

PUBLIC CONTRACTS REVIEW BOARD

Case 1665 – CT 2162/2021– Tender for the Supply of Newborn Screening for CHT and PKU Equipment on Loan

27th December 2021

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for and on behalf of Cherubino Ltd, (hereinafter referred to as the appellant) filed on the 24th September 2021;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo, Dr Leon Camilleri and Dr Kristina Busuttil on behalf of Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 4th October 2021;

Having heard and evaluated the testimony of the witness Mr Ian Brincat (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for the Central Procurement and Supplies Unit;

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

Having noted and evaluated the minutes of the Board sitting of the 14th December 2021 hereunder-reproduced.

Minutes

Case 1665–CT2162/2021. Tender for the Supply of Newborn Screening for CHT and PKU with Equipment on Loan

The tender was published on the 28th May 2021 and the closing date was the 1st July 2021. The value of the tender excluding VAT was € 410,792. The tender was awarded on the 14th September 2021.

On the 24th September 2021 Cherubino Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that the offer was technically not compliant.

A deposit of € 2,054 was paid.

There were two (2) bidders and three (3) bids

On 14th December 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Cherubino Ltd

Dr Matthew Paris Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Mr Charles Borg	Chairperson Evaluation Committee
Mr Ian Brincat	Member Evaluation Committee
Ms Rita Zammit	Representative
Dr Gerald Buhagiar	Representative
Ms Claudia Bartolo	Representative

Preferred Bidder – TechnolineLtd

Mr Ivan Vassallo	Representative
Mr Chris Rizzo	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations.

Dr Matthew Paris Legal Representative for Cherubino Ltd said that both the letter of appeal and the letter of reply were very clear as to the basis of this appeal. Appellant was objecting to being disqualified on Section 3.3 to 3.5 of the tender as the Contracting Authority claims that the instrument offered had to have separate parts. The Evaluation Committee is bound to the tender specifications and is limited by those specifications. Nowhere does the tender state that the offered product has to be separate. The Authority confirms that the bid was compliant.

Dr Camilleri Legal Representative for the Central Procurement and Supplies Unit said that Article 3.1 in the tender makes it clear that the equipment has to be separate as the constituent devices are referred to separately in the wording of the tender.

Mr Ian Brincat (313571M) called as a witness by the Contracting Authority stated on oath that he is a Medical Laboratory Scientist and was the technical expert on the Evaluation Committee and wrote the technical specifications of the tender. The tender specifications clearly explain that all clauses are separate and therefore require separate devices. He explained that test are carried out concurrently and hence flexibility is required in the equipment and that failure to obtain concurrent results can lead to medical problems later on in a baby's life. Different parts of the equipment need to be used at different times and in different temperatures so separate units are needed.

In reply to questions from Dr Paris witness confirmed that he was involved in the drafting of the tender and in the evaluation. Witness agreed that nowhere in the tender does it state that the equipment has to be separate, or that the word separate is used, but said that the use of the article 'a' is equivalent to asking for separate parts. It is not stated in the tender, continued the witness, that a combined product will be excluded and agreed that Appellants offer meets the tender requirements in Section 3.1 to 3.3.

Conclusion of testimony.

Dr Paris said the Mr Brincat in his testimony expressed what he wished the product should be; however between the wish and the tender document there is a difference and the testimony was not reflected in the tender. The tender does not request separate parts and the article 'a' does not equate to a separate item. Appellant fully met the tender requirements as nowhere does it state that if the equipment is not separate then disqualification follows. New criteria are not allowed in the evaluation stage and the Public Procurement Regulations demand clarity, with the benefit of the doubt, if any, going to the bidder.

Both the Court of Appeal and the CJEU (Case 278/14) confirm that the wording in a tender is to be adhered to and one cannot exclude on the basis of what was expected but on what was requested. In any case the product offered can be used separately and there were no doubts therefore or the need for precontractual remedies to be sought. The decision of the Authority should be reversed.

Dr Camilleri said that if the tender was not clear there were remedies available or even a clarification sought. The tender clearly asked for separate parts in the use of the word 'all' and the listing of the separate devices. The article 'a' means one product and the provision of a list was clear as to what was required. Reference was made to Case 1247 regarding discretion allowed on the product offered. The evaluators should have discretion in their choice and their decision should stand.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 14th December 2021.

