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& ASSOCIATES

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Public Contracts Review Board  
Department of Contracts  
Notre Dame Ravelin  
Floriana VLT 2000



**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')**

I write on behalf of the Recommended Bidder, Triomed Limited ('Triomed'), in reference to the supplementary grievances raised by the Appellant in their communication dated 28th July 2023, pertaining to Case 2385/2021 (the "Tender").

**A. PRELIMINARY CONSIDERATIONS**

**1. Inadmissibility of additional grievances:**

Under the provisions (particularly regulation 270) of the Public Procurement Regulations, it is evident that the proper channel for raising objections and grievances is through the submission of a reasoned letter of objection. This not only ensures that the contracting authority and other parties involved are apprised of the full scope of objections but also facilitates an efficient and focused resolution of the matter.

The rationale behind this approach is evident. Allowing for the introduction of additional grievances would not only undermine the principle of finality but also potentially lead to protracted and unwieldy proceedings, negatively impacting the overall efficiency and fairness of the process.

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Therefore, based on the explicit language of the Public Procurement Regulations, it is clear that the introduction of additional grievances beyond the initial letter of objection is not in alignment with the prescribed procedure. Any attempt to raise new objections at later stages of the proceedings would run counter to the applicable legislation, and thus, such additional grievances should be deemed inadmissible.

Reference is made to a case that specifically dealt with the introduction of additional grievances, and namely **Case 1898 - CT2364/2022 - Supplies - Tender for the Supplies of Implantable Bone Conduction Hearing Aids**, dated 1st August 2023 wherein it was declared that:

“e) With regards to the “\*” issue present in the preferred bidder’s technical literature, this Board opines that:

- i. Such a grievance was not present in the original letter of objection which was filed on 31st May 2023 by the Appellant. Consequently such a grievance cannot be presented at this stage as it contravenes regulation 270 of the PPR which states “.....*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.***” (bold & underline emphasis added)
- ii. None-the-less, no sufficient proof was presented to cast doubt on the evaluation done by the evaluation committee..”

The regulatory scheme's emphasis on raising all objections within the prescribed initial letter of objection is not a mere formality but an attempt to ensure that all parties are cognizant of the full scope of issues at play.

In light of these considerations, it is evident that the introduction of additional grievances beyond the scope of the initial letter of objection would contravene the procedural framework laid down by the PPR and, more specifically, regulation 270. The case law cited vividly illustrates the application of this principle, emphasizing the importance of adhering to the regulatory prescription of raising all objections within the confines of the initial letter of objection.

Consequently, it is manifest that the introduction of additional grievances subsequent to the initial letter of objection should be deemed inadmissible.

## **2. Contrast between Appellant's Approach and applicable law:**

In the course of the proceedings, particularly during the sitting regarding the admissibility of the communication containing supplementary grievances, the Appellant frequently invoked the concept of "praxis" rather than adhering to the pertinent legal framework. It is imperative to underscore that while praxis may embody customary practices, it must be aligned with the provisions of the law itself. Instances where such customary practices diverge from the confines stipulated by legal principles should not be tolerated and/or used as a 'precedent'.

## **3. Preservation of Procedural Integrity:**

It is also incumbent to address an ancillary matter that bears relevance to the broader context of procedural propriety.

In this regard, it is prudent to reflect upon the mode through which unsolicited submissions are transmitted by Objector in these proceedings, particularly through electronic mail. While acknowledging the inherent efficiencies and expediencies afforded by electronic communication, it is imperative to underscore the paramount importance of upholding established and officially recognized procedural channels.

The potential for misdirection, delays, and misunderstandings increases when established channels are circumvented.

## **B. REPLY ON THE ADDITIONAL GRIEVANCES**

### **1. First Additional Ground of Objection:**

The Objector alleges that the evaluation committee lacked the authorization to issue the request for rectification on 22nd February 2023, contending that the absence of a "Literature List" Form in the procurement documentation renders the basis for rectification void. This allegation is simply a frivolous one and is unfounded both at fact and at law. Indeed, Section 1 – Instructions to Tenders, No 5 (C)(ii) emphasizes the requirement of literature itself, not the format of submission as is evidence by the emphasized term "literature".

Furthremore, it is clear that the rectification issued on 22nd February 2023 pertained to clause 2.20.2 of the tender document, not a literature list. It is clear Section 1 – Instructions to Tenders, No 5 (C)(ii) categorizes this requirement as a Note 2 requirement, enabling the request for clarification/rectification within five working days as per applicable tender procedural requirements.

The assertion that the evaluation committee was prohibited from issuing a rectification is therefore erroneous, as per the stipulated regulatory framework.

## **2. Second Additional Ground of Objection:**

In the second ground, the Objector contends that the document considered by the evaluation committee subsequent to the request for rectification was non-existent at the time of tender submission closure.

The assertion that Triomed was somehow noncompliant is unfounded and lacks merit. In reality, Triomed diligently followed the Contracting Authority's request. The company promptly submitted updated documentation for its software, as requested, which software was available before the tender's closing date.

It is crucial to address the Appellant's suggestion that updating software literature is an irregular practice. Such a stance not only contradicts the prevailing industry norms but also highlights the Appellant's attempt to misconstrue standard operational practices for their own advantage. It is common knowledge that software literature undergoes updates and is aimed at providing accurate and current information to potential users and stakeholders.

It is evident that the Appellant's argument is an attempt to cast aspersions on Triomed's compliance and create a baseless grievance. Contrary to Appellant's insinuations, Triomed complied strictly with the tender requirements.

In conclusion, the contention that Triomed was noncompliant is without merit and conveniently disregards both standard industry practices and the diligent efforts undertaken by Triomed to fulfill the tender requirements. The Appellant's attempt to portray routine software literature updates as irregularities only serves to underscore their intentions to misguide the Board.

It is imperative to address the timing and context in which the alleged non-compliance regarding literature submission has been raised. Notably, this grievance is conspicuously absent from the debate in the first appeal. At no point during the first

appeal did the Appellant bring up the issue of literature submission non-compliance. This omission is significant and raises pertinent questions about the legitimacy and consistency of their claims.

In light of these considerations, it is reasonable to question the motives behind introducing these new grievances at this juncture.

In addition to the considerations discussed, it is worth highlighting that the Appellant has neglected to provide any substantive indication or evidence suggesting that the version of the documentation submitted by Triomed differs from the version obtainable at closing date of the Tender.

This omission raises a significant question: if the Appellant's contention is rooted in genuine concerns about the non-compliance of the literature submission, it would be expected that they could readily identify and highlight discrepancies between the two versions of the documentation. This in itself casts serious doubt on the legitimacy of the Appellant's claim and reinforces the notion that their argument is baseless and lacking in substance.

In conclusion, the absence of any indication of differences between the versions of the documentation not only raises doubts about the validity of Objector's claim but also highlights lack of substantive evidence supporting their grievance. It reinforces the notion that Objector's attempt to introduce this new line of argument is tenuous at best, and its case remains unsupported by verifiable evidence.

### **C. CONCLUSION**

In conclusion, we humbly maintain that the additional grounds of the Objector should be deemed inadmissible by the PCRB, in view of the fact that they have been submitted in contravention of the applicable legislation.

Furthermore, we respectfully emphasize that the Appellant's actions resemble a fishing expedition, contravening the principles of public procurement review processes, and appear to intend to misguide the Board through the introduction of frivolous and vexatious arguments.

Finally, and without prejudice to the above, it is being submitted that this Board should reject the additional grievances, together with the main ones and consequently confirm the award to the Preferred Bidder, namely Triomed Ltd.

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