PUBLIC CONTRACTS REVIEW BOARD

Case 1822– CT 2037/2022 – Tender for the Supply of an Automated System for Antibiotic Sensitivity Testing of Bacteria with Equipment on Loan

25th October 2023

The tender was issued on the 18th February 2022 and the closing date was the 5th April 2022. The estimated value of the tender excluding VAT, was € 2,314,486.

On the 7th October 2022 Cherubino Ltd filed an appeal 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 € 11,572 was paid.

There were six (6) bids.

On the 1st December 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Cherubino Ltd

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative
Ms Jasmina Trajkovic	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Maria Camilleri	Chairperson Evaluation Committee
Mr Mario Farrugia	Secretary Evaluation Committee
Mr Robert Cassar	member Evaluation Committee

Director of Contracts

Dr Mark Anthony Debono	Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Matthew Paris Legal Representative for Cherubino Ltd referred to the exchange of correspondence between Appellant and the CPSU. On the 29th September 2022 it sent a letter asking for information on

the brand name and model. Reminders were sent to the Department of Contracts (DoC) on the 3rd and 4th October and on this latter date the DoC replied mentioning what information Appellant was entitled to. The reply covered only the model but Appellant pointed out that there are two items requested in the tender but despite further e-mails no reply was forthcoming. Appellant still requires the brand and model of the kits as these are vital to the tender.

Dr Leon Camilleri Legal Representative for the CPSU said that information has been provided and if the PCRB so decrees further information will be given.

Dr Paris said that details of model name and number was requested as he cannot make the case without that information. Since the 4th October he has been waiting for this information and he is now requesting a deferment of the case until this information is provided.

Dr Camilleri said that Appellant was not contesting compliance but simply trying to prove that his product meets the specifications.

After a short recess the Chairman stated that the Board meets this preliminary request by Dr Paris on behalf of Cherubino Ltd that since information on the brand and model number has already been given to him on the equipment on loan similarly the same information on the brand name and model number on the various kits should be given as these are a substantial part of this tender. This information must be provided by Monday 5th December at 12.00noon. This appeal is deferred to Wednesday 14th December at 11.00am.

End of Minutes

SECOND HEARING

On the 14th December 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef as members convened a public hearing to consider further this appeal.

The attendance for this public hearing was as follows:

Appellant – Cherubino Ltd

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative
Ms Janet Pace	Representative
Ms Jasmina Trajkovic	Representative (online)
Dr Filiberto Zavarese	Representative (online)

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Maria Camilleri	Chairperson Evaluation Committee
Mr Mario Farrugia	Secretary Evaluation Committee
Mr Robert Cassar	Member Evaluation Committee
Ms Julie Haider	Member Evaluation Committee
Ms Sonia Debattista	Member Evaluation Committee
Dr Claire Marantidis Cordina	Representative

Preferred Bidder – Evolve Ltd

Mr Mark Mizzi Representative

Director of Contracts

Dr Mark Anthony Debono Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and requested Appellant to proceed with its submissions.

Dr Paris prior to resuming submissions requested that the late submissions in writing by the preferred bidder should not be considered. He then requested the testimony of witnesses.

Ms Julie Haider (231782M) called as a witness by Appellant testified on oath that she is the Head of the Biological Laboratory Department at Mater Dei Hospital and was one of the three evaluators. Referred to pages 18 to 21 (Section 3 specifications) witness was asked to detail how the Appellant and preferred bidder had met the tender requirements. She was assisted by Ms Sonia Debattista (182177M) also on oath.

According to the witness:

- On 1.1 A:
  Cherubino Ltd did not meet all the requested combinations but offered alternative test for Ampicillin
  Evolve offered tests on option A and satisfied all requirements

- On 1.2 A:

  Both Cherubino and Evolve satisfied this requirement

- On 2.1:
  Cherubino did not satisfy the requirement on Ampicillin but offered alternative method
- On 2.2:
  Cherubino satisfied fully
  Evolve had the test on inducible clindamycin resistance missing but offered alternative through a ready prepared Ager plate test plus antibodies discs
- On 2.3:
  Cherubino satisfied fully and Evolve completely compliant.

