

Public Contracts Review Board  
Department of Contracts  
Notre Dame Ravelin  
Floriana VLT2000



9 June 2023

Dear Sirs,

**Re: Tender for the Supply, Installation, and Commissioning of a Dual-Energy CT Scan at SVP Long-Term Care Facility – Reference No. CT2385/2021 (the “Tender”)**

1. We have been instructed by Suratek Limited (C-44989) (the “**Appellant**”) to file a second appeal in terms of Regulation 270 of the Public Procurement Regulations (the “**PPR**”) in connection with the above-captioned Tender.
2. The fact that this appeal had to be filed is surreal. The first recommendation notice issued by the Department of Contracts on behalf of the St. Vincent de Paul Long-Term Care Facility (the “**Contracting Authority**”) on 22 April 2022 is already the subject of Decision 1740 of 2022 (the “**Decision**”) by this Honourable Board. No appeal against this Decision was lodged by Triomed Limited (C-36613) (the “**Recommended Bidder**”), and consequently the Decision became final and definitive (*res judicata*).
3. In that Decision, this Honourable Board had concluded that “*the solution offered by the Preferred Bidder does not satisfy the conditions and specifications of the tender dossier, specific reference to spec no 2.20.2 and the overall and end objective of the same tender dossier in spec 1.1*”
4. Consequently, the Board ordered “*the contracting authority to re-evaluate all the bids received in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee **whilst also taking into consideration this Board’s findings***” (emphasis added).
5. Yet, in its second recommendation notice published on 30 May 2023 (the “**Second Recommendation**”) (attached to this appeal as “**Document SL11**”), the Contracting Authority and the newly-constituted Evaluation Committee have again recommended that the Tender be awarded to the same Recommended Bidder in spite of the fact that the Board concluded that its offer does *not* satisfy the conditions and specifications requested(!).
6. This Board is now faced with a situation where the Contracting Authority has disregarded its findings and the Decision in their totality, all the while the Appellant is being deprived of its right to a rapid and effective remedy.

**Factual Matrix**

7. Since this Tender has already been the subject of the Decision, this Board is aware of the factual and legal circumstances which led to the Second Recommendation. For this reason, the Appellant shall not be reiterating the factual matrix underpinning this appeal, and shall proceed to the legal submissions.

**Legal Submissions**

8. As a starting point, the Tender cannot be awarded to the Recommended Bidder whose offer falls short of the required technical specifications. This is not a conjecture of the Appellant. This was proven on a balance of probability before the Board in the written submissions and the subsequent three hearings on the basis of which Decision 1740 of 2022 was delivered. This matter has now been decided *res judicata* and it cannot be reopened by the Contracting Authority.
9. The Board itself observed in its findings that: *“the solution offered by the Preferred Bidder does not satisfy the conditions and specifications of the tender dossier, specific reference to spec no 2.20.2 and the overall and end objective of the same tender dossier in spec 1.1, i.e. to have a “CT full-body scanner”.*
10. Specification 1.1 required the supply of a “CT full-body scanner” while Section D: Software required:

*“2.20 A second CT workstation having 2 monitors for image viewing should be included. The following clinical applications should be available on the host computer workstation:*

*2.20.1 Basic abdominal analysis package*

*2.20.2 The bidder should include the full dual energy software available at the time of bidding, including (but not limited to) composition analysis software (to evaluate composition of renal calculi etc), dual energy lung perfusion software enabling perfusion mapping, dual energy metal artefact reduction software, and virtual unenhanced series from enhanced CT.”*

11. However, the Recommended Bidder submitted the model Philips® Incisive CT Plus which does not comply with the main clinical function requested in the Tender, and is incapable of performing functions such as dual energy lung perfusion, and virtual unenhanced series from enhanced CT.
12. The non-compliance of the Recommended Bidder’s product was confirmed separately by Dr. Chiara Romei (the “**Philips Employee**”), a CT modality sales specialist within Philips with a double degree in biomedical engineering and a PhD in nuclear engineering,<sup>1</sup> and Dr. Paul Bezzina who was the Head of the Department of Radiography at the Faculty of Health Sciences at the University of Malta (the “**Independent Expert**”), the independent expert appointed by this Board *ex officio* in terms of Regulation 90(1) of the PPR.

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<sup>1</sup> Page 8 of Dr. Chiara Romei’s sworn testimony before the Public Contracts Review Board during the sitting held on 3 October 2022.

