

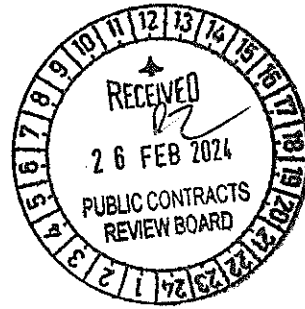
RONALD AQUILINA

LL.D., LL.M. (INL), Adv. Trib. Eccles. Melit.

AVUKAT

25th February, 2024

Public Contracts Review Board
Notre Dame Ravelin
Floriana VLT 2000



Dear Chairman,

Re: CT2342/2023 – Tender for the Provision of Nursing Services for the Ministry For Health (the “Tender”)

1. We have been instructed by our clients, **Health Services Group Limited (C16298)** of JPR Buildings, Level 1, Taz-Zwejt Road, San Gwann SGN 3000 (the “Applicant”) to lodge an application in terms of Regulation 262 of the Public Procurement Regulations (“PPR”) in connection with the captioned tender.
2. The Tender (vide Dok A) was published on the 5th November, 2023 and the Deadline for the Submission of Tenders currently is the 23rd April, 2024.
3. The Tender is divided into five (5) lots, for the provision of nursing services to Mater Dei Hospital and Sir Anthony Mamo Oncology Centre (Lot 1), Mental Health Services (Lot 2), Ministry for Health within Health Administration (Lot 3), Dar Kenn Ghal Sahhtek (Lot 4) and Rehabilitation Services Karen Grech Hospital (Lot 5).

4. BACKGROUND

4.1 Clause 1.3 of Section 1 – Instructions to Tenderers sets the Estimated Procurement Value for all five lots at **€22,032,151.20**, made up as follows:-

- €6,723,778.30 for Lot 1 – MDH/Samoc, with an estimated 419,940 hrs
- €8,382,247.70 for Lot 2 – MHS, with an estimated 499,200 hrs
- €5,110,233.30 for Lot 3 – MFH within Health Administration, with an estimated 312,000 hrs
- €129,279.00 for Lot 4 - DKGS, with an estimated 7,500 hrs and
- €1,686,612.90 for Lot 5 - RHKG, with an estimated 106,080 hrs, all excluding VAT.

4.2 Section D of Section 1 - Instructions to Tenderers, directs bidders to provide “a financial offer calculated on the basis of Delivery duty Paid (DDP) ²⁰²⁰ (Grand Total) for the services tendered as per Tender Response Format. ^(Note 3)”

A filled-in financial bid form (as per document available to download online from www.etenders.gov.mt) as per Tender Response Format. ^(Note 3)”.

4.3 The financial bid form downloaded from www.etenders.gov.mt, once opened, appears to reveal a separate sheet for each lot (a copy of the excel document provided is being attached hereto

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and marked as document B while a printed copy of each of the opened sheets referring to Lot 1 to Lot 5 respectively is attached and marked as documents B1 to B5), directing bidders to quote the following rates, in respect of each Lot and separately for of each of the years 2024, 2025 and 2026:-

- i) Hourly workers' cost rate from Monday to Saturday; Diploma
- ii) Hourly workers' cost rate for Sundays and Public Holidays; Diploma
- iii) Hourly workers' cost rate from Monday to Saturday; Degree
- iv) Hourly workers' cost rate for Sundays and Public Holidays; Degree
- v) Non-Statutory extra allowance from Monday to Saturday
- vi) Non-Statutory extra allowance for Sundays and Public Holidays
- vii) Rate per hour for all other expenses to carry out the services as per Terms of Reference including but not limited to the key expert, materials, administrative charges, etc

4.4 In respect of each of the aforementioned rates, the financial bid form stipulates the estimated number of hours per annum. Moreover, in respect of Hourly worker's cost rates and the Non-Statutory extra allowances mentioned above, the financial bid form also stipulates minimum amounts below which bidders cannot quote .

4.5 The estimated procurement values indicated in clause 1.3 of the Instructions to Tenderers cover only the respective Hourly workers' cost rates and the Non-Statutory extra allowance rates at the respective minimum rates stipulated in the financial bid form for the number of hours therein indicated. The estimated procurement values make no provision whatsoever for all other expenses which are imposed on bidders by the tender document, such as:-

- a) the key expert
- b) administrative charges
- c) uniforms
- d) training
- e) materials
- f) immunisations and vaccinations
- g) potential damages caused by contractor's employees
- h) insurances

Nor has any provision been made in the estimated procurement value for bidder's profit. (vide an excel sheet and PDF of the Applicant's workings attached hereto and marked as document C1 and C2 respectively).