At this stage there was a discussion regarding how much access to information on the preferred bidders submissions could be made available to the Appellant. Dr Paris maintained that his appeal letter makes it clear that he needs to refer to the preferred bidder's offer. He also referred to the letter from the DoC regarding what information could be revealed.

Dr Camilleri pointed out that the grievance of Appellant is solely on its bid and that should be the only grievance considered and not whether the preferred bidder's offer was compliant.

The Chairman ordered a short recess to enable the Board to consider and decide on the points raised.

On resumption the Chairman directed that Dr Debono on behalf of the DoC be asked to explain in the light of his letter of 3rd October 2022 to Dr Paris, particularly para 4 (d) what information could be provided.

Dr Debono said that the information that could be made available was covered by Regulation 242 (2) but was certainly not including to the entire technical offer form.

The Chairman then stated that the Board directs that Dr Paris can ask a direct question to the Evaluation Committee (TEC) to elicit information on a particular criterion only.

Ms Haider, resuming her testimony, was referred to Item 2.2 and asked how Evolve had met this requirement and stated that there was an alternative offered in 2.2.6 and 2.2.7. Similarly in regard to Item 2.3 the offer was substantiated in 3.3.6 and 3.3.7. In the literature submitted in the Cherubino offer there were many more limitations but the TEC only listed those that applied. The established tests give results on which one cannot depend resulting in extra 90 test a day and thousands of Euro in costs and extending reporting time. The tender requires an automated system with the need to perform only one extra manual test. The limitations in the offer by Evolve do not affect the antibiotics asked for in the tender and the limitations in Table 3 are not clinically relevant. The panels issued cover a broad spectrum of bacteria but they cannot cover all possibilities. Referred to item 1.5 on page 22 of the tender witness confirmed that only one alternative test can be managed. Referred to panel 1.2A witness said that if the antibiotic Aztreonam was not included it is because it is extremely rare and tested if the organism is not existent. The tender guidelines follow the European directives and there was no need to actually write certain details in the tender. In the case of Erythromycin mentioned in Item 2.2 there are no limitations whilst the items in Table 3 are not clinically relevant as the Authority would not be using that antibiotic for that organism. Where in the tender it does not state what is included or excluded it is because the European guidelines are available and have to be followed. As to the reference to calibration in special specifications 2.3 (page 22) this refers to the resistance to infections.

In reply to questions from Dr Camilleri witness replied that she was an Executive Allied Health Practitioner with 40 years' experience and Ms Debattista was a Laboratory practitioner with some 20 years' experience. She confirmed that Cherubino's technical offer had more limitations than indicated in the technical offer form. The tender required that one sample tests for several antibiotics and they were ready to accept one extra test but Cherubino amounted on average to over 100 extra tests a day. Those omitted are included in list 1.1 according to the literature supplied by them. The Authority only listed in the tender those that affected a broad spectrum of organisms as it is not possible to issue a tender for every possible organism. The offer by Cherubino offered more than one alternative test whilst Evolve involved only one alternative test according to the lists in the tender.

In reply to a further question from Dr Paris witness replied what is the point of carrying out an alternative test which takes 15 minutes but gives you irrelevant results?

Ms Jasmina Trajkovic (CO5960747923) called to testify online by the Appellant stated on oath that she is a professional Development Manager in microbiology and the Company she works for has been supplying Cherubino Ltd with their products for over 60 years. She was familiar with the tender and stated that some of the combinations offered did not meet all the requirements – there is no one single combination which does. She was aware that the panels would be issued for use in Malta and confirmed that what was offered by her firm can perform all the tests requested. In certain cases the product cannot reach 100% of requirements; in such instances alternative methods were proposed. There are detailed various alternatives to the tender requirements as to what is clinically relevant in

technical medical publications. [In a screenshare witness indicated the different offers and the clinically offered alternatives according to scientific publications (Documents exhibited to be circulated)

In reply to question put by Dr Camilleri witness said that she is aware that the according to the tender only one extra alternative test was to be allowed. Under reference 423025 VTec2 ASTN 376 were listed the alternative tests on certain antibiotics which came under option 1.1A.

