PUBLIC CONTRACTS REVIEW BOARD

Case No. 307

CT/2174/10; Adv. No. 158/10
Tender for the Supply of a Full Field Direct Digital Mammography Unit and a Stereotactic Biopsy Unit

This call for tenders was published in the Government Gazette on the 20th August 2010. The closing date for this call with an estimated budget of € 600,000 was the 12th October 2010 extended up to 16th November 2010.

Four (4) tenderers submitted their offers.

FUJIFILM Italia S.p.a. filed an objection on 18th April 2011 against the decision by the Contracts Department to disqualify its tender for being technically non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Friday, 1st July 2011 to discuss this objection.

Present for the hearing were:

FUJIFILM Italia S.p.a.

Dr Antoine Cremona	Legal Representative
Dr Giovanni Valtorta	Representative
Mr Kevin Galea	Representative

TRIOMED Ltd

Dr John Gauci	Legal Representative
Mr Alex Vella	Representative
Mr Ian Vella	Representative
Mr Charles Cascun	Representative

Ministry of Health, the Elderly and Community Care

Dr Adrian Mallia	Legal Representative

Evaluation Board:

Dr Nadine Delicata	Chairperson
Mr Joseph Psaila	Member
Mr Mario Caruana	Member
Mr Mark Borg	Member
Ms Carmen Harkins	Secretary

Mater Dei Hospital:

Mr Chris Attard Montaldo	MDH Official

After the Chairman's brief introduction, the appellant company was invited to explain the motives of his company's objection.

Dr Antoine Cremona, legal representative of FUJIFILM S.p.A., the appellant company, declared that he was going to raise a few legal issues about this tendering procedure.

With regard to the reason for rejection Dr Cremona submitted the following:

i. by letter dated 8th April 2011, the Department of Contracts informed his client that the company's offer was found technically not compliant for the following reason:

> *"No submission of Protective Shields in line with Clause 1 (g) of the published Technical Specifications – Volume 3"*

ii. the protective shields represented an ancillary item to the mammography unit which was meant to safeguard women patients from exposure to radiation;

iii. Clause 1 'The Dedicated Mammographic Unit' (g) 'Others' of the tender document (page 37) provided as follows:-

> *"The following attachments shall be quoted separately and specified* – among them:
>
> - *A comprehensive quality assurance kit for mammography. All technical specifications and original literature (no photocopy shall be accepted) shall be submitted at the tendering stage.*
> - *A set of conesl diaphragms and compression paddles that include those for magnification*
> - *Other protective shields e.g. waist supported aprons, Gonard shields, etc*
> - *Storage for all relevant accessories*
> - *The Mammography unit shall be delivered complete with a reclining chair complete with wheels and a braking system, that can be reclined to a horizontal position if ever required for emergency purposes."*

iv. therefore, albeit tenderers had to quote separately for the above attachments, yet, on the other hand, Clause 16 bound the bidders in a mandatory manner as to how they were to submit their quotes, i.e. by filling in the prescribed form at Volume 4 'Financial Bid' of the tender document (page 47), and, as a result, it would follow, that any other quotes submitted outside the prescribed form would have led to the disqualification of the bidder so much so that Clause 16.1 (f) (ii) stated that:

> *"A financial bid calculated on the basis of Delivered Duty Paid (DDP) for the works/supplies tendered (inclusive of spare parts/after-sales services/maintenance/training as applicable) in the form provided in Volume 4."*

v. on examining the Bill of Quantities in the form provided in Volume 4, one would note that, whereas certain items that featured under Clause 1 (g) corresponded to one of the 17 items listed in the form - e.g. the first bullet 'A comprehensive quality assurance kit..' corresponded to item 8 'Test equipment for quality control', bullets 2 and 4 were accounted for under item 10 'Accessories', the last bullet '.. reclining chair..' was provided for under item 7 – however, there was no such item in the Bill of Quantities/Financial Bid that corresponded to Gonard shields and other protective shields;

