

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1944 – CT2157/2023 – Supplies – Tender for the Provision of BIPAP and CPAP Machines with Reduced Environmental impact for Loaning Purposes, for a Period of Three Years**

**29<sup>th</sup> December 2023**

The Board,

Having noted the letter of objection filed Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of OK Medical Limited, (hereinafter referred to as the appellant) filed on the 28<sup>th</sup> September 2023;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 9<sup>th</sup> October 2023;

Having heard and evaluated the testimony of the witness Mr Jimmy Bartolo (Member of the Evaluation Committee) as summoned by Dr Calvin Calleja acting for OK Medical Limited;

Having heard and evaluated the testimony of the witness Mr Josef Cachia (Representative of OK Medical Limited) as summoned by Dr Calvin Calleja acting for OK Medical Limited;

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

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

Having noted and evaluated the minutes of the Board sitting of the 23<sup>rd</sup> November 2023 hereunder-reproduced.

### **Minutes**

#### **Case 1944 – CT 2157/2023 – Supplies – Tender for the Provision of BIPAP and CPAP Machines with reduced Environmental Impact for loaning purposes, for a period of three years**

The tender was issued on the 31<sup>st</sup> May 2023 and the closing date was the 4<sup>th</sup> July 2023.

The estimated value of this tender, excluding VAT, was € 550,850.

On the 28<sup>th</sup> September 2023 OK Medical Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not technically compliant.

A deposit of € 2,754 was paid.

There were ten bids.

On the 23rd November 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – OK Medical Ltd**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Josef Cachia	Representative

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

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Eng Frankie Caruana	Chairperson Evaluation Committee
Mr Hristo Ivanov Hristov	Secretary Evaluation Committee
Ms Bernice Grech	Evaluator
Mr Josef Micallef	Evaluator
Mr Jimmy Bartolo	Evaluator

**Recommended Bidder – Sidroc Services Ltd**

Mr George Bonello	Representative
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**Department of Contracts**

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Calvin Calleja Legal Representative for OK Medical Ltd stated that certain requirements in the tender asked for guarantees particularly those in Articles 32.1 and 33.1 and 6.2.1. Appellant conformed with all these requirements with a warranty from the manufacturer and a declaration confirming the requirements of 6.2.1. The Contracting Authority asked for a seven year warranty which they claim is implied under this clause; however this requirement is nowhere found in the tender parameters. This is a clear shift of the goalposts.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit said that Appellant objection is on the interpretation of Article 6.2.1 which is clear and states that the product must have a service life of the guarantee period plus five years – this expectation is quite usual. Appellant’s offer did not satisfy this clause.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that the DoC policy is that the tender should be followed.

Mr Jimmy Bartolo (228464M) called to testify by the Appellant stated on oath that he was one of the Evaluators. Ten bids were received and of these six were compliant and four did not meet the requirement of Article 6.2.1.

Mr Josef Cachia (160084M) called to testify by the Appellant stated on oath that he is the Chief Operations Officer of OK Medical Ltd and that he carefully analysed the tender before submission. The requirement was for a two year warranty and they offered five years and a manufacturer's guarantee for ten years availability on spare parts and servicing. The rejection letter was the first intimation they had that their offer was rejected.

In reply to a question from Dr Camilleri, witness said that the life expectancy of the product was ten years. The tender asked for a five year warranty and Appellant was offering five years over the five year warranty.

Mr Jimmy Bartolo (228464M) recalled to testify by the Contracting Authority stated that he is the Operations Manager at the Department of Health and was the technical evaluator of the tender. When the Appellant's bid was evaluated it was noticed that clause 6.2.1 was not met. Every manufacturer certifies the service life of a product – some for ten years, some for seven, others for five and some for none. A two year warranty is common to most manufacturers usually certified by an international body such as ISO. In this particular case the manual states the warranty is for two years plus five years' service life. The clarification stated expressly a service life of five years. The official warranty, according to the user manual was for two years.

In reply to a question from Dr Calleja witness stated that the Appellant's product meets international standards.

