

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1851– SPD6/2022/095 – Supplies – Framework Contract for the Supply and Delivery of Sustainable, Baby Items and boxes with a reduced environmental impact for the Ministry for the Environment, Energy and Enterprise**

**6<sup>th</sup> March 2023**

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 2<sup>nd</sup> February 2023;

Having also noted the letter of reply filed by Dr Kimely Borg Warne acting for the Ministry for the Environment, Energy and Enterprise (hereinafter referred to as the Contracting Authority) filed on the 8<sup>th</sup> February 2023;

Having heard and evaluated the testimony of the witness Ms Francine Pace Caruana (Chairperson of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Cherubino Limited;

Having heard and evaluated the testimony of the witness Dr Francis Cherubino (Representative of Cherubino Limited) as summoned by Dr Matthew Paris acting for Cherubino Limited;

Having heard and evaluated the testimony of the witness Ms Francine Pace Caruana (Chairperson of the Evaluation Committee) as summoned by Dr Daniel Inguanez acting for the Ministry for the Environment, Energy and Enterprise;

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 sitting of the 2<sup>nd</sup> March 2023 hereunder-reproduced.

#### **Minutes**

##### **Case 1851 – SPD6/2022/095 – Supplies – Framework Contract for the Supply and Delivery of Sustainable Baby items and Boxes with a Reduced Environmental Impact for the Ministry for the Environment, Energy and Enterprise**

The tender was issued on the 19<sup>th</sup> November 2022 and the closing date was the 22<sup>nd</sup> December 2022. The estimated value of the tender excluding VAT, was € 169,200.

On the 2<sup>nd</sup> February 2023 Cherubino Ltd filed an appeal against the Ministry for the Environment, Energy and Enterprise as the Contracting Authority objecting to their disqualification on the grounds that the Contracting Authority had deemed their bid not to be the cheapest compliant one.

A deposit of € 846 was paid.

There were two (2) bids on this tender.

On the 2<sup>nd</sup> March 2023 the Public Contracts Review Board composed of, Mr Kenneth Swain as Chairman Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public 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 Josianne D’Angelo	Representative

**Contracting Authority – Ministry for the Environment, Energy and Enterprise**

Dr Daniel Inguanez	Legal Representative
Dr Kimely Borg Warne	Legal Representative
Dr Frank Luke Attard	Legal Representative
Ms Francine Pace Caruana	Chairperson Evaluation Committee
Ms Sabrina Schembri	Evaluator
Mr Matteo Privitelli	Evaluator
Mr Christian Sultana	Evaluator (online)
Mr George Said	Representative

**Preferred Bidder – The Organic Kid**

Dr Luca Amato	Legal Representative
Ms Alessia Carbone	Representative
Mr Arben Zisi	Representative

**Department of Contracts**

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Matthew Paris Legal Representative for Cherubino Ltd said that in line with Regulation 40 of the PPR Appellant had requested certain information from the Contracting Authority. The e-mail reply dated 27<sup>th</sup> January 2023 gave the brand name and product number but not the model. The Appeal is based thereon. The Department of Contracts (DoC) confirms that it complied with the request but the model number was still not provided but is still required. He requested that a witness from the Authority supplies this information.

Ms Francine Pace Caruana (12889G) called as a witness by the Appellant testified on oath that she was the Chairperson of the Tender Evaluation Committee (TEC) and stated that there was no model numbers stated on the products as the technical offer asked only for the brand. The Technical Literature supplies other details. Witness gave details of product listed under Item 3.1 but Dr Paris insisted that it was the model number that he wanted indicated. Witness said there was no such thing as it had not been asked for in the tender. The description of the products indicated by Appellant do not match requirements. The specs on item 3.5 specify ‘one size fits all’ or ‘adjustable’. The weight specification was not mandatory.

The Chairman proposed a short recess to enable the Board members to consider the submissions made.

On resumption the Chairman stated that the Board has analysed the Technical Offer Form and the Technical Literature submitted by the preferred bidder. It is clear from these documents that the brand name is clearly stated. As already established this information is in the hands of the Appellant. The same Appellant is also seeking to find out the model number – something which normally it is entitled to under Regulation 40 of the Public Procurement Regulations.

