

PUBLIC CONTRACTS REVIEW BOARD

Case 1907 – CT3026/2023 – Supplies Tender for the Provision of Two IVF Workstation Systems (2 Workplaces) with Integrated Anti-Vibration Tables including Micromanipulators, Inverted Microscopes, Stereo Microscopes and Laser Units, with reduced environmental impact, energy efficient IT equipment, used in the IVF Department at Mater Dei Hospital including Service Agreement for Eight Years

11th September 2023

The Board,

Having noted the call for remedies filed by Dr Francis Basile Cherubino acting for and on behalf of Cherubino Limited, (hereinafter referred to as the appellant) filed on the 10th August 2023;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 14th August 2023;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as the DoC) filed on the 16th August 2023;

Having noted the urgent application filed by Dr Matthew Paris acting for and on behalf of Cherubino Limited, (hereinafter referred to as the appellant) filed on the 28th August 2023;

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 sitting of the 29th August 2023 hereunder-reproduced.

Minutes

Case 1907 – CT 3026/2023 – Supplies Tender for the Provision of Two IVF Workstation Systems (2 Workplaces) with Integrated Anti-vibration Tables including Micromanipulators, Inverted Microscopes, Stereo Microscopes and Laser Units, with reduced Environmental Impact, Energy Efficient IT Equipment, used in IVF Department at Mater Dei Hospital including Service Agreement for Eight Years.

Remedy before Closing Date of a Call for Competition

The tender was issued on the 17th July 2023 and the closing date was the 22nd August 2023. The estimated value of the tender, excluding VAT, was € 1,200,000

On the 10th August 2023 Cherubino Ltd filed an application for a Remedy before the closing date of a call for competition against the Department of Contracts as the Contracting Authority under Regulation 262 of the Public Procurement Regulations (PPR).

A deposit of € 6,000 was paid.

On the 29th August 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Cherubino Ltd

Dr Matthew Paris	Legal Representative
Ms Janet Pace	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Ruth Spiteri	Representative
Ms M Schiriha	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions referred to an urgent application submitted by Dr Paris on behalf of Cherubino Ltd on the 28th August 2023.

Dr Matthew Paris Legal Representative for Cherubino Ltd stated that late yesterday through scanning the ePPS he realised that notwithstanding this outstanding appeal under Regulation 262 filed on 10th August 2023 it appears that on the 22nd August the tender was opened by the Department of Contracts (DoC) despite the fact that on the 14th August they had acknowledged that an appeal had been filed and had even submitted a letter of reply. The CPSU were also aware of this call for remedy and had replied on the 11th August 2023. This makes the application for remedy by Cherubino practically superfluous. In such situation the Appellant can only request that all decisions taken in regard to this tender are declared null and void and that ‘the clock is moved back’ to give everyone a chance to compete. The alternative is the cancellation of the tender according to the PPR.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts referred to the established procedures of the PCRB that any fresh submissions must be filed at least three days before a hearing and thus Cherubino’s urgent application is not admissible and the DOC requests that it must not be accepted.

Dr Leon Camilleri Legal Representative for the CPSU said that a human error caused this problem and suggested that the specifications in query by the Appellant should be discussed at this stage to avoid any waste of time.

Dr Paris said that circumstances in this case were not normal. The DoC was now asking that regulations are followed when it had walked all over the regulations itself. The law was blatantly broken by the Director of Contracts whose responsibility it is to run the Contracts Department. It is ridiculous to claim that the application was not filed in time. It is difficult to accept the CPSU's suggestion which is legally not sustainable as it creates legal problems. The process has been vitiated whichever way the matter is considered. The best solution is cancellation to safeguard everyone's interest as there is no article in law to support any other solution.

Dr Camilleri stated that if the tender is cancelled and re-issued it will again be challenged and will come again before this Board, so why not include the specifications required by Cherubino and re-issue an amended tender accordingly?

Dr Paris mentioned that any delays were not the fault of the Appellant. The Contracting Authority was jumping the gun by assuming that the Appellant's points could be made before this matter is decided. Regulation 276(h) allows no alternative.

Dr Camilleri pointed out that under Regulation 262 the Board has the power to cancel and re-issue a tender.

Dr Debono insisted that only the provisions of Regulation 262 should apply in this case and the DoC objects to the application of Regulation 276(h).

Dr Paris referred to and quoted Regulation 90(3) regarding the powers of the Board.

At this stage the Chairman suggested a short recess to enable the Board to consider the submissions made.

On resumption the Chairman stated:

1. Application for removal of Application.

On the point that the urgent application should be removed from the records the Board notes that this urgent application was submitted by Cherubino Ltd on the 28th August 2023. The Board also considered the objection raised by Dr Debono in the name and interests of the Department of Contracts. Finally the Board also considered the argument put forward by the Contracting Authority.

The Board is dumbfounded to note that the Department of Contracts has not made a single submission regarding the points raised by the Appellant before the Public Contracts Review Board deploring the failure of the Department to follow procedures. The same Department of Contracts which is charged with ensuring that processes are scrupulously followed has disappointingly only raised the point that the Board should ignore and order the removal of the Application of the Appellant, which Application is clearly justified. Consequently and without further comments

the Board directs that it denies the request for inadmissibility and the request by the DoC for the removal of the urgent Application from the records of this case.

