

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1908 – CT2264/2022 – Supplies - Tender for the Supplies of Disposable Professional Podiatry Nail Clippers for Podiatry Centre**

**11<sup>th</sup> September 2023**

The Board,

Having noted the letter of objection filed Dr Adriano Spiteri acting for and on behalf of HospiMalta, (hereinafter referred to as the appellant) filed on the 14<sup>th</sup> July 2023;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 24<sup>th</sup> July 2023;

Having also noted the letter of reply filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for and on behalf of Medina Healthcare Limited (hereinafter referred to as the Preferred Bidder) filed on the 21<sup>st</sup> July 2023;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for and on behalf of the Department of Contracts (hereinafter referred to as the DoC) filed on the 21<sup>st</sup> July 2023;

Having heard and evaluated the testimony of the witness Mr Andrew Scicluna (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

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 31<sup>st</sup> August 2023 hereunder-reproduced.

#### **Minutes**

#### **Case 1908 – CT 2246/2022 – Supplies – Tender for the Supplies of Disposable Professional Podiatry Nail Clippers for Podiatry Centre**

The tender was issued on the 9<sup>th</sup> January 2023 and the closing date was the 14<sup>th</sup> February 2023. The estimated value of the tender, excluding VAT, was € 407,550.

On the 14<sup>th</sup> July 2023 HospiMalta filed an application against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 2,037.75 was paid.

On the 31<sup>st</sup> August 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – HospiMalta**

Dr Adriano Spiteri	Legal Representative
Mr Stephen Saliba	Representative

**Contracting Authority – Central Procurement and Supplies Unit**

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Mr Andrew Scicluna	Evaluator

**Preferred Bidder – Medina Healthcare Ltd**

Dr Matthew Paris	Legal Representative
Dr Zack Esmail	Legal Representative
Mr John Soler	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 a request made by Appellant to the Department of Contracts (DoC) for information on make and model of the product offered and which up to the time of the appeal remained unanswered.

Dr Adriano Spiteri Legal Representative for HospiMalta said that on two occasions by email Appellant had requested information on the make and model of the product offered by the preferred bidder which was not replied to in time and therefore triggered the appeal. Eventually the DoC claimed confidentiality citing the Varec case in support. The Varec case has been overtaken by the EU Directive and in any case it dealt with military equipment. Appellant waited ten days for a reply which came after the statutory time for an appeal and the Appellant on this basis requests refund of the deposit.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit (CPSU) said that the Contracting Authority had no comments to make on this point.

Dr Mark Anthony Debono Legal Representative for the DoC said that requests for information have to balance the interests of all parties. The Varec case is a general guide in this case. Pressure of work caused the delay in replying to Appellant's request.

The Chairman said that the make and model of a product were not confidential information and has to be provided. The PPR ten day limit restricts the time available to submit an appeal and it is the view of the Board that such requests should be provided promptly. It is the duty of the DoC to provide information where legitimate in time.

Dr Spiteri stated that the tender is based on technical specifications which are not gospel as, what matters, is if the product offered fulfills the function required. Appellant stated 'yes' in the technical specification and this was backed by the manufacturer's literature submitted with the offer. After the request for samples Appellant's bid was rejected. Appellant could not at this stage use Regulation 262

as the rejection came after the request for samples. The tender only specified the overall length. The Declaration of Conformity and the dictionary definition of 'length' indicate that the decision by the Authority is restrictive since it decided that the measurement had to be tip to tip.

Dr Camilleri said that introducing fresh documents late was against normal practice. On the merits of the case Appellant had recourse to Regulation 262 if the specifications were not clear and is not now respecting the terms of the tender. The measurement referred to was tip to tip and Appellant's offer did not meet the requisite at the testing of samples stage. This offer should not be accepted.

Dr Matthew Paris Legal Representative for Medina Healthcare Ltd said that a distinction must be drawn between the appeal and submissions made at this hearing. There is indication that if the information was available there would not have been an appeal. Two tools were available to the Appellant - clarification or Regulation 262. The claim by Appellant that the Authority is narrowing competition is contradicted by the high number of bidders in this instance.

Dr Debono said that the DoC objects to documents being presented at the last minute. Bidder could have used clarification or Regulation 262 if it had any doubts. The number of bidders indicate that competition was followed.