The Philips Employee confirmed that: “I would not suggest dual energy position for [the] whole lung. I would suggest other software than you can use with this CT”.<sup>2</sup> She went on to confirm that dual energy lung perfusion would require the use of a “completely different scanner”.<sup>3</sup>

13. On the same wavelength, the Independent Expert stated that:

*[...] Philips CT Incisive+ does not have this feature [of dual energy lung perfusion] and as a result there will be a time difference between the scans which will make dual energy scanning of moving body parts, such as the lungs, impossible.*<sup>4</sup>

14. The Independent Expert concluded his report dated 9 September 2022 in the following manner:

*The selection of the Philips CT Incisive+ as the preferred bidder **is not in the best interest of the patient.** [...] its clinical application is restricted to unenhanced studies, such as kidney stone differentiation, gout, and metal artifact reduction in metal implants. This will not ensure patient safety and well-being.*<sup>5</sup>

15. These statements under oath by the Philips Employee and the Independent Expert were endorsed by the Board in its findings, with specific reference to point (a) to point (e) of its rationale in the Decision. In fact, the Board concluded that:

*Serious doubts have been raised in the testimony of Dr. Chiara Romei whereby different software technology to that offered in the Preferred Bidder's bid would be able to scan the whole lung. Spec 2.20.2 was unambiguous when it stated “The Bidder should include the full dual energy software available **at the time of bidding** [...]” (bold & underline emphasis added)*

16. When testifying under oath, the Philips Employee claimed that the Philips® Incisive CT Plus is capable of performing “dual-energy lung perfusion”, but that the Tender did not require that this is done for the whole lung and that a coverage of 4cm was sufficient.
17. Quite apart from the fact that the Tender specifically requested a “full-body scanner” to be used in an old people’s home on particularly vulnerable geriatric patients, the Philips Employee appears to have opted for a naïve interpretation of the technical specifications rather than accurately and clearly representing the capabilities of the Philips® Incisive CT Plus which clearly does not include the full dual energy perfusion capabilities.

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<sup>2</sup> *ibid*, page 18.

<sup>3</sup> *ibid*, page 20.

<sup>4</sup> Page 2 of the report dated 9 September 2022 as compiled by Dr. Paul Bezzina as the Independent Expert appointed on an *ex officio* basis by the Public Contracts Review Board.

<sup>5</sup> *ibid*, page 3.

18. The testimony of the Philips Employee and the verifications carried out by the Independent Expert both reveal that Philips® has a newer model known as CT7500 Spectral which is technically compliant and is capable of carrying out the clinical functions requested in the Tender.

19. On page 2 of his report, the Independent Expert remarked that:

*Philips actually have 2 models that do this [dual energy lung perfusion], one of which is the CT7500 Spectral which has a dual detector. This model would have been compliant with the tender requirements.*

20. However, this newer model would have come at a higher price as acknowledged by the Philips Employee under oath: "it is a [...] more expensive system".<sup>6</sup>

21. The availability of the more expensive but technically compliant CT7500 Spectral at the time of bidding, as opposed to the technically non-compliant Philips® Incisive CT Plus, was picked up on by the Board in paragraph (e) to its conclusions:

*It seems that Philips (as a supplier) has other possible solutions to meet the tender specifications, but they would have come at a higher cost price.*

22. It is important to reiterate that the Board's Decision was *not* appealed from, and hence became *res judicata* for all concerned, the Contracting Authority and the Recommended Bidder included.

23. From the Board's findings, it is to be inferred that the Recommended Bidder has at best, negligently, or at worst intentionally, provided misleading information that had a material influence on the Contracting Authority's decision to recommend the award of the Tender to the Recommended Bidder.

24. It is disheartening for the Appellant to see that the newly-composed evaluation committee has failed to take note of the Board's findings in Decision 1740 of 2022.

25. In doing so, the Contracting Authority's Second Recommendation has breached the Appellant's right to a rapid and effective remedy. The fact that this second appeal has to be filed to obtain the same remedy sought before the Board by means of the first appeal reveals a twofold breach of the Remedies Directive:

- a. the protracted nature of the proceedings; and
- b. the remedy obtained by means of the Decision is ineffective, because it led to the same result and the perpetration of the same infringement by the Contracting Authority.

26. It is incomprehensible that the evaluation committee would take such a decision, as contained in the Second Recommendation, particularly given the Board's findings of technical non-compliance of the Recommended Bidder's offer.

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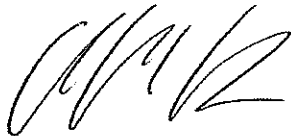
<sup>6</sup> Page 21 of Dr. Chiara Romei's sworn testimony.

27. The Appellant is aggrieved by the Contracting Authority's decision of 30 May 2023 and, for the above-mentioned reasons and others that might be brought in due course, that decision ought to be set aside.

