

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1740 – CT2385/2021 – Supplies Tender for the Supply, Installation and Commissioning of a Dual-Energy CT Scan at SVP Long-Term Care Facility**

**29<sup>th</sup> November 2022**

The Board,

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Suratek Limited, (hereinafter referred to as the appellant) filed on the 2<sup>nd</sup> May 2022;

Having also noted the letter of reply filed by Dr Noel Bezzina on behalf of Bezzina Legal acting for and on behalf of St Vincent de Paul Long Term Facility (hereinafter referred to as the Contracting Authority) filed on the 20<sup>th</sup> May 2022;

Having also noted the letter of reply filed by Dr John L Gauci on behalf of Dr John L Gauci & Associates acting for and on behalf of Planning and Triomed Limited (hereinafter referred to as the Preferred Bidder) filed on the 12<sup>th</sup> May 2022;

Having heard and evaluated the testimony of the witness Mr Cees Verlooiij (Representative of Canon Medical Systems) as summoned by Dr Clement Mifsud Bonnici acting for Suratek Limited;

Having heard and evaluated the testimony of the witness Dr Ronald Fiorentino (Chairperson of the Evaluation Committee) as summoned by Dr Noel Bezzina acting for St Vincent de Paul Long Term Facility;

Having heard and evaluated the testimony of the witness Mr Sandro Ghigo (Secretary of the Evaluation Committee) as summoned by Dr Noel Bezzina acting for St Vincent de Paul Long Term Facility;

Having heard and evaluated the testimony of the witness Engineer Chris Attard Mantalto (Expert Advisor to the Evaluation Committee) as summoned by Dr Noel Bezzina acting for St Vincent de Paul Long Term Facility;

Having heard and evaluated the testimony of the witness Dr Paul Bezzina (Expert appointed by the Board as per Regulation 90(1) of the Public Procurement Regulations);

Having heard and evaluated the testimony of the witness Dr Chiara Romei (Representative of Philips) as summoned by Dr John L Gauci acting for Triomed Limited;

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 31<sup>st</sup> May 2022, 29<sup>th</sup> September 2022 and 20<sup>th</sup> October 2022 hereunder-reproduced.

## Minutes

### Case 1740 – CT 2385/2021 – Tender for the Supply, Installation and Commissioning of a Dual Energy CT Scan at SVP Long Term Care Facility

The tender was issued on the 5<sup>th</sup> December 2021 and the closing date was the 1<sup>st</sup> February 2022. The value of the tender, excluding VAT, was € 1,550,050

On the 2<sup>nd</sup> May 2022 Suratek Ltd filed an appeal against the St Vincent de Paul Long Term Care Facility as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not the cheapest offer.

A deposit of € 7,750 was paid.

There were six (6) bids.

On the 31st May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Suratek Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Kevin Galea	Representative
Ms Annabelle Bartolo	Representative

#### Contracting Authority – St Vincent de Paul Long Term Care Facility

Dr Noel Bezzina	Legal Representative
Dr Ronald Fiorentino	Chairperson Evaluation Committee
Mr Sandro Ghigo	Secretary Evaluation Committee
Dr James Carabott	Member Evaluation Committee
Mr Anthony Caruana	Member Evaluation Committee
Ms Marica Saliba	Representative
Mr Mark Micallef Costa	Representative
Eng Chris Attard Montalto	Representative

#### Preferred Bidder – Triomed Ltd

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

#### Interested Observer

Dr Adrian Spiteri

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

Dr Clement Mifsud Bonnici Legal Representative for Suratek Ltd said that this appeal will deal with the technical side of the bid and will ask if the recommended bid is compliant with the tender requirements – particularly the need for a dual energy CT scanner. There are different technologies covering different functions but the Philips product cannot perform the function required.

Dr Noel Bezzina Legal Representative for St Vincent de Paul Long Term Care Facility said that the tender technical requirement is stated in Clause 2.20.2 of the tender specifications. The Tender Evaluation Committee (TEC) after comparing the submissions found that the preferred bidder met the requirements besides having a more favourable price and was consequently awarded the tender.

Dr John Gauci Legal Representative for Triomed Ltd agreed that this appeal hinges on the technical specifications but added that it is outside the scope of the Public Contracts Review Board to technically evaluate the award.

