

PUBLIC CONTRACTS REVIEW BOARD

Case 1740 – CT 2385/2021 – Tender for the Supply, Installation and Commissioning of a Dual Energy CT Scan at SVP Long Term Care Facility

27th December, 2023

The tender was issued on the 5th December 2021 and the closing date was the 1st February 2022. The value of the tender, excluding VAT, was € 1,550,050

A deposit of € 7,750 was paid.

There were six (6) bids.

On the 31st May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Suratek Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Kevin Galea	Representative
Ms Annabelle Bartolo	Representative

Contracting Authority – St Vincent de Paul Long Term Care Facility

Dr Noel Bezzina	Legal Representative
Dr Ronald Fiorentino	Chairperson Evaluation Committee
Mr Sandro Ghigo	Secretary Evaluation Committee
Dr James Carabott	Member Evaluation Committee
Mr Anthony Caruana	Member Evaluation Committee
Ms Marica Saliba	Representative
Mr Mark Micallef Costa	Representative
Eng Chris Attard Montalto	Representative

Preferred Bidder – Triomed Ltd

Dr John L Gauci	Legal Representative
Mr Alex Vella	Representative
Mr Charles Cascun	Representative

Interested Observer

Dr Adrian Spiteri

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Suratek Ltd said that this appeal will deal with the technical side of the bid and will ask if the recommended bid is compliant with the tender requirements – particularly the need for a dual energy CT scanner. There are different technologies covering different functions but the Philips product cannot perform the function required.

Dr Noel Bezzina Legal Representative for St Vincent de Paul Long Term Care Facility said that the tender technical requirement is stated in Clause 2.20.2 of the tender specifications. The Tender Evaluation Committee (TEC) after comparing the submissions found that the preferred bidder met the requirements besides having a more favourable price and was consequently awarded the tender.

Dr John Gauci Legal Representative for Triomed Ltd agreed that this appeal hinges on the technical specifications but added that it is outside the scope of the Public Contracts Review Board to technically evaluate the award.

Dr Mifsud Bonnici countered by saying that the competence of the Board is to decide on the grievances raised about the award whilst he agreed that they were not there to decide the technical side. It may well turn out that the TEC correctly carried out their role but were not well advised by their experts.

Mr Cees Verlooi (Nederlands ID No IRFB42PB1) called as a witness by the Appellant stated on oath that for twenty-two years he has worked for Canon Medical Systems, had a B.Sc. qualification and was a Teacher at the Training Academy. He produced a visual display of a dual image scanner performing its function on the lung together with accompanying data. He stated that the scanner offered by the preferred bidder does not cover the whole lung, but only an area of 4cm against the 25cms necessary for the whole image. This means that the patient has to be moved to obtain the full image. There is no mention of the lungs in the material prepared by the preferred bidder. In a high and low voltage dual energy system one energy cannot distinguish between tissues. For complete lung scanning one needs helical or sequential screening.

Questioned by Dr Bezzina witness said that perfusion of the whole lung cannot be done with the Philips model – in fact there is no mention of lung application in their literature.

Dr Ronald Fiorentino (127161M) called as a witness by the Contracting Authority stated on oath that he was the Chairperson of the TEC. Asked to state the names of the other members of the TEC he stated that these were Dr James Carabott; Mr Francis Asciak (Head of

Secretariat, Medical Procurement Unit) and Mr Anthony Caruana (Technical Officer) plus a technical expert who was not a member of the TEC. The members of the TEC followed the expert's view. Witness was not aware as to what literature had been handed to the expert.

Mr Sandro Ghigo (513684M) called as a witness by the Authority confirmed that he was the Secretary of the TEC. He stated that the literature submitted by the preferred bidder had been forwarded to the expert. Witness said that the offer did not include a 'dual energy' scanner.

In reply to a question from Dr Gauci witness stated that the expert confirmed that the preferred bidder's offer was fully compliant with the tender.

Engineer Chris Attard Montalto (260567M) called as a witness by the Authority stated on oath that he was the technical expert appointed to evaluate the offers. A matrix had been provided as a commitment that bidders accepted the terms. The technical offer form indicated that the Philips product was dual image; the tender did not specify a set size for the image. The machine complies in full with the specifications of the tender. The preferred bidder stated clearly that its offer meets the specification.

Questioned by Dr Mifsud Bonnici witness agreed that the tender requested dual imaging but he was not interested in comparing images as his role was to check submissions.

In reply to a question from Dr Gauci witness said that the Philips model offered was fully compliant even in the technical literature.

At this stage Dr Gauci objected to Dr Mifsud Bonnici questioning witness on the contents of the literature submitted as this was confidential – however Dr Mifsud Bonnici claimed that what he was about to ask was about documents in the public domain.

The Chairman said that the Board would have a short recess to consider how to proceed.

After the recess the Chairman stated that at this stage of the proceedings the Board feels that it should invoke the powers given to it under Regulation 90(1) which empowers such Board to engage an expert in this context. He then declared the hearing adjourned to a later date.

End of Minutes

SECOND HEARING

On 29th September 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Muscat as members convened a public virtual hearing to further consider this appeal.

The attendance for this public hearing was as follows:

Appellant – Suratek Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Kevin Galea	Representative

Contracting Authority – St Vincent De Paul Long Term Care Facility

Dr Noel Bezzina	Legal Representative
Dr Ronald Fiorentino	Chairperson Evaluation Committee
Mr Anthony Caruana	Member Evaluation Committee
Ms Marika Saliba	Representative

Preferred Bidder – Triomed Ltd

Dr John L Gauci	Legal Representative
Mr Charles Cascun	Representative
Ms Chiara Romei	Representative
Mr Alex Vella	Representative

Director of Contracts

Dr Mark Anthony Debono	Legal Representative
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The Chairman of the Public Contracts Review Board, Mr Kenneth Swain welcomed the parties and noted that following the decision at the last hearing the appointed expert Dr Paul Bezzina had produced his Report which was circulated to all parties and on which questions may be asked once the expert had confirmed his Report.

Dr Paul Bezzina (312864M) confirmed on oath the contents of the Report prepared by him.

Dr John Gauci Legal Representative for Triomed Ltd said that his client wished to put written questions of a technical nature to the expert.

Dr Clement Mifsud Bonnici Legal Representative for Suratek Ltd objected to written questions being submitted. He said that the Board procedure has to be level to all parties.