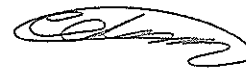
THEREFORE, in view of the above and for other reasons that may be adduced at law at the sitting to be set by the Public Contracts Review Board, the Appellant humbly submits that the same Board should, subject to any declaration or order that it deems fit and opportune:

- (a) declare that the Contracting Authority's decision of 30 May 2023 was illegal and consequently proceed to quash it;
- (b) declare that the Contracting Authority's decision of 30 May 2023 is in breach of the *res judicata* Decision 1740 of 2022 and consequently proceed to quash it;
- (c) cancel and revoke the proposed award of the Tender to the Recommended Bidder;
- (d) give any and all necessary instructions and directions to the Contracting Authority such that this incident does not repeat itself again in the future;
- (e) order the refund of the deposit paid to the Appellant.

Yours sincerely,  
Ganado Advocates



Dr. Clement Mifsud-Bonnici  
([cmifsudb@ganado.com](mailto:cmifsudb@ganado.com))



Dr. Calvin Calleja  
([ccalleja@ganado.com](mailto:ccalleja@ganado.com))

# DOCUMENT SL11

DIPARTIMENT TAL-KUNTRATTI  
Notre Dame Ravelin  
Floriana FRN 1600 – MALTA



DEPARTMENT OF CONTRACTS  
Notre Dame Ravelin  
Floriana FRN 1600 – MALTA

Contact Number: +356 2378 1001  
e-Mail: [info.contracts@gov.mt](mailto:info.contracts@gov.mt)  
website: [www.contracts.gov.mt](http://www.contracts.gov.mt)

30<sup>th</sup> May 2023

**Suratek Ltd**  
**TID 167871 & 167874**

**REFERENCE: CT2385/2021**

**SUBJECT: Tender for the Supply, Installation and Commissioning of a Dual Energy CT Scan at SVP Long Term Care Facility.**

Dear Sir/Madam,

Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the tender submitted by your company was not successful since the criteria for award of this tender was the cheapest priced offer satisfying the administrative and technical criteria.

The tender was recommended for award to Triomed Ltd ID (167852) the amount of €549,681.00 excluding VAT, this being the cheapest priced tender satisfying the administrative and technical criteria.

If you intend to object to this decision, the Public Procurement Regulations allow for an official objection which in this case has to be lodged electronically with the Public Contracts Review Board by sending an email on: [info.pcrb@gov.mt](mailto:info.pcrb@gov.mt) by noon of Friday 9<sup>th</sup> June 2023 against a deposit of €7,750.00.

Payments are to be made through bank transfer in terms of the following details:

Name of Account Holder	Cashier Malta Government
Name of Bank	Central Bank of Malta
Address of Bank	Castille Place, Valletta
Account Number	40001EUR-CMG5-001-H
BIC	MALT MT MT
IBAN Code	MT55MALT011000040001EURCMG5001H
Bank Code	01100

The official schedule can be accessed on the website: [www.etenders.gov.mt](http://www.etenders.gov.mt).

**DIPARTIMENT TAL-KUNTRATTI**  
**Notre Dame Ravelin**  
**Floriana FRN 1600 – MALTA**



**DEPARTMENT OF CONTRACTS**  
**Notre Dame Ravelin**  
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Contact Number: +356 2378 1001  
e-Mail: [info.contracts@gov.mt](mailto:info.contracts@gov.mt)  
website: [www.contracts.gov.mt](http://www.contracts.gov.mt)

Although we have not been able to make use of your services on this occasion, I trust that you will continue to take an active interest in our initiatives.

Yours sincerely,

Joseph Anthony Zammit

f/Director General (Contracts)



**Bank of Valletta p.l.c**  
 Registration Number: C 2833  
 Registered Office: 58 Zachary Street, Valletta VLT 1130 - Malta

## Pay third party

Printed by: Mrs. Giselle Galea Gusman  
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### Transaction details

Payer's name:	SURATEK LTD.
Beneficiary name:	Cashier Malta Government
Relation:	Professional Service
Reason:	Other
Payment details:	CT2385 2021
Currency:	EUR - Euro
Beneficiary IBAN/Account:	MT55MALT011000040001EURCMG5001H
Beneficiary IBAN/Account type:	Valid IBAN of country - Malta
Bank name:	Other bank
Bank address / Bank's BIC:	Insert the beneficiary bank BIC manually
Bank's BIC:	MALMTMT
Beneficiary address:	No
From account:	Overdraft (EUR) 4001881246 0
Charges should be paid by:	Shared - I pay BOV charges; Cashier Malta Government pays the beneficiary bank charges
Amount:	EUR 7,750.00
BOV to transfer the money:	as soon as possible
Receiving bank to get the money as:	normal priority payment
Saved template:	Cashier Malta Government

### Additional information

Credit amount:	EUR 7,750.00
Debited amount (excluding charges):	EUR 7,750.00
Estimated amount to be withdrawn from account:	EUR 7,754.00
Transaction charge:	EUR 4.00

### Transaction result

Status:	Your instructions have been processed successfully.
Transaction ID:	127976369