



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

**28 September 2023**

Dear Sirs,

**Re: Tender Ref. No. CT2157/2023 for the Provision of BIPAP and CPAP Machines with Reduced Environmental Impact for Loaning Purposes, for a Period of Three Years (the "Tender")**

1. We have been instructed by **OK Medical Limited (C-79739)** (the "**Appellant**") to file an appeal in terms of Regulation 270 of the Public Procurement Regulations (the "**PPR**") in connection with the above-captioned Tender.
2. In brief, the Appellant is aggrieved by the Contracting Authority's decision to reject its bid on an alleged issue of non-compliance with the tender conditions. The Contracting Authority's decision ought to be quashed and the Appellant's bid reintegrated in the evaluation process. This is so for the following reasons:
  - a. First, the Appellant's bid is, as a matter of fact, compliant with the Warranty Requirements (as defined later in this objection): (i) first, the warranty covers "repairs and replacements" for 5 years from installation and commissioning; and (ii) second, and after the lapse of this warranty, spare parts will be made available for a 5 year period (Section: B).
  - b. Second, the Contracting Authority has changed the tender conditions *ex post facto* by requiring a 7-year minimum life expectancy, and therefore, it has shifted the goal posts after closing date of the Tender (Section: C).
  - c. Third, the Contracting Authority's reading of the Tender conditions is disproportionate and exceeds the objective of the Tender (Section: D).

**A. Factual Background**

3. The Tender was issued by the Department of Contracts on behalf of the Central Procurement and Supplies Unit (the "**Contracting Authority**") on 31 May 2023 with a closing date of 4 July 2023. A total of 10 bids were submitted by 5 bidders.
4. This appeal concerns the Appellant's bid with reference number TID 195238 for the price of €155,442.

5. Clause 6.2.1 entitled 'Product Longevity and Warranty' of Section 3 of the Tender raised a requirement for the:

*'repair or replacement of the product [to] be covered by the warranty terms given by the manufacturer. The tenderer shall further ensure that genuine or equivalent spare parts are available (direct or via other nominated agents) for the expected service life of the equipment, at least for 5 years over warranty'.*

6. Article 32.1 (Warranty Obligations) of the Special Conditions provided as follows:

*This warranty shall remain valid for two (2) years from installation and commissioning date, on all parts and labour. [...]*

7. In simple terms, the tender specifications required that:

- a. the manufacturer provides a warranty covering repairs and replacements;
- b. the minimum warranty period was 2 years from installation and commissioning date; and
- c. spare parts are available for the entire warranty term (2 years), and for at least 5 years over warranty, and therefore, after the warranty term lapses.

(these requirements shall be referred to as the "**Warranty Requirements**")

8. Article 33.1 (After-Sales Service) of the Special Conditions stipulates that:

*The contractor shall provide and secure the provision of reliable and regular after-sales for a period of five years.*

9. On 17 July 2023, the Appellant received a request for rectification from the Contracting Authority (the "**Rectification Request**"). This Rectification Request asked the Appellant to confirm compliance of the BIPAP and CPAP machines with Clause 6.2.1 cited above of the Tender, and to substantiate this with reference to technical literature.
10. The Appellant replied to the Contracting Authority's request on 19 July 2023, confirming that the BIPAP and CPAP machines tendered complied with the Warranty Requirements and this in accordance with the technical literature submitted by the Appellant's principal and the self-declarations in the Technical Offer Form.
11. On 19 September 2023, the Appellant received a letter of rejection from the Contracting Authority (the "**Rejection Letter**") informing it that the bid subject-matter of this objection had been rejected, and that instead the contract was being recommended for award to the bid submitted by Sidroc Services Limited (C-59456) (the "**Recommended Bidder**")

for the price of €218,117.40. The Rejection Letter is attached to this letter and marked as Document A-1.

12. The Contracting Authority declared the Appellant's bid to be technically non-compliant for the following reason:

*The tender document Clause 6.2.1 stipulates that the product must have a service life of a minimum of 5 years over the warranty given by the manufacturer. This implies a minimum lifetime period of 7 years. The reply on an evaluation clarification revealed that for both BIPAP and CPAP machines stated that total lifetime is only 5 years. Not acceptable and not subject to further clarifications.*

13. The Appellant is aggrieved by the Contracting Authority's decision of 19 September 2023, and is lodging this appeal to overturn and quash the same.