Dr Gauci said that he wanted it recorded that he was asking for written questions to be submitted with written answers in reply.

Dr Noel Bezzina Legal Representative for the Contracting Authority said that he had no objections to questions being put in writing since he too, had technical questions to submit.

Dr Mifsud Bonnici then requested that it be recorded that the Appellant objects to the recommended bidders' demands for questions to be put in writing to the expert in relation to the Report for the following reasons. Regulation 91 (3) of the PPR provides for experts to be examined and cross-examined and there is no reference to questions being put in writing. Secondly the nature of proceedings are meant to be rapid and therefore no further delays

should be allowed by the Board . On a concluding note, according to Regulations 90 (2) it is the Board that determines the procedure and this has been done also with the rapid character of proceedings in mind.

At this stage the Chairman said that the Board will have a short recess to consider the points made.

On resumption the Chairman stated that Board having heard the request of both Triomed Ltd and the Contracting Authority to put written questions to the nominated expert Dr Paul Bezzina, as well as the objections on the part of Suratek Ltd, notwithstanding that procedures should be accelerated as much as possible, nonetheless meets the request for questions of a technical nature to be put in writing bearing in mind that the requests of Triomed Ltd and the Contracting Authority relate to the conclusions of the Report which was only confirmed on oath at today's hearing.

Failure on the part of the Board to assent to the request of Triomed Ltd and the Contracting Authority would deny them a fair hearing. The Board therefore meets the request of Triomed Ltd and the Contracting Authority.

With the above in mind the Board is directing Triomed Ltd and the Contracting Authority to submit to Dr Paul Bezzina, by the 4th October 2022 any questions in writing relating to his Report. Dr Bezzina, in turn, is directed to reply in writing to these questions by the 14th October 2022. At the same time Suratek Ltd will be given the opportunity of cross examination on the resumption of this hearing which is being deferred to the 20th October 2022.

End of Minutes

THIRD HEARING

On the 20th October 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to further consider this appeal.

The attendance for this public hearing was as follows:

Appellant – Suratek Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Kevin Galea	Representative

Contracting Authority – Saint Vincent de Paul Long Term Care Facility

Dr Noel Bezzina	Legal Representative
Mr Sandro Ghigo	Secretary Evaluation Committee
Mr Anthony Caruana	Member Evaluation Committee

Ms Marika Saliba	Representative
Mr Mark Micallef Costa	Representative
Eng Chris Attard Montalto	Representative

Preferred Bidder – Triomed Ltd

Dr John L Gauci	Legal Representative
Mr Charles Cascun	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Dr Paul Bezzina resumed his testimony under oath.

In reply to questions put to him by Dr Noel Bezzina witness stated that he had not been given a copy of the tender dossier. Referred to Specification 2.20.2 of the tender witness agreed that the specification required software and he had accessed the Philip's website. It was confirmed by the Philip's Clinical Leader at the international conference what the apparatus could or could not do. [At this stage a video available on Philip's UK website was shown to demonstrate the performance range of the apparatus]. Witness explained that according to the video it was important to note that this type of equipment has two examination cards relating to abdomen and extremities scanning. The lung volume is larger than 4cms and therefore the equipment would not cover the entire lung which is larger. No other evidence was provided to the witness that other facilities, except the two cards, are available and even the manufacturer's own manual confirms that these scans cannot be repeated or extended. The technical specifications facility is too small for lung double energy profusion examination – this information is given by Philip's themselves and there is no doubt that this apparatus is not suitable for double lung examination. It is suitable for static scans such as gout or kidney stones but not for situations where there is patient movement. Patients' safety could be affected by double function through the double dose needed and this was confirmed by the Philip's specialist.

Questioned by Dr Gauci witness said that verbal information was obtained during the European Congress of Radiology where he spoke to clinical persons and took notes which he included in his report to the Board. The information was not given to him under oath. The conference was held in mid-July before he was asked to act as a Court expert. Witness was not aware that Appellant had provided the same video as that shown earlier – however this was available online, as was the manual.

At this stage Dr Mifsud Bonnici asked the Board to direct that the document filed by Dr Noel Bezzina, at the last minute, on the 20th October 2022, be declared not eligible to be considered since it does not accord with the Board's rulings on the time limit for the filing of documents.

Dr Chiara Romei (PP AF 4772956) called as a witness by Triomed Ltd testified on oath that she was a Product Specialist at Philips, was familiar with the tender and that the product offered perfectly matches the tender request in regard to all bodily organs. The video shown earlier during this hearing was merely indicating the use of the product not its performance which

can extend to all examinations. This is the case for examination of the lungs and one can use other software if more than 4 cm coverage is required – this is comparable to other systems on the market when performing lung perfusion. These specifications match perfectly what is requested in the tender. The safety of the product is guaranteed through certification by the European Safety Authorities.

Referring to the video shown, witness stated that that is purely a teaching aid and is not meant to explain the functions of the system. The 40mm. specification is well known normal segmenter of the system and is the minimum required for full examination. In this respect this matches perfectly anything offered by the competition which offers the same coverage. Witness confirmed that she had not been contacted by the expert appointed by the Board.

Questioned by Dr Mifsud Bonnici, witness stated that her job is as a modality specialist with a background in medical engineering, managing both hardware and software of a product. She started work as a clinical application user. Witness confirmed that the product offered by Philips can perform dual energy lung perfusion through one low and one high energy scans. There is other software available to deal with more than the 4cm. product. Witness agreed that she was making a distinction between part of a scan and a whole scan and that for a dual energy scan repetition and extension of the scan was required.

Dr Mifsud Bonnici referred the witness document SL5 (Page 177) filed by Appellant and directed the witness' attention to the section regarding dual energy process which states "repeat and extend as not available for dual energy acquisitions". Witness replied that perfusion could be performed in particular regions of the lung as one analyses only that part. She went on to state that there is different software technology available to scan the whole lung but it is a completely different system to that offered. Witness said she was not in a position to comment about prices but agreed that there would be a difference in price and the different software technology would be more expensive.

Dr Noel Bezzina asked the witness two questions to which she replied that lung perfusion would still be possible with a 4cm scanner and the model offered satisfies the tender criteria.

This concluded the testimonies.

