PUBLIC CONTRACTS REVIEW BOARD

Case 1822 – CT2037/2022 – Supplies - Tender for the Supply of an Automated System for Antibiotic Sensitivity Testing of Bacteria with Equipment on Loan

28th December 2022

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of Dalli Paris Advocates acting for and on behalf of Cherubino Limited, (hereinafter referred to as the appellant) filed on the 7th October 2022;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 14th October 2022;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as DoC) filed on the 14th October 2022;

Having heard and evaluated the testimony of the witness Ms Julie Haider (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Cherubino Limited;

Having heard and evaluated the testimony of the witness Ms Sonia Debattista (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Cherubino Limited;

Having heard and evaluated the testimony of the witness Ms Jasmina Trajkovic (Development Manager in Microbiology) as summoned by Dr Matthew Paris acting for Cherubino Limited;

Having heard and evaluated the testimony of the witness Dr Claire Marantidis Cordina (Consultant Microbiologist at Mater Desi Hospital) 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 representatives of the parties;

Having noted and evaluated the minutes of the Board sittings of the 1st December 2022 and 14th December 2022 hereunder-reproduced.

Minutes

Case 1822– CT 2037/2022 – Tender for the Supply of an Automated System for Antibiotic Sensitivity Testing of Bacteria with Equipment on Loan

The tender was issued on the 18th February 2022 and the closing date was the 5th April 2022. The estimated value of the tender excluding VAT, was € 2,314,486.

On the 7th October 2022 Cherubino Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 11,572 was paid.

There were six (6) bids.

On the 1st December 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef 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
Dr Francis Cherubino	Representative
Ms Jasmina Trajkovic	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Maria Camilleri	Chairperson Evaluation Committee
Mr Mario Farrugia	Secretary Evaluation Committee
Mr Robert Cassar	member Evaluation Committee

Director of Contracts

Dr Mark Anthony Debono	Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Matthew Paris Legal Representative for Cherubino Ltd referred to the exchange of correspondence between Appellant and the CPSU. On the 29th September 2022 it sent a letter asking for information on the brand name and model. Reminders were sent to the Department of Contracts (DoC) on the 3rd and 4th October and on this latter date the DoC replied mentioning what information Appellant was entitled to. The reply covered only the model but Appellant pointed out that there are two items requested in the tender but despite further e-mails no reply was forthcoming. Appellant still requires the brand and model of the kits as these are vital to the tender.

Dr Leon Camilleri Legal Representative for the CPSU said that information has been provided and if the PCRB so decrees further information will be given.

Dr Paris said that details of model name and number was requested as he cannot make the case without that information. Since the 4th October he has been waiting for this information and he is now requesting a deferment of the case until this information is provided.

Dr Camilleri said that Appellant was not contesting compliance but simply trying to prove that his product meets the specifications.

After a short recess the Chairman stated that the Board meets this preliminary request by Dr Paris on behalf of Cherubino Ltd that since information on the brand and model number has already been given to him on the equipment on loan similarly the same information on the brand name and model

number on the various kits should be given as these are a substantial part of this tender. This information must be provided by Monday 5th December at 12.00noon. This appeal is deferred to Wednesday 14th December at 11.00am.

End of Minutes

SECOND HEARING

On the 14th December 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef as members convened a public hearing to consider further this appeal.

The attendance for this public hearing was as follows:

Appellant – Cherubino Ltd

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative
Ms Janet Pace	Representative
Ms Jasmina Trajkovic	Representative (online)
Dr Filiberto Zavarese	Representative (online)

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Maria Camilleri	Chairperson Evaluation Committee
Mr Mario Farrugia	Secretary Evaluation Committee
Mr Robert Cassar	Member Evaluation Committee
Ms Julie Haider	Member Evaluation Committee
Ms Sonia Debattista	Member Evaluation Committee
Dr Claire Marantidis Cordina	Representative

Preferred Bidder – Evolve Ltd

Mr Mark Mizzi	Representative

Director of Contracts

Dr Mark Anthony Debono	Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and requested Appellant to proceed with its submissions.

Dr Paris prior to resuming submissions requested that the late submissions in writing by the preferred bidder should not be considered. He then requested the testimony of witnesses.

Ms Julie Haider (231782M) called as a witness by Appellant testified on oath that she is the Head of the Biological Laboratory Department at Mater Dei Hospital and was one of the three evaluators. Referred to pages 18 to 21 (Section 3 specifications) witness was asked to detail how the Appellant

and preferred bidder had met the tender requirements. She was assisted by Ms Sonia Debattista (182177M) also on oath.