Dr Claire Marantidis Cordina (269994M) called as a witness by the Contracting Authority testified on oath that she is a Consultant Microbiologist and has been the leading Consultant in the Microbiology Department at Mater Dei Hospital for several years. She was consulted during the drafting of the tender. Referring to a list of indications in the tender, witness said, it covers the list of antibiotics for treating groups of organisms and to treat certain patients and certain resistance to organisms. The panels are used to find if bacteria is sensitive or resistant and if it can be administered – this covers a list of microbes not just one. According to the witness, not clinically relevant means that antibiotics will never be used to treat the particular infection mentioned – in her experience both locally and abroad she is not aware that such antibiotics are used in other conditions. Cefepime is used in other microbes that are not back hold areas.

This concluded the testimonies.

Dr Paris said it was essential to ask what the tender required. Page 18 Section 3 Specifications quoted Antibiotic Sensitivity testing of Bacteria as that requirement and what it included. According to the testimonies heard Cherubino's offer meets all the requirements of testing – if there are any shortcomings then Articles 1.5 states that if the test is not included in the AST panels an alternative testing method is accepted; despite this Article 1.5 has been used to disqualify Cherubino. Appellant submitted exactly what was required – what it offered is what was requested and this has not been contested. Article 1.5 does not deal with results but with one test and one cannot judge on items not in the tender to exclude. Self-limitation does not allow decisions on items not stated in the first instance. Cherubino did not claim that Evolve are not compliant but if there are shortcomings in its bid they are similar to the ones in Appellant's offer. There is no limitation as claimed and there is no reference to limitations in the tender. In the Enteral Feeding Pumps case it was accepted that limitation clauses are always there in medical equipment tenders in which case alternative tests are used. All that one is suggesting is that alternative testing is used to ascertain 100% result. The limitations in Cherubino's offer are similar to those in the Evolve bid and cannot be used to exclude any party. The persons who evaluated the tender were end-users and hence prejudiced. They first decide to exclude as not pleased with the product in use and then found the reason on which to exclude. So the solution is either to cancel the tender or exclude both parties and start again. Article 2.3 is the only reference to European standards and there is no other reference to limitation and therefore this point is not relevant. The panels offered give the tests required and where none were available alternative testing was offered.

Dr Camilleri stated that Cherubino's literature does not mention rare cases but orders performance in five different tests not exceptional or rare but ordered to perform. However it is expecting medical people to rely on a product with the need to perform tests on four antibiotics published in the same table thereby attempting to change the rules by suggesting four alternative tests when only one was permitted. It is obvious that the medical product offered cannot be relied upon since the literature suggests otherwise. The Evolve offer is not contested as no points have been raised against their offer. In Appellant's objection letter there is no grievance on Evolve's offer. If one focussed on the compliance of Cherubino's product it is clear from the testimony of expert medical witnesses that the

offer was checked against the tender document and if it was found that four antibiotics require alternative tests, when only one was allowed, how can one not exclude such bid.

Although the Evolve offer was not contested, continued Dr Camilleri, one must mention that, as Dr Cordina explained in her testimony, not all the same antibiotics are in all the lists as there are different needs. This was confirmed by the TEC that when the literature was checked with what was requested it was clear that for each item one alternative test was required - quite contrary to Cherubino's offer. Self-limitation and equal treatment were correctly observed and what is important is that the best product is chosen in the interest of patients and end-users.

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

End of Minutes

THIRD HEARING

On the 3rd October 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public hearing to consider further this appeal.

The attendance for this public hearing was as follows:

Appellant - Cherubino Ltd

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative
Ms Janet Pace	Representative
Ms Piera Assenzo	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Ms Maria Camilleri	Chairperson Evaluation Committee
Mr Mario Farrugia	Secretary Evaluation Committee
Ms Julie Haider	Evaluator
Mr Robert Cassar	Evaluator
Ms Sonia Debattista	Evaluator

Preferred Bidder – Evolve Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Mark Mizzi	Representative
Mr Christopher Busuttil Delbridge	Representative
Mr Aisid Samad	Representative (Online)
Mr Bassem Hamdy	Representative (Online)

Department of Contracts

Dr Mark Anthony Debono	Legal Representative

Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and said this was the third hearing of this appeal following the decision of the Court of Appeal. He invited submissions.