4.6 The financial bid forms excel sheets, as downloaded from the e-tenders website, contain also a number of hidden rows (being rows 10 to 18 and rows 78 to 85) which, when unhidden, direct bidders to quote also for the year 2022 as well as a second set of rates covering January till February 2026. An excel copy of the financial bid form with unhidden cells is being attached hereto and marked as Document D whereas a printed copy of each of the said financial bid forms with unhidden rows are being attached hereto and marked as documents D1 to D5 respectively).

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- 4.7 Through a "Corrigendum" published on the 24th February, 2024 (hereinafter "the Corrigendum" a copy of which is being attached hereto and marked as document E), bidders were instructed as follows:
- "When completing the financial bid, bidders are kindly requested to fill in the hourly rate, expenses rate and non-statutory allowances rate for Year 2024, Year 2025 and Year 2026 only. Any hidden cells should be disregarded".*
- The Financial Bid Form itself was not, however, amended or replaced.
- 4.8 The tender document (Instructions to Tenderers - Economic and Financial Standing) stipulates that for Lots 1, 2 and 3, bidders need to have in place a minimum credit facility of €550,000.00, €700,000.00 and €400,000.00 respectively. For the same Lots 1, 2 and 3, bidders need to demonstrate an average yearly turnover for the years of 2020-2022 of not less than €1,500,000.00.
- 4.9 The Instructions to Tenderers Technical and Professional Ability stipulates that for Lots 1, 2, 3 and 5, bidders are to submit a list of principal services of a similar nature and magnitude being nursing services effected during 2020-2022, the minimum value of which must not be less than €1,500,000.00, €2,100,000.00, €1,100,000.00 and €500,000.00 excluding VAT respectively.
- 4.10 Through Answer 3 of Clarification Number 3 (attached hereto and marked as document F), it is stipulated that:-
- a. "the Economic and Financial Standing Criteria and the Technical and Professional Ability criteria must be cumulatively satisfied for each individual Lot tendered for in terms of Regulation 220 of the Public Procurement Regulations..."
- b. Tenderers bidding for Lots 1, 2 and 3 must provide three (3) credit facilities of the respective amounts or one (1) credit facility of the aggregate amount (i.e. €550,000 (sic) + €700,000 + €400,000, as applicable) but must have an average yearly turnover during the years 2020-2022 of not less than €1,500,000. "This criterion applies for each of the Lots 1, 2, and 3, that is whether bidding for one or more Lots (Lots 1, 2 and 3) the average yearly turnover must be that of €1,500,000."
- c. In respect of the Professional ability, "tenderers must provide evidence of the respective experience required for each Lot (Lots 1, 2, 3 and 5) tendered for. Principal services effected by a tenderer may be used as required past experience in more than one (1) Lot. Therefore, if a tenderer bids for all Lots requiring past experience (Lots 1, 2, 3 and 5) that tenderer must provide a list of principal services amounting to €2,100,000 (being the highest amount requested in the individual Lots."
- 4.11 Regulation 220 of the Public Procurement Regulations provides that:
- "220.** Where a procurement document including a tender is divided into lots, regulations 217 to 224 shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover that economic operators are required to have by

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reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time”.

- 4.12 The Applicant declares that it provides Nursing Services of the type requested by the Tender and that it is interested in submitting a bid pursuant to the Tender.

5. DETAILED REASONS FOR THIS APPLICATION

- 5.1 The Applicant's reasons for this application are as follows:-
- (A) decisions including clauses contained in the procurement document and clarification notes taken unlawfully (PPR – Regulation 262 (1) (a));
 - (B) issues relating to the submission of an offer through the government's e-procurement platform (PPR – Regulation 262 (1) (b));
 - (C) ambiguities of a particular term or clause included in the call for competition, in the contract documents, in clarification notes or in any other document relating to the contract award procedures (PPR – Regulation 262 (1) d));
 - (D) the Tender as drafted will or will likely violate a particular law if it is continued (PPR – Regulation 262 (1) (e))
- as will be explained in detail hereunder.