Dr Mifsud Bonnici stated that the appeal hinged on a technical point and there were two questions facing the Board – what did the tender request and did the product offered meet that request? The tender is clear – indeed even the Title refers to 'Dual' and Section 1.1 of the Specifications talks of 'full-body scanner... with fast 360° rotation etc'. In 2.9 the specifications state ' 'should also be able to perform dual energy CT applications detailed in the Software section'. From this it is obvious that the tender is tied to software. The technical offer by Philips cannot do dual energy lung perfusion without a consequential even if fractional time lag. This affects the scan image as there is a time lag giving a varied image. This has been confirmed by the witness Dr Romei who however is claiming that the apparatus can perform the required functions as it is up to 4cm, as requested, but she totally ignores the dual image requirement.

Procurement is a matter of substance over form, said Dr Mifsud Bonnici – dual energy is the objective of the tender and in her testimony Dr Romei agrees with the expert's view that the

entire lung cannot be covered. The equipment in question is to be used at Saint Vincent de Paul at a sensitive time health wise with ailments likely to affect the lung. The Contracting Authority is trying to prove that the offer meets tender requirements when evidence is to the contrary and accepting the 4cm restrictions leads to hit and miss diagnosis. The price offered by the preferred bidder is well below the estimated value of the tender which makes it so obvious that the technology is limited and not up to the highest requirements and does not meet the objectives of the tender. If Philipps had chosen the correct technology their offer would have exceeded the estimated value. Appellant has provided proof that the Philips product is not up to the technical specifications as amply proven in the documents submitted – conversely no proof has been offered by the other parties that the specifications have been met.

According to Dr Mifsud Bonnici the Board was right in appointing an independent expert whose report agrees with the Appellant's arguments and who had 100% confirmation of his findings at the conference. It is unusual for the Board to appoint experts and in the known three PCRB cases where this happened (Cases 914, 915 and 1230) it relied on their findings and there is no reason why it should not do likewise in this case. Finally, the affidavit filed by Dr Noel Bezzina is purely argumentative as the tender asked for dual energy software.

Dr Gauci said that the preferred bidder's submission had passed through the competence of the Evaluation Committee. On the contrary all that was offered by Appellant were just allegations. The Evaluation was correctly carried out and there is no point in speculating on alternatives. The Board must ensure that what was asked for was offered and the two requested criteria were met. The Board expert's opinion came from unreliable sources on the internet – even he himself admitted that he is not an IT expert and could not recall when the notes he used were made. This, apart from the fact that he admitted that he did not see the tender dossier. As against this the preferred bidder produced a technical representative who testified in detail that the tender requirements were fully met by the product offered.

Dr Noel Bezzina said that the arguments in this case have been exhausted. The tender requisites for lung perfusion software and a 4cm detector were met and the preferred bidder has thus complied. Full dual energy software is what was required and witness confirmed that the offer meets this requirement. Dr Cortis confirmed that the tender is based on software and the expert overstepped the mark in his report by bringing in patients' safety plus his mention of many unknown sources of information. The appeal should be denied.

Dr Mifsud Bonnici concluded by saying that there were four bids higher than that of the preferred bidder which was way out of line. Any mention of a precontractual remedy was out of place as in this case there were only open doors to the bidders. Dr Romei stated that the video shown was only educative and that in reality the product has a much wider capacity but this has to be weighed against the findings of the expert. The Board was invited to look at document SL6 which says that the user card is limited and does not include the lung and consider this against the documents submitted by the preferred bidder but no proof thereof has been provided. Dr Romei has a commercial interest in this tender and is not clinically experienced as she claims and failed to answer questions put to her in this regard. The equipment offered is not suitable for the envisaged clients and could possibly not be safe. The

discussions on this appeal should have been purely technical and it is unfortunate that the integrity of the appointed expert was attacked in the absence of any substantive proofs.

Dr Gauci commented that no new points have been raised by Appellant and the Board should rely on what has already been submitted.

The Chairman concluded the hearing by thanking the parties for their submissions.

End of Minutes of Meeting.

FOURTH HEARING

On the 20th July 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider further an Urgent Application filed on this appeal.

The attendance for this public hearing was as follows:

Appellant – Suratek Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Kevin Galea	Representative

Contracting Authority – Saint Vincent de Paul Long Term Care Facility

Dr Joseph Camilleri	Legal Representative
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Preferred Bidder – Triomed Ltd

Dr John L Gauci	Legal Representative
Mr Alex Vella	Representative
Mr Mark Bondin	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Suratek Ltd referred to the urgent application filed by the Appellant on the 21st June 2023 requesting the title of literature submitted by the recommended bidder and all requests for clarifications issued by the Tender Evaluation Committee and any replies thereto and said that the request was proportionate and non-confidential. The Contracting Authority submits to the decisions the Public Contracts Review Board might reach and the recommended bidder likewise will

comply. An early decision is requested as the main hearing on this case is on the 3rd August. Appellant assured the Board that the information given will remain solely in the hands of the parties. Reference was made to the Antea Polska Case (C 54/21) paragraphs 78 to 80 regarding the right of appellant to have information to enable an appeal to be raised.

Dr Gauci Legal Representative of Triomed Ltd confirmed that he had submitted a letter confirming the recommended bidder's will comply with the Board's decision.

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

End of Minutes

FIFTH HEARING

On the 3rd August 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider an application by the Appellant to raise two additional points of objection.

The attendance for this public hearing was as follows:

Appellant – Suratek Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Kevin Galea	Representative

Contracting Authority - St Vincent de Paule Long Term Care Facility

Dr Joseph Camilleri	Legal Representative
Dr Noel Bezzina	Legal Representative
Ms Phyllis Mercieca	Chairperson Evaluation Committee
Dr Kieran Chircop	Evaluator
Ms Marica Saliba	Evaluator

Preferred Bidder – Triomed Ltd

Dr John L Gauci	Legal Representative
Mr Alex Vella	Representative

Department of Contracts

Dr Mark Anthony Debono

Legal Representative

Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Suratek Ltd gave a short chronology of events in the hearing of this appeal and referred to Appellant's request for disclosure of evidence. On receipt of this evidence two further grounds of appeal became evident. The introduction of these fresh grounds was opposed by the preferred bidder and hence the need for this hearing. The preferred bidder was incorrect to claim that the permission of the Board was required to consider the fresh grievances – Appeal Court Case 191/23 was cited in support of this. The objection was an unnecessary lengthening of proceedings.