According to the witness:

- On 1.1 A:

  Cherubino Ltd did not meet all the requested combinations but offered alternative test for Ampicillin
  Evolve offered tests on option A and satisfied all requirements

- On 1.2 A:

  Both Cherubino and Evolve satisfied this requirement

- On 2.1:

  Cherubino did not satisfy the requirement on Ampicillin but offered alternative method

- On 2.2:

  Cherubino satisfied fully
  Evolve had the test on inducible clindamycin resistance missing but offered alternative through a ready prepared Ager plate test plus antibodies discs

- On 2.3:

  Cherubino satisfied fully and Evolve completely compliant.

At this stage there was a discussion regarding how much access to information on the preferred bidders submissions could be made available to the Appellant. Dr Paris maintained that his appeal letter makes it clear that he needs to refer to the preferred bidder's offer. He also referred to the letter from the DoC regarding what information could be revealed.

Dr Camilleri pointed out that the grievance of Appellant is solely on its bid and that should be the only grievance considered and not whether the preferred bidder's offer was compliant.

The Chairman ordered a short recess to enable the Board to consider and decide on the points raised.

On resumption the Chairman directed that Dr Debono on behalf of the DoC be asked to explain in the light of his letter of 3rd October 2022 to Dr Paris, particularly para 4 (d) what information could be provided.

Dr Debono said that the information that could be made available was covered by Regulation 242 (2) but was certainly not including to the entire technical offer form.

The Chairman then stated that the Board directs that Dr Paris can ask a direct question to the Evaluation Committee (TEC) to elicit information on a particular criterion only.

Ms Haider, resuming her testimony, was referred to Item 2.2 and asked how Evolve had met this requirement and stated that there was an alternative offered in 2.2.6 and 2.2.7. Similarly in regard to Item 2.3 the offer was substantiated in 3.3.6 and 3.3.7. In the literature submitted in the Cherubino offer there were many more limitations but the TEC only listed those that applied. The established tests give results on which one cannot depend resulting in extra 90 test a day and thousands of Euro

in costs and extending reporting time. The tender requires an automated system with the need to perform only one extra manual test. The limitations in the offer by Evolve do not affect the antibiotics asked for in the tender and the limitations in Table 3 are not clinically relevant. The panels issued cover a broad spectrum of bacteria but they cannot cover all possibilities. Referred to item 1.5 on page 22 of the tender witness confirmed that only one alternative test can be managed. Referred to panel 1.2A witness said that if the antibiotic Aztreonam was not included it is because it is extremely rare and tested if the organism is not existent. The tender guidelines follow the European directives and there was no need to actually write certain details in the tender. In the case of Erythromycin mentioned in Item 2.2 there are no limitations whilst the items in Table 3 are not clinically relevant as the Authority would not be using that antibiotic for that organism. Where in the tender it does not state what is included or excluded it is because the European guidelines are available and have to be followed. As to the reference to calibration in special specifications 2.3 (page 22) this refers to the resistance to infections.

In reply to questions from Dr Camilleri witness replied that she was an Executive Allied Health Practitioner with 40 years' experience and Ms Debattista was a Laboratory practitioner with some 20 years' experience. She confirmed that Cherubino's technical offer had more limitations than indicated in the technical offer form. The tender required that one sample tests for several antibiotics and they were ready to accept one extra test but Cherubino amounted on average to over 100 extra tests a day. Those omitted are included in list 1.1 according to the literature supplied by them. The Authority only listed in the tender those that affected a broad spectrum of organisms as it is not possible to issue a tender for every possible organism. The offer by Cherubino offered more than one alternative test whilst Evolve involved only one alternative test according to the lists in the tender.

In reply to a further question from Dr Paris witness replied what is the point of carrying out an alternative test which takes 15 minutes but gives you irrelevant results?