Dr Mifsud Bonnici on behalf of OK Medical Ltd referred the witness to the Financial Bid Form and confirmed that the rate for spare parts was not requested since in the first two years this was the manufacturers responsibility under the warranty. Witness agreed that it would be more advantageous if the warranty period was for a longer period.

This concluded the testimonies.

Dr Calleja said the Appellant's bid was compliant and it had made a gold plated offer. Four bids had failed *ex post facto* because of the seven year period; this expectation is nowhere stated in the tender. Case 1786 refers to how a reasonable and prudent economic operator would understand and interpret a tender. Four economic operators understood the tender the same way. Case C513/99 paragraph 62 states that criteria must be expressly stated to be understood – implication does not come into it. Appellant could not take advantage of Regulation 262 as the grievance only came to light in the rejection letter.

Dr Mifsud Bonnici cited C 448/1 paragraph 56 and 57 which lays down that all parties must have equal opportunity to meet tender terms which have to be so clear as to allow all economic operators to compete. This is a standard objective yet 40% of bidders interpreted it similarly.

Dr Debono said that whether Appellant offer conforms hinges on Regulation 53 (11) since the tenderer must prove that its offer meets the tender requirements. The evaluators stated that it does not meet requirements. The Appellant claims that the goal posts were changed but the terms of the tender did not change. If the economic operator had any doubts it could have had recourse to Regulation 262 or Regulation 130. The Authority acted proportionately.

Dr Camilleri stated that Appellant claims that the seven years criterion was only found out through the rejection letter but Clause 6.2.1 is very clear that it is five years plus the warranty period that was requested. The majority of bidders interpreted this standard requirement correctly and the parameters were not changed but followed religiously. The Appellant is trying to invoke his five year offer as justification but the Evaluation Committee had no option as it had to follow the tender criteria

and it would be unjust if the parameters were interpreted differently. Such interpretation would prejudice other bidders. The reason for refusal was on the expected service life and all grievances should be rejected.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 23<sup>rd</sup> November 2023.

Having noted the objection filed by OK Medical Limited (hereinafter referred to as the Appellant) on 28<sup>th</sup> September 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2157/2023 listed as case No. 1944 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 Alexia J Farrugia Zrinzo & Dr Leon Camilleri

Whereby, the Appellant contends that:

a) ***1<sup>st</sup> grievance - The Appellant has complied with the Warranty Requirements -***

The Appellant's bid satisfies all the requirements of the Tender, and should consequently have been considered technically compliant by the evaluation committee.

The Technical Offer and the technical literature submitted by the Appellant expressly state that:

- the manufacturer provided a warranty covering repairs and replacements;
- the manufacturer gold-plated the Contracting Authority's requirement by providing a warranty period of 5 years from installation and commissioning date;
- spare parts are available not only for the entire warranty term of 5 years, but also for at least 5 years over warranty; and
- the products also satisfy the requirement in Article 33.1 for reliable and regular after-sales for a period of 5 years.

b) ***2<sup>nd</sup> grievance - Contracting Authority has shifted the goal posts by requiring a 7-year minimum life expectancy after closing date -***