***B. First Ground of Appeal: The Appellant has complied with the Warranty Requirements***

14. The Appellant's bid satisfies all the requirements of the Tender, and should consequently have been considered technically compliant by the evaluation committee.
15. The Technical Offer and the technical literature submitted by the Appellant expressly state that:
- a. the manufacturer provided a warranty covering repairs and replacements;
  - b. the manufacturer gold-plated the Contracting Authority's requirement by providing a warranty period of 5 years from installation and commissioning date;
  - c. spare parts are available not only for the entire warranty term of 5 years, but also for at least 5 years *over* warranty; and
  - d. the products also satisfy the requirement in Article 33.1 for reliable and regular after-sales for a period of 5 years.
16. The Appellant stresses that both its Technical Offer and the technical literature submitted are confidential documents and must be treated as such by this Honourable Board and by the Contracting Authority.
17. The Contracting Authority's decision to disqualify the bid of the Appellant was incorrect and should be overturned and quashed by this Honourable Board.

**C. Second Ground of Appeal: Contracting Authority has shifted the goal posts by requiring a 7-year minimum life expectancy after closing date**

18. The Rejection Letter premises the reasons for rejection on the minimum 7-year life expectancy requirement. However, the Appellant first learnt of the minimum 7-year life expectancy requirement for the products to be supplied under the Tender upon receipt of the Rejection Letter.
19. The minimum life expectancy was not a technical specification in the Tender itself, or in the subsequent clarifications which the Contracting Authority had at its disposal.
20. Nor was the minimum life expectancy explicitly requested from the Appellant in the Rectification Request dated 17 July 2023 where the only 'rectification' requested from the Appellant was confirmation of compliance with the Warranty Requirements, that is, that the warranty covered repairs and replacements, and that spare parts are available for the entire period of the warranty plus another 5 years.
21. The only time that the minimum life expectancy was clearly expressed as a requirement was in the Appellant's Rejection Letter where the Contracting Authority stated that the product '*must have a service life of a minimum of 5 years over the warranty given by the manufacturer. **This implies a minimum lifetime period of 7 years***' (emphasis added).
22. Even the Contracting Authority *ex admissis* stated that the minimum lifetime requirement was extrapolated by means of an **implication**, an inference drawn from the wording used for Clause 6.2.1.
23. Nor is the implication in terms of Clause 6.2.1 sufficient to arrive at the 7-year life expectancy requirement. To do so, it is also necessary to look at the wording contained in Article 32 of the Special Conditions which requires a minimum warranty period of 2 years, and to interpret the combined reading of the two tender clauses in the manner applied by the Contracting Authority.
24. Through its conduct, the Contracting Authority inserted an additional tender requirement *ex post facto*: after the Tender was published, after the deadline for clarifications had lapsed, after the bidding process had closed, and after the Appellant as a bidder had been requested to confirm its compliance with the Warranty Requirements.
25. In this respect, the Contracting Authority fell short of its obligation to draft and publish tender documents: "*written in clear and unambiguous terms so as to enable all interested parties to understand properly the terms and conditions of the process*" (Regulation 38 of the PPR).
26. Clear and unambiguous drafting leads to certainty, and certainty generates a level playing field on the basis of which all economic operators can be assessed. Without

such certainty, it is easy for the procurement process to be stultified, and for different bidders to take into account different factors in formulating their bid.

27. Therefore, and in view of the above, the Contracting Authority has acted in breach of the principle of equal treatment, transparency and self-limitation, and therefore, the decision of 19 September 2023 ought to be quashed.

**D. Third Ground of Appeal: Contracting Authority's reading of the Tender conditions is disproportionate and exceeds the objective of the Tender**

28. The Appellant further submits that the Contracting Authority has misapplied the principle of proportionality in its interpretation and application of the Tender conditions.
29. The main objective of the Tender was the procurement of the cheapest technically compliant offer for the procurement of the equipment in question.
30. The Warranty Requirements were after 2 undertakings in connection with the equipment:
- a. First, the warranty covering "repairs and replacements" for 2 years from installation and commissioning.
  - b. Second, and after the lapse of this warranty, spare parts are available for a 5-year period.

It is submitted that the spare parts, after the lapse of the warranty, were not included in the financial offer submitted by the bidder. In fact, the bidders were neither asked to include the cost of these spare parts (over the warranty) in the financial offer nor were they asked to quote for the cost of these spare parts (over the warranty) in a separate line item in the Financial Bid Form. The undertaking required under this *second limb* is simply to make the spare parts "*available (direct or via other nominated agents)*".

31. The Contracting Authority's implication that the product had to have a minimum lifetime of 7 years is not only a wrong reading of the Tender, but would exceed what is strictly necessary to achieve the objective of the Tender. This is so for the following reasons:
- a. The minimum lifetime period of 7 years exceeds the minimum warranty of 2 years. A Contracting Authority can only procure a guaranteed "minimum lifetime period" by requesting a warranty for that period.
  - b. In any case, the Appellant's 5-year warranty covering repairs and replacement would have covered the minimum warranty of 2 years and would have achieved the objective of the Tender. The Appellant's 5-year warranty would have also

covered the requirement in Article 33.1 for reliable and regular after-sales for a period of 5 years.