vi. therefore, whereas on one hand the contracting authority required the bidders to conform strictly to the items listed in the 'Financial Bid' at Volume 4, on the other hand the contracting authority failed to include in the same list the 'protective shields' as one of the items in respect of which the bidder had to submit his quote;

vii. it was neither regular nor fair to reject an offer claiming technical non-compliance when the cause for the alleged non-compliance was the result of inconsistency in the drafting of the tender document;

viii. the bidder was not obliged to correct or to clarify an unclear provision in the tender document and, in this particular case, it was not necessary because the protective shields had been rendered redundant as would be explained in due course; and

ix. the cost of a Gonard shield, which was used by numerous patients until such time that it developed cracks, was €46 and when considering that this was an accessory and that the units requested in this tender were estimated by the department at €600,000 and that the offer by his client amounted to €331,811 then one would realise the irrelevance of the reason brought forward for the rejection of his client's offer.

Dr Adrian Mallia, legal representative of the contracting authority, rebutted in the following manner:-

a. it was not being contested that the protective shields were a mandatory requirement in the tender document as indicated by the use of the term 'shall' in Clause 1 (g);

b. the appellant company had every opportunity to ask for a clarification questioning (a) the use and purpose of the protective shields given today's technology and (b) where the company should quote for this item since it was not specifically listed in the form at Volume 4, however, the appellant company failed to seek such clarifications; and

c. on its part, the contracting authority specifically asked the appellant company what it was offering in terms of protective shields and the appellant company's reply was quite clear and outright, i.e. that its offer did not include any protective shields for specific patients' needs, which reply represented a confirmation that the appellant company was not going to provide this mandatory requirement.

Dr Nadine Delicata, chairperson of the evaluating board and Director of the National Breast Screening Programme, under oath, submitted the following comments:-

i. contrary to what the appellant company had stated, the protective shields were still in use;

ii. the members of her staff were all females and, up to some time ago, one staff member was pregnant and she had to protect herself;

iii. it was true that the breast screening programme was currently aimed at women over 50 years, however, besides breast screening, after normal working hours her department also had to cater for patients referred by Mater Dei Hospital who were not necessarily over 50 years old and hence some might be pregnant and would require protective shields;

iv. in spite of the technological developments made in this line of medicine, professionally, she would still do all she could to protect pregnant women, staff or patients, even by the use of protective shields and not limited to Gonard shields;

v. protective shields were still required when using any kind of technology because, as far as she was aware, there were no guarantees that one could do away with protective shields for all kinds of patients;

vi. bidders had the opportunity to clarify any aspect of the tender document prior to the closing date of the tender, during the on-site visit and, in the case of the appellant company, on being specifically asked in writing by the contracting authority;

vii. all the items requested in the tender document had to be included somewhere in the financial bid and, if it were for her, she would have included the protective shields either under *item 1*, the 'mammography unit' itself, or under item 10 'Accessories'.

Dr Mallia strongly insisted that the line of questioning carried out by the appellant company was irrelevant because the items were requested in the tender specifications and the role of the adjudicating board was to adhere to tender conditions and specifications and it certainly did not have the discretion to pick and choose which specifications were relevant. He added that, although the form at Volume 4 could have been clearer with regard to the protective shields, still, the instructions at Clause 1 (g) were both clear and mandatory and the tenderer could not simply omit the item.

Dr Cremona, on his part, insisted that according to Clause 16 (f) (ii) the bill of quantities had to be submitted in the form provided in Volume 4 and he even quoted from technical reports of the UN Atomic Agency that the use of lead shields for mammography tests, such as a lead apron, was neither necessary nor recommended.

The representative of the recommended tenderer went through the original tender submission and indicated to the Public Contracts Review Board that the protective shields were included

in the breakdown of the items making up the mammography unit under item 1.