At this stage the Board has two observations to make:

- 1) In the letter of Appeal the Appellant states “whereas, by means of a letter, Appellants requested DOC to furnish the information in relation to the brand of the product on offer of the recommended bidder, inter alia in accordance with inter alia article 40 of the PPR and their reply”
- 2) In the Literature List the model number is not stated and this precisely because it was not requested.

Therefore, once Appellant in its letter requested solely the “brand” and this information has already been provided, and further that the information on model numbers is not available the Board feels that this case can continue to be heard on its merits. At this stage the Board directs that evaluation committee witnesses may read extracts from the Technical Order Form and Literature Lists that refer to items 3.1, 3.5, 3.10 and 3.11 if so requested by Appellant.

Dr Paris was requested to proceed with his examination of the witness.

Ms Pace Caruana, as requested gave details of items 3.5 and 3.10. Asked why the TEC felt the need to extend the date for submission of samples witness stated that the original date clashed with the recess period laid down by the DoC and therefore it was obliged to extend it and this had been notified to all economic operators. Further delays were not desirable due to the urgency of the tender.

Dr Francis Cherubino (167384M) called to testify by the Appellant stated on oath that he is a Director of the Appellant company and was involved in the tender submission. He stated that the recommended bidder was not compliant since in item 3.1, (tender page 13) requires products made from eco-friendly materials as the objective of the tender was to encourage sustainability in accordance with GPP criteria. From an up to date perusal of the supplier’s website on this product it appears to contain polyester – a product which is not eco-friendly. On item 3.5 the manufacturer’s website indicates a 20% polyester content. In 3.10 the content shows 18% polyamide – all products being not eco-friendly and in instances not bio-degradable. The obligatory specifications which came under Note 3 were not met. Cherubino’s offered products which were eco-friendly and hence more expensive which made their bid non-competitive.

Questioned by Dr Debono on behalf of the Department of Contracts, witness said that the information that the products were non-sustainable was obtained through the website and other sources including the TEC.

In reply to questions from Dr Luca Amato, Legal Representative for The Organic Kid, witness said that the information on the preferred bidder’s product offer was obtained as part of the tender bids. Specific details on those products were only known at this hearing and on research made on the manufacturer’s website once the information was given to them. Witness said he was not in a position to reply to a statement from Dr Amato that this was not possible as the products offered by the

preferred bidder were not available on any website as this was a wholesale operation not available to the public. Witness said that the GPP criteria were available on eco-friendly and sustainable products.

Ms Francine Pace Caruana (12889G) called to testify by the Contracting Authority stated on oath that she is an Assistant Director at the Ministry. She detailed the additional documents submitted by the Appellant compared with those submitted by the preferred bidder. In 3.1 and 3.5 there is a material difference as the product is 100% polyester; 3.10 also does not agree as 100% polyester and the details supplied do not agree with the website. In 3.5 the design does not agree and the material shown as 100% PUL does not agree with the offer and witness cannot confirm that it is the same product. The GPP requirements were satisfied by Organic Kid in their offer through their declarations. According to specification 3.8 the final decision will be taken post award as the products have to conform to these criteria. Witness confirmed that if a product met the requirements of 3.8 it would be eco-friendly.

This concluded the testimonies.

Dr Paris said that the scope of the tender was a shift to a more sustainable and eco-friendlier upbringing of children. The Appellant's grievance is based on the selection of the preferred bidder which is incorrect. The lack of catalogue number of the products created problems in identifying products and could well lead to their interchangeability as no one is certain what is being offered. It is not sufficient to simply indicate brand. This is a Note 3 matter and the technical offer form cannot be changed and is not subject to rectification as often stated in past Board and Court cases. The requirements of the technical specifications lack details but created the possibility of a mismatch of products. The technical offer seems to have been ignored in favour of samples to arrive at a decision. The products in 3.1 *et al* did not all have to comply with GPP criteria in specification 3.8. Dealing with the composition of the materials, polyester is definitely not eco-friendly and sustainable and does not meet the criteria. Appellant maintains that the preferred bidder did not meet these latter requirements.