Dr Mifsud Bonnici countered by saying that the competence of the Board is to decide on the grievances raised about the award whilst he agreed that they were not there to decide the technical side. It may well turn out that the TEC correctly carried out their role but were not well advised by their experts.

Mr Cees Verlooi (Nederlands ID No IRFB42PB1) called as a witness by the Appellant stated on oath that for twenty-two years he has worked for Canon Medical Systems, had a B.Sc. qualification and was a Teacher at the Training Academy. He produced a visual display of a dual image scanner performing its function on the lung together with accompanying data. He stated that the scanner offered by the preferred bidder does not cover the whole lung, but only an area of 4cm against the 25cms necessary for the whole image. This means that the patient has to be moved to obtain the full image. There is no mention of the lungs in the material prepared by the preferred bidder. In a high and low voltage dual energy system one energy cannot distinguish between tissues. For complete lung scanning one needs helical or sequential screening.

Questioned by Dr Bezzina witness said that perfusion of the whole lung cannot be done with the Philips model – in fact there is no mention of lung application in their literature.

Dr Ronald Fiorentino (127161M) called as a witness by the Contracting Authority stated on oath that he was the Chairperson of the TEC. Asked to state the names of the other members of the TEC he stated that these were Dr James Carabott; Mr Francis Asciak (Head of Secretariat, Medical Procurement Unit) and Mr Anthony Caruana (Technical Officer) plus a technical expert who was not a member of the TEC. The members of the TEC followed the expert's view. Witness was not aware as to what literature had been handed to the expert.

Mr Sandro Ghigo (513684M) called as a witness by the Authority confirmed that he was the Secretary of the TEC. He stated that the literature submitted by the preferred bidder had been forwarded to the expert. Witness said that the offer did not include a 'dual energy' scanner.

In reply to a question from Dr Gauci witness stated that the expert confirmed that the preferred bidder's offer was fully compliant with the tender.

Engineer Chris Attard Montalto (260567M) called as a witness by the Authority stated on oath that he was the technical expert appointed to evaluate the offers. A matrix had been provided as a commitment that bidders accepted the terms. The technical offer form indicated that the Phillips

product was dual image; the tender did not specify a set size for the image. The machine complies in full with the specifications of the tender. The preferred bidder stated clearly that its offer meets the specification.

Questioned by Dr Mifsud Bonnici witness agreed that the tender requested dual imaging but he was not interested in comparing images as his role was to check submissions.

In reply to a question from Dr Gauci witness said that the Phillips model offered was fully compliant even in the technical literature.

At this stage Dr Gauci objected to Dr Mifsud Bonnici questioning witness on the contents of the literature submitted as this was confidential – however Dr Mifsud Bonnici claimed that what he was about to ask was about documents in the public domain.

The Chairman said that the Board would have a short recess to consider how to proceed.

After the recess the Chairman stated that at this stage of the proceedings the Board feels that it should invoke the powers given to it under Regulation 90(1) which empowers such Board to engage an expert in this context. He then declared the hearing adjourned to a later date.

End of Minutes

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## **SECOND HEARING**

On 29<sup>th</sup> September 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Muscat as members convened a public virtual hearing to further consider this appeal.

The attendance for this public hearing was as follows:

### **Appellant – Suratek Ltd**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Kevin Galea	Representative

### **Contracting Authority – St Vincent De Paul Long Term Care Facility**

Dr Noel Bezzina	Legal Representative
Dr Ronald Fiorentino	Chairperson Evaluation Committee
Mr Anthony Caruana	Member Evaluation Committee
Ms Marika Saliba	Representative

### **Preferred Bidder – Triomed Ltd**

Dr John L Gauci	Legal Representative
Mr Charles Cascun	Representative
Ms Chiara Romei	Representative
Mr Alex Vella	Representative

## Director of Contracts

Dr Mark Anthony Debono

Legal Representative

The Chairman of the Public Contracts Review Board, Mr Kenneth Swain welcomed the parties and noted that following the decision at the last hearing the appointed expert Dr Paul Bezzina had produced his Report which was circulated to all parties and on which questions may be asked once the expert had confirmed his Report.

Dr Paul Bezzina (312864M) confirmed on oath the contents of the Report prepared by him.

Dr John Gauci Legal Representative for Triomed Ltd said that his client wished to put written questions of a technical nature to the expert.