6. TECHNICAL AND PROFESSIONAL ABILITY REQUIREMENTS

- 6.1 Regulation 220 of the PPR clearly stipulates that when a procurement document including a tender is divided into lots, regulations 217 to 224 shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.
- 6.2 On the strength of the legal maxim *ubi lex voluit dixit, ubi non voluit non dixit*, it is evident that while the contracting authority is free to set the minimum yearly turnover that economic operators are required to have by reference to groups of lots, the same contracting authority enjoys no similar power in respect of Economic and Financial Standing requirements (regulation 218) or Technical and Professional Ability requirements (regulation 222).
- 6.3 This is also confirmed by the Contracting Authority itself which at the outset of its answer to Clarification 3 Question 3 states in no uncertain terms that “The Economic and Financial Standing criteria and the Technical and Professional Ability criteria must be cumulatively satisfied for¹ each individual Lot tendered for in terms of Regulation 220 of the Public Procurement Regulations (Subsidiary Legislation 601.03)”.
- 6.4 When applying the provisions of regulation 220, however, and notwithstanding its own clear statement that the both the Economic Standing criteria and the Technical and Professional

¹ Underlining of the Contracting Authority

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Ability criteria must be cumulatively satisfied, the Contracting Authority failed to apply regulation 220 uniformly to the Economic Standing criteria and the Technical and Professional Ability criteria.

- 6.5 Indeed, in respect of the Economic Standing criteria, the Contracting Authority effectively did provide (through its Answer 3 in Clarification number 3) that economic standing criteria are to be satisfied cumulatively by requiring bidders bidding, for example, for all Lots 1, 2 and 3, to prove they have in place credit facilities for an amount equivalent to the individual amounts stipulated for each of the respective lots added together. Thus, the Contracting Authority required prospective bidders bidding for all Lots 1, 2 and 3 to have in place credit facilities for the sum of €550,000 + €700,000 and €400,000 (i.e. €1,650,000) and not just €700,000 (the highest of the three lots). It is respectfully submitted that, in so doing, the Contracting Authority applied Regulation 220 correctly as it is not permissible for it to lay down economic standing criteria by reference to a group of lots, as would have been the case had the contracting authority provided that credit facilities for just €700,000 would have been sufficient to satisfy economic standing criteria for all of Lots 1, 2, and 3.
- 6.6 Inexplicably, however, in the same Answer 3 in Clarification Number 3, the Contracting Authority adopted a different interpretation of Regulation 220 with regards to Technical and Professional Ability requirements. In this case, the Contracting Authority directed that “if a tender bids for all Lots requiring past experience (Lots 1, 2, 3 and 5), that tenderer must provide a list of principal services amounting to €2,100,000 (being the highest amount requested in the individual Lots)”. Thus, the respective amounts stipulated for Lots 1, 2, 3 and 5 were not applied cumulatively, contrary to the approach adopted in respect of economic standing criteria.
- 6.7 The Contracting Authority’s decision to stipulate that that the “highest amount requested in the individual Lots” is enough to satisfy all Technical and Professional Ability criteria in respect of all lots where bidders are required to demonstrate past experience for which a prospective bidder chooses to bid, is in direct violation of Regulation 220 as the latter does not grant the Contracting Authority the right to set Technical and Professional Ability requirements by reference to groups of lots.
- 6.8 It is respectfully submitted that the part of Answer 3 in Clarification 3 stipulating that that the “highest amount requested in the individual Lots” is enough to satisfy all Technical and Professional Ability criteria in respect of all lots requiring bidders to demonstrate past experience which a prospective bidders chooses to bid, consequently amounts to a decision or clause which has been taken unlawfully by the Contracting Authority to which regulation 262 (1) (a) applies.
- 6.9 It is furthermore respectfully submitted that the Contracting Authority the part of Answer 3 in Clarification 3 stipulating that that the “highest amount requested in the individual Lots” is enough to satisfy all Technical and Professional Ability criteria in respect of all lots requiring bidders to demonstrate past experience which a prospective bidders chooses to bid conflicts

with the that part of the same Answer 3 in Clarification 3 wherein the Contracting Authority replied that “The Economic and Financial Standing criteria and the Technical and Professional Ability criteria must be cumulatively satisfied for² each individual Lot tendered for in terms of Regulation 220 of the Public Procurement Regulations (Subsidiary Legislation 601.03)”. These clearly conflicting parts of the same Answer 3 create an ambiguity to which Regulation 262 (1) (d) applies.