Dr John Gauci, legal representative of the recommended tenderer, pointed out that at no stage of the process did the appellant company seek any clarification on this aspect of the tender and, on top of that, on being specifically asked by the contracting authority about the protective shields, the appellant company stated flatly that it would not be providing them when the protective shields had to be included both in the technical and in the financial submissions.

With regard to the fact that the client's offer did not require protective shields, Dr Cremona declared that:-

i. the product offered by his client and, in all probability, even that offered by the recommended tenderer, did not require external protective shielding and that did not compromise, in any way, the health of patients, a fact which the contracting authority itself was not contesting;

ii. the breast screening carried out, nowadays, was limited to the breast area only and, as a consequence, the radiation did not affect the genital parts of the patient or even pregnant women which fact was supported with all relevant technical data;

iii. the fact that shields similar to those requested in this tender were redundant was corroborated by the *European Guidance for Quality Assurance in Breast Cancer Screening and Diagnosis* and the technical report of the UK National Health Scheme on National Quality Assurance Group for Radiography;

iv. the breast screening departments of both Mater Dei Hospital and the Gozo General Hospital used the products of the recommended tenderer and none used protective shields; and

v. it was not reasonable to request bidders to submit a solution that was technically inferior by present standards.

Mr Joseph Psaila, surgeon and member of the evaluation board, remarked that:-

a. it was useful to have protective shields available because the Health Department catered for the general public besides the fact that radiation was also generated by other sources;

b. professionally speaking, no one would take the risk of doing away with protective shields and it was not a matter of being zealous but it was a reasonable precaution to take with patients, especially, pregnant woman referred by Mater Dei Hospital;

c. albeit the on-going breast screening programme was presently meant for women aged 50 and over, yet, the centre catered also for patients from Mater Dei Hospital who were not, necessarily, 50 years and over, besides, the next cycle of the breast screening programme would target female patients under 50 years of age;

d. the centre was also in the course of undertaking a family history programme which included persons of all ages; and

e. it could be the case that modern technology could eventually do away with the use of protective shields but it was considered too premature to eliminate such protection.

At this point the statement made by the evaluation board, namely that the 'Recommended Tender Non-Compliant with Mandatory Requirements' was discussed

Referring to the 'size of the table' Dr Cremona made the following submission:-

a. he assumed that the recommended tenderer had offered a (Selenia) Digital Image Receptor and, as a result, he presented the relative system specifications;

b. Clause 1 (c) 'The Table' second bullet stated that "It shall have a field of view better than 23cmx30cm";

c. the recommended tenderer's product had an image receptor size of 24cmx29cm;

d. if a patient had a breast bigger than the table of the product offered by the recommended tenderer it could happen that the patient would have to be subjected to two tests in order to cover the whole breast and thus avoid the possibility of not detecting a cancer in that part of the breast not covered if only one test was carried out;

e. the size of the table was specified for a purpose and, in fact, the size varied from country to country according to the stature of the average patient, e.g. that applicable for Japan would be smaller than that applicable for Italy; and

f. in any case, this requirement was mandatory and it did not match with that of the recommended tenderer.

Dr Delicata intervened to state that:-

i. the image receptor size indicated in the tender document had to be 23cmx30cm or larger and, in the case of all the bids received, this tender requirement was exceeded in terms of surface area (e.g. 23x30=690 and 24x29=696);

ii. although there was a degree of tolerance, the length and the breath of the table had to be within certain dimensions and, hence, the indication of 23cmx30cm and not of 69cmx10cm;

iii. in her opinion 24cmx29cm was better than 23cmx30cm; and

iv. no bidder was excluded for this reason.

Mr Mark Borg, a radiation physicist and member of the evaluation board, under oath, gave the following evidence:-

a. a table with dimensions of 24cmx29cm produced a better view than that with 23cmx30cm;

b. there were tables with different dimensions on the market all of which, however, would vary by a couple of millimeters or, at most, centimeters;

c. most of the tables on the market were smaller than that requested in the tender and the dimensions set out in the tender were for guideline purposes; and

d. it was not simply a matter of surface area but the length and breadth had to be within certain accepted limits given that this item was going to be used for breast screening.