Dr Matthew Paris Legal Representative for Cherubino Ltd outlined the process so far. The appeal covered a preliminary grievance and main grievances. There are two separate items covered by the tender - Cherubino's grievance was on the panels not on the items on loan. According to the Contracting Authority the panels offered by the Appellant were not acceptable. Cherubino's request for the brand name and models of the panels offered by the preferred bidder was not answered. This information is not confidential under Public Procurement Regulations (PPR) 40. Unless this information is to hand a specific grievance of the preferred bidder's offer cannot be mounted whilst Appellant's hands are bound by the 10 days restriction imposed by the PPR and the failure of the Authority to provide information.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit said that the information about the products that Appellant is talking about has long been provided and any further requests should have been made long ago. The Authority objects to this claim.

Dr Calvin Calleja Legal Representative for Evolve Ltd said that Appellant has had this information since December 2022. The grievance was raised at the first hearing when the Board gave direction to provide the information . In September 2022 the IFU of the recommended bidder was presented and it therefore follows that it is certain that the information was to hand.

Dr Clement Mifsud Bonnici Legal Representative for Evolve Ltd said that once the information was available to the Appellant their grievance has to be raised straightaway and the appeal triggered immediately. The Court of Appeal decision was not a factor in the parties minds and the onus was to raise the grievance at the first opportunity. This process is simply an attempt to cancel the award to the benefit of the incumbent supplier.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts stated that the information requested was provided in December 2022 and the request by Appellant should be denied.

Dr Paris asked for the following note to be recorded verbatim:

"In view of the fact that the information has been requested by Cherubino Ltd within the time frames set within the Public Procurement Regulations and in view of the fact that the Department of Contracts notwithstanding the several reminders failed to provide the requested information and in view of the fact that Cherubino Ltd was obliged to submit its appeal within ten days from notification and in view of the fact that the Court of Appeal declared null and void the proceedings before the Public Contracts Review Board and its decision. In its first possibility Cherubino Ltd is asking to (a) either be permitted to include submissions in relation to the products on offer by the recommended bidder, an invite which has been extended to the CPSU, the Department of Contracts and Evolve Ltd, an invite which has been outrightly rejected, Cherubino is hereby compelled to ask the PCRB in its current composition to determine all the first four requests indicated as preliminary within its submissions. For all intents and purposes Cherubino Ltd forcefully rebuts the statement made by Dr Mifsud Bonnici on behalf of Evolve Ltd that it is making this request since it is an incumbent supplier. This request is being made on the principle of equality of arms to ascertain that all parties are at a level playing field."

Dr Camilleri requested that the following note be recorded verbatim:

"The CPSU objects to the request of the objector Cherubino Ltd for the below reasons that the appeal period of ten days in accordance with Regulation 270 of the Public Procurement Regulations has lapsed. Moreover and without prejudice to the above Cherubino Ltd did not attempt to include such grievances during the first proceedings nor did it include a grievance on this request in their appeal application. The Court of Appeal in its decision dated 18th April 2023 annulled the decision of the PCRB and not the whole process and thus this decision should not be used by the objectors to attempt to include what they should have requested during the initial round of proceedings before the PCRB. Moreover the decision of the Court of Appeal was based on a missing transcript and not on the process itself. Without prejudice to the above this information has been in the hands of the objector since December 2022 and they were in a position to make such a request as from April 2022 following the decision of the Court of Appeal".

Dr Calleja requested that the following note be recorded verbatim:

"The recommended bidder agrees with the submissions made by the Contracting Authority in this regard. The information regarding the AST panels offered by Evolve Ltd as the recommended bidder has been in the possession of the Appellant since at least the 5th December 2022. This is the deadline which was imposed by this Board in its first composition, on the Department of Contracts and on the Contracting Authority for the disclosure of this specific information. The Appellant has been in possession of this information so much so that in the sitting of the 14th December 2022 submissions were made on the offers submitted by the recommended bidder and the Appellant even called upon Ms Jamina Trajkovic as technical expert to discredit the offer of Evolve as technically non-compliant. On the 7th September 2023 the Appellant submitted the IFUs pertaining to the AST panels offered by Evolve. This request for information which is already in the possession of the Appellant goes against the effective and rapid nature of procurement appeal aside from the fact that Appellant is already in possession of the information requested, the proper practice implemented by this Board is to make any disclosure request ahead of the actual Board sitting. In any case the recommended bidder categorically objects to the claim raised by the Appellant tht it has the right to submit additional grounds of objections related to the recommended bidder's offer. No such grounds were raised in its initial objection and no such grounds have been raised since in spite of the lapse of a ten month period since coming into possession of this information. The recommended bidder does not object to the Appellant making submissions concerning the recommended bidders offer as long as it is not given the opportunity to raise new grounds for objection".

Dr Debono requested that the following note be recorded verbatim:

"The Director of Contracts objects to the request made by Appellant as the information is already in the hands of the Appellant. Secondly there is a ten day time limit for objections and according to Regulation 271 it is a matter of pubic order nature and the time limit may not be derogated from by the Board or a Court. The judgement of the 18th April of this year had only annulled the decision of the Public Contracts Review Board and not the entire evaluation procedure.

At this stage the Chairman directed that the Board would have a short recess to consider the submissions made.

On resumption the Chairman stated that the Board had considered the submissions by all parties and decides that the Appellant had ample time since December 2022 to raise new grievances and therefore the Board would continue to hear the appeal on the grievances already submitted by the Appellant.

Dr Paris referred to the appeal letter and went on to explain that it is clinically impossible to have AST panels without limitation whatsoever. Appellant maintains that all products have similar limitations and thus the offer of Cherubino has to be re-integrated in the re-evaluation. Appellant maintains that all evaluations must be equal to all bidders and that it has not been judged on that basis. Ten months after than the original appeal Appellant is not in the same position as the other bidder.

Dr Camilleri stated that the Call is for one single alternative test. Appellant offer requires more than one test. The Authority maintains that the tender document has to be followed otherwise the bid is not compliant.

Dr Calleja said that the facts of the case are simple. Clause 1.5 allowed one alternative test and Evolve offered one test whilst Appellants offer needs several tests. Appellant claims that all systems have limitations but there is a vast difference between the offer of Evolve and Cherubino. The Authority had no option in making their decision.

Ms Julie Haider (232782M) called to testify by the Appellant stated on oath that she was one of the three Evaluators in this tender and that she was not involved in the drafting of the tender. Referred to Cherubino's offer on the AST panels witness stated that it offered panels with five different options. [Witness was advised that questions would be limited to Bid 171767 which was the cheapest bid]. Witness gave details of the panels offered under Option A in Table 1 and Table 2 of the tender and offered Option A in Item 1.1A. This panel had one antibiotic missing and a manual alternative test was offered for Amoxillin. On Item 1.2A Cherubino offered all panels as requested whilst on Table 2.1, 2.2 and 2.3 the panels offered covered all the antibiotics as requested. In the literature from Biomerieux accompanying each panel which was submitted with the offer it is mentioned that for certain bacteria the organisers required alternative tests. Witness stated that she was familiar with Biomerieux products 'with all their limitations' as they have been in use in the hospital for several years. In the fine print these suppliers state that in many instances alternative tests are required. The Tender Evaluation Committee (TEC) duty is to examine all submissions in detail and was aware that the tender required an automated system not one requiring several tests running into hundreds, which does not make sense in the context of an automated system. Every product has limitations but the limitation in the Cherubino offer affects the use of the product. The limitations on the Evolve offer on the other hand are on antibiotics which are not in the specifications and will not be used. The Authority has to accept the use of panels that are easily available on the market and cannot order custom-made panels because the demand is too small and not economical. Limitation of antibiotics on panels not requested is not of concern because they will not be required or used or not clinically significant.

