



24th September 2023

Public Contracts Review Board
Notre Dame Ravelin,
Floriana,
Malta

Cherubino Limited [TID 181082]

vs

[1] Department of contracts; and

[2] Central Procurement & Supplies Unit;

CT 2021/2022

Tender Name: Supplies tender for the purchase on a pay per use basis, qty 2 high power urological laser units for the urological surgical department at MDH

REASONED LETTER OF OBJECTION

Whereas, the Department of Contracts (*hereinafter* **DOC**) issued a call for tenders “for the purchase on a pay per use basis, qty 2 high power urological laser units for the urological surgical department at MDH”

Whereas, Messrs. Cherubino Limited (*hereinafter* “**Appellants**”) submitted an offer for this procurement procedure;

Whereas, by means of a letter dated 15th September 2023, the appellants were informed the the procurement is being cancelled;

Whereas, appellant company feels aggrieved by such a decision, and thereby is submitting its objection within the time-frame and accompanied with the relative payment (copy of payment enclosed as **DOC1**), based on the following grievances:

1. **Preliminary**

- 1.1 Reference is hereby being made to a request made to the DOC, wherein information about the composition of the evaluation committee has been requested;
- 1.2 In view of the fact that this information has not been supplied by the DOC, and this in manifest breach of *inter alia* article 40 of the PPR, Cherubino is respectfully requesting the board to order DOC to issue the requested information and to re-issue the rejection letter and this to ensure that the legal principle of *equality of arms* is upheld;
- 1.3 Without prejudice to the above, Cherubino is hereby reserving its rights to the fullest extent possible to produce additional submissions, documentation and evidence to the Public Contracts Review Board, in the eventuality that the PCRB rejects it's request for the re-issuance of the rejection letter;

2. **Reason for cancellation: wrong**

- 2.1 In its cancellation letter, the contracting authority holds that in accordance with article 18.3(b) of the General Rules Governing Tenders [GRGT]:

“the economic or technical parameters of the project have been altered”

- 2.2 It thereafter motivates such a decision on the basis of statements made by the evaluation committee [vide grievance 3 hereunder];
- 2.3 The appellant company contends that the technical parameters of the project have not been altered, and *semmai* the contracting authority should have held that the cancellation should be based on article 18.3(d) – the motivation clearly states that there is a discrepancy within the tender document [an alleged discrepancy which is being rebutted through grievance 2 hereunder] but definitely no alteration to the scope or change in the parameters of the project;
- 2.4 As will be proven throughout the appeal, there have been no technological advancements, as alleged in the cancellation letter, nor has there been any changes to the scope of the services requested, and thereby article 18.3(b) of the GRGT is absolutely irrelevant and legally unsustainable in the context under review;

3. Reason for cancellation: not justified

- 3.1 It is the position of Cherubino limited, that there has been no advancements whatsoever within technology, nor has been any medical needs to warrant the change of heart;
- 3.2 Whilst the contracting authority is at the liberty to purchase whatever it desires, once it had established a need, and such need is clearly spelt out through a procurement document, it is only for justified reasons that it can proceed to withdraw such procurement – the appellant company confirms that there are no changes whatsoever to the technical requirements, nor are the solutions on offer inferior to the needs of the contracting authority;
- 3.3 For all intents and purposes, Cherubino confirms that its product on offer conforms to the tender document, the pre submissions clarifications, as well as it supplied all the necessary information throughout the evaluation as requested – the contracting authority has all such comfort necessary to ascertain that the product on offer will provide the solution required – however for a reason which is not medically sound nor legally sustainable, the contracting authority proceeded to a regretted cancellation;

4. Evaluation committee: ultra vires

- 4.1 In the cancellation letter, it is held that:

“1. The EC recognizes the fact that the specifications presented in the Tender Dossier are to be updated to cover the advances in the technology for holmium and thulium lasers so that two more versatile machines can be procured which will be able to cater for all the requirements of the Urology Department.

2. The EC also noted that the present specifications present a fundamental flaw in the technical offer form for items A3.1.1 and B3.1.1. The wavelength bandwidth specified, covers both the holmium and thulium laser wavelengths such that there is no differentiation between the 2 bandwidths. For clarity: A holmium laser has a wavelength of 2100nm A thulium laser has a wavelength varying from 1940 – 2013nm. Specifications describe a wavelength ranging from 2000nm – 2100nm (2100 +/- 100 nm). This covers both lasers simultaneously and therefore, cannot be considered as a suitable specification.

Specification needs to be amended so that the two lasers can be clearly differentiated, since a thulium laser can be offered instead of a holmium laser and be technically compliant and vice versa, i.e. a holmium laser can be offered instead of a thulium laser and this will still be technically compliant.”