At this point Dr Cremona interrupted the witness and cited Clause 1 (b) (page 36) which provided that the C-Arm shall be able to rotate by more than ± 180º. He added that the rotation of the recommended tenderer's product was +195º to -155º.

Dr Mallia remarked that this point had not been included in the letter of objection and hence he was unprepared and thus not in a position to elaborate upon or answer any question in regard.

Mr Joseph Psaila, surgeon and member of the evaluation board, under oath, gave the following evidence:-

i. the rotating arm was an integral part of the mammography unit;

ii. the rotation depended on where one would put the horizontal part and, after taking into consideration certain technical aspects, he considered the +195º to -155º indicated by the recommended tenderer in line with specifications;

iii. perfection in the extreme range was rarely required;

iv. all the offers that were found acceptable were within the range stipulated in the tender document, i.e. ± 180º, and the fact that it included the sign ± could in itself be interpreted as an advantage from the technical point of view due to the oblique position;

v. the contracting authority requested a range of ± 180º and not strictly 360º because there were occasions when one had to go to the extreme of that range;

vi. to his recollection no bidder had offered the product in excess of ± 180º but it had to be stressed that this was a difficult area and the extensive research carried out by the department demonstrated that the dimensions and rotations were not absolute but tended to vary;

vii. with reference to Question No 6 of Clarification No 2 dated 5th October 2010 raised by a bidder as to what was meant in Clause 1 (b) by the terms 'more than' when –180 º and +180º represented a complete rotation, the contracting authority's representatives claimed that this meant that the ± 180º overlaps; and

viii. albeit none of the bidders submitted a specification equivalent to more than 180º, yet no bidder was disqualified with regard to the C-Arm.

Dr Giovanni Valtorta, representative of FUJIFILM Italia S.p.a. which was responsible for the region that incorporated Malta, under oath, gave the following evidence:-

i. the new technology limited the test to the breast area of the patient and it did not affect other parts of the body;

ii. normally, this was not used on pregnant women and a pregnant staff member would be detailed to work outside the X-ray area which was adequately shielded by a protective wall;

iii. the size of the table was very important so that the test would cover the entire breast and the technology offered by Fujifilm Italia S.p.a. provided the best resolution worldwide because the dose was rather low and so no protective shield was required;

iv. it was important that the C-Arm rotated up to a complete revolution so that one could put the patient in a comfortable position; and

v. the answer given to the clarification to question no. 8 that his firm was not going to provide protective shields was in line with the literature provided in the tender submission which the contracting authority could have checked out.

Mr Chris Attard Montalto, the person charged with the drafting of the tender document, under oath, declared that:

a. he always prepared the tender specifications in consultation with the users;

b. he worked at Mater Dei Hospital and when he was asked to draw up the specifications in connection with breast screening he used the specifications applicable to Mater Dei Hospital and, in addition, he took into account the instructions by Dr Nadine Delicata, who was in charge of the breast screening programme; and

c. over the years technology had developed even with regard to security features such as the level of radiation that patients and staff would be exposed to.

At this point Dr Cremona concluded his interventions by:

i. reiterating his claim that the only place where the tenderer had to quote the prices was in the 'Financial Bid' at Volume 4 and that the 17 items listed in that form somehow

covered all the items mentioned at Clause 1 (g) with the exception of the protective shields;

ii. contending that this omission was not the result of it being overlooked but because it was not a requisite to quote for the protective shields otherwise the appellant company would have included same in the bill of quantities;

iii. stating that he considered it trivial to reject a tender worth a few hundreds of thousand Euros for the omission of the protective shield which, besides having been rendered obsolete, was valued at about €46;

iv. stating that if one were to enter the website of the breast screening programme run by Dr Delicata one would find that this programme was operated on the *European Guidelines for Quality Assurance Breast Cancer* (Fourth Edition), Brussels, January 2006, where at page 152 it dealt with radiation safety which did not include the use of the Gonard or any other protective shield;