Referred to Table 3 in Evolve's offer [Doc 1 in submission] witness said this contains products which are not clinically relevant and therefore do not affect the Authority. About 400 of these panels are used everyday and they are the workhorses with 95% of organisms falling within a certain group – the automatic system is for routine tests. The Ertapenem offered by Cherubino in Table 1.1A requires alternative testing method and would involve over 50 manual tests a day apart from costs. The highlighted Limitations of the Procedure on BD Phoenix products in Doc 1 do not refer to EUCAST but to CSLI explained the witness and went on to say that EUCAST standards are guidelines on testing and conform to Euro standards whilst CSLI is an international standard which is interchangeable with EUCAST. The systems are similar but not identical but the method of calibration and activation is the same. Biomerieux is CSLI compliant. Finally witness stated that she is not qualified to deal with questions on National Antibiotic Committee guidelines which are matters for a doctor.

Questioned by Dr Camilleri witness stated that she is a Professional Executive Allied Health Practitioner of 42 years standing. Referred to Doc 1 witness said that Table 2 indicates the limitations which are irrelevant and not specified in the specifications. The literature, on page 9, indicates that

the card cannot be used for certain organisms without alternative tests. This amounts to something like 11 cases of alternative testing on Table 1.1A. Alternative testing is not optional but has to be done on all antibiotics specified using over 6,000 panels per year. The offer by Cherubino shows that there are 11 cases where alternative tests are required.

Ms Maria Kydonaki (A31377023 – Greek PP) called to testify by the Appellant stated on oath that she has a Biomedical Sciences background and is a product manager at Biomerieux, a multi-national company. The system offered by Cherubino in the tender is the one mainly used by the Company. Biomerieux has been in collaboration with Cherubino for some 20 years and helped in the preparation of the tender submission. Different options were offered by Cherubino – option 1 was fully compliant with the tender for one antibiotic which required alternative testing. There must have been, said the witness, a very divergent interpretation of the tender if, as its claimed, several tests are required on this option as only one test is required. There are no products that come without limitation and even EUCAST has limitation on the guidelines they authorise. Profile of pathogens changes and new formulations come on the market. There are various reasons, continued the witness, why limitations are common in tests and there are different guidelines between the two bodies EUCAST and CLSI with the latter being the one mainly adopted. These two bodies use different references. Epidemiology changes and guidelines have to change to cover the treatment. Referred to Table 2.2.3 in the tender witness said she understands that the panels in use can be also used under local EUCAST guidelines.

Dr Camilleri referred the witness to the products Instructions for Use. She stated that all panels cover all antibiotics except one, for which an alternative test is recommended. All test methods have limitations and is something common with all manufacturers. For certain antibiotics an additional test is recommended and this applies to all products. Witness confirmed that for certain pathogens in the offer extra tests have to be carried out.

Questioned by Dr Mifsud Bonnici witness said that this was the first occasion that she has heard the expression 'clinical relevance'. The changes in pathogens was not hypothetical as it is a fact that pathology changes all the time and can be predicted by studying the reports of international bodies.

Dr Francis Cherubino (167384M) called to testify by the Appellant stated on oath that he is a Director of Cherubino Ltd and that its tender submission is 100% compliant. His company have been supplying this product for 10 to 15 years. The rejection letter did not reflect what the tender required and he did not agree with it as there was an element of changing of goal posts. All tests requested in tender pages 18 to 21 were included. And their rejection appears like an attempt to change the terms of the tender. There are no limitations mentioned in the tender document. Referred to Standards Clause 3.1.2 in the tender witness said that he had tried to research on the standards established but was referred to an internet site limited to Health Care professionals. . No information as to clinical relevance exists. The offer by the Company had one antibiotic missing and therefore it offered an alternative test. As the incumbent he had never been made aware of any limitation in its products nor was there any reference to them in the tender document. The offer was fully based on Clause 1.5 in the tender. If, prior to tendering, there had been any doubts on any limitations the Company would have sought a precontractual remedy.

In reply to a question from Dr Camilleri, witness confirmed that in the tender document Instructions for Use are requesting alternative tests in certain circumstances.

Questioned by Dr Mifsud Bonnici, witness stated that he does not agree that the tests were required to be automated.

Dr Claire Marantidis Cordina (269984M) called to testify by the Contracting Authority stated on oath that as a Doctor she specialised in Microbiology and is the Lead Consultant Microbiologist at Mater Dei Hospital. She stated that she was involved in the drafting of the specifications of the tender and went on to explain that the scope of the automated system was to speed up and simplify the work of coping with hundreds of samples received daily. As an example, witness quoted that urine tests alone take up 120 tests daily. Manual processing takes up a lot of workers time. The scope of Clause 1.5 in the tender was to limit the number of manual tests.