Dr Joseph Camilleri Legal Representative for the Contracting Authority said that there was no objection on their part to the grievances being heard so long as the other parties were allowed to reply to the points raised. He agreed that there should be no unnecessary delays in these proceedings – however it provided a good opportunity for the Board to give guidance on future proceedings on such matters.

Dr John Gauci Legal Representative for Triomed Ltd said that permission to raise new objections had to be obtained from the Board. He referred to the PCRБ decision in Case 1898 where Appellant was not allowed to raise additional grievances.

Dr Mifsud Bonnici said Appellants would abide by the Board's decision; however he pointed out that there was a difference between introducing fresh grievances at the start of proceedings and those that became known only at later stages of proceedings.

At this stage the Chairman proposed a short recess for the Board to consider the submissions raised.

On resumption of the hearing the Chairman stated that the Board had heard the submissions of the Appellant, the Authority and the preferred bidder as interested parties. The Board accepts the Appellants application of the 28th July 2023. The parties have till the 14th August 2023 to reply to the application of the Appellant.

Dr Mifsud Bonnici noted that the Appellant had requested disclosure of the requested revision number and date of a publication which has not yet been provided and he requested the Authority to follow up this request.

There being no further submissions the Chairman declared the hearing adjourned to a later date.

End of Minutes

SIXTH HEARING

On the 12th October 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri 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 – Suratek Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr Kevin Galea	Representative
Ms Annabelle Bartolo	Representative

Contracting Authority – St Vincent De Paule Long Term Care Facility

Dr Noel Bezzina	Legal Representative
Dr Joseph Camilleri	Legal Representative
Dr Kieran Chircop	Chairperson Evaluation Committee
Ms Marica Saliba	Secretary Evaluation Committee
Ms Karen Muscat	Evaluator
Eng Norbert Mifsud	Evaluator
Ms Phyllis Mercieca	Representative

Preferred Bidder – Triomed Ltd

Dr John L Gauci	Legal Representative
Mr Alex Vella	Representative
Mr Charles Cascun	Representative
Mr Mark Bondin	Representative
Mr Peter Apap	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
Mr Nicholas Aquilina	Representative

Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Suratek Ltd said that the basis of the appeal was the dual energy aspect of the product offered, a full discussion on which had taken place at the first hearing and on what was the cheapest offer. This product was to be used at SVP Long Term Care Facility which housed vulnerable patients. A second evaluation directed by the PCRB ignored their decision acting against the principles of the tender. This matter was *res judicata* and can stop at that point. The three grievances originally raised will be revisited today in what can be termed a surreal situation since the second evaluation ignored totally the Board's decision.

Dr Joseph Camilleri Legal Representative for SVP Long Term Care Facility (SVP) said that the Appellant makes a major point that this matter is *res judicata* and surreal. The PCRB cannot substitute the Tender Evaluation Committee (TEC) which decided the outcome of the re-evaluation. Fresh technical people looked objectively and reached same decision as the previous evaluation. This is not a matter of *res judicata* but a continuation of the process.

Dr Mifsud Bonnici requested that proofs of the first hearing are taken as previously recorded and a record noted of all items disclosed. He then requested that witnesses be called.

Dr Kieran Chircop (438682M) called to testify by Appellant stated on oath that he was the Chairperson of the second TEC. He was referred to correspondence exchanged between the TEC and the preferred bidder and confirmed that Triomed provided three documents regarding the offer – one from Triomed, one from Ms Chiara Romei and Instructions for Use of IntelliSpace from Philips. Witness stated that even without these documents he had concluded that the offer was compliant as the information was already available. However, for the benefit of the other TEC members, who were not technical, he had requested clarification on four points as clearer information was required. Witness agreed that in the original offer there already was reference for Instructions for Use (IfU) but the second document made it more clear. The previous information in hand did not have so much detail. The documents in the first evaluation ‘IntelliSpace Portal Technical Data Sheet’ was exhibited – this reduced version Doc SL15 (24 out of 48 pages) was the only software submitted in the first offer.

Witness confirmed that there was no specific or clear direct reference or mention to the requirements in the tender regarding perfusion and dual energy in the literature provided in the first offer, so clarification was requested. The product was compliant after the second lot of literature. The first offer was not well documented. Referred to the letter from Triomed and Ms Romei witness said that the letter from the latter verified the IfU which was not in the first offer.

Questioned by Dr Noel Bezzina witness stated that he is a medical doctor specialising as a Radiologist. He confirmed that the TEC made certain that the offer was for a full body scanner which scan in practice was done in at least two sections. The bid was compliant in Sections 1.1 and 2.20.2 and the preferred bidder offered the software required all as requested in the tender. All software required was offered. Witness had seen the expert’s report and disagreed with it on several points and on its conclusions.

Dr Mifsud Bonnici objected to these comments saying that they should have been raised at the first hearing when the expert was present and could have been questioned on these points directly.

Referred to the Technical Offer Form (page 9) by Dr Gauci, witness said that the Philips document offered provision of dual energy tools online and the key benefits and was part of the original offer.

Further questioned by Dr Mifsud Bonnici witness said that the document referred to above is part of the technical literature submitted with the Technical Offer and was not separate from it. Referred to the Board’s decision in the first case, which spoke of lack of conviction on the

technical literature, witness said that the result of the second TEC did not agree with the above statement by the Board.

Ms Franca De Brouwer (Netherlands PP MS7R00LB1) called to testify by the Appellant stated on oath that she is an Application Systems Specialist working for Philips. Witness said she had a brief telephone conversation with Ms Chiara Romei as she wanted to know what this hearing was all about. She had read the procurement document. Witness confirmed that she was present at a European Congress of Radiology Event in Vienna as she was a demonstrator at that event. She does not recall meeting Dr Paul Bezzina at that event. Referred to the Incisive CT+ dual energy system witness agreed that Philips offered a different platform model but the ICT has the same capability as the Incisive.

Mr Alex Vella (288160M) called to testify by the Appellant stated on oath that he is a former Director of Triomed and was now working with them as Business Development Manager. At the time of the tender bid he was the Commercial Director of the firm. In compiling the tender he had sent the document to Phillips who assisted in the submission and recommended the model to offer. Ms Romei was not involved. Referred to the letters from Philips and Triomed, witness said that he replied to the clarification on the basis of the replies provided by Phillips and Ms Romei.