4.2 In accordance with article 16 of the GRGT, the evaluation committee is bound to evaluate the tenders in accordance with the established criteria within the tender document;

4.3 The aforesaid is also confirmed through DOC Policy note #14 [dated 10.10.2019] wherein it is held that:

“They [the evaluation committee] are tasked to check the compliance of the submissions against the instructions and requirements as detailed in the Procurement Document.”

4.4 In the case under review, the evaluation committee went beyond its permitted functions and thus acted *ultra vires*;

4.5 In passing comments, in determining alleged flaws, in manifesting opinions, evaluation committees will be acting beyond their permitted function – in the context under review the evaluation committee did not only manifest an opinion, but even worse determined what in its own opinion should be acquired by the contracting authority – a function which does not fall within its remit, and thus acted out of its boundaries;

4.6 Wheresoever the evaluation committee usurps the powers granted to others, and acts outside its remit, it therefore falls short the Public Procurement Regulations in particular article 39 – unpleasantly acting not in a transparent manner;

4.7 Article 18 of the GRGT stipulates that it is the “*Right of the Central Government Authority / Contracting Authority To Accept Or Reject Any Tender*” and thereby the prejudice of the evaluation committee should result in *de minimis* the re-evaluation of the tenders by a newly composed evaluation committee;

5. Proportionality

5.1 The concept of proportionality has been used loosely throughout multiple procedures – proportionality is such concept which seeks to ascertain a balance between the different perspectives of the stakeholders, whilst ensuring that no one's rights are prejudiced to the detriment of others;

5.2 In the case, Cherubino claims that the actions by the contracting authority are not proportionate, for the following reasons:

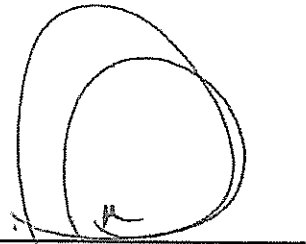
- 5.2.1 The solutions on offer, at least the one by Cherubino, provides precisely what the contracting authority requires;
- 5.2.2 The supplying company is a well regarded and has extensive experience, in the supply of the product;
- 5.2.3 The technical requirement was specially debated through a request for clarifications, and thus the contracting authority was fully aware of the situation *ab initio*;
- 5.2.4 Cancellation has always been deemed to be an extraordinary act, and should always be a last resort – in which context, it is clearly not the last resort, but a comfortable solution, which only seeks to safeguard the contracting authority, without taking the time to actually corroborate its conclusions;
- 5.2.5 Finally, medical studies and medical papers, confirm that what is stated in the cancellation letter is not justified nor is it correct;

NOWTHEREFORE, whilst reserving the right to put forward further submissions, the Appellant company hereby requests:

- i. Preliminary to provide the requested information;
- ii. To revoke the cancellation of the procurement procedure;
- iii. To order the DOC / CPSU to re-instate the offer/s of the appellant company;
- iv. To order the DOC / CPSU to re-evaluate all of the offers, by a newly composed evaluation committee;

- v. To do anything else which is conducive and necessary for the proper execution of the above requests;
- vi. If appropriate, to order that the offer of the appellant company is fully compliant with the tender specifications and thus order, instruct or in any other manner that the appellant company should be awarded the tender;
- vii. To refund the deposit paid in its entirety in view of the wrong evaluation;

Appellant company is hereby reserving the right to present further evidence, both orally or in written, during the hearing.



Dr Matthew Paris LL.D
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- Requested Testimony by:**
- (i) Representative of the Evaluation committees [first and second]
 - (ii) Representative of the contracting authority
 - (iii) Representative of the Appellant company:
 - (iv) Representatives of Government departments, including the General Contracts Committee; the Director of Contracts;
 - (v) Medical experts, clinical end users and other practitioners;



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

Pay third party
Reprinted by: Ms. Kimberly Cordina
Reprinted on: 25/09/2023 - 09:54
Document ID: 17493735

Transaction details

Date: 25/09/2023

From: Internet Banking

Transaction ID: 132464879

Status: Registered

Transaction: Pay third party

Beneficiary name: CASHIER MALTA GOVERNMENT

Relation: Utilities

Reason: Other

Payment details: TENDER CT2021.2022

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: Let the bank apply the beneficiary bank BIC

Beneficiary address: No

Withdraw from account: Operating (EUR) 4001006681 6

Charges should be paid by: Shared - I pay BOV charges; CASHIER MALTA GOVERNMENT pays the beneficiary bank charges

Amount: EUR 6,761.00

Receiving bank to get the money as: normal priority payment

To be effected on: as soon as possible

Credited amount: EUR 6,761.00

Debited amount (excluding charges): EUR 6,761.00

Estimated amount to be withdrawn from account: EUR 6,765.00

Transaction charge: EUR 4.00

Creator: Ms. Kimberly Cordina

Authorised by: Mr. David Basile Cherubino

Result: Your instructions have been processed successfully.