Dr Clement Mifsud Bonnici Legal Representative for Suratek Ltd objected to written questions being submitted. He said that the Board procedure has to be level to all parties.

Dr Gauci said that he wanted it recorded that he was asking for written questions to be submitted with written answers in reply.

Dr Noel Bezzina Legal Representative for the Contracting Authority said that he had no objections to questions being put in writing since he too, had technical questions to submit.

Dr Mifsud Bonnici then requested that it be recorded that the Appellant objects to the recommended bidders' demands for questions to be put in writing to the expert in relation to the Report for the following reasons. Regulation 91 (3) of the PPR provides for experts to be examined and cross-examined and there is no reference to questions being put in writing. Secondly the nature of proceedings are meant to be rapid and therefore no further delays should be allowed by the Board. On a concluding note, according to Regulations 90 (2) it is the Board that determines the procedure and this has been done also with the rapid character of proceedings in mind.

At this stage the Chairman said that the Board will have a short recess to consider the points made.

On resumption the Chairman stated that Board having heard the request of both Triomed Ltd and the Contracting Authority to put written questions to the nominated expert Dr Paul Bezzina, as well as the objections on the part of Suratek Ltd, notwithstanding that procedures should be accelerated as much as possible, nonetheless meets the request for questions of a technical nature to be put in writing bearing in mind that the requests of Triomed Ltd and the Contracting Authority relate to the conclusions of the Report which was only confirmed on oath at today's hearing.

Failure on the part of the Board to assent to the request of Triomed Ltd and the Contracting Authority would deny them a fair hearing. The Board therefore meets the request of Triomed Ltd and the Contracting Authority.

With the above in mind the Board is directing Triomed Ltd and the Contracting Authority to submit to Dr Paul Bezzina, by the 4<sup>th</sup> October 2022 any questions in writing relating to his Report. Dr Bezzina, in turn, is directed to reply in writing to these questions by the 14<sup>th</sup> October 2022. At the same time Suratek Ltd will be given the opportunity of cross examination on the resumption of this hearing which is being deferred to the 20<sup>th</sup> October 2022.

End of Minutes

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### **THIRD HEARING**

On the 20<sup>th</sup> October 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to further consider this appeal.

The attendance for this public hearing was as follows:

#### **Appellant – Suratek Ltd**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Kevin Galea	Representative

#### **Contracting Authority – Saint Vincent de Paul Long Term Care Facility**

Dr Noel Bezzina	Legal Representative
Mr Sandro Ghigo	Secretary Evaluation Committee
Mr Anthony Caruana	Member Evaluation Committee
Ms Marika Saliba	Representative
Mr Mark Micallef Costa	Representative
Eng Chris Attard Montalto	Representative

#### **Preferred Bidder – Triomed Ltd**

Dr John L Gauci	Legal Representative
Mr Charles Cascun	Representative

#### **Department of Contracts**

Dr Mark Anthony Debono	Legal Representative
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Dr Paul Bezzina resumed his testimony under oath.

In reply to questions put to him by Dr Noel Bezzina witness stated that he had not been given a copy of the tender dossier. Referred to Specification 2.20.2 of the tender witness agreed that the specification required software and he had accessed the Philip's website. It was confirmed by the Philip's Clinical Leader at the international conference what the apparatus could or could not do. [At this stage a video available on Philip's UK website was shown to demonstrate the performance range of the apparatus]. Witness explained that according to the video it was important to note that this type of equipment has two examination cards relating to abdomen and extremities scanning. The lung volume is larger than 4cms and therefore the equipment would not cover the entire lung which is larger. No other evidence was provided to the witness that other facilities, except the two cards, are available and even the manufacturer's own manual confirms that these scans cannot be repeated or extended. The technical specifications facility is too small for lung double energy profusion examination – this information is given by Philip's themselves and there is no doubt that this apparatus is not suitable for double lung examination. It is suitable for static scans such as gout or kidney stones

but not for situations where there is patient movement. Patients' safety could be affected by double function through the double dose needed and this was confirmed by the Philip's specialist.

Questioned by Dr Gauci witness said that verbal information was obtained during the European Congress of Radiology where he spoke to clinical persons and took notes which he included in his report to the Board. The information was not given to him under oath. The conference as held in mid-July before he was asked to act as a Court expert. Witness was not aware that Appellant had provided the same video as that shown earlier – however this was available on line, as was the manual.