Furthermore, the Appellant submits that its offer is technically superlative given the extended warranty.

- c. The Contracting Authority has denied itself the benefit of the cheapest technically compliant offer by rejecting the Appellant's bid on this basis.
- d. The Contracting Authority's requirement for a minimum lifetime period of 7 years places undue importance on the Warranty Requirements of making parts available for 5 years over warranty at the cost of a higher financial offer. This is incompatible with the very objective of the Tender because the Contracting Authority will have to pay for any spare parts purchased in the 5 years over warranty.

32. Therefore, and in view of the above, the Contracting Authority's decision to reject the Appellant's bid for an alleged non-compliance with a minimum lifetime period of 7 years exceeds what was strictly necessary to achieve the objective of the Tender, and therefore, it is to be quashed.

33. For these reasons, and others that may be brought in due course of the case, the reasons for rejection are unfounded and ought to be quashed.

THEREFORE, the Appellant humbly requests that this Public Contracts Review Board:

- a. declares that the Contracting Authority's decision of 19 September 2023 is wrong and/or unlawful;
- b. consequently, quashes the Contracting Authority's decision of 19 September 2023;
- c. orders the refund of the deposit paid to the Appellant;

in view of the above and for other reasons that may be brought in due course at law, subject to any declaration or order as it deems fit and opportune.

Yours sincerely,  
Ganado Advocates

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

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



## DOCUMENT A-1

19th September 2023

OK Medical Limited  
TID:195238

REFERENCE: CT 2157/2023

**SUBJECT: TENDER FOR THE PROVISION OF BIPAP AND CPAP MACHINES WITH REDUCED ENVIRONMENTAL IMPACT FOR LOANING PURPOSES, FOR A PERIOD OF THREE YEARS**

Dear Sir/Madam,

Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the offer submitted by your company was found to be technically non-compliant as follows:

195238

The tender document Clause 6.2.1 stipulates that the product must have a service life of a minimum of 5 years over the warranty given by the manufacturer. This implies a minimum lifetime period of 7 years. The reply on an evaluation clarification revealed that for both BIPAP and CPAP machines stated that total lifetime is only 5 years. Not acceptable and not subject to further clarifications.

195244

The tender document Clause 6.2.1 stipulates that the product must have a service life of a minimum of 5 years over the warranty given by the manufacturer. This implies a minimum lifetime period of 7 years. The reply on an evaluation clarification revealed that for the BIPAP machine offered stated that total lifetime is only 5 years. Not acceptable and not subject to further clarifications.

The tender was recommended for award to TID 195270 Sidroc Services Limited for the amount of €218,117.40 excluding VAT, these being the cheapest priced tenders 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 29<sup>th</sup> September 2023 against a deposit of €2754.

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



DEPARTMENT OF CONTRACTS  
Notre Dame Ravelin  
Floriana FRN 1600 – MALTA

Telephone: (0356) 2122 0212  
(0356) 2122 0313

Fax: (0356) 2124 7681

e-Mail: [info.contracts@gov.mt](mailto:info.contracts@gov.mt)

website: [www.contracts.gov.mt](http://www.contracts.gov.mt)

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).

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,

Jacqueline Camilleri  
f/Director General (Contracts)



**APS BANK  
Plc**Registration  
Number:  
Address:C 2192  
APS Centre, Tower Street B'Kara  
BKR 4012Transaction  
Reference:  
Printed On:  
Printed By:195107032  
10:2528.09.2023  
GLENN LUCAS**Third Party Payment**Debit Account: **40715610011**Status: **Authorized**

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**Currency: EUR**

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Amount: 2,754.00

Credit Account: MT55MALT011000040001EURCMG5001H

Payment Date: 28.09.2023

Payment Reference: appeal on a Tender for CPAP machine

Fee: 0

Charges: SHA

Sort Code:

Swift Code: MALTMTMTXXX

Beneficiary Bank Name: CENTRAL BANK OF MALTA

Beneficiary Bank Address Line 1: Castille Place,

Beneficiary Bank Address Line 2: Valletta

Beneficiary Bank Country: MALTA

Beneficiary Name: Cashier Malta Government

Beneficiary Address Line 1: Malta

Beneficiary Address Line 2:

Beneficiary ZIP Code:

Beneficiary City:

Beneficiary Country: MALTA

Intermediary Bank Swift Code:

