilities

Name	Address
Dar Bjorn	308, Triq il-Kbira, Hal Qormi
Sir Paul Boffa Hospital Long Term Care facility	Sqaq Harper, Il-Furjana
St Vincent De Paule Residence	Triq I-Ingiered, Hal Luqa
The Good Samaritan	Pjazza Sir Luigi Preziosi, San Pawl il-Baħar

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