

IN THE PUBLIC CONTRACTS REVIEW BOARD

2nd March 2024



Re: 423 - Call for Remedies CT 2342/2023 - Tender for the Provision of Nursing Services for 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 Health Services Group Limited (the applicant) in terms of regulation 262 of the Public Procurement regulations (PPR) in relation to a number of specifications, the estimated procurement value and the financial bid form of the call for tenders in caption.

On the 5th of November 2023 a call for tenders for Provision of Nursing Services for the Ministry for Health was issued in 5 lots with a number of administrative requirements, terms of reference, an estimated procurement value for each lot, and the mandatory forms amongst other requirements;

The tender document in clause 1.3 section 1 – Instructions to tenderers provided that:

Estimated Procurement Value, based on market research, is that of:

€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.

Grand Total €22,032,151.20 excluding VAT

The Criteria for award is a Best Price Quality Ratio (BPQR) in accordance with the award criteria and the associated weighting as detailed an evaluation grid for every lot, forming part of the tender document.

During the clarification period the applicant submitted a request for clarification, to which the contracting authority replied.

The applicant felt aggrieved by the replies and filed this application, alleging breach of regulations 262. (1) (a)(b)(d)(e). The application revolves around three main parts of the tender documents, the technical and professional ability requirements, the estimated procurement value and the financial bid form;

CPSU humbly disagrees with the application and is filing the below submissions in reply, in the same order of the issues raised by the applicant:

Submissions:

On the Technical and Professional Ability Requirements:

1. The applicant links its arguments on this point to regulation 262.1(a) of the PPR which deals with unlawful decisions and clauses and 262.1(d) which deals with conflicting provisions within the tender;
2. Despite the lengthy arguments of the applicant, the applicant's reasoning can be rebutted with simple, yet clear arguments;
3. The applicant in this part of its application compares the technical and professional ability with the economic standing as if these were one and the same and as if the rules applicable to one criterion should be identically applicable to the other;
4. The appellant's argument is that since regulation 220 dealing with selection criteria when contracts are divided into lots state on economic standing and yearly turnover that *"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"*, the fact that regulation 222 does not include a similar proviso means that using the same technical and professional ability for more than one lot is illegal and contrary to the PPR;
5. The applicant basis this argument on the latin maxim *ubli lex voluit dixit, ubi non voluit non dixit*, a maxim used in traditional civil and criminal law proceedings which essentially means that where the law want it states, but where it does not want it does not state;
6. CPSU submits however that the law should be interpreted in a wider context in the sense that it should be read within the context of the Directive 2014/24/EU of the European Parliament and of the Council of the 26 February 2014 on Public Procurement (the Directive) and any interpretation should be made in line with the spirit of this particular law;
7. Regulation 220 of the PPR corresponds to Regulations 58(3) of the Directive, which states that *"Where a contract is divided into lots this Article 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."*
8. Article 58 of the Directive relates to selection criteria, and starts with the below:
 1. *Selection criteria may relate to:*
 - (a) *suitability to pursue the professional activity;*
 - (b) *economic and financial standing;*
 - (c) *technical and professional ability.*

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any

requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

9. The legislator chose to use the term 'may' throughout regulation 58 clearly demonstrating that the imposition of selection criteria is purely discretionary to contracting authorities;
10. In Steinicke and Vesterdorf's publication, Brussels Commentary on EU Public Procurement Law, it is stated that *"It is voluntary for contracting authorities to use selection criteria, but if contracting authorities wishes to use such criteria, only those criteria listed in article 58 can be applied. [...] If the contracting authority does not set up any requirements with regards to selection criteria, the contracting authority must accept all the participation of all types of tenderers in the procurement procedure and their possibility of ultimately being awarded the contract in question"*

"Article 58(1) contains selection criteria, which contracting authorities can use. It is voluntarily for contracting authorities to use selection criteria [...]".¹
11. CPSU thus argues that since the imposition of selection criteria is purely discretionary, then the contracting authority was within its right to accept the highest contractual value of previous experience in individual lots as a proof of the technical and professional ability of all the lots;
12. CPSU argues with due respect that the applicant is purposely confusing selection criteria and using the parameters and purpose of one selection criteria over another;
13. The selection criteria for economic and financial standing serves a different purpose to the selection criteria on technical and professional ability. The selection criteria for economic and financial standing seeks to ensure that the undertaking has adequate financial resources to remain in business during the contract period, to complete the contract and to meet any legal liability to the authority arising from performance.² It was for this reason that the contracting authority requested separate credit facilities for each lot or an aggregate amount. With regards to the yearly turnover, in order to act proportionately, giving room for more possible competitors, requested the proof of annual turnover of €1,500,000 which could be used for a group of lots (1,2 and 3);
14. The selection criteria relating to technical and professional ability on the other hand is intended to obtain a proof of expertise and experience in the particular area of operation. The PPR in Regulation 222, which is a reflection of article 58(4) of the Directive states that:

1 Steinicke/Vesterdorf, Brussels Commentary on EU Public Procurement Law, C.H. Beck. Hart. Namos 2018, p.648,649

2 Ibid p.651

222.(1) *As to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.*

(2) Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

15. If a particular bidder possesses sufficient level of expertise as requested by the tender document for the lot requiring the highest level of expertise and the highest level of contractual value for previous experience/contracts, how can this same contractor not have the level of expertise for the lots requesting a lesser amount?
16. Moreover, and in addition to the argument that the choice whether or not to impose selection criteria is at law purely discretionary to contracting authorities, the directive in article 58(1) and the regulations in regulation 217(2) impose on contracting authorities once they choose to impose selection criteria, the obligation that these criteria are proportionate to the subject matter of the contract;
17. In the Brussels Commentary on EU Public Procurement Law it is also states that: *Administrative burden in procurement procedures can be considerably reduced by making sure that any procedural and substantial requirement are proportionate to the subject matter of the contract. Thus, requirements for participation in procurement procedures must be limited to what is strictly necessary to ensure that a candidate or tenderer is able to perform the contract fully and satisfactorily. It is essential that contracting authorities observe the principle of proportionality in order to ensure that the access to public contracts are not limited, but also to avoid excessive administrative burdens and unjustified risks of exclusions for participants;*³
18. What has thus been established from a careful reading of the relevant legal provisions and the literature cited and referred to is that, the imposition of selection criteria (1) is discretionary to contracting authorities as to choose whether or not to impose (2) should be limited to what is strictly necessary in order to ensure that access to public contracts is not limited;
19. CPSU submits that it has complied with all these requirements and its decisions and level of selection criteria required is well within these parameters;
20. By implying that the selection criteria for technical and professional ability should be that of €5,200,000 (being the aggregate of the value stipulated for all the individual Lots 1, 2, 3 and 5), that the applicant is attempting to limit competition;
21. In CPSU's humble view, this should never be the spirit of a remedy sought in terms of regulation 262 of the PPR. This Honourable Board has also recently acknowledged that Public Procurement Law matters should be interpreted within

³ Steinicke/Vestendorf (n1) p. 650

the spirit and the general principles of public procurement legislation and that the spirit of applications in terms of regulation 262 of the PPR should never be with the intention of limiting competition. In a similar application decided on the 26th of February 2024 in fact this Honourable Board stated that *"From a purely public procurement point of view, as is the remit of this Board, the remedy being sought by the appellant runs somewhat contrary to the true spirit of a 'Remedies before closing date of call for competition'."*⁴

22. Moreover and in addition to the above, CPSU also rebuts the claim that the reply to question number 3 or clarification 3 by the contracting authority and the Department of Contracts (DOC) was ambiguous and in breach of regulation 262(1)(d);
23. A normal reading of the reply to question number 3 of clarification number 3 certainly does not leave any shred of doubt on the clarity of the reply;
24. The applicant bases this argument around the use of word cumulatively, which might be subject to interpretation if read on its own, however CPSU and the DOC did not stop there. They explained in detail what they were expecting from bidders when it comes to the credit facility, the average yearly turnover and the technical and professional ability. From a reading of the below explanation it is amply clear that the word cumulative meant that economic operators had to submit the requested criteria for each and every lot, but did not exclude that one criteria cannot be used for a different lot. Where the contracting authority requested a separate and different requirement for each and every lot (the credit facility) it clearly indicated that it wanted 3 credit facilities in the respective amounts or an aggregate;

Tenderers must provide the respective minimum credit facility required for each Lot tendered for. Therefore, if a tenderer bids for Lots 1, 2 and 3, the tenderer must provide three (3) credit facilities of the respective amounts or one (1) credit facility of the aggregate amount (i.e., €550,000 + €700,000 + €400,000, as applicable).

Tenderers submitting an offer for one or more of the Lots 1, 2 and 3 must have an average yearly turnover during the past three years (being 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.

There is no condition that the amount of the average yearly turnover must be higher than that of €1,500,000 if a tenderer bids for more than one Lot (Lots 1, 2 and 3), that is, if a tenderer bids for all of the three Lots, an average yearly turnover of €1,500,000 shall suffice to satisfy the criterion for all three Lots.

Finally, 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).