v. claiming that the contracting authority seemed to have spotted and acted decisively on a relatively small shortcoming on the part of his client when, at the same time, the contracting authority overlooked two mandatory items, namely the size of the 'Table' and the 'C-Arm', in respect of which the recommended tenderer was not technically compliant;

vi. insisting that, with regard to the table size, the length and the breadth were relevant and not the area as such;

vii. stating that his client's proposal was not only cheaper but even superior, e.g. with regard to the resolution which was a very useful feature when it came to breast cancer detection; and

viii. recommending that his client's tender ought to be reintegrated in the process and, for the purposes of Clause 32.1, the award should be given to his client for offering the cheapest administratively and technically compliant bid.

On his part Dr Gauci submitted that:-

a. in the tender document the contracting authority made the provision of protective shields a mandatory requirement so much so that it had to be specified and quoted separately;

b. various witnesses had confirmed that protective shields were still useful and, although examples were given in the tender document, tenderers were free to indicate the kind of protective shield that they would be providing;

c. apparently, the appellant company was the only bidder who failed to provide the requested protective shield/s and when its representative was specifically asked what kind of protective shield the company was going to provide the latter flatly stated that none

were going to be provided;

d. if the appellant company felt that the tender document was incorrectly drafted with regard to the provision of protective shields, then it should have sought pre-contractual remedies before the Public Contracts Review Board at which stage the said company would have had the opportunity to demonstrate whether that provision was, for example, irrelevant or discriminatory;

e. the appellant company did not even bother to seek a clarification about this issue but it was the contracting authority that sought a clarification from the same appellant company; and

f. from the evidence given at the hearing it emerged that the evaluation process was carried out diligently and, under oath, various witnesses confirmed that his client's offer met the technical requirements and the evidence of the members of the evaluation board carried more weight than that of the appellant company.

Dr Mallia concluded by submitting that:-

i. in Case No. 155 of 2009, the Public Contracts Review Board (then known as Public Contracts Appeals Board) had stated that the tender requirements are set by the contracting authorities and not by the bidders. Regardless of the fact as to whether a participating tenderer was in full agreement with the content or not, such tenderer has to abide by such terms and conditions and not seek to rectify matters after a manifested refusal by the said tenderer to be aligned with the specific mandatory requirements requested by the contracting authority;

ii. in Case Nos. 144 and 145 of 2009 respectively, the Public Contracts Review Board (then known as Public Contracts Appeals Board) referred to the principle whereby if a bidder was in doubt about the tender specifications or if one's proposal represented a departure from what had been requested by the contracting authority, one should seek clarifications prior to submitting one's offer and not expect that one's interpretation of things would meet the customer's needs;

iii. it was not being contested that the appellant company did not provide the protective shields;

iv. the appellant company was contending that the requested protective shields were negligible in value and unnecessary as they were technically outdated. Nevertheless, the fact remained that these protective shields were a mandatory requirement;

v. the evaluating board did not have the discretion to assess the tender conditions and specifications and decide on which could be retained and which could be eliminated and one should not allow that to happen;

vi. from the evidence it emerged that the recommended tenderer met requirements with

regard to the image receptor size whereas with regard to the C-Arm rotation none of the bidders proposed a solution of more than ± 180º and, as a result, the contracting authority applied the principle of equal treatment enshrined in our legislation whereby it accepted those proposals that were materially in conformity with specifications and, in fact, none of the bidders were disqualified on that score; and