In reply to questions from Dr Paris, witness said that in terms of Clause 1.5 the alternative test could be manual or automated. She agreed that there are always limitations in tests but could not recall if there were any other references to limitations in the tender. Anything that is included in the tender is clinically relevant. There are regular meetings with the National Antibiotic Committee by the medical team at Mater Dei.

Ms Julie Haider was recalled to testify by the Contracting Authority and was asked what is clinically relevant? Witness replied that the combination of microbes with antibiotics is clinical relevance – every organism is relevant and the issue of relevance is what antibiotic one is going to use. On current basis use is running at 100 manual tests a day due to limitation. Every manual test costs € 3.50 excluding human resource costs. Ertapenem runs into 50 tests per day. The literature submitted by Appellant states that tests have to be 'performed' – this is not a recommendation but an instruction. This would work out at € 127,750 extra tests per year or € 600,000 over five years. Mater Dei was currently using Vitec 2c system provided by Cherubino Ltd.

Replying to a question from Dr Paris, witness stated that the figures quoted were based on laboratory records and used in formulating the tender requirements.

In reply to a question from Dr Mifsud Bonnici, witness said that literature had to be submitted and used exclusively in assessing the tender submissions.

This concluded the testimonies.

Dr Paris said that it is crucial that evaluations are done on the same basis and within the parameters of the tender document. What is not stated in the tender cannot be used to judge a bid and that is the point of this appeal. In the *South Lease* case it was held that requirements had to be stated in the tender and must be clear in its interpretation. This is the doctrine of self-limitation. Cherubino was here judged on different basis to other parties through the BD submissions. Clause 1.5 states that if a test is not included in the AST panels an alternative test will be accepted. Ms Haider confirmed that an alternative manual test was offered – nothing else was requested in the tender. Both bids are compliant but if one is disqualified so should be the bid of Evolve. Cherubino could have used a remedy if the tender had any limitations. Dr Cordina said that everything in the tender is clinically relevant – this contradicts the evidence of Ms Haider. According to Dr Cordina, with reference to Clause 1.1A in Table 1 both antibiotics are clinically relevant and therefore the offer of BD should also have been excluded. The tender is for 5½ years and it does not mean that one cannot foresee what is likely to happen. The Board must ensure that all bids are judged on the same basis. Cherubino's limitations have been taken into account but not so those of Evolve. What is not stated in the tender cannot be considered. A reasonable economic operator must check what is acceptable to the National Antibiotic Committee according to Legal Notice 122/2008. A reasonably informed tenderer could not reach the same conclusion as the Contracting Authority as there is no indication of such. There is a distinction between panels and equipment on loan - Article 2.3 covers only panels. Witness Ms Kydonaki stated that EUCAST and CSLI are different. The offer by BD is biased towards CSLI and might give different

standards with a not like for like comparison. Article 1.5 refers to automatic testing but does not refer to limitations.

Dr Calleja stated that according to Dr Paris, Appellant Cherubino is compliant with EUCAST but Evolve's bid is not. Page 49 of the BD User's Manual states that it is compliant with both. Section 2.3 refers to calibration of panels on loan to EUCAST standards but refers also to calibration to other national standards. A distinction is being made by Cherubino between the technical offer and technical literature – the latter makes reference to multiple tests. Ms Haider stated that 11 alternative tests are required and this does not meet Clause 1.5. The principle of proportionality demands that manual tests are very limited as otherwise the whole things becomes disproportionate. The point of clinical relevance is the combination of microbe and antibiotic effectiveness.

Dr Mifsud Bonnici said that the further test is on Ertapenem – that already means two tests. The tender refers to automated system and that is precisely the point of this appeal. Cherubino seems to have a different interpretation of automated and indeed of the word hybrid. The manual test is a concession as the aim of the tender is automation at the lowest cost taking all factors into consideration.