On item 3.5, according to Dr Paris, witness stated that size is not important as product could be 'size fits all' or 'adjustable'. The weight matters, however, immaterial of the size, and the tender is more specific as to what was required – namely 13 kgs although witness claims that it is 15 kgs, and the offer is outside the terms of the tender although we are told that this is not important. The TEC is entitled to certain changes in the tender. However, in the case of the request for samples the change in dates was actioned by the TEC through an internal circular which binds nobody except themselves. One is bound to ask if this could be done? Since the TEC relied on the samples for their decision, and in the absence of catalogue numbers, this widening of the time period goes totally against PPR and the principle of self-limitation. The Authority and the DoC were notified that Appellant was objecting to the new extended date which was against the terms of the tender and there was no reason why the request could not have been carried forward till after the Christmas holidays.

Dr Amato said that the Appellant only found out exactly today the details of the preferred bidder's offer and it is difficult to establish what the appeal is about. The preferred bidder submitted certification to prove compliance. The weight argument is not valid as there is no problem if offer goes over what was required. As to the extended date for the submission of samples both sides were treated equally and the principles of the PPR are met as long as equal treatment is observed. The *Cassar Petroleum* case is clear evidence of this. There has been no preferential treatment of bidders and the decision of the TEC is valid. The difference in the bid prices is significant.

Dr Debono stated that the DoC is bound by Regulation 242 and thus it is up to the Authority in their discretion to decide what information to provide. Regulation 53 request compliance with the tender documents. Regulation 10 of the General Rules Governing Tenders entitles the Authority to extend dates and times and certain extensions are necessary to follow Court regulations. The letter requesting samples was sent to both parties and there was thus no discrimination.

Dr Inguanez the Legal Representative for the Ministry said that Appellant claimed that the conclusion on the material offered by Organic Kid had been reached through information obtained from a website. It was stated that the products were not shown on any website. The declaration in the technical offer eventually forms part of the contract and the TEC insist that this is compliant and to specifications. On item 3.5 two alternative products could be offered and it is clear that this is an either/or situation. The verification stage would happen at the contract stage and therefore it is reasonable to tie the economic operator down by the technical offer. On this point there has been no request submitted to Organic Kid to clarify or rectify its offer. If one refers to the GPP criteria on page 17 it is clear that it is not up to the TEC to decide as the criteria are clearly stated. The catalogue number may not have been requested in the tender but there is enough information in the technical literature to identify the items. The extension of the date for submission of samples is not altering the tender itself - it is simply giving more time and there is no infringement of the self-limitation principle as no advantage was given to either party. The PPR allows certain leeway in parts (Regulation 38) whilst the General Rules also grants the possibility of extensions.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 2<sup>nd</sup> March 2023.

Having noted the objection filed by Cherubino Limited (hereinafter referred to as the Appellant) on 2<sup>nd</sup> February 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD6/2022/095 listed as case No. 1851 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Matthew Paris
Appearing for the Contracting Authority:	Dr Daniel Inguanez
Appearing for the Department of Contacts:	Dr Mark Anthony Debono
Appearing for the Preferred Bidder:	Dr Luca Amato

Whereby, the Appellant contends that:

- a) The Organic Kid does not meet the tender requirements -  
Following the information received from the DOC in relation to the product on offer by The Organic Kid, it transpires that the following items are not in accordance with the tender specifications: ITEM 3.1, ITEM 3.5, ITEM 3.10, ITEM 3.11
- b) Samples submitted not in accordance with the Tender specifications -  
In addition and in accordance with the 'logsheet of samples received by bidders', it transpires that The Organic Kid submitted its samples on the 11th January 2023, thus in breach of the Technical Offer Sample List [Note 3], which stipulated that the samples are to be submitted within ten [10] working days from notification.
- c) Doctrine of self-limitation -  
The doctrine of self-limitation is an important public procurement principle which has been referred to by this honourable Board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document, this will ensure predictability and transparency.  
The Appellant company feels aggrieved by the decision of the evaluation committee, in particular since it failed to adhere to the mandatory requirement of the tender document, and in the process breaching this fundamental principle.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 8<sup>th</sup> February 2023 and its verbal submission during the hearing held on 2<sup>nd</sup> March 2023, in that:

- a) The Organic Kid does not meet the Tender Requirements  
In its first grievance, Appellant is claiming that Items 3.1, 3.5, 3.10 and 3.11 of the offer by The Organic Kid are not in accordance with the tender specifications. The Appellant does not give any reasons for its grievance despite the formal requirements contained in Regulation 270 of the Public Procurement Regulations (S.L. 601.03) – "*may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints*". The Ministry is thus reserving its right to present ulterior defence pleas once the Appellant clarifies the object of its grievance. In the failure of the Appellant to state in a clear manner the reasons for its first grievance, the grievance should be rejected for lack of observance of the aforementioned formal requirement. Without prejudice to the above, the Ministry stands by its evaluation and holds that it was correct when the procurement was recommended for award to The Organic Kid, this being the cheapest priced offer satisfying all the administrative and technical criteria stipulated in the Tender Document.
- b) Samples Submitted not in Accordance with the Tender Specifications

In its second grievance, Appellant is also claiming that The Organic Kid submitted its samples on the 11th of January 2023 and therefore was in breach of the Technical Specification C (iii) requiring the submission of samples. Appellant argues that the requested samples had to be submitted within 10 working days from tenderers being notified and not by the 11th of January 2023 as requested by the Ministry. By virtue of a letter dated the 22nd of December 2022 the Ministry informed all bidders including Cherubino Ltd and The Organic Kid that samples in line with the Item Specifications found in Section 3 of the Tender Document had to be submitted by noon of Wednesday 11th of January 2023. Cherubino Ltd submitted its samples on the 5th of January 2023 and The Organic Kid submitted its samples on the 11th of January 2023 both within the time limit provided by the Ministry. The Ministry thus considers that the samples for both bids were submitted within the time-limit of the 11th of January 2023 which is the applicable time-limit imposed.

c) Doctrine of Self-Limitation

In its third grievance, the Appellant is arguing that the Evaluation Committee failed to adhere to the mandatory requirement of the Tender Document, and thus breached the doctrine of self-limitation. The principle of self-limitation is seen as a corollary to the principles of equal treatment and transparency and was given its due importance during the evaluation, such that the Evaluation Committee fully adhered to the terms of the Tender Document.

The case law of the General Court of the Court of Justice of the European Union (CJEU) defines clearly that the doctrine of self-limitation cannot be read without reference to the principle of equal treatment of economic operators: *“it must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations.”* - Case T-415/10, Nexans France v. European Joint Undertaking for ITER and the Development of Fusion Energy, judgment of the 20th of March 2013, paragraph 80.

Therefore, the objective of the doctrine of self-limitation is to enforce the principle of equal treatment, in accordance with Regulation 39(1) of the Public Procurement Regulations (S.L. 601.03) so that all tender conditions apply to all bidders equally. It is clear according to the above-cited case law that, even if for the sake of the argument it is to be accepted that the Ministry changed the time-limit specified in the Tender Specifications, this minor change does not alter the Tender Specifications. The bidders were still bound by the same Tender Specifications, i.e. to submit the same samples that were included in the tender document. The time-limit of the 11th of January

2023 applied to all bidders equally. Therefore, no bidder was disadvantaged and a level playing field was maintained. Moreover, the time-limit of the 11th of January 2023 was communicated to all tenderers on the same date using official channels using the ePPS portal. Therefore, given that there is no doubt that all bidders had been treated equally there could have been no breach of the principle of self-limitation.

It should also be noted that Regulation 38 of the Public Procurement Regulations (S.L. 601.03) expressly allows contracting authorities to clarify or even amend the tender document:

*“(4) The contracting authority or the central government authority may issue clarification notes to explain certain matters, to give additional information, to remove or amend certain inconsistencies or errors and to fill in missing information contained in the procurement document.*

*(5) When issued in the clarification notes, the additional information and the supporting document shall form an integral part of the procurement document.”*

If a contracting authority is allowed to amend the procurement document, then surely in this case, where the tender specifications were not changed but the Ministry merely extended the deadline for submission of the samples for all bidders equally, the Ministry acted in line with the Public Procurement Regulations.