7. UNREALISTIC ESTIMATED PROCUREMENT VALUE

- 7.1 The estimated procurement value established in the tender document has remained fixed at **€22,032,151.20**. This notwithstanding that the Contracting Authority’s attention was drawn to the fact that the estimated procurement value did not make any provision whatsoever for any of the expenses indicated in paragraph 4.5 above or for bidders’ profit margin. Question 2 and Answer 2 of Clarification Number 3 refer.
- 7.2 Regulation 28 (1) of the PPR directs that the “calculation of the estimated value of a procurement procedure shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents”.
- 7.3 The said Regulation clearly requires contracting authorities to make reasonable efforts to provide a realistic estimated value of a procurement (“shall be based on the total amount payable”, net of vat, as estimated by the contracting authority”).
- 7.4 In Answer 2 in Clarification Number 3, the Contracting Authority confirms that in fact no provision was made in the estimated contract value for “materials, administrative charges etc” on the ground that “This is very difficult to estimate as it completely depends on the bidders’ operational services”.
- 7.5 While it is accepted that the expenses referred to in paragraph 4.5 above may in fact vary depending on the bidder’s operational setup and that different bidders may in fact opt for different profit margins, the Contracting Authority totally abdicated its responsibility of provide a realistic estimated value of a procurement when it opted to make no provision whatsoever in its estimate of all the expenses referred to in paragraph 4.5 or bidder’s profit. Regulation 28 requires contracting authorities to make an estimate of the true value of the whole contract value, not just of those parts which can be easily ascertained!
- 7.6 The Contracting Authority’s abdication is particularly relevant in view of the fact that the Tender is one to which Circular 04/2023 (now amended by Circular 01/2024) applies, on account that this tender centres around the provision of labour (nursing services) where it is acknowledged that particular attention needs to be given to avoid precarious conditions of employment for the selected contractor’s employees.

² Underlining of the Contracting Authority

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- 7.7 Moreover, the estimated procurement value is also relevant as, in practice, economic and financial standing criteria as well as technical and professional criteria are usually calculated in direct relation to the estimated contract value.
- 7.8 Additionally, at tender adjudicating stage, contracting authorities are enjoined to require economic operators to explain the price and costs proposed in their bid where tenders appear to be abnormally low in relation to the works, supplies or services (Regulation 243 PPR). It is a known fact that tenders are not, as a general rule, considered as abnormally low unless they are substantially less than the estimated contract value (by a margin of around 15%). Ironically, where it is not for this current application, it might be subsequently argued that the Applicant has acquiesced the estimated contract value is correct and no remedies will be available to it if other bidders submit offers which are equivalent to or even slightly higher than the estimated procurement value but which do not account for the expenses indicated in paragraph 4.5 above or for bidder's profit.
- 7.9 By making no provision whatsoever in the estimated contract value for any of the substantial expenses to be incurred by the selected bidder in terms of the Tender and for any element of profit, the Contracting has:-
- i) acted in violation of Regulation 28 of the PPR;
 - ii) subjected bidders to an increased risk of being exposed to precarious conditions of employment at the hands of unscrupulous bidders who may be tempted or misled by the inadequate estimated procurement value stated in the tender into submitting a lower offer to secure the contract and subsequently skimp on their obligations towards their employees and/or the Contracting Authority in terms of law or in terms of the procurement document
 - iii) is subjecting prospective bidders to a higher risk that the procurement procedure is cancelled as the Contracting Authority has expressly provided in the Instructions to Tenderers that it "reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value", thus not only imperilling unnecessarily bidders' time and expenses incurred in submitting a bid but also causing bidders' rates to become publicly known to their competitors who may take undue advantage of this information in a future procurement procedure for the same services.
- 7.10 As the tender document fails to provide a realistic estimated procurement value as required by Regulation 28 of the PPR, the call for competition is in violation of law (the Public Procurement Regulations – Subsidiary Legislation 601.03) and thus regulation 262 (1) (e) applies thereto.
- 7.11 For the avoidance of doubt, the foregoing considerations apply to both the overall estimated procurement value as well as to the estimated procurement value of each individual lot.
- 8. FINANCIAL BID FORM**
- 8.1 As can be evinced from Docs D1 to D6 attached, the financial bid form provided by the contracting Authority contains a number of hidden rows which are not immediately apparent

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to bidders but have to be located and unhidden by potential bidders themselves acting of their own initiative.