Dr Debono said that the Authority relies on its written submissions. The evaluation has to follow the PPR. Witnesses confirmed that there is nothing in the evaluation that was not stated in the tender and Appellant's claim is unfounded on this point. No proof has been submitted that the bidders were treated differently.

Dr Camilleri stated that the Call is a request for an automated system on loan. Dr Cordina made it clear that if all tests were carried out manually it would take a long time. The tender in Clause 1.5 allows one alternative test. Appellant claims that one test has been offered but did not offer an alternative test for the item for which an alternative test was needed. Appellant did not offer a test for something that needed an alternative test – this is tantamount to not offering anything at all. Appellant claims this should have been stated in the tender but that is the whole point of procuring an automated system. Contrary to what the Appellant's witness stated this test is not a suggestion – the clause is mandatory not discretionary. Board has already decided on this point and the Evaluators made it clear how they reached their conclusion. It is clear that what was offered does not conform without the need of going into other offers.

Dr Paris in a concluding comment said that it has been proved beyond reasonable doubt that both offers are in the same waters. He cited the Appeal Court Case *OK Ltd vs Director of Contracts* where the Court stated that the Board is entitled of its own accord to check bids and not to necessarily rely on the judgement of the Evaluation Committee.

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

End of Minutes.

Decision

This Board, having noted this objection filed by Cherubino Ltd on the 7th October 2022 (herein after referred to as the appellant), The objection refers to the claims made by the same appellant against the Central Procurement and Supplies Unit (herein after referred to as the contracting authority) regarding the tender listed as case No.1822

in the records of the Public Contracts Review Board, and its verbal submissions during the hearing on 3rd October 2023

The Board also noted the Contracting Authority's letter of reply filed on the 14th October 2022 and the verbal submissions during the hearing on the 3rd October 2023, and the submissions made by the preferred bidder during the hearing, as well as the testimonies cited by the Appellant and Contracting Authority.

The Board also noted the submissions made by the Director of Contracts on the 14th October 2022 and the verbal submissions.

Finally, the Board took into consideration the decision of the Court of Appeal dated 18th April 2023 and the Minutes of the hearing of the Board on the 3rd October 2023 as appended above. Whereby, the Appellant contended that the appeal covered a preliminary grievance and main grievances. There are two separate items covered by the tender.

Preliminary

A. That the Contracting Authority did not answer Cherubino's request for the brand name and models of the panels offered by the preferred bidder.

B. This information is not confidential under Public Procurement Regulations (PPR) 40, and that unless this information is to hand a specific grievance of the preferred bidder's offer cannot be mounted whilst Appellant's hands are bound by the 10 days restriction imposed by the PPR and the failure of the Authority to provide information.

The Contracting Authority contended that that the information about the products that the Appellant is talking about has long been provided and any further requests should have been made long ago.

Having noted the submissions by all parties, the Board decided not to accept the preliminary plea since the Appellant had ample time to raise new grievousness and the Board will continue to hear the appeal on grievances already submitted.

Main Grievances

Appellant's claim that its bid is fully compliant thus the offer must be re-integrated and re-evaluated. Cherubino's bid was judged on different basis to the other parties.

A. That it is clinically impossible to have AST panels without limitation whatsoever and that all products on the market, like those offered by Cherubino, have similar limitations.

B. Clause 1.5 states that if a test is not included in the AST panels an alternative test will be accepted and this was offered by Appellant.

The above was counter argued by the Contracting Authority as follows.

A. The Appellant did not meet the specifications as required under Clause 1.5 which allowed one alternative test as more than one alternative tests are required by the system offered by Appellant and was therefore not compliant.

B. Whilst the Appellant offered more than one test it did not offer an alternative test for the items for which it was required.

After the Board considered the arguments and documentation from both parties, the

testimonies of the witnesses and the preferred bidder's submissions and taking note

of clause 1.5 in the tender Document, the Board's view was that the Appellant's claim is not sustainable.

The Board concludes and decides that:

a) Does not uphold the Appellant's Letter of objection.

b) Upholds the Contracting Authority's decision in the award of the tender.

c) Directs that the deposit paid by the Appellant not to be reimbursed

Dr Charles Cassar	Mr Lawrence Ancilleri	Mr Richard Matrenza
Chairperson	Member	Member