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) ***The Organic Kid does not meet the tender requirements – 1<sup>st</sup> grievance*** – the Appellant raised a number of different arguments. This Board will deal with the most relevant:

- i. Model number – reference was made by the appellant to the Technical Offer Questionnaire whereby *“Bidders are to state the brand of the supplies being offered in response to the specification requested under Section 3 – Technical Specifications. Bidders are to also specify the items being offered and confirm compliance of offered items to GPP Criteria”* – This Board opines that this clause can be divided into three (3) separate requirements. The first requirement is self-explanatory. The ‘brand’ name had to be declared specifically, something which was done by both the recommended bidder and the appellant. The second requirement, i.e. *“Bidders are to also specify the items being offered”*, is in this Board’s opinion, open for interpretation. The appellant is of the opinion that this required a specific ‘model number’ to be submitted and is therefore feeling aggrieved that the recommended bidder rather than supplying a ‘model number’ listed down specifications of the products being offered. The Board opines that since the model number was not asked for specifically, and the information as



provided by the recommended bidder could easily be verified by the request of samples (which was actually done by the Contracting Authority), then the Evaluation Committee correctly interpreted such a requirement. The third requirement, i.e. “confirm compliance of offered items to GPP Criteria” was adhered to by both parties.

- ii. GPP Criteria & Scope of Tender – this Board agrees with the argument as brought forward by the appellant that the scope of the tender is to shift to a more sustainable and eco-friendly upbringing of children. However, the Evaluation Committee, due to the principle of self-limitation, is to follow what is ‘sustainable and eco-friendly’ as listed in the tender dossier. Page 17 of the tender dossier clearly states which items fall under the GPP (Green Public Procurement) criteria and what thresholds they are to meet. The products offered by the recommended bidder were confirmed to be compliant with such criteria (this as requested in the Technical Offer Questionnaire). Moreover, it is also clearly listed that the verification stage will be done ‘upon deliver’, i.e post award.
- iii. Item 3.5 – this item could be offered either in a ‘one size fits all’ form or in an ‘adjustable’ form. This Board finds no non-compliance with what the recommended bidder offered. The fact that this item could be used for ‘up to 15 kgs’ when the tender required ‘up to 13 kgs’ is certainly not an issue of non-compliance.
- iv. Note 3 – the Board opines that following the above analysis, no changes were required in the Technical Offer Questionnaire of the recommended bidder, hence this point and argument, becomes now irrelevant.

This Board therefore does not uphold Appellant’s first grievance.

b) ***Samples Submitted not in Accordance with the Tender Specifications – 2<sup>nd</sup> grievance –***

This Board makes reference to the General Rules Governing Tenders section 10 which states “*The Central Government Authority/Sectoral Procurement Directorate/Contracting Authority may, at its own discretion, extend the deadline for submission of tenders to give Economic Operators sufficient time to take clarification notes into account when preparing their tenders. Economic Operators will be notified with any such extension through the issuing of a clarification note. In such cases, all rights and obligations of the Central Government Authority/Sectoral Procurement Directorate/Contracting Authority and the tenderer regarding the original date specified in the contract notice will be subject to the new date.*” Therefore, it is clear that the Contracting Authority has options as to how and why it can extend the deadline for submission of tenders, or, as in this case, the samples requested. While doing so it must however abide by the requirements as set out in this same section, being referred to, as well as the major principles guiding the public procurement process. This Board opines, that with the way that the Evaluation Committee proceeded, all the requirements were met. A letter was issued to all the parties participating in this tender procedure instructing them about the date by when samples needed to be submitted. The decision as taken by the Evaluation Committee does not in any way, form or matter go against the principle of Self-Limitation, as most importantly, the principle of equal

treatment was well adhered to. A case could have been made, if the timeframes were shortened. However, in this very case, the timeframes were extended only due to the Christmas holiday recess. Since all the parties were informed in due time, this Board will not uphold this grievance of the Appellant.

- c) ***Doctrine of Self-Limitation – 3<sup>rd</sup> grievance*** – as already discussed above, the principle of self-limitation has not be infringed by the Evaluation Committee. Hence, this Board does not uphold the Appellant’s third grievance.

**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**

**Mr Lawrence Ancilleri**  
**Member**

**Ms Stephanie Scicluna Laiviera**  
**Member**