At this stage Dr Mifsud Bonnici asked the Board to direct that the document filed by Dr Noel Bezzina, at the last minute, on the 20<sup>th</sup> October 2022, be declared not eligible to be considered since it does not accord with the Board's rulings on the time limit for the filing of documents.

Dr Chiara Romei (AF 4772956) called as a witness by Triomed Ltd testified on oath that she was a Product Specialist at Philips, was familiar with the tender and that the product offered perfectly matches the tender request in regard to all bodily organs. The video shown earlier during this hearing was merely indicating the use of the product not its performance which can extend to all examinations. This is the case for examination of the lungs and one can use other software if more than 4 cm coverage is required – this is comparable to other systems on the market when performing lung perfusion. These specifications match perfectly what is requested in the tender. The safety of the product is guaranteed through certification by the European Safety Authorities.

Referring to the video shown, witness stated that that is purely a teaching aid and is not meant to explain the functions of the system. The 40mm. specification is well known normal segmenter of the system and is the minimum required for full examination. In this respect this matches perfectly anything offered by the competition which offers the same coverage. Witness confirmed that she had not been contacted by the expert appointed by the Board.

Questioned by Dr Mifsud Bonnici, witness stated that her job is as a modality specialist with a background in medical engineering, managing both hardware and software of a product. She started work as a clinical application user. Witness confirmed that the product offered by Philips can perform dual energy lung perfusion through one low and one high energy scans. There is other software available to deal with more than the 4cm. product. Witness agreed that she was making a distinction between part of a scan and a whole scan and that for a dual energy scan repetition and extension of the scan was required.

Dr Mifsud Bonnici referred the witness document SL5 (Page 177) filed by Appellant and directed the witness' attention to the section regarding dual energy process which states "repeat and extend as not available for dual energy acquisitions". Witness replied that perfusion could be performed in particular regions of the lung as one analyses only that part. She went on to state that there is different software technology available to scan the whole lung but it is a completely different system to that offered. Witness said she was not in a position to comment about prices but agreed that there would be a difference in price and the different software technology would be more expensive.

Dr Noel Bezzina asked the witness two questions to which she replied that lung perfusion would still be possible with a 4cm scanner and the model offered satisfies the tender criteria.

This concluded the testimonies.

Dr Mifsud Bonnici stated that the appeal hinged on a technical point and there were two questions facing the Board – what did the tender request and did the product offered meet that request? The

tender is clear – indeed even the Title refers to ‘Dual’ and Section 1.1 of the Specifications talks of ‘full-body scanner... with fast 360° rotation etc’. In 2.9 the specifications state ‘‘should also be able to perform dual energy CT applications detailed in the Software section’. From this it is obvious that the tender is tied to software. The technical offer by Philips cannot do dual energy lung perfusion without a consequential even if fractional time lag. This affects the scan image as there is a time lag giving a varied image. This has been confirmed by the witness Dr Romei who however is claiming that the apparatus can perform the required functions as it is up to 4cm, as requested, but she totally ignores the dual image requirement.

Procurement is a matter of substance over form, said Dr Mifsud Bonnici – dual energy is the objective of the tender and in her testimony Dr Romei agrees with the expert’s view that the entire lung cannot be covered. The equipment in question is to be used at Saint Vincent de Paul at a sensitive time health wise with ailments likely to affect the lung. The Contracting Authority is trying to prove that the offer meets tender requirements when evidence is to the contrary and accepting the 4cm restrictions leads to hit and miss diagnosis. The price offered by the preferred bidder is well below the estimated value of the tender which makes it so obvious that the technology is limited and not up to the highest requirements and does not meet the objectives of the tender. If Philipps had chosen the correct technology their offer would have exceeded the estimated value. Appellant has provided proof that the Philips product is not up to the technical specifications as amply proven in the documents submitted – conversely no proof has been offered by the other parties that the specifications have been met.

According to Dr Mifsud Bonnici the Board was right in appointing an independent expert whose report agrees with the Appellant’s arguments and who had 100% confirmation of his findings at the conference. It is unusual for the Board to appoint experts and in the known three PCRB cases where this happened (Cases 914, 915 and 1230) it relied on their findings and there is no reason why it should not do likewise in this case. Finally, the affidavit filed by Dr Noel Bezzina is purely argumentative as the tender asked for dual energy software.