Ms Romei was called to testify online but as the time was later than she had indicated she would be available she could not be contacted. As Dr Mifsud Bonnici indicated that the evidence of Ms Romei was important to his submissions the Chairman deferred the case to the 21st November 2023 at 9.00am when Ms Romei would be advised that she would be the first person to testify on that day.

The Chairman thanked the parties for their submissions and declared the hearing deferred.

End of Minutes of this hearing.

SEVENTH HEARING

On the 21st November 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri 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 – Suratek Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr Kevin Galea	Representative
Ms Annabelle Bartolo	Representative

Contracting Authority – St Vincent De Paule Long Term Care Facility

Dr Noel Bezzina	Legal Representative
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Dr Joseph Camilleri	Legal Representative
Ms Marica Saliba	Secretary Evaluation Committee
Ms Karen Muscat	Evaluator
Eng Norbert Mifsud	Evaluator
Ms Phyllis Mercieca	Representative

Preferred Bidder – Triomed Ltd

Dr John L Gauci	Legal Representative
Mr Alex Vella	Representative
Mr Mark Bondin	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Suratek Ltd asked that it be noted and confirmed that his request that the proofs heard at the first hearing will apply throughout the entire hearing of the case. There was no objection to this request and it is recorded that this request was met.

Dr John Gauci Legal Representative for Triomed Ltd asked that his objection to the technical expert report is confirmed.

Dr Mifsud Bonnici asked that witnesses be heard.

Dr Chiara Romei (Italian ID ES477295C) called as a witness by the Appellant, testifying on oath on line was referred to document entitled 'Philips Rectification Report February 2023 – Instructions for Use' and confirmed that she had written the technical part of this report which was indicated by the blue coloured text. This official document was prepared to show the final user of the system how to use the system properly and covered only part of the whole application of the system possibilities. It does not cover all possibilities as this depends on the final use. Applications are all listed but not the final user of such applications. Referred to document entitled 'Intellispace Portal – Instructions for Use' (Doc SL12) witness said that this document was not for the CT system but a manual for post processing applications of all Philips systems on the market. Her report, said the witness, is for post processing instructions for use of the CT system. Instructions for use are also for the Intellispace Portal software propriety to Philips. Witness confirmed that instructions for use relate to post processing software after image is taken by Incisive CT+. Instructions for use were attached to the letter and the instructions in Doc SL12 are for post processing software. According to the witness one can obtain non-enhancement images by adjusting the iodine from the image but that depends on the system. Spectral application can be used only for a particular system but cannot be used on standard CT system.

Witness went on to refer to the different CT scanners offered by Philips but mentioned that the Incisive CT+ was not part of the Spectral CT family. Referred to the response to the Evaluation Report witness confirmed that the letter was prepared specific to this tender. Referred to the first response on the composition analysis software, witness was directed to screenshot of page 264 of Doc SL12 and to page 268 of the IfU on lung perfusion analysis and indicated that no screen shot of the latter was presented as she could not ask a patient for a demonstration, so could not obtain an image and had to use what was available. Asked to indicate were, in the instructions for use, does the IfU state that it can do dual perforations witness stated that duality can be used for all organs in the body or for body parts. Because there is no reference to it in the paragraph it does not mean that it cannot be used for lung perfusion. Final application of one single protocol is not listed in the instructions for use.

The witness confirmed that the IfU does not indicate that it does dual perfusion. There are two ways to obtain virtual non-contact imagery that is by subtraction of iodine. In the IfU there is no reference to the subtraction of iodine but there is a description of the functionality in the basic application of the CT how to subtract iodine from one image to another – this is how dual image is performed. Referred to Doc SL16 – Philips Computed Tomography - witness agreed that one of the images on page 18 of that document was the same as that submitted in her response report and went on to explain that this picture was captured by a different machine which works exactly the same and was used to explain how extraction is processed.

In reply to a question from Dr Camilleri representing the Contracting Authority witness stated that dual-imaging can be produced by the product offered in the bid.

Questioned by Dr Gauci, witness explained how perfusion function is performed using different energy levels varying between high and low levels and by dividing different components of the lung. The software offered was available at the time that the bid was submitted.

Mr Alex Vella (288160 M) called to testify by the Appellant stated on oath that he did not agree with part of the PCRb's decision of the 29th December 2022 paragraph (b). If that was the case, he was asked why the decision was not appealed and why there was no reaction to the Board's decision? Witness was advised by Dr Gauci not to reply to the question as the questions put were of a legal nature.

Dr Mifsud Bonnici requested that it be recorded that he was not allowed to put perfectly valid questions to the witness.

Engineer Norbert Mifsud (186974M) called to testify by the Contracting Authority stated on oath that he had a Masters degree in Biomedical Engineering and was a Professional Specialist at Mater Dei Hospital and was one of the Evaluators in this tender. Referred to Section 1.1 and 2.20.2 of the tender witness confirmed that it required a table to travel over the full body to acquire images and bidder's offer was compliant on this requirement. The TEC requested clarification on Section 2.20.2 on tender reference ID 167852 and this confirmed that the offer fulfilled what was required. The TEC had considered the PCRb decision and sought the rectification. They also considered the technical expert's report but the witness had reservation on this report, as for example, he does not agree that the patient

is exposed to a higher dose of radiation and the scan had to cover the whole length of the lung perfusion, which latter point was not a requisite of the tender. Whole lung perfusion was not requested in the tender and the offered product does it over 4cms with dual energy. Nowhere does the tender state that the process must be continuous. Detailed literature was made available with the offer and was acceptable to the TEC. There was no change in the offer as only clarification was required and since the bidder had stated 'yes' in the technical offer.

Dr Mifsud Bonnici referred the witness to the PCRB decision paragraph (b) on page 15 to which witness replied that the PCRB could not have been very convinced as otherwise they would not have used the word 'rather' in their decision. 'The rectification was only issued to cover our backsides' said the witness, not because it was needed. The use of phrases like 'taking into consideration' in the PCRB decision do not mean anything and we used the rectification to combat the PCRB when the case came up for rehearing.

In reply to further questions from Dr Mifsud Bonnici witness stated that 4cm coverage is the bare minimum required and cannot cover the whole lung which is 28cm long with the lung movement being twice every second. The software allows the image to be enhanced. Referred to the technical literature regarding virtual unenhanced and virtual non contrast images witness replied that he could not trace Pages 9 and 10 in the bidders submissions.

