

PUBLIC CONTRACTS REVIEW BOARD

Case 1975 – CT 2021/2022 – Supplies Tender for the Purchase on a Pay per Use Basis, Qty 2 High Power Urological Laser Units for the Urological Surgical Department at MDH

2nd April 2024

The tender was issued in on the 4th August 2022 and the closing date was the 16th October 2022

The estimated value of this tender, excluding VAT, was € 1,352,119.

On the 25th September 2023 Cherubino Ltd filed an appeal against the Central Procurement and Supplies Unit objecting to decision of the Contracting Authority to the cancellation of the tender.

A deposit of € 6,761 was paid.

There were seven bids.

On the 12th March 2024 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Cherubino Ltd

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Eng Patrick Borg Cardona	Chairperson Evaluation Committee
Mr Steve Dimech	Secretary Evaluation Committee
Mr Stephen Mattocks	Evaluator
Eng Jesmond Farrugia	Evaluator
Eng Chris Attard Montalto	Representative

Department of Contracts

Dr Audrey Marlene Buttigieg Vella	Legal Representative
Dr Mark Anthony Debono	Legal Representative

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

Dr Matthew Paris Legal Representative for the Appellant, Cherubino Ltd, stated that he will deal with the preliminary point made in the letter of appeal in the process of his submissions. He then stated that the cancellation of the tender in terms of General Rule 18.3 was incorrect as there was no change in the economic or technical specifications. The principle of proportionality was totally ignored as prices were already indicated by the time of the

cancellation. A clarification note issued covers exactly the reason stated in the cancellation letter and the cancellation of the tender should be rejected.

Dr Leon Camilleri Legal Representative for the Contracting Authority said that the Authority relied on the letter of reply for their submission. The Authority has every right to cancel in instances where there are technical changes in the product, and this complies fully with Regulations.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts referred to Procurement Policy Note 39 and the fact that the Contracting Authority has discretion when changes in technology occur.

Dr Paris requested production of witnesses.

Dr Francis Cherubino (167384M) called