Having noted the objection filed by Cherubino Ltd (hereinafter referred to as the Appellant) on 24th September 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2162/2021 listed as case No. 1665 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Matthew Paris

Appearing for the Contracting Authority: Dr Leon Camilleri

Whereby, the Appellant contends that:

- a) Whereas, the Appellant submitted multiple bids for this procedure, together with another company. Whereas, by means of a letter dated 14th September 2021, Appellants where informed that that their offer was being rejected *"With reference to Section 3, Specifications clause 3.3.3 and 3.3.5*

plate shaker and plate incubator are being requested separately. Bidder is offering a combined shaker/incubator. This is very limiting and hinders the testing process”

- b) The Appellant company confirms that it is fully compliant to all technical requirements of the tender document, thus and thereby there are no reasons whatsoever for the rejection of the tender submitted by the Appellant company;

Section 3 of the special specifications, listed the equipment specifications, and in clear terms in 3.3 it highlighted that the

“Equipment must include:

3.3.3. A microtitre plate shaker with adjustable speed ranging from 200 rpm to 1000 rpm.

3.3.5. A plate incubator capable of maintaining a constant incubation temperature of 37°C”

The appellant company confirms that its submission adheres fully to provision 3.3. Without prejudice to the fact that the contracting authority has assumed that the equipment is combined, the appellant company rebuts the argument that section 3 requested separate as opposed to combined equipment;

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 4th October 2021 and its verbal submission during the virtual hearing held on 14th December 2021, in that:

a) **On the Clarity of the Technical Specification –**

- i. Reference is being made to section 3 of the technical specifications which gives numerous indications that the contracting authority is requesting separate equipment.
- ii. Primarily section 3.1 provides "that the offer must include ALL equipment", with a highlight on the word 'all' indicating multiple equipment. Had the Contracting Authority wanted to request otherwise, it would have used the term 'functions' rather than the term 'equipment'. The fact that the Contracting Authority clearly stated that it was requesting all equipment and provided a non-exhaustive list of what this equipment shall be, clearly indicates that it was requesting separate equipment.
- iii. Secondly in clause 3.3, the fact that the specifications are dealing with 'a device', 'a plate reader', 'a plate incubator' and not about a plate reading function or a plate incubator function clearly indicates that the Contracting Authority was seeking to procure separate equipment.

b) **On the Pre-Contractual Remedies Available**

- i. Furthermore, and without prejudice to the previous submissions, the CPSU submits that the tender document and the technical specifications were publicly available for the consideration of all interested parties, including the appellant, who had the opportunity to

request a clarification in terms of regulation 38 of the Public Procurement Regulations. If following a clarification, or even, if no such technical clarification is requested, the appellant (at that stage a prospective tenderer) felt that any technical specification was discriminatory or any technical specification was ambiguous, he had the chance to submit a reasoned application for a remedy before the closing date of a call for competition, in terms of Regulation 262 of the Public Procurement Regulations. The appellant did not file any reasoned application for a remedy, consequently it has accepted all the specifications of the tender document.

c) *On the Discretion of the Evaluation Board*

- i. Without prejudice to the submissions presented above, the CPSU also submits that the Evaluation Board also has a certain discretion in awarding the tender and compliance should not be limited to compliance on paper;

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 witness duly summoned, will consider Appellant's grievances, as follows:

a) The Board notes that:

- i. The only point of contention in this specific case is the interpretation of article 3 Section 3 of the Tender Dossier which lists, in sub-article 3.3, a number of devices / functions which the equipment must include.
 - ii. Even though sub-articles 3.1 and 3.2 make reference to the wording 'all equipment', nowhere in the tender dossier it is mentioned that separate equipment is to be provided for each different function as listed in sub-article 3.3.
 - iii. The Appellant submitted in his offer a device which included a combined microtitre plate shaker (reference to sub-article 3.3.3) and plate incubator (reference to sub-article 3.3.5) and was henceforth deemed to be non-compliant.
- b) The Board opines that the Evaluation Committee did not observe the principle of Self-Limitation when it deemed the Appellant's offer as non-technically compliant when it adjudged the equipment of the Appellant company on issues not included within the Tender Dossier. Nowhere in the Tender Dossier it is mentioned that equipment which serves a '2 in 1' function would not be deemed acceptable.

Therefore, the Board upholds Appellant's grievances.

In conclusion this Board;

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the Letter of Acceptance dated 14th September 2021 sent to "Technoline Ltd";
- c) To cancel all the Letters of Rejection dated 14th September 2021;
- d) To order the contracting authority to re-evaluate the bid received from Cherubino Ltd in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member