25. CPSU submits that the explanation does not leave any room for interpretation, let alone ambiguities;

26. For the above stated reasons this application, particularly where linked to the grievances and arguments to which this part of the reply is addressed, should be rejected.

On the Estimated Procurement Value

27. The applicant argues that the estimated procurement value is unrealistic and does not cater for the 'other expenses and profit margin. In attempt to substantiate its argument applicant refers to CPSU and DOC's reply to question number 2 of clarification number 3;

28. The applicant links this argument to regulation 262(1)(e) which empowers this Honourable board "*to cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued.*";

29. This argument is made in relation to the fact that this tender related to the provision of labour, and thus the applicant argues that this might be a link to precarious work conditions;

30. CPSU argues that the applicant's claim is highly speculative and can never be directly linked to a most likely breach of the law. The possibility of a violation of some form of legislation exists always and it is then the role of the contracting authority at a contract execution stage to oversee that the contract is being executed within the parameters of the law, however the tender document does not contain any element even in its estimated procurement value which proves a most likely violation of the law as regulations 262(1)(e) requests;

31. CPSU and DOC in determining the estimated procurement value considered all the major expenses in the contract, being the payment of the workforce for to the requested number of hours in the tender and all the non-statutory allowances;

32. The tender document clearly indicates that the estimated procurement value is purely indicative. Clause 1.3 of the instructions to tenderers states that:

The purpose of this value shall be the guidance of prospective bidders when submitting their offer and is not to be considered as a binding capping price.

Therefore, the published Estimated Procurement Value is not restrictive and final on the Contracting Authority. Economic Operators are free to submit financial offers above or below the Estimated Procurement Value.

33. The applicant also argues that with the estimated procurement value as published, tenderers are more likely to be determined as potentially abnormally low, because if there is an assumption which should be made is that the evaluation committee will be evaluating the offers in line with all the rules and regulations in force and one cannot assume that the evaluation committee will not be following the rules relating to abnormally low tender;

34. Moreover, and without prejudice to the above, in scenario as applicant is envisaging, the applicant still has other available remedies. In case 1775 regarding tender number CT2234/2021 which was a Tender for the Provision of Security Services for the Ministry of Health, and which decision is now res judicata, despite the fact that this Honourable Board still determined the offer of the recommended bidder as potentially abnormally low and directed the evaluation committee to ask for clarifications, despite the fact that the service was offered at a price very close to the estimated procurement value;
35. Moreover, and with reference to the argument that the applicant may be prejudiced if the tender is cancelled, CPSU submits that this risk exists in all tender procedures and is part of the risk every bidder takes when submitting an offer;
36. For the above stated reasons this application, particularly were linked to the grievances and arguments to which this part of the reply is addressed, should be rejected.

On the Financial Bid Form

37. In this part of its application the applicant argues that the fact that the financial bid form contains a number of hidden cells, breaches the principle of transparency, causes ambiguity and breaches regulation 262(1)(b)(d) and (e);
38. CPSU submits that this grievance is not only unfounded but also frivolous;
39. This is being submitted because the financial bid form and the corrigendum were more than clear on this matter;
40. The Corrigendum to the tender document which was issued on the 24th of February 2024 clearly stated that:

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.

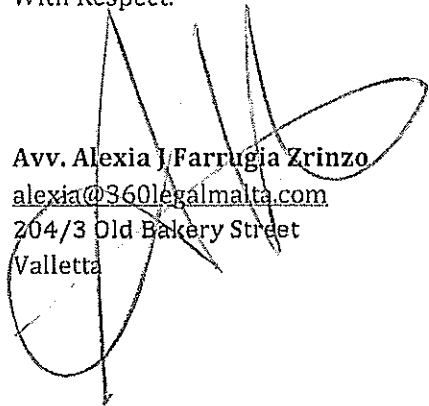
41. The applicant makes the extended argument that bidders might be confused because they were instructed to fill in the rates for the year 2026 and there were hidden cells on January and February of the year 2026. There were however visible cells for the whole of year 2026 which was clearly the part which should be filled in. The hidden cells, since hidden should have been disregarded since the corrigendum states that any hidden cells should be disregarded;
42. For the above stated reasons this application, particularly were linked to the grievances and arguments to which this part of the reply is addressed, should be rejected

For the above reasons and submissions which will be further explained and evidenced during the sitting, CPSU humbly requests that the application ought to be rejected, the tender document confirmed as published and the deposit forfeited.


CPSU reserves the right to make additional submissions, orally or in writing and to present evidence to sustain its position.

CPSU will not object to the refund of the deposit if the application is withdrawn before the date set for hearing.

With Respect.



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