Questioned by Dr Camilleri why they had come to the same conclusion as before and why they had not decided to exclude the preferred bidder as non-compliant witness stated that the DoC would not act when requested and so the TEC decided themselves to re-evaluate all bids.

In reply to a question from Dr Debono, witness confirmed that the TEC had decided matters on their own.

This concluded the testimonies.

Dr Mifsud Bonnici said that after all the witnesses have been heard this case has a surreal aura. The interpretation of the PCRB decision by the Authority has been used to serve its own agenda. The Board should not accept new arguments on a *res judicata* case and should not consider the matter further. Three new grievances have been raised and the Appellant requests the Board to deal with each point even if after the first point the case is decided. This is a technical compliance matter. These issues are insurmountable. Apart from the matter of the *res judicata* there is the issue of the technical noncompliance. The third grievance is that there was no basis for the rectification and this was not explained. The final grievance is that if documents were submitted it was not permissible for them to be presented.

Dealing with the *res judicata* principle, Dr Mifsud Bonnici said that it gives certainty and legitimate expectations. Case C370/17 deals with the importance both in European and local legal systems of the principles of *res judicata* and the definitiveness of such. Even the breaking of a European law did not alter the outcome of a local decision that was *res judicata*. The three elements required in *res judicata* exist in this case - there are the three same parties; the same object as it is the same tender and the same course of action under regulation 270. The PCRB made it clear that they were rather convinced on balance that the

solution offered by the preferred bidder did not satisfy the tender – that binds everyone the same. In support of the Court of Appeal decisions on *res judicata* Cases 5/10/98 and 50/1988/2 were cited.

The PCRB decision links motivation, consideration and disposal and made clear that it was upholding Appellant's grievances, it made its decision clear and that matter cannot be reopened. The Board expressed serious doubt about the testimony of Ms Romei – doubts which were reinforced today. It is very unfair to try to discredit *ex post facto* the expert's report. Citing Court of Appeal decision in Case 298/2013/1, which dealt with procurement, Dr Mifsud Bonnici said that one cannot make a case on another case where a decision has already been made. One cannot accept grievances which have already been decided upon and a *res judicata* cannot be reversed. Regulation 93(5) of the PPR makes it clear that the Board decision is final unless there is an appeal and the Contracting Authority had no option but to accept as binding the decision of the Board. This is backed by the decision in PCRB Case 317 where the Board stated that it cannot accept a case to be reopened once it had already been decided by the same Board citing further Court of Appeal Case 115/2013/1 in support where it was held that once not appealed that decision becomes law to the parties concerned. The first hearing was a lengthy and full one, with the testimony and cross examination of the witness and cannot now be reopened as it would hold to ridicule the PPR.

Dr Mifsud Bonnici proceeded by saying that the legislators had denied the Authority the right of appeal, so they concocted one themselves when they created the need for the rectification – if there was no need for the rectification as evidenced by Engineer Mifsud why issue it? It was either needed or not and it was just a ploy to circumvent the law to create the right to appeal. The grievance that the offer was not technically compliant was an attempt to create a smokescreen to confuse the Board with technicalities. The tender asked for dual energy which cannot be fulfilled by a bare minimum 4cm detector hardware and very detailed software component. The argument put forward is that since the hardware is not able to do that which the software is capable of, then there was no need to request it. The PCRB reached the correct decision that that was not what the tender requested. Ms Romei at the first hearing stated that this could not be done – she is now arguing that the tender does not state full lung capacity. Tender specification 2.9 clearly states that perfusion has to be done at one go and no one can argue otherwise whilst Dr Bezzina stated clearly that the hardware could not perform what was required with the software provided. The IfU submitted by the bidder nowhere indicates dual energy perfusion; Ms Romei claims that it might not be indicated but it can be done – it is not indicated for the simple reason that it cannot be done, and that is the reason why Philips would not put their name to it. Dr Bezzina further stated that the offered equipment hardware can only be used to perform dual energy scan in non-moving situations – since the lung is constantly moving it cannot be covered by a 4cm scan. An e-mail from the Precision Diagnosis Department of Philips (Doc SL17) specifically confirms that it is not possible to do VNC imaging on the Incisive equipment. When challenged on this point Ms Romei replied that the screenshot displayed was presented from a totally different Philips product and not from the Incisive CT+

According to Dr Mifsud Bonnici, it has been established that the request for clarification was not necessary; in line with the principles of transparency and self-limitation the request for rectification or clarification requires the basis for it in the tender document. The technical

offer was Note 3 and the literature was Note 2. The Authority claim that the rectification was sought only on the literature, but the list form is not there and therefore there is no ground for rectification. The rectification note referred to 5 c (2) which covers literature, but if there is no literature list what was the bidder asked to rectify. General Rules (16.1) and Public Procurement Policy Note (footnote 12) make it clear what can be asked for and that the request for a clarification has to be under note 2. *Ex admissis* the TEC declared that the clarification was not required as the tender was clear and this was a study in what not to do as it was not only without basis but done to give one of the parties an advantage. In this context Appeal Case 35/22/1 gives clear direction on how a tender has to be rigorously followed.

The ultimate grievance, stated Dr Mifsud Bonnici, is that the Appellant maintains that the TEC should not have considered the three documents submitted namely the covering letter from the Distributor, the letter from Ms Romei and the Instructions for Use on Intellispace. These documents had to pre-exist and be in the hand of the bidder at the time of its bid (Regulation 62.1 of the PPR and 16.1 of the GRGT). The bid cannot be changed. The documents could not be accepted as the IfU is dated after the closing date of the tender and could not be considered by the TEC whilst the letter from Ms Romei was obtained from a totally unrelated manual, which is not acceptable. If these documents are accepted the Board would be allowing the offer of the preferred bidder to be changed.