The Rejection Letter premises the reasons for rejection on the minimum 7-year life expectancy requirement. However, the Appellant first learnt of the minimum 7-year life expectancy requirement for the products to be supplied under the Tender upon receipt of the Rejection Letter. The minimum life expectancy was not a technical specification in the Tender itself, or in the subsequent clarifications which the Contracting Authority had at its disposal. Nor was the minimum life expectancy explicitly requested from the Appellant in the Rectification Request dated 17 July 2023 where the only 'rectification' requested from the Appellant was confirmation of compliance with the Warranty Requirements, that is, that the warranty covered repairs and replacements, and that spare parts are available for the entire period of the warranty plus another 5 years. The only time that the minimum life expectancy was clearly expressed as a requirement was in the Appellant's Rejection Letter where the Contracting Authority stated that the product must have a service life of a minimum of 5 years over the warranty given by the manufacturer. This implies a minimum lifetime period of 7 years. Even the Contracting Authority *ex admisis* stated that the minimum lifetime requirement was extrapolated by means of an implication, an inference drawn from the wording used for Clause 6.2.1. Nor is the implication in terms of Clause 6.2.1 sufficient to arrive at the 7-year life expectancy requirement. To do so, it is also necessary to look at the wording contained in Article 32 of the Special Conditions which requires a minimum warranty period of 2 years, and to interpret the combined reading of the two tender clauses in the manner applied by the Contracting Authority. Through its conduct, the Contracting Authority inserted an additional tender requirement *ex post facto*: after the Tender was published, after the deadline for clarifications had lapsed, after the bidding process had closed, and after the Appellant as a bidder had been requested to confirm its compliance with the Warranty Requirements. In this respect, the Contracting Authority fell short of its obligation to draft and publish tender documents: "*written in clear and unambiguous terms so as to enable all interested parties to understand properly the terms and conditions of the process*" (Regulation 38 of the PPR).

c) ***3<sup>rd</sup> grievance - Contracting Authority's reading of the Tender conditions is disproportionate and exceeds the objective of the Tender -***

The Appellant further submits that the Contracting Authority has misapplied the principle of proportionality in its interpretation and application of the Tender conditions. The main objective of the Tender was the procurement of the cheapest technically compliant offer for the procurement of the equipment in question.

The Warranty Requirements were after 2 undertakings in connection with the equipment:

- First, the warranty covering "repairs and replacements" for 2 years from installation and commissioning.
- Second, and after the lapse of this warranty, spare parts are available for a 5-year period.

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

The Contracting Authority's implication that the product had to have a minimum lifetime of 7 years is not only a wrong reading of the Tender, but would exceed what is strictly necessary to achieve the objective of the Tender.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 9<sup>th</sup> October 2023 and its verbal submission during the hearing held on 23<sup>rd</sup> November 2023, in that:

a) ***1<sup>st</sup> Grievance - The Appellant has complied with the warranty requirement -***

The objector in this grievance states that the appellant's bid satisfies all tender requirements. CPSU disagrees and respectfully submits that the evaluation committee's decision was legally correct for the reasons as stated in the rejection letter to which it holds firm.

b) ***2<sup>nd</sup> Grievance - The Contracting Authority has shifted to goal posts by requiring a 7-year minimum life expectancy after closing date -***

The Tender document in clause 6.2.1, under section 6.2 entitled Product Longevity and Warranty, provides that: *"6.2.1 Repair or replacement of the product shall be covered by the warranty terms given by the manufacturer. The tenderer shall further ensure that genuine or equivalent spare parts are available (direct or via other nominated agents) for the expected service life of the equipment, at least for 5 years over warranty"*

Following a request for clarification, the objector was asked to indicate the service life in light of clause 6.2.1 of the tender document.

The Objector submitted a reply which inter alia included the below: *"We, Jiangsu Yuyue Medical Equipment & Supply Co. Ltd, hereby declare that, the expected life time of the Breathcare PAP YH725 and YH560 is 5 years."*

The direct and clear implication from article 6.2.1 of the tender document particularly the words "the expected service life of the equipment, at least for 5 years over warranty" is that the expected

service life should be that of 5 years over the manufacturer's warranty which, according to the tender document should be of a minimum of 2 years, hence 2 years and 5 years make a minimum life span of 7 years. Since the objector declared that its product had a minimum life span of 5 years this could never meet the 5 years over the warranty period and thus the evaluation committee came to its just conclusions. Clause 6.2.1 was accepted by the objector as published since the objector did not challenge the clause by means of a clarification request or by means of an application in terms of regulation 262 of the PPR. If the objector was not in agreement with clause 6.2.1, which requests a lifetime of 5 years over the warranty period, the objector should have filed an application in terms of regulation 262 of the PPR, which he did not.