Ms Jasmina Trajkovic (CO5960747923) called to testify online by the Appellant stated on oath that she is a professional Development Manager in microbiology and the Company she works for has been supplying Cherubino Ltd with their products for over 60 years. She was familiar with the tender and stated that some of the combinations offered did not meet all the requirements – there is no one single combination which does. She was aware that the panels would be issued for use in Malta and confirmed that what was offered by her firm can perform all the tests requested. In certain cases the product cannot reach 100% of requirements; in such instances alternative methods were proposed. There are detailed various alternatives to the tender requirements as to what is clinically relevant in technical medical publications. [In a screenshare witness indicated the different offers and the clinically offered alternatives according to scientific publications (Documents exhibited to be circulated)]

In reply to question put by Dr Camilleri witness said that she is aware that the according to the tender only one extra alternative test was to be allowed. Under reference 423025 VTec2 ASTN 376 were listed the alternative tests on certain antibiotics which came under option 1.1A.

Dr Claire Marantidis Cordina (269994M) called as a witness by the Contracting Authority testified on oath that she is a Consultant Microbiologist and has been the leading Consultant in the Microbiology Department at Mater Dei Hospital for several years. She was consulted during the drafting of the tender. Referring to a list of indications in the tender, witness said, it covers the list of antibiotics for treating groups of organisms and to treat certain patients and certain resistance to organisms. The

panels are used to find if bacteria is sensitive or resistant and if it can be administered – this covers a list of microbes not just one. According to the witness, not clinically relevant means that antibiotics will never be used to treat the particular infection mentioned – in her experience both locally and abroad she is not aware that such antibiotics are used in other conditions. Cefepime is used in other microbes that are not back hold areas.

This concluded the testimonies.

Dr Paris said it was essential to ask what the tender required. Page 18 Section 3 Specifications quoted Antibiotic Sensitivity testing of Bacteria as that requirement and what it included. According to the testimonies heard Cherubino's offer meets all the requirements of testing – if there are any shortcomings then Articles 1.5 states that if the test is not included in the AST panels an alternative testing method is accepted; despite this Article 1.5 has been used to disqualify Cherubino. Appellant submitted exactly what was required – what it offered is what was requested and this has not been contested. Article 1.5 does not deal with results but with one test and one cannot judge on items not in the tender to exclude. Self-limitation does not allow decisions on items not stated in the first instance. Cherubino did not claim that Evolve are not compliant but if there are shortcomings in its bid they are similar to the ones in Appellant's offer. There is no limitation as claimed and there is no reference to limitations in the tender. In the Enteral Feeding Pumps case it was accepted that limitation clauses are always there in medical equipment tenders in which case alternative tests are used. All that one is suggesting is that alternative testing is used to ascertain 100% result. The limitations in Cherubino's offer are similar to those in the Evolve bid and cannot be used to exclude any party. The persons who evaluated the tender were end-users and hence prejudiced. They first decide to exclude as not pleased with the product in use and then found the reason on which to exclude. So the solution is either to cancel the tender or exclude both parties and start again. Article 2.3 is the only reference to European standards and there is no other reference to limitation and therefore this point is not relevant. The panels offered give the tests required and where none were available alternative testing was offered.

Dr Camilleri stated that Cherubino's literature does not mention rare cases but orders performance in five different tests not exceptional or rare but ordered to perform. However it is expecting medical people to rely on a product with the need to perform tests on four antibiotics published in the same table thereby attempting to change the rules by suggesting four alternative tests when only one was permitted. It is obvious that the medical product offered cannot be relied upon since the literature suggests otherwise. The Evolve offer is not contested as no points have been raised against their offer. In Appellant's objection letter there is no grievance on Evolve's offer. If one focussed on the compliance of Cherubino's product it is clear from the testimony of expert medical witnesses that the offer was checked against the tender document and if it was found that four antibiotics require alternative tests, when only one was allowed, how can one not exclude such bid.

Although the Evolve offer was not contested, continued Dr Camilleri, one must mention that, as Dr Cordina explained in her testimony, not all the same antibiotics are in all the lists as there are different needs. This was confirmed by the TEC that when the literature was checked with what was requested it was clear that for each item one alternative test was required - quite contrary to Cherubino's offer. Self-limitation and equal treatment were correctly observed and what is important is that the best product is chosen in the interest of patients and end-users.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 1st December 2022 and 14th December 2022.