Dr Noel Bezzina said that the merits of the case have been exhausted and decided. The PCRB in its decision ordered a re-evaluation of all bids by a newly constituted TEC. Thus, this is not a question of *res judicata* but a continuation of the process. It is claimed by the Appellant that the decision of the PCRB had to be accepted lock, stock, and barrel – if it had been so then it would not have been worth the effort. The Authority carried out the instructions of the PCRB and a rectification was requested. If the exercise had not been carried out the Authority would have been failing in its duty. There are no grounds for excluding the preferred bidder as it became compliant after the submission of the literature. The Chairperson of the new TEC confirmed that a thorough exercise was carried out before it reached the same decision. This was a continuation of the process and therefore not *res judicata*. Witnesses gave testimony that the literature presented by the preferred bidder met the tender requirements in specifications 1.1 and 2.20.2. It would only be a surreal situation if the members of the TEC did not carry out their work correctly. The grievance about the lack of literature is a matter of substance over form; the TEC, under specification 5c(2) requested literature not a literature list and such was presented. The rectification was asked simply to harden the TEC members views. The offer was not changed, and the TEC was correct to demand the literature, as has been established in the *Polaris* case. This was done merely to substantiate what was already offered. The reply by Ms Romei after the rectification confirmed the original claim that the offer was compliant even if in the process, she used material not in the original offer. It is up to the Board to decide if the literature submitted is correct or not. There was no intention of discrediting the technical expert - it's simply that the TEC do not agree with his findings.

Dr Camilleri said that the Contracting Authority had no interest in saving the offer or in the choice of the offer. The new TEC could have eliminated the bid on the doubts raised. The PCRB expressed serious doubts on the award but did not state that the offer should be put aside - that is outside the Board's terms and therefore they ordered re-evaluation. The TEC considered the Board's doubts and reached the same conclusion.

Dr Gauci stated that this was not a question of not accepting a decision as it was not liked – this is merely a continuation of the process even if the views are different – there is therefore no question of this being *res judicata*. The PCRB indicated doubts and requested re-evaluation of all bids not to eliminate any bidders. Three experienced persons in both cases reached the same conclusions that the preferred bidder met the tender requirements. Dr Kieran Chircop expressed the view that he did not need the rectification but sought it to put people’s mind at rest. Ms Romei is a reliable witness and an expert in her field. The point of the appeal is to prove that the offer was not correct not if the equipment works or not. The appeal is not about guarantees but whether the equipment offered works as required. As to the point about whether later submission of documents is admissible one refers to PCRB Case 1898. The Authority confirmed that the bid was compliant, the software has not been changed and no proof has been provided that the documentation or literature has been changed between evaluations. The claim of an abnormally low bid was not part of this appeal but what is certain is that the Authority is clear that the offer makes sense.

Dr Debono said that the Board did not say that the preferred bidder did not conform, they ordered a re-evaluation. The TEC had to observe the directions of the Board which has the discretion to review and ensure that the PPR are observed. Reference was made to Court of Appeal cases of Steelshape (2013) and Labopharm (2015). The DoC did not give any directions to the TEC. On the matter of the technical literature the DoC refers to GRGT rule 16 indicating that rectifications are intended to corroborate an offer. Under Regulation 229 (4) the Contracting Authority can request any document.

In his final submission Dr Mifsud Bonnici said that earlier he had referred to this case as being surreal – in fact it is a nightmare, and the PCRB should deal with it once and for all. The argument has been put forward that only the TEC has the technical expertise and therefore the PCRB should rely on their decision. The TEC, however, made a manifest mistake and the PCRB was right to disturb that decision. The PCRB was fully entitled to ask for a re-evaluation. Secondly, the decision of the Board is being re-interpreted since there is no basis in the tender to request literature list – rectification is a concession and is restricted. Under regulation 276 (h) the Board has to accept or refuse an appeal. The Board accepted the appeal and stated that it ‘upholds Appellant’s concerns and grievances’ thereby creating a situation where the other side’s offer could never be saved. In the case of Triomed the offer was *res judicata*. Once the Board accepted the appeal and decided that the bid was not technically compliant it binds all parties.

The Chairman thanked the parties for their forbearance in what turned out to be a very lengthy process and declared the hearing closed.

End of Minutes

Decision:

As a preamble The Board, notes that:

On the 2nd May 2022 Suratek Ltd (hereinafter referred to as the Appellant) filed an appeal against the St Vincent de Paul Long Term Care Facility (herein after referred to as the Contracting Authority) objecting to their disqualification. (tender of reference CT2385/2021 listed as case No. 1740 in the records of the Public Contracts Review Board).

On the 29th December 2022, the Public Contracts Review Board, after having appointed a technical expert and scrutinised the whole process of the evaluation, upheld the appellant's grievances and ordered the contracting authority to re-evaluate all the bids received in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee whilst also taking into consideration this Board's findings;

The newly constituted Evaluation Committee reached the same outcome as that of the previous one and Appellant filed a second objection dated 9th June 2023

The Board hereby resolves:

The Board refers to the minutes of the Board sittings of the, 20th July 2023, 3rd August 2023, 12th October 2023 and 21st November 2023.

Having noted the 2nd objection filed by Suratek Limited on the 9th of June, 2023 refers to the claims made by the same Appellant regarding the tender of reference CT2385/2021 listed as case No. 1740 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Noel Bezzina & Dr Joseph Camilleri

Appearing for the Preferred Bidder: Dr John L Gauci

Appearing for the Department of Contracts Dr Mark Anthony Debono

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Suratek Limited, (hereinafter referred to as the appellant) filed on the 9th June, 2023

Having also noted the letter of reply filed by Dr Noel Bezzina on behalf of Bezzina Legal acting for and on behalf of St Vincent de Paul Long Term Facility (hereinafter referred to as the Contracting Authority) filed on the 19th June, 2023

Having also noted the letter of reply filed by Dr John L Gauci on behalf of Dr John L Gauci & Associates acting for and on behalf of Triomed Limited (hereinafter referred to as the Preferred Bidder) filed on the 20th June, 2023

Having heard and evaluated the testimony of the witness Dr Kieran Chircop (Chairperson of second Evaluation Committee) as summoned by Dr Clement Mifsud Bonnici acting for Suratek Limited;

Having heard and evaluated the testimony of the witness Ms Franca De Brouwer (Representative of Phillips) as summoned by Dr Clement Mifsud Bonnici acting for Suratek Limited;

Having heard and evaluated the testimony of the witness Mr Alex Vella (Representative for the Preferred Bidder) as summoned by Dr Clement Mifsud Bonnici acting for Suratek Limited;

Having heard and evaluated the testimony of the witness Engineer Norbert Vella (Member of Evaluation Committee) as summoned by The Contacting Authority

Having heard and evaluated the testimony of the witness Dr Chiara Romei (Representative of Philips) as summoned by Dr Clement Mifsud Bonnici acting for Suratek Limited,

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties.