vii. in view of the foregoing the decision reached by the contracting authority should be confirmed.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 18th April 2011 and also through their verbal submissions presented during the hearing held on 1st July 2011, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) by letter dated 8th April 2011, the Department of Contracts informed his client that the company's offer was found technically not compliant in view of the fact that protective shields in line with Clause 1 (*g*) of the published Technical Specifications – Volume 3 were not included in the offer, (b) the protective shields represented an ancillary item to the mammography unit which was meant to safeguard women patients from exposure to radiation, (c) there was no item in the Bill of Quantities/Financial Bid that corresponded to Gonard shields and other protective shields, (d) whereas on one hand the contracting authority required the bidders to conform strictly to the items listed in the 'Financial Bid' at Volume 4, on the other hand the contracting authority failed to include in the same list the 'protective shields' as one of the items in respect of which the bidder had to submit his quote, (e) it was neither regular nor fair to reject an offer claiming technical non-compliance when the cause for the alleged non-compliance was the result of inconsistency in the drafting of the tender document, (f) the cost of a Gonard shield, which was used by numerous patients until such time that it developed cracks, was €46, (g) when considering that this was an accessory and that the units requested in this tender were estimated by the department at €600,000 and that the offer by his client amounted to €331,811 then one would realise the irrelevance of the reason brought forward for the rejection of his client's offer, (h) the product offered by the appellant company and, in all probability, even that offered by the recommended tenderer, did not require external protective shielding and that did not compromise, in any way, the health of patients, a fact which the contracting authority itself was not contesting, (i) the breast screening carried out, nowadays, was limited to the breast area only and, as a consequence, the radiation did not affect the genital parts of the patient or even pregnant women which fact was supported with all relevant technical data, (j) normally, this was not used on pregnant women and a pregnant staff member would be detailed to work outside the X-ray area which was adequately shielded by a protective wall (k) the fact that shields similar to those requested in this tender were redundant was corroborated by the *European*

Guidance for Quality Assurance in Breast Cancer Screening and Diagnosis and the technical report of the UK National Health Scheme on National Quality Assurance Group for Radiography, (l) the breast screening departments of both Mater Dei Hospital and the Gozo General Hospital used the products of the recommended tenderer and none used protective shields, (m) *Clause 1 (c)* 'The Table' second bullet stated that "It shall have a field of view better than 23cmx30cm" and the recommended tenderer's product had an image receptor size of 24cmx29cm implying that if a patient had a breast bigger than the table of the product offered by the recommended tenderer it could happen that the patient would have to be subjected to two tests in order to cover the whole breast and thus avoid the possibility of not detecting a cancer in that part of the breast not covered if only one test was carried out, (n) the size of the table was very important so that the test would cover the entire breast and the technology offered by Fujifilm Italia S.p.a. provided the best resolution worldwide because the dose was rather low and so no protective shield was required, (o) albeit *Clause 1 (b)* (page 36) provided that the C-Arm shall be able to rotate by more than ± 180º, yet the rotation of the recommended tenderer's product was +195º to -155º, (p) it was important that the C-Arm rotated up to a complete revolution so that one could put the patient in a comfortable position, (q) the only place where the tenderer had to quote the prices was in the 'Financial Bid' at Volume 4 and that the 17 items listed in that form somehow covered all the items mentioned at *Clause 1 (g)* with the exception of the protective shields, (r) if one were to enter the website of the breast screening programme run by Dr Delicata one would find that this programme was operated on the *European Guidelines for Quality Assurance Breast Cancer* (Fourth Edition), Brussels, January 2006, where at page 152 it dealt with radiation safety which did not include the use of the Gonard or any other protective shield, (s) the contracting authority seemed to have spotted and acted decisively on a relatively small shortcoming on the part of his client when, at the same time, the contracting authority overlooked two mandatory items, namely the size of the 'Table' and the 'C-Arm', in respect of which the recommended tenderer was not technically compliant and (t) the appellant company's proposal was not only cheaper but even superior, e.g. with regard to the resolution which was a very useful feature when it came to breast cancer detection;