2. Application by Cherubino Ltd

With reference to the justified content of the urgent Application this Board is of the view that it is just and equitable in this instance to invoke Regulation 262(e) of the Public Procurement Regulations and consequently orders the cancellation of tender CT 3026/2023 since the process has been vitiated through the Department's explicitly ignoring Regulation 266 by failing to suspend the process. For the sole purpose of this cancellation the Board is indicating that it is foregoing its obligation under regulation 267 to establish a new deadline for the submission of tenders since in this case it does not apply as the existing process is null and void.

This Board is giving this decision verbally today so that the appeal period starts running from today, the 29th August 2023. A written copy of this decision will be forwarded in due course.

There being no further submissions the Chairman thanked the parties and declared the hearing concluded.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 29th August 2023.

Having noted the call for remedies filed by Cherubino Limited (hereinafter referred to as the Appellant) on 10th August 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT3026/2023 listed as case No. 1907 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Matthew Paris

Appearing for the Contracting Authority:

Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Appearing for the Department of Contracts:

Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) Artificially narrowing competition – It is the submission of the appellant company that, the tender document is breaching such a regulation in that, the tender as drafted can only be supplied by an entity that represents or supplies the products manufactured. Clauses limiting Competition to single brands amongst others include -
- i. Stage; Specification 2.3.11
 - ii. Optical system switching ranges; Specification 2.3.5
 - iii. Micromanipulators; Specifications 2.4.2, 2.4.3, 2.4.4.1, 2.4.4.4, 2.4.4.5,
 - iv. Condenser turret: Specification 2.3.8
- b) Creating unjustified obstacles –

In addition to the above, the public procurement regulations through Article 53 (6) and where it specifically regulates technical specifications, clearly states that *“Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.”*

It is clear that the tender document, in particular Section 3 [specifications] this does not allow equal access to economic operators, wherein several Technical specifications are specific for a certain single brand and product.

In reality, the tender is seeking to buy certain trade products which are manufactured solely by a specific and certain manufacturer for each of the items referred, for which there are equally appropriate and excellent alternatives, only if the tender specifications are opened fairly, wherein other multinationals in the industry, being long standing and highly experienced market leaders in the sector, are afforded the same and equal opportunity; to offer their products in the tender.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 14th August 2023 and its verbal submission during the virtual hearing held on 29th August 2023, in that:

- a) During the clarification period the applicant submitted a request for clarification, relating to a number of specifications of the equipment.
- b) CPSU replied to requests for clarification on the 3rd August 2023, holding firm to the specifications as published.
- c) CPSU still holds firm that the specifications as published since both grievances raised in the application, are unfounded in fact and at law as shall be further evidenced during the hearing.

This Board also noted the Appellant’s Urgent Application filed on 28th August 2023, in that:

- a) Breach of article 266 of the PPR

In accordance with article 266 of the PPR, this procedure was to be suspended, since the article of the law stipulates that: *“Pending the decision of the Public Contracts Review Board the process of the call for*

tenders shall be suspended.” It transpires that, on the 22nd August 2023, there has been an opening session of the above captioned tender, at 10:00am, wherein it was established that a single bidder in the name of E.J. Busuttill Limited, has submitted its offer. The aforesaid implicitly confirms that the Department of Contracts acted in blatant breach and with total disregard to article 266 of the PPR, and this notwithstanding that the DOC was validly notified, as also confirmed through the reply by DOC dated 14th August, wherein inter alia it was declared that: “The DOC acknowledges the application of the economic operator and shall hereinafter provide its reply”

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will re-state its verbal decision delivered during the hearing.

a) Application for removal of Application.

On the point that the urgent application should be removed from the records the Board notes that this urgent application was submitted by Cherubino Ltd on the 28th August 2023. The Board also considered the objection raised by Dr Debono in the name and interests of the Department of Contracts. Finally the Board also considered the argument put forward by the Contracting Authority.

The Board is dumbfounded to note that the Department of Contracts has not made a single submission regarding the points raised by the Appellant before the Public Contracts Review Board deploring the failure of the Department to follow procedures. The same Department of Contracts which is charged with ensuring that processes are scrupulously followed has disappointingly only raised the point that the Board should ignore and order the removal of the Application of the Appellant, which Application is clearly justified. Consequently, and without further comments the Board directs that it denies the request for inadmissibility and the request by the DoC for the removal of the urgent Application from the records of this case.

b) Application by Cherubino Ltd

With reference to the justified content of the urgent Application this Board is of the view that it is just and equitable in this instance to invoke Regulation 262(e) of the Public Procurement Regulations and consequently orders the cancellation of tender CT 3026/2023 since the process has been vitiated through the Department’s explicitly ignoring Regulation 266 by failing to suspend the process. For the sole purpose of this cancellation the Board is indicating that it is foregoing its obligation under regulation 267 to establish a new deadline for the submission of tenders since in this case it does not apply as the existing process is null and void.

This Board gave the decision verbally during the hearing so that any possible appeal period, before the Courts of Appeal as per regulation 265 of the PPR, starts running from the hearing date, the 29th August 2023.

The Board,

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

- a) To cancel the call for competition as per regulation 262(1)(e) on the basis that the call for competition violated regulation 266 of the Public Procurement Regulations;
- b) that the deposit is to be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Ms Stephanie Scicluna Laiviera
Member