- 8.2 Once unhidden, the hidden rows (rows 9 to 18 and 78 to 86) direct bidders to provide rates for year 2022 (when the tender was issued in 2023) and a second set of rates for January to February 2026 at minimum rates higher than those stipulated for 2026 in rows 61 and 63 respectively.
- 8.3 This, by itself, is already highly irregular and violates the principle of transparency which is one of the pillars on which any procurement procedures should be based.
- 8.4 In the Corrigendum, the Contracting Authority *en passant* directs bidders to “fill in the hourly rate, expenses rate and non-statutory allowances rate for Year 2024, Year 2025 and Year 2026 only. Any hidden cells should be disregarded”.
- 8.5 Notwithstanding that the Contracting Authority thus acknowledged the existence of “any hidden cells” in the financial bid form, the Contracting Authority’s very casual approach of just directing bidders that “any hidden cells should be disregarded” is highly misleading and can have very serious consequences for prospective bidders, particularly as the financial bid form has been categorised as Note 3 where no rectification is allowed.
- 8.6 Indeed, the Corrigendum stipulates at the same time that bidders are requested to fill in the rates *inter alia* for Year 2026 (the financial bid form includes rows requesting bidders to quote for the whole of Year 2026 and additionally, separately for January to February 2026 at higher minimum rates) and at the same time requires bidders to disregard “hidden cells”, presumably including rows 78-86 in respect of January to February 2026.
- 8.7 It is respectfully submitted that bidders should never be in a precarious position of having to choose which parts of the financial bid form to fill in and which parts of it to disregard, let alone where conflicting instructions are given in this regard (provide rates for 2026, ignore hidden rows regarding 2026).
- 8.8 The confusion and ambiguities caused by the Contracting Authority in this respect are such that Regulation 262 (1) (b), (d) and (e) apply
- 8.9 For the avoidance of doubt, it is stated that the foregoing considerations apply to each of the lots as each sheet of the financial bid form relating to the different lots contains the same hidden rows / cells.

9. REQUESTS

- 9.1 Therefore, for the above-mentioned reasons and for such other reasons which may be brought during the proceedings, the Applicant respectfully requests this Honourable Bord, save for any other declaration, order or decree that it may deem fit and appropriate in the circumstances:

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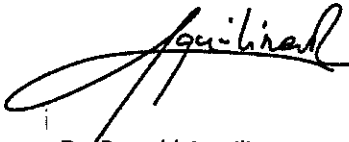
a. declares that the Tender, as drafted, including all clarifications thereto, the Corrigendum and the Financial Bid Form:

- (i) contains ambiguities and/or contradictions; and/or
- (ii) contains decisions including clauses taken unlawfully; and/or
- (iii) will violate or will likely violate a particular law.

b. consequently, orders the setting aside of the Tender and/or removal from the Tender by whatsoever means necessary of such ambiguities and/or contradictions hereinbefore indicated, including but not limited to the correction or cancellation of the Tender in terms of Regulation 262 of the PPR, inter alia paragraphs (a), (b), (d) and €;

c. to refund in full the deposit paid upon the filing of this application in terms of Regulation 262(2) of the PPR (vide copy of bank transfer acknowledgement attached hereto and marked as Document G.

Yours sincerely .



Dr. Ronald Aquilina

ANNEXES

Dok A - Tender Document CT2342/2023

Dok B –Financial Bid Form (excel sheet) as downloaded (with Hidden rows/cells)

Dok B1 – Hidden Financial Bid Form for Lot 1

Dok B2 – Hidden Financial Bid Form for Lot 2

Dok B3 – Hidden Financial Bid Form for Lot 3

Dok B4 – Hidden Financial Bid Form for Lot 4

Dok B5 – Hidden Financial Bid Form for Lot 5

Dok C – estimated procurement value workings (excel sheet)

Dok C1 – estimated procurement value workings (pdf)

Dok D –Financial Bid Form (excel sheet) with unhidden rows/cells

Dok D1 – Unhidden Financial Bid Form for Lot 1

Dok D2 – Unhidden Financial Bid Form for Lot 2

Dok D3 – Unhidden Financial Bid Form for Lot 3

Dok D4 – Unhidden Financial Bid Form for Lot 4

Dok D5 – Unhidden Financial Bid Form for Lot 5

Dok E –Corrigendum

Dok F – Clarification Note 3

Dok G– proof of payment



Priority Payment

The status for payment 28426TL01W0F is: Processed by bank

Debit account and beneficiary details

Pay from	HEALTH SERVICES GROUP LTD MT MTHBMTCA016-268021-001 EUR
Debit currency	EUR
Pay to	
Beneficiary name and address	Cashier Malta Government
Beneficiary bank	Malta CENTRAL BANK OF MALTA CASTILLE PLACE VALLETTA MALTA
IBAN	MT55MALT011000040001EURCMG5001H
SWIFT-BIC	MALMTMT

Payment details

Amount	EUR 50,000.00
Value date	Mon 26 Feb 2024
Charges	Share
Your reference	CT 2342/2023

Additional details

Information for the beneficiary	Health Services Group Limited CT 2342/2023 remedies in terms of reg 262 PPR
Payment advice	Added

Time of report: 26 Feb 2024 09:59:11 GMT