- having considered the contracting authority's representative's reference to the fact that (a) it was not being contested that the protective shields were a mandatory requirement in the tender document as indicated by the use of the term 'shall' in *Clause 1 (g)*, (b) the appellant company had every opportunity to ask for a clarification questioning the use and purpose of the protective shields given today's technology, yet the appellant company failed to seek such clarifications, (c) the appellant company had every opportunity to ask for a clarification questioning where the company should quote for this item since it was not specifically listed in the form at Volume 4 yet the appellant company failed to seek such clarifications, (d) the contracting authority specifically asked the appellant company what it was offering in terms of protective shields and the appellant company's reply was quite clear and outright, i.e. that its offer did not include any protective shield for specific patients needs, which reply represented a confirmation that the appellant company was not going to provide this mandatory requirement, (e) contrary to what the appellant company had stated, the protective shields were still in use and, professionally speaking, no one would take the risk of doing away with protective shields and it was not a matter of being zealous but it was a reasonable precaution to take with patients, especially, pregnant

woman referred by Mater Dei Hospital, (f) the members of the National Breast Screening Programme were all females and, up to some time ago, one staff member was pregnant and she had to protect herself, (g) it was true that the breast screening programme was currently aimed at women over 50 years, however, besides breast screening, after normal working hours the National Breast Screening Programme also had to cater for patients referred by Mater Dei Hospital who were not necessarily over 50 years old and hence some might be pregnant and would require protective shields, (h) protective shields were still required when using any kind of technology because there were no guarantees that one could do away with protective shields for all kinds of patients, (i) bidders had the opportunity to clarify any aspect of the tender document prior to the closing date of the tender, during the on-site visit and, in the case of the appellant company, on being specifically asked in writing by the contracting authority, (j) all the items requested in the tender document had to be included somewhere in the financial bid and, if it were for the chairperson of the evaluation board, she would have included the protective shields either under *item 1*, the 'mammography unit' itself, or under item 10 'Accessories', (k) although the form at Volume 4 could have been clearer with regard to the protective shields, still, the instructions at Clause 1 (*g*) were both clear and mandatory and the tenderer could not simply omit the item, (l) it could be the case that modern technology could eventually do away with the use of protective shields but it was considered too premature to eliminate such protection, (m) the image receptor size indicated in the tender document had to be 23cmx30cm or larger and, in the case of all the bids received, this tender requirement was exceeded in terms of surface area (e.g. 23x30=690 and 24x29=696), (n) although there was a degree of tolerance, the length and the breath of the table had to be within certain dimensions and, hence, the indication of 23cmx30cm and not of 69cmx10cm, (o) there were tables with different dimensions on the market all of which, however, would vary by a couple of millimeters or, at most, centimetres - most of the tables on the market were smaller than that requested in the tender and the dimensions set out in the tender were for guideline purposes (p) no bidder was excluded for this reason, namely *Clause 1 (c),* (p) the rotating arm was an integral part of the mammography unit and that the rotation depended on where one would put the horizontal part and the evaluating board considered the +195º to -155º indicated by the recommended tenderer in line with specifications, particularly in view of the fact that perfection in the extreme range was rarely required (q) apart from the fact that the contracting authority requested a range of ± 180º and not strictly 360º because there were occasions when one had to go to the extreme of that range, the contracting authority requested a range of ± 180º and not strictly 360º because there were occasions when one had to go to the extreme of that range. Albeit of the bidders submitted a specification equivalent to more than 180º, yet no bidder was disqualified with regard to the C-Arm, (r) with reference to Question No 6 of Clarification No 2 dated 5th October 2010 raised by a bidder as to what was meant in *Clause 1 (b)* by the terms 'more than' when – 180 º and +180º represented a complete rotation, the contracting authority's representatives claimed that this meant that the ± 180º overlaps, (s) albeit the appellant company was contending that the requested protective shields were negligible in value and unnecessary as they were technically outdated, yet, the fact remained that these protective shields were a mandatory requirement and (t) from the evidence it emerged that the recommended tenderer met requirements with regard to the image receptor size whereas with regard to the C-Arm rotation none of the bidders proposed a solution of more than ± 180º

and, as a result, the contracting authority applied the principle of equal treatment enshrined in our legislation whereby it accepted those proposals that were materially in conformity with specifications and, in fact, none of the bidders were disqualified on that score;