Dr Gauci said that the preferred bidder’s submission had passed through the competence of the Evaluation Committee. On the contrary all that was offered by Appellant were just allegations. The Evaluation was correctly carried out and there is no point in speculating on alternatives. The Board must ensure that what was asked for was offered and the two requested criteria were met. The Board expert’s opinion came from unreliable sources on the internet – even he himself admitted that he is not an IT expert and could not recall when the notes he used were made. This, apart from the fact that he admitted that he did not see the tender dossier. As against this the preferred bidder produced a technical representative who testified in detail that the tender requirements were fully met by the product offered.

Dr Noel Bezzina said that the arguments in this case have been exhausted. The tender requisites for lung perfusion software and a 4cm detector were met and the preferred bidder has thus complied. Full dual energy software is what was required and witness confirmed that the offer meets this requirement. Dr Cortis confirmed that the tender is based on software and the expert overstepped the mark in his report by bringing in patients’ safety plus his mention of many unknown sources of information. The appeal should be denied.

Dr Mifsud Bonnici concluded by saying that there were four bids higher than that of the preferred bidder which was way out of line. Any mention of a precontractual remedy was out of place as in this case there were only open doors to the bidders. Dr Romei stated that the video shown was only educative and that in reality the product has a much wider capacity but this has to be weighed against the findings of the expert. The Board was invited to look at document SL6 which says that the user



card is limited and does not include the lung and consider this against the documents submitted by the preferred bidder but no proof thereof has been provided. Dr Romei has a commercial interest in this tender and is not clinically experienced as she claims and failed to answer questions put to her in this regard. The equipment offered is not suitable for the envisaged clients and could possibly not be safe. The discussions on this appeal should have been purely technical and it is unfortunate that the integrity of the appointed expert was attacked in the absence of any substantive proofs.

Dr Gauci commented that no new points have been raised by Appellant and the Board should rely on what has already been submitted.

The Chairman concluded the hearing by thanking the parties for their submissions.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sittings of the 31<sup>st</sup> May 2022, 29<sup>th</sup> September 2022 and 20<sup>th</sup> October 2022.

Having noted the objection filed by Suratek Limited (hereinafter referred to as the Appellant) on 2<sup>nd</sup> May 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2385/2021 listed as case No. 1740 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Noel Bezzina

Appearing for the Preferred Bidder: Dr John L. Gauci

Whereby, the Appellant contends that:

- a) Following market research made by the Appellant, it would appear that the Incisive CT Plus does not comply with the main clinical function requested for this CT SCANNER. This was clearly specified Section 3 - Specifications/Terms of Reference (the "Technical Specifications") set in the Tender, specifically: Clause 2.20.2 of the Technical Specifications requires that: *“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.”*

b) To explain the Appellant's position, it is necessary to provide a brief overview of the manner in which a dual-energy CT Scanner functions which is an advanced version of a conventional (standard) CT Scanner. Various technologies and methods exist within different manufacturers for achieving Dual Energy diagnostic scans. The Appellant on this point refers to an article published in the peer-reviewed Korean Journal of Radiology entitled 'Dual-Energy CT: New Horizon in Medical Imaging' written by Hyun Woo which sets out the main technologies used for Dual Energy CT Scanning:

- Dual Tubes with or without Beam Filtration
- Rapid Voltage Switching with Single Tube
- Dual-Layer Detector with Single Tube
- Single Tube with Split Filter
- Single Tube with Sequential Dual Scans

This paper highlights the major limitations of the sequential method of scanning, that is, the last technology referred to above: - Single Tube with Sequential Dual Scans. These limitations include but are not limited to dual energy CT scanning of different moving organs, such as the lung and the heart, and diagnostic procedures. The paper states the following on the Single Tube with Sequential Dual Scans: *“Single Tube with Sequential Dual Scans. In this method, dual-energy CT data with spiral or sequential scanning are acquired simply twice sequentially with two different tube voltages, usually 80 and 140 kVp. Sophisticated CT hardware is not required, which may be regarded as a merit. However, the method is greatly limited by the greatest temporal difference between the two X-ray energy spectra precluding many dual-energy evaluations involved in contrast enhancement and moving body parts. As a result, its clinical application is restricted to unenhanced studies, such as kidney stone differentiation, gout, and metal artifact reduction in metal implants. This method uses an image-based dual-energy reconstruction algorithm; and radiation- lowering technique such as tube current modulation can be used.”* The Appellant submits that this means that this technology is not capable of performing dual energy lung perfusion mapping and enhanced CT which is required by the Tender. From this paper, it is evident, on the other hand, that the remaining technologies are capable of performing dual-energy lung perfusion mapping and enhanced CT. For the record, the product offered by the Appellant employs the Rapid Voltage Switching with Single Tube technology, and therefore, it is able to perform dual-energy lung perfusion and enhanced CT.