c) ***3<sup>rd</sup> Grievance: Contracting Authority's reading of the tender conditions is disproportionate and exceeds the objectives of the Tender -***

CPSU submits that the evaluation committee evaluated the tender in line with the principles of equal treatment of self-limitation, keeping also in mind the principle of proportionality and is convinced that this principle was also adhered to. Again, to the submission that "*A contracting Authority can only procure a guaranteed minimum lifetime period by requesting a warranty for that period*" should have been the subject of an application in terms of regulation 262 of the PPR. The expected lifetime and the guarantee period are different and distinct. Whilst the guarantee period is the period that the supplier guarantees functionality in the sense that any repairs will be covered by the supplier, lifetime period is a timeframe wherein the supplier guarantees the functionality of the equipment without excluding the need for possible repairs and without covering the said repairs if need be. Making available spare parts is part of the obligation to ensure the indicated lifetime period. CPSU thus argues that the condition as published in clause 6.2.1 imposed a limitation on the evaluation committee to decide in the way it decided in line with the fundamental principles of public procurement including the principles of self limitation.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances in their entirety.

- a) The main bone of contention of this appeal revolves around article / criterion / specification 6.2.1 of Section 3 – Technical Specifications / Terms of Reference – Section 3B – Specifications of CPAP Machines which states "*Repair or replacement of the product shall be covered by the warranty terms given by the manufacturer. The tenderer shall further ensure that genuine or equivalent spare parts are available (direct or via other nominated agents) for the expected services life of the equipment, at least for 5 years over warranty.*"

- b) Appellant's main argument is that the Contracting Authority 'changed the goalposts' when it 'implied', from such a clause, that there should have been a minimum lifetime period of 7 years. On the other hand, the Contracting Authority is holding firm to such an interpretation.
- c) Therefore, this Board, finds it necessary to initially dissect and ascertain what article 6.2.1 actually required out of the economic operators participating in this tender procedure. Initially, it is clear that this clause is requiring that repairs or replacement (of the machine) need to be covered by a manufacturer warranty. It then goes on to discuss the issue of spare parts, genuine or equivalent. It is here that the 'expected service life' or 'minimum lifetime' (as described in the rejection letter) is mentioned. It states that "*The tenderer shall further ensure that genuine or equivalent **spare parts** are available..... for the expected service life of the equipment, at least for 5 years over warranty.*" (bold emphasis added). It is this Board's opinion that this particular requirement encapsulates only issues relating to spare parts and is not to be interpreted as was implied by the Contracting Authority in its rejection letter.
- d) Once the appellant, in his original submission (technical offer), met the requirements of such specification, this Board opines that the reason provided in the rejection letter is due to the incorrect interpretation of such specification 6.2.1 which was made by the Evaluation Committee. Reference is also made to the testimony under oath of Mr Josef Cachia who stated that the requirement was for a two year warranty period and they offered five years warranty. Moreover, they provided a manufacturer's guarantee for ten years availability on spare parts and servicing (i.e. five years over warranty). This, in the Board's opinion, more than satisfies the particular issue on spare parts as mentioned in specification 6.2.1.
- e) Therefore, this Board agrees with argumentation brought forward by the Appellant that the Contracting Authority did in fact 'change the goalposts' when it implied that there must be a 'minimum lifetime period of 7 years'. This requirement was never expressly stated in the tender document. Therefore, such a requirement (which this Board does not agree with) was indeed inserted *ex post facto*.
- f) Once this requirement ('minimum lifetime period of 7 years') was not included in the tender document and therefore not known to the appellant before receiving the rejection letter, is certainly not an issue where the appellant could have made use of regulation 262!

Hence, this Board cannot but uphold the Appellant's grievances.

**The Board,**

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' letter dated 19<sup>th</sup> September 2023;
- c) To cancel the Letter of Rejection dated 19<sup>th</sup> September 2023 sent to OK Medical Ltd;
- d) To order the contracting authority to re-evaluate the bid received from OK Medical Ltd 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.
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

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

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

**Mr Lawrence Ancilleri**  
**Member**