Mr Andrew Scicluna (483163M) called to testify by the Contracting Authority stated on oath that he is the Head of Podiatry and was one of the evaluators. [Witness displayed and compared samples of product offered by Appellant and preferred bidder]. Witness demonstrated that Appellant's offer did not meet the length requested. It is normal to measure the instrument tip to tip and the length is specified for ease of use.

Questioned by Dr Spiteri witness agreed that the length of the tips was the same but pointed out that the length of the tip was not part of the specifications.

This concluded the testimony.

Dr Spiteri said that the tender specifications did not indicate measurement as tip to tip but simply overall length. There was no point in seeking any clarification as the manufacturer clearly stated that the length of the instrument was 14cms. The technical specifications must not be ambiguous and must be clear. The product offered conforms to requirements. The tender was awarded to the seventh or eight bidder and without any confirmation that the product was for single use.

Dr Paris said that an experienced witness had indicated what is acceptable to the Authority. There is no ambiguity in the tender and in specification 2.1.2 it is clear what is required. If any doubt a remedy should have been sought. Transparency is essential for equality as cited in para 27 Court of Appeal Polaris case. The award decision is correct and the matter of the deposit is up to the Board which is requested to ignore the last minute submission of documents. The decision must be based on the letter of appeal. The functionality of the product is not something that should be considered as it is not part of the tender specifications. There has to be proportionality on the part of the TEC in that it is obliged to consider the effect on all parties and must not be used to give the Appellant an advantage over the preferred bidder. The TEC was justified in its decision as the length was not according to the tender requirement.

Dr Camilleri said that the Appellant claims that the tender clauses are clear but that the TEC did not follow them. Clarification is available if terms are not clear. There is only one form of measuring length – from one end to the other in a straight line. Appellant did not provide any proof to substantiate their claim and the TEC's decision should be confirmed.

Dr Spiteri said that the point of the appeal is how the product is measured – if its function is met it should be accepted.

Dr Paris said that if equivalence is claimed it has to be proven but this is not a case of equivalence.

The Chairman noted that consideration will be given to the points made about late presentation of documents. He then thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 31<sup>st</sup> August 2023.

Having noted the objection filed by HospiMalta (hereinafter referred to as the Appellant) on 14<sup>th</sup> July 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2264/2022 listed as case No. 1908 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Adriano Spiteri

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Appearing for the Preferred Bidder: Dr Matthew Paris

Appearing for the DoC: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) **The evaluation committee may ask an evaluation clarification** – Despite the alleged non-compliance, the Contracting Authority chose against opting for an evaluation clarification as per section 15.1 of the General Rules Governing Tenders (V4.8), which states “*when checking tenders, the evaluation committee may, after obtaining approval from the Director General (Contracts)/ Departmental Contracts Committee/ Sectoral Procurement Directorate, as the case may be, ask a tenderer to clarify any aspect of his tender.*” The evaluation committee, which must have noticed our confirmation of conformity with specification 2.1.2, never availed itself of the right to ask an evaluation clarification when they ruled out our offer as non-compliant. Had the evaluation committee asked a clarification question, it would have been provided with an explanation prior to its decision. The latter would have therefore been taken in the full knowledge of tip-to-tip and peripheral methods of measurement.
- b) **The Contracting Authority shall use clear and unambiguous terms** – The drafter/s of the technical specifications was or were meant to provide clear and unequivocal descriptions of the

device they were calling for, adopting the commonly known and accepted measurement standards within the European market as dictated by article 38 (1) of S.L.601.03 which states *“the procurement document shall be written in clear and unambiguous terms so as to enable all interested parties to understand properly the terms and conditions of the process”*.

- c) **Equal treatment and no artificial narrowing of competition** – While ‘length’, as a technical specification was unaccompanied by a description, the applicable tolerance could have done away with the tip-to-tip or peripheral length variances had the drafter/s taken into consideration the characteristics of the products already used within the market. Should it however result that the Contracting Authority is specifically calling for a 15cm +/-1cm tip-to-tip length, then provided that no more than two manufacturers can fulfil the entire technical specifications requested in this tender, the market is not only narrowed but completely limited to two makes, presumably the 7<sup>th</sup> and 8<sup>th</sup> most expensive bids for this tender, costing the public coffers Euro40,755 (ca.24%) and Euro155,705 (ca.92.5%) more than our offer.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 24<sup>th</sup> July 2023 and its verbal submission during the hearing held on 31<sup>st</sup> August 2023, in that:

- a) On the First Grievance - The Evaluation Committee may ask for evaluation clarification - The objector claims that the product as presented was technically compliant since the peripheral length complies with the specification as laid down in clause 2.1.2. CPSU submits that this specification was not respected by the product as presented, and this was confirmed by the evaluation committee after measuring the samples as presented. The measurement of such nail nippers is based on the 'tip-to-tip' length and not the 'peripheral' length. Sample testing serves to give the evaluation committee the opportunity to determine whether the product fulfils the specifications and laid down by the tender document. Sample testing has been long recognised by this Honourable Board as one of the most effective methods of evaluation. As will be further explained and testified during the sitting, the product was measured by Mr Andrew Scicluna, Professional Lead of Podiatry Services with a vast experience who found the product not to be compliant with the specifications as provided and laid down in the tender document.
- b) On the Second Grievance - The Contracting Authority shall use clear and unambiguous terms - In this second grievance the objector states that the tender specifications should be clear and unequivocal. CPSU rebuts strongly to the above since the wording of the tender document respects this obligation. Furthermore, without prejudice to the above, CPSU submits that if the objector had any difficulties with the specifications as laid down and the tender documents, it had the remedy under regulation 262 of the Public Procurement Regulations at its disposal which it could use, but did not.
- c) On the Third Grievance: Equal treatment and no artificial narrowing of competition. - CPSU refers to Regulation 262 of the Public Procurement Regulations which provide for a remedy before the

closing date of a call for competition. The purpose of this procedure is to grant prospective bidders the opportunity to request a remedy in limited cases, one of which being: "(c) to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure;" Although CPSU disagrees with the grievance put forward by the Objector that a 'tip-to-tip length' measurement limits competition, in any case, the present application is filed under Regulation 270 of PPR which is an appeal from a decision taken after the closing date for the submissions of an offer, which procedure may only be used to syndicate the evaluation process and relative outcome, and not the tender requirements and specifications.

- d) Final submission - CPSU refers to paragraph numbered 19, and submits that it has not received the email referred to in the said paragraph.

This Board also noted the DoC's Reasoned Letter of Reply filed on 21<sup>st</sup> July 2023 and its verbal submission during the hearing held on 31<sup>st</sup> August 2023, in that:

- a) In accordance with paragraph 19 of the reasoned letter of objection, the appellant submitted that it had communicated an email in order to obtain the information consisting in the make and model of the recommended bid. Whilst acknowledging the email of the appellant dated 12th July 2023, the DoC submits that, in accordance with article 20.3, article 21.1 of Directive 2014/24/EU, regulation 40 and regulation 48(8) of the Public Procurement Regulations, 2016, the disclosure of information is subject to the integrity of data, the confidentiality of tenders, and the legitimate commercial interests of economic operators.
- b) Furthermore, reference is made to the principle of adversariality in the judgment of the Court in the names Varec SA vs Etat Belgie: *"It follows that, in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets."*
- c) In accordance with regulation 93(1) of the Public Procurement Regulations, 2016, it is stated that the Public Contracts Review Board is the entity that ensures the principle of adversariality since it provides the right to the parties to make oral submissions during a public hearing.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 21<sup>st</sup> July 2023 and its verbal submission during the hearing held on 31<sup>st</sup> August 2023, in that:

- a) **Appellant's bid is not compliant with tender specifications** - Unlike what is alleged by the appellant, the bid which is submitted is not compliant with the mandatory technical specifications of the tender. Section 3 - Technical specifications, which is of a Note 3 status, in specification 2.1.2, clearly stipulates that: "2.1.2 15cm (+/- 1 cm) in length. N/A Mandatory". This specification did not make any distinction between tip-to-tip length and/or peripheral length [a distinction only introduced by the appellant at appeal stage], it mere spoken (sic) of length, and made it clear that anything above 16cm or below 14cm will not be accepted. *Ex admissis*, the length of product on offer by the appellant is of 12.5cm, and thus not compliant with the mandatory technical specifications.
- b) **Tender document compliant with article 39 of the PPR** - It is the position of the recommended bidder that the tender document was clear and unambiguous, and thus in accordance with article 39 of the PPR. If the appellant had any concerns in anyway about the drafting of the tender, as claimed within the objection [vide paragraph 13 of the tender document], it had the ability to. i) Request a clarification on the particular mandatory requirement, to clarify any matters which are of its concern; or ii) Submit a procedure in accordance with article 262 of the PPR, thus ensuring that anything which was of concern would be addressed at the appropriate time and in the appropriate manner. Once the appellant opted to submit its bid, without any reservation [as per 2.2] it thereby accepted in its entirety the contents of the tender document, and any complaints at this stage are 'superfluous'.
- c) **Doctrine of self-limitation** - The doctrine of self-limitation is an important public procurement principle which has been referred to by this Honourable Board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document, this will ensure predictability and transparency.
- d) **Competition as a way to circumvent tender specifications** - Whilst competition is an objective which is professed by inter alia the Treaty on the Functioning of the European Union (hereinafter TFEU), the objective should not be used to circumvent tender obligations. The appellant company seems to suggest that 'only two manufacturers can fulfill the entire technical specifications' - whilst this is an unproven statement, it doesn't in anyway provide the necessary comfort to show that the contracting authority artificially narrowed competition. No one was precluded by parallelly importing the product - No one was precluded from obtaining quotations and/or seeking to import directly from the two manufacturers directly - Thus all economic operators were on equal standing when participating within this tender procurement.

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 witness duly summoned, will now consider Appellant's grievances.

- a) **Make and model request** – the facts in relation to this point are the following:
- i. Date of Rejection Letter from the Department of Contracts to the Appellant – 4<sup>th</sup> July 2023
  - ii. First email from the Appellant to the Department of Contracts – 12<sup>th</sup> July 2023
  - iii. Second email from the Appellant to the Department of Contracts – 13<sup>th</sup> July 2023
  - iv. No reply was forthcoming from the Department of Contracts before the lodging of the appeal on 14<sup>th</sup> July 2023

This Board opines that this issue has been discussed and decided upon on multiple occasions. The make and model of a recommended bidder's winning product are not to be deemed as confidential information as per regulation 40 (1) of the Public Procurement Regulations ("PPR").

Regulation 271 of the PPR is very clear in that an objection "**shall be filed within ten calendar days following the date on which .....**" (bold & underline emphasis added). Therefore, such information, if requested, needs to be passed on to the economic operator immediately. This is readily available information with no time needed for research and / or other administrative duties. When such instances occur, i.e. legitimate information, which is requested, is not provided in time to economic operators which are **still** pondering on whether to submit an objection or otherwise, it will most likely result in unnecessary objections being filed before this Board.

In such circumstances, this Board cannot but decide in favour of the Appellant being refunded his deposit, irrespective of the outcome on the merits of this case.

- b) **1<sup>st</sup> & 2<sup>nd</sup> grievance – Clarification request & unambiguous terms –**

Reference is made to the tender document specification 2.1.2 which states "*15cm (+/- 1cm) in length*". Even though different dictionaries might offer diverse explanations and / or definitions of length, this Board corroborates the statement of witness Mr Andrew Scicluna, under oath, who stated "*it is normal to measure the instrument tip to tip and the length is specified for ease of use*" with the Eric Weisstein's World of Physics definition of length which is "*Length is defined as the **straight-line distance** between two points along an object*" (bold & underline emphasis added).

Therefore, it is the opinion of this Board that the terms in the tender document were clear and unambiguous.

Moreover, the sample testing carried out was in conformity with the General Rules Governing Tenders which is used to "*.....corroborate the technical compliance of the offers received. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified*".

Therefore, the first two grievances of the Appellant are not being upheld.

- c) **3<sup>rd</sup> grievance - Equal treatment and no artificial narrowing of competition –**

This Board notes the argumentation from Appellant that if 'length' was to be interpreted as 'tip-to-tip' rather than 'peripheral length', this would lead to a situation of narrowing of competition with only two operators being able to supply the required product. It is however noted that the



other economic operators participating in this tendering procedure were disqualified for other technical reasons not related to the 'length' of the product offered.

Moreover, it is the opinion of this Board that such grievances, on narrowing of competition, fall under the remit of regulation 262 of the PPR with 'Remedies before closing date of call of competition' objection being the right tool to utilise to argue such grievances.

Therefore, this grievance of the Appellant is not being upheld.

**The Board,**

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that in this exceptional circumstance, as stated in the Board's considerations, the deposit paid by Appellant is to be reimbursed in full.

**Mr Kenneth Swain**  
**Chairman**

**Dr Charles Cassar**  
**Member**

**Dr Vincent Micallef**  
**Member**