- c) Plainly put, the Single Tube with Sequential Dual Scans technology is not capable of performing lung perfusion since it employs a sequential method of scanning, that is, by using a single scanner to scan twice at two different energy levels in a sequential manner.
- d) The Appellant further submit that, from the literature available on the market, it appears that the technology used in the product offered by the Recommended Bidder (i.e. the Philips Incisive CT PLUS) is Single Tube with Sequential Dual Scans.

- e) Therefore, the Incisive CT Plus offered by the Recommended Bidder is incapable of carrying out a process called 'Dual-energy lung perfusion, Perfusion mapping, and virtual unenhanced series from enhanced CT' which is specifically and expressly requested in Clause 2.20.2 of the Technical Specifications.
- f) On this basis it would appear that the model proposed by the recommended bidder was not technically compliant with the main scope of this tender set in the title itself "TENDER FOR THE SUPPLY, INSTALLATION AND COMMISSIONING OF A DUAL ENERGY CT SCAN at SVPR LONG-TERM CARE FACILITY". This is due to the fact that the INCISIVE CT PLUS is nothing more than a normal CT SCANNER which scans different body parts with different energies and has included an additional programmed group of 2 scans, one after the other, named dual energy scans but only available for the abdominal and extremity areas of the body excluding the lung and enhanced (contrast) scans.
- g) The Recommended Bidder's financial offer stood at approximately 35% of the Estimated Procurement Value of the Tender. While this would normally be cause for objection on the ground of being an "abnormally low offer", the Recommended Bidder's financial offer is, in the Appellant's opinion, justifiable since it is based on a standard / conventional CT Scanner which is not compliant with the technical specifications which require a superior quality product.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20<sup>th</sup> May 2022 and its verbal submission during the virtual hearings held on 31<sup>st</sup> May 2022, 29<sup>th</sup> September 2022 and 20<sup>th</sup> October 2022, in that:

- a) Compliance with the Tender Specifications - The Appellant bases its objection mainly on the fact that the Recommended Bidder was not compliant with the technical specifications of the tender document, particularly with clause 2.20.2 of the Technical Specifications. In this regard, the Contracting Authority submits that the Recommended Bidder was indeed compliant with the technical specifications, including Clause 2.20.2, as will be explained below. The documentation submitted by the Recommended Bidder, clearly states that the model being offered by Triomed Ltd (Philips Model CT Plus) is indeed a dual energy CT Scanner, as requested in the tender specifications.

In fact, the literature submitted by the Recommended Bidder stipulates the following: *"Dual Energy - Includes a Dual Energy scan type that allows the acquisition and reconstruction of sequential dual-energy scans. The Spectral Analysis application may allow separation and analysis of materials such as calcium and uric acid when used with dual-energy scan data."*

Such literature further stipulates:

*"Dual-Energy Analysis IX - CT Dual Energy Viewer is designed to assist in separation and analysis of different tissue material based on their energy value from Dual-Energy CT Scans. CT Dual Energy Viewer provides a set*

*of tools for registration, quantification and visualisation of dual-energy image data derived from sequential dual-energy acquisition.”*