Having noted the objection filed by Cherubino Limited (hereinafter referred to as the Appellant) on 7th October 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2037/2022 listed as case No. 1822 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Matthew Paris
Appearing for the Contracting Authority:	Dr Leon Camilleri & Dr Alexia J Farrugia Zrinzo
Appearing for the DoC:	Dr Mark Anthony Debono

Whereby, the Appellant contends that:

a) Preliminary -

Reference is being made to a request made to the DOC, wherein information about the brand/model/code number of the product on offer [antibiotic sensitivity testing kit] has been made. In view of the fact that this information has not been supplied by the DOC, and this in manifest breach of article 40 of the PPR, Cherubino is respectfully requesting the board to order DOC to issue the requested information and to re-issue the rejection letter and this to ensure that the legal principle of equality of arms is upheld. Without prejudice to the above, Cherubino is hereby reserving its rights to the fullest extent possible to produce additional submissions, documentation and evidence to the Public Contracts Review Board, in the eventuality that the PCRB rejects it's request for the re-issuance of the rejection letter.

b) Appellant's bid is fully compliant -

Cherubino rebuts the rejection by the DOC, on the following counts:

i) Clause 1.5 has been installed as a measure to widen competition and not as a measure to restrict competition. In view of the fact that within the market there are multiple companies and not all companies offer AST panels in the form requested by the

contracting authority, it developed clause 1.5 through which tenderers may submit AST panels together with one additional test to satisfy the mandatory requirement;

ii) The product on offer by Cherubino is the incumbent product, which has been used by the clinical users for a considerable amount of years, and which they can attest that the product on offer is perfectly compliant with the tender requirements;

iii) It is clinically impossible to have AST panels without any scientific limitations whatsoever, wherein the product on offer by Cherubino and any other third-party product in the market all have similar limitations. Thus, the offer of Cherubino has to be reintegrated within the evaluation and for which the same considerations are applied and employed to the products as offered by evolve (sic;

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 14th October 2022 and its verbal submission during the hearing held on 1st December 2022 and 14th December 2022, in that:

a) On the First Grievance - Preliminary

On the preliminary plea CPSU submits that, the Department of Contracts did request the make and model from CPSU and the same information was forwarded to the Objector. In light of the above, the preliminary plea was unnecessary and should therefore be rejected unless withdrawn voluntarily by the objector. Moreover, the Department of Contract and CPSU never published the make/model /brand of the recommended bidder in the rejection letters but provide the same information upon request by any of the participating bidders. This case should not be an exception and there is no valid reason at law for the re publication of the rejection letter as the disclosure of the brand/make/model are not a requirement under the Public Procurement Regulations (PPR).

b) On the Second Grievance - On the Compliance of the Objector's bid

i. First Count - The objector in this part of the objection letter submits that clause 1.5 of the technical specifications was installed as a measure to widen competition. Whilst CPSU always makes sure that competition is as wide as possible, the Contracting Authority always seeks to purchase the best product for its needs, seeking maximum efficiency. These specification create a limitation on the prospective bidders, which are required to offer products compliant to the published specifications. Clause 1.5 of the Technical Specifications provides that: *"If a test is not included in the AST panels as indicated in Tables 1 and 2, and an alternative testing method is offered, only one test with an alternative testing method will be accepted."* The above quoted specification clearly stipulates that only one test with alternative testing method will be accepted, and as will be explained by the evaluation committee during the sitting, more than one alternative tests are required by the system offered by the objector in his offer number TID 171767 and therefore the product could never be compliant to the above quoted technical specification 1.5.

ii. On the Second Count - In this second count the objector submits that the fact that the objector is the incumbent contractor for this system, and is therefore compliant to the specifications as published. CPSU submits that this argument does not hold water, since every procurement process is separate from past processes for the same product and is to be determined and decided on its own merits. Moreover and strictly without prejudice to the submissions above to which it holds firm, Clause 1.5 of the Technical specifications was not part of the tender conditions in the previous tender and was introduced in the present tender document to increase system efficiency and reduce manual alternative testing. After all the procurement is for an automated system and hence manual testing should be decreased as much as possible.

iii. On the Third Count - In its third count the objector submits that it is impossible to have such a system without any scientific limitations and all products on the market have similar limitations. In reply to this argument, CPSU submits that it never requested a system without any scientific limitations, so much so that in clause 1.5 of the technical specifications it gave an allowance for one alternative test. Moreover CPSU, as will be better explained by the evaluation committee during the sitting, gave an allowance from an alternative test from the range of antibiotics listed in table 1 and 2. Other systems on offer, such as the recommended system, do require alternative tests for more than one antibiotic, but not more than one from the range listed in table 1 and 2. It is therefore being submitted that unlike what is claimed by the objector, not all systems are the same, so much so that a recommendation for award was made for a compliant system. In addition to the submissions above and without prejudice to these same, it is being submitted in reply to the assertion of the objector that 'It is clinically impossible to have AST panels without scientific limitations whatsoever', that if the objector was not in agreement with the specifications as published, particularly clause 1.5 of the technical specifications, it should have resorted to a remedy before closing time in terms of regulation 262 of the PPR, something which the objector did not do. In a recent decision, number 1796, this Honourable Board states that: *"It is a well-established principle in public procurement, that evaluation committees are to observe the principle of self-limitation and their evaluation is to follow the specifications of what is listed in the tender document. If appellants are not in agreement with how the technical specification have been listed and / or formulated, different remedies are available as per the Public Procurement Regulations ("PPR") (reference to regulation 262)."* These same principles and argumentation applies for the present case.

This Board also noted the DoC's Reasoned Letter of Reply filed on 14th October 2022 and its verbal submission during the hearing held on 1st December 2022 and 14th December 2022, in that:

a) Preliminary - In response to the preliminary grievance of the appellant, the DoC respectfully disagrees with the submission of the appellant that there had been default in so far the information requested to the appellant which consisted in the brand and model and had been provided via email dated 4th October in accordance with the standard operating procedure. Further information, being of a commercially sensitive nature, and which is requested by the appellant in terms of regulation 40 of the Public Procurement Regulations, 2016 would require to be addressed to the Public Contracts Review Board on the basis of the doctrine and principles established in Varec SA vs Etat Belgie: *"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"*

b) Cherubino's bid fully compliant - The DoC respectfully disagrees with the submission of the appellant in this heading whereby it states *"Cherubino rebutts (sic) the rejection by the DoC"* since the evaluation of the technical compliance of tender offers is an exercise vested exclusively within the Tender Evaluation Committee and is carried out in accordance with the procedure laid down in rule 16 of the General Rules Governing Tenders and regulation 17 of the Public Procurement Regulations, 2016. Without prejudice, the DoC submits that the burden of proving that the tender offer of the appellant is compliant with the tender document specification and that consequently the decision of the Tender Evaluation Committee is incorrect rests on the appellant and, in the absence of such evidence, the DoC humbly submits that the decision of the same Tender Evaluation Committee merits confirmation. Without prejudice to the aforesaid, in the evaluation of tender offers, the Tender Evaluation Committee is bound by the principle of self-limitation in accordance with the tender document specifications, and therefore the issue of incumbency of the product is not of relevance nor has any bearing as to the issue of establishing technical compliance.

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 witnesses duly summoned, will now consider Appellant's grievances.

a) This Board notes that the compliance or otherwise of Evolve's (preferred bidder) bid does not form part of the Appellant's grievances. Such fact was also ascertained and confirmed by the same Appellant during final submissions.

b) What this Board will consider is the compliance or otherwise of the Appellant's bid as per grievance listed in their letter of objection.

c) Most relevant to this appeal is special condition 1.5 of page 22 of the tender dossier which states *"if a test is not included in the AST panels as indicated in Tables 1 and 2, and an alternative testing method is*

offered, ***only one test*** *with an alternative testing method will be accepted."* (bold & underline emphasis added)

d) Numerous witnesses were called to provide their sworn testimony under oath. Initially, Ms Julie Haider stated *"The panels issued cover a broad spectrum of bacteria but they cannot cover all possibilities……. Where in the tender it does not state (relevant or otherwise) what is included or excluded it is because the European guidelines are available and have to be followed"* Consequently, Dr Claire Marantidis Cordina stated *"not clinically relevant means that antibiotics will never be used to treat the particular infection mentioned"*. The Board agrees with such statements and is henceforth very much comfortable with the way the tender has been drafted.

e) Reference is now made to the technical literature as submitted by the Appellant whereby *ex admissis*, under the limitations sections, the AST panels offered require an alternative **testing** method to be performed prior to reporting results for a number of antibiotics on more than one type of antibiotic as listed in the tender dossier. This goes contrary to the requirement as listed in special condition 1.5 of page 22 of the tender dossier.

f) This Board notes that major principles of public procurement, such as the principles of self-limitation and equal treatment were duly followed by the evaluation committee.

Therefore, this Board does not uphold the Appellant's grievances.

The Board,

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

a) Does not uphold Appellant's Letter of Objection and contentions,
b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain **Chairman**	**Dr Vincent Micallef** **Member**	**Ms Stephanie Scicluna Laiviera** **Member**