- having considered the recommended tenderer's representative's reference to the fact that (a) if the appellant company felt that the tender document was incorrectly drafted with regard to the provision of protective shields, then it should have sought pre-contractual remedies before the Public Contracts Review Board at which stage the said company would have had the opportunity to demonstrate whether that provision was, for example, irrelevant or discriminatory and (b) being specifically asked by the contracting authority about the protective shields, the appellant company stated flatly that it would not be providing them when the protective shields had to be included both in the technical and in the financial submissions

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the appellant company had every opportunity to ask for a clarification questioning (a) the use and purpose of the protective shields given today's technology and (b) where the company should quote for this item since it was not specifically listed in the form at Volume 4. Nevertheless this Board, regrettably, notes that the appellant company failed to seek such clarifications.

2. The Public Contracts Review Board argues that the fact that the Director of the *National Breast Screening Programme* stated that all the items requested in the tender document had to be included somewhere in the financial bid and, if it were for her, she would have included the protective shields either under *item 1*, the 'mammography unit' itself, or under item 10 'Accessories' is, somehow, suggesting that the huge importance placed on this item by the evaluating board was either beyond what it really represented as regard overall crucial significance, or else, it was verbally given a 'prima donna' status when, in reality, it is simply an 'accessory'.

3. The Public Contracts Review Board feels that the references made by Dr Mallia with regard to Case Nos. 144, 145 and 155 respectively are also pertinent in this tender. One cannot deny the fact that:

    a. tender requirements are set by the contracting authorities and not by the bidders and that, regardless of the fact as to whether a participating tenderer is in full agreement with the content or not, such tenderer has to abide by such terms and conditions and not seek to rectify matters after a manifested refusal by the said tenderer to be aligned with the specific mandatory requirements requested by the contracting authority;

    b. if a bidder was in doubt about the tender specifications or if one's proposal represented a departure from what had been requested by the contracting authority, one should seek clarifications prior to submitting one's offer and not expect that one's interpretation of things would meet the customer's needs.

4. The Public Contracts Review Board feels that the appellant company has committed an administrative error when the contracting authority specifically asked the said appellant company what it was offering in terms of protective shields with the latter's reply being quite clear and outright, namely that its offer did not include any protective shields for specific patients' needs, which reply, *prima facie*, represented a confirmation that the appellant company was not going to provide this mandatory requirement.

5. This Board acknowledges that the administrators of the *National Breast Screening Programme* could have any justifiable reason to be cautious of the radiation effect in the absence of these shields. However, this Board is not really convinced that a world famous branded supplier would persist in supplying a piece of equipment which could end up being a health hazard to the ultimate user or those close to it when it is in use.

6. In this instance one has to consider this tender within a context of 'substance' over 'form'. This Board, whilst acknowledging that the contracting authority has amongst its fold very valid and knowledgeable professionals, yet, in so far as the specifications of this tender are concerned, this Board cannot but also but notice that if this particular equipment, namely the protective shields, were to be considered as pivotal, indispensible, then this Board contends as to why these were not treated as a single item 'per se' in Form 4 and not represented as an 'ancillary' item to the mammography unit which was meant to safeguard women patients from exposure to radiation. Considering that the estimated value of this tender is € 600,000, and considering that, during the hearing, no one disputed the trivial cost associated with these shields, then the Public Contracts Review Board opines that the appellant company's contention that the rejection of a bid on the premise that such an 'ancillary' item was not offered albeit costing just a pittance compared to the value of the tender is more than justifiable and deemed to be based on a hasty, albeit over cautious deliberation process by the evaluating board which is anything but pragmatic.

In view of the above this Board finds in favour of the appellant company and recommends that the said tenderer be reinstated in the evaluation process as well as recommending that the deposit paid by the latter should be reimbursed.

Alfred R Triganza	Edwin Muscat	Carmel Esposito
Chairman	Member	Member

19 July 2011