- b) Moreover, in the technical specifications form, the Recommended Bidder also declared that the model being offered complies with the tender requirements and specifications. Once the technical specifications were complied with, the only determining factor remaining was the price (given that the sole criterion for award as per tender was the cheapest price offer satisfying the administrative and technical criteria).
- c) With respect to compliance to the technical specifications, jurisprudence maintains that courts cannot and do not have the competence to review or re-evaluate what has already been evaluated by an evaluation board composed of experts in the relative field who, following an evaluation of the submissions made, deem that an offer is technically compliant with the tender specifications.
- d) This serves to show that the model offered by the Recommended Bidder was indeed compliant with the tender's technical specifications (after having been evaluated by the Board and a technical evaluator) and that resultantly, being the cheapest offer submitted, the evaluation committee was correct in recommending the tender to be awarded to the Triomed Limited.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 12<sup>th</sup> May 2022 and its verbal submission during the virtual hearing held on 31<sup>st</sup> May 2022, 29<sup>th</sup> September 2022 and 20<sup>th</sup> October 2022, in that:

- a) Objector essentially alleges that Recommended Bidder's offer falls foul of Clause 2.20.2 of the Technical Specifications. Objector bases this allegation on a number of conjectures and spurious assumptions in an attempt to give the impression that Recommended Bidder is not compliant. Furthermore, Objector bandies about defamatory and simply untrue phrases attributing bad faith to the Recommended Bidder ('misrepresentations', 'half-truths', 'not entirely forthcoming'). The Recommended Bidder will be demonstrating the complete unfoundedness and gratuitous nature of these allegations. Thus, it is reiterated that i) Recommended Bidder did not in any way misrepresent any part of its bid and ii) the Recommended Bidder's bid is fully compliant with the technical specifications. All this will undoubtedly be confirmed by the contracting authority and, if so required, Objector will provide any technical evidence to this effect.
- b) Without prejudice to the above, review bodies should not be requested to reappraise the technical evaluation of the tender evaluation committee, unless grave and serious shortcomings are demonstrated. It is also to be underlined that, whilst Recommended Bidder has absolutely no objection to its technical compliance, Maltese and European jurisprudence maintain that review boards and Courts should not be expected to re-evaluate tender bids from a technical point of view unless it is clearly demonstrated that the tender evaluation committee is guilty of some manifest error of assessment or that it misused its powers.

- i. That reference is made, inter alia, to the judgment delivered by the Court of Appeal (App. Number 59/2012 - judgment date - 27th May 2015), wherein it was held that: *“Qabel ma jigi ttrattat il-meritu tal-appell tajjeb illi din il-Qorti, qabel xejn, tirribadixxi li bhala Qorti tat-“tielet istanza” fdawn it-tip ta’ kazzjiet, ma hux mistenni li din tidbol biex teżamina d-dettalli teknici ta’ kull offerta biex tara jekk offerta partikolari tissodisfax jew le r-rekwiziti teknici mitluba fis-sejba għall-offerti. Din il-Qorti, kif kostitwita, la tista’ u langas għandha x-xjenza teknika meħtiega biex tevalwa materji li imorru lil hinn mill-kompetenza tagħha. Kif qalet il-Qorti Ewropea ta’ Gustizzja (ECJ), f’kaz numru T-300/07 fl-ismijiet Evropaiki Dynamiki v. Commission, deciza fid-9 ta’ Settembru, 2010: “As a preliminary point, it should be recalled that the Commission enjoys a broad margin of discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (see, to that effect, Case T-145/98 ADT Projekt v. Commission [2000] ECR 11387, paragraph 147; Case T-148/04 T03 Travel Solutions Belgium v. Commission (2005) ECR 11-2627, paragraph 47; and Case T-437/05 Brink’s Security Luxembourg v. Commission [2009] ECR 11-0000, paragraph 193.” Dak il-kaz, hu veru, kien jolqot kaz mistharreg minn kummissjoni ewropeja, pero, il-principju jibqa’ li, bhala qorti ta’ revizjoni, il-kompetenza ta’ din il-Qorti hija necessarjament cirkoskritta.” (App. Sup -Steelsape Limited vs Direttur tal- Kuntratti et. deciza 7 ta’ Anwissu 2013. Tradott dan l-inseniamet għal din il-vertenza, huwa evidenti illi din il-Qorti ma tistax u langas għandha il-kompetenza illi iccagalaq dak mistharreg mill- Kumitat tal-Evalwazzjoni kompost minn esperti in materia li debrilhom illi l-prodotti li kellhom għall-eżami guddiembom kienu kollha technically compliant mat-tender specifications.”*
- ii. Reference is also made to the decision of the Court of Appeal (Appeal Number 93/19 - delivered on the 6th February 2015) wherein it was held that: *“Qabel xejn għandu jingħad illi din hija, materja ta’ kriterji teknici li dwarhom bhala regola din il-Qorti m tiddisturbax l-apprezzament magħmul min bord tekniku. “Għal darba obra din il-Qorti tosserva illi fuq materja ta’ apprezzament tekniku bhala regola generali u sakemm ma jintwerewx ragunijiet gravi u konvincenti ma tiddisturbax apprezzament magħmul minn bord tekniku.”*

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.