Whereby, the Appellant contends that:

- A. The Board should not accept new arguments on a case that is *res judicata* and should not consider the matter further
- B. That the interpretation of the PCRB decision has been used by the Authority to serve its own agenda.
- C. There was no basis for the request for rectification, and this was not explained.
- D. If documents were submitted it was not permissible for them to be presented. If these documents are accepted the Board would be allowing the offer of the Preferred Bidder to be changed.
- E. The technical offer of the Preferred Bidder was non-compliant. The perfusion required must be done at one go and the Preferred Bidder's bid could not satisfy this requirement.

Res judicata

The Appellant contended that the three elements required in *res judicata* exist in this case. There are the same three parties; the same object as it is the same tender and the same course of action under regulation 270. The PCRB made it clear that they were rather convinced on balance that the solution offered by the preferred bidder did not satisfy the tender – that binds everyone the same. In support of decisions on *res judicata* Court of Appeal decisions in Cases 5/10/98 and 50/1988/2 were cited.

The Contracting Authority and the Preferred bidder argued that the PCRB in its decision ordered a re-evaluation of all bids by a newly constituted Evaluation Committee. Therefore, this is not a question of *res judicata* but a continuation of the process.

Citing the caption from the judgement on the plea of *Res Judicata* BORG HELEN SIVE EILEEN vs BANK OF VALLETTA PLC - 1753/2000/1 - CIVILI, PRIM AWLA, MALTA

"Sabiex tigi milqugha l-ecezzjoni tal-gudika huwa essenzjali li jkun hemm il-konkorrenza ta' tliet elementi: (a) l-istess oggett (eadem res), (b) l-istess partijiet (eadem personae) u (c) l-istess mertu (eadem causa petendi).

L-eccezzjoni tal-gudikat ghandha bhala sisien taghha l-interess pubbliku u hija ta' interpretazzjoni dejqa, tant li, f'kaz ta' dubju, l-gudikant ghandu jaqta' kontra dik l-eccezzjoni."

Taking into account the strictness on the interpretation in the Court decision that in case of doubt "*l-gudikant ghandu jaqta' kontra dik l-eccezzjoni*," this Board believes that this is not a case of *res judicata* and considers that the process was on going.

Rectification

The Appellant contended that there was no need for the rectification as evidenced by Engineer Mifsud, and that the legislators had denied the Authority the right of appeal, so they concocted one themselves when they created the need for the rectification. The request for clarification was not necessary; in line with the principles of transparency and self-limitation the request for rectification or clarification requires the basis for it in the tender document. The technical offer was Note 3 and the literature was Note 2. The Authority's claims that the rectification was sought only on the literature and went on to argue that since there was no literature list, the question "what was the bidder asked to rectify?" becomes pertinent.

The Contracting Authority contended that it carried out the instructions of the PCRB and a rectification was requested. If the exercise had not been carried out the Authority would have been failing in its duty. There are no grounds for excluding the preferred bidder as it became compliant after the submission of the literature. The rectification was asked simply to harden the TEC members views.

The Board takes note that witness Engineer Mifsud admitted that there was no need for rectification as this was done to cover the evaluation committee's backs.

Submission of documents

Appellant maintains that the TEC should not have considered the three documents submitted namely the covering letter from the Distributor, the letter from Ms Romei and the Instructions for Use on Intellispace. These documents had to pre-exist and be in the hands of the bidder at the time of its bid (Regulation 62.1 of the PPR and 16.1 of the GRGT). The bid cannot be changed. The documents could not be accepted as the IfU is dated after the closing date of the tender and could not be considered by the TEC whilst the letter from Ms Romei was obtained from a totally unrelated manual, which is not acceptable.

The Contracting Authority argued that the literature presented by the preferred bidder met the tender requirements in specifications 1.1 and 2.20.2. The members of the Evaluation Committee carried out their work correctly. The grievance about the lack of literature is a matter of substance over form; the TEC, under specification 5c(2) requested literature not a literature list and such was presented. The offer was not changed, and the TEC was correct to demand the literature.

The Board believes that the TEC should not have considered these documents which had to be in the hands of the bidder at the time of its bid (Regulation 62.1 of the PPR and 16.1 of the GRGT)

Technical compliance

The appellant amongst other arguments contended that, the tender specification 2.9 clearly states that perfusion must be done at one go and no one can argue otherwise. The appellant also cited PCRB appointed expert's (Dr Paul Bezzina) report stating that this report clearly indicated that the equipment hardware can only be used to perform dual energy scan in non-moving situations.

The Contracting Authority stated that the Chairperson of the new TEC confirmed that a thorough exercise was carried out before it reached the same decision.

The Preferred Bidder stated that two different Evaluation boards reached the same conclusion that the bid offered by the preferred bidder was compliant with the tender requirement.

The Board refers to Ms Romei's testimony where she claims that though the IfU submitted by the bidder nowhere indicates dual energy perfusion, the perfusion can be done. This claim raises doubts as to the compliance of the Preferred Bidder's bid.

The Board also refers to Engineer Norbert Mifsud's testimony where he stated that the rectification was done to cover the Evaluation Committee's back and that he had reservations on the report submitted by the PCRB appointed expert. Engineer Mifsud indicated the points which he disagreed with but failed to substantiate by not giving technical arguments to prove his divergence. The above raises serious doubts as to the compliance of the Preferred Bidder and the process in which the second Evaluation Committee carried out their work.

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

To uphold the Appellant's concerns and grievances.

- a. To cancel the Letter of Acceptance dated 30th May 2023 sent to "Triomed Ltd";
- a. To cancel the Letter of Rejection dated 30th May 2023 sent to "Suratek Ltd"
- a. To order the contracting authority to re-evaluate the Preferred Bidder's bid with the requirements of the tender in the light of the above decision through a newly constituted Evaluation Committee composed of members (including at least one technical expert) which were not involved in the original and subsequent Evaluation Committees whilst also taking into consideration the Board's findings in the above decision after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Dr Charles Cassar
Chairman

Mr Lawrence Ancilleri
Member

Dr Vincent Micallef
Member