Initially this Board will list down what it considers to be most relevant to these proceedings. These are:

- a) Section 3 – Spec 1.1 of the Tender dossier (page 13) states *“This CT **full-body** scanner shall function.....”* (bold & underline emphasis added)

- b) Section 3 – Spec 2.20.2 of the Tender dossier (page 15) states “*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.” (bold & underline emphasis added)*
- c) Testimony under oath of Dr Chiara Romei when she stated:
- i. “*This is the case for examination of the lungs and one can use **other** software if more than 4 cm coverage is required” (bold & underline emphasis added)*
  - ii. “*there is different software technology available to scan the whole lung but it is a completely different system to that offered”*
- d) Testimony under oath of Dr Paul Bezzina when he stated:
- i. “*The lung volume is larger than 4cms and therefore the equipment (of the preferred bidder) would not cover the entire lung which is larger.”*
  - ii. “*..... there is no doubt that this apparatus is not suitable for double lung examination. It is suitable for static scans such as gout or kidney stones but not for situations where there is patient movement.”*
- e) Signed report prepared by expert appointed by the Board as per Regulation 91(1) of the Public Procurement Regulations (“PPR”) whereby it is stated:
- i. “*Philips actually have 2 models that do this, one of which is the CT7500 Spectral which has a dual detector. This model would have been compliant with the tender requirements. However, Philip’s CT Incisive+ does not have this feature 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.”*
  - ii. “*I confirm that the points raised by Suratek through their legal firm Ganado (sic) Advocates dated 2<sup>nd</sup> May, as part of the objections are correct. Reference is hereby being made to para 11, 13 and 14.”*

Once the most relevant points have been identified and ascertained, the Board will now proceed to list down its conclusions. However, before doing so, the Board declares that it will not take into consideration the statements asserted by the expert by the said board relating to the third parties he mentioned to have been consulted precisely because the third parties’ considerations as asserted by the same expert were not confirmed under oath during this appeal. As a consequence, his version of facts replicating the third parties’ consideration translate themselves into hearsay evidence.

### Conclusions

- a) Initially, this Board notes that the nomination of the board’s expert and his final conclusions cannot be subtly discarded despite the fact that the board, as in a court of law, is not bound by the conclusions of such expert. However, in the case decided by the Court of Appeal decided on the

23<sup>rd</sup> June 1967, in the names **Giswarda Bugeja vs Emanuele Muscat et**, the court reiterated: *“Għalkemm il-Qorti mbux marbuta li taccetta l konklużjonijiet peritali kontra l konvinzjonijiet tagħha nnifisha, u l-konklużjonijiet peritali bhal materjali stutturi obrajn kontrollabli mil gudikant, ma dana kollu ‘il giudizjo dell’ arte espress mit tekniku ma jistawx u m’ghandux, aktar u aktar fejn il parti interessata ma tkunx ipprevalit ruha mil fakolta lila mogħtija b’talba ta nomina ta periti addizzjonali, jigi skartat facilment, ammeno che ma jkunx jidber sodifacetament illi l konklużjonijiet peritali huma fil kumpless kollu tac cirkostanzi irragonevoli”*

- b) Considering the content of the above cited judgement and applying same to the current context, this Board finds itself rather convinced, at least on the basis of probability, in concluding 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”.
- c) 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)
- d) Finally, the conclusions reached by Dr Paul Bezzina are very clear and leave little room for interpretation.
- e) 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.

Hence, this Board upholds the Appellant’s grievance.

### **The Board,**

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

- a) To uphold the Appellant’s concerns and grievances;
- b) To cancel the Letter of Acceptance dated 8<sup>th</sup> April 2022 sent to “Triomed Ltd”;
- c) To cancel all the Letters of Rejection dated 8<sup>th</sup> April 2022;
- d) To order 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;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Dr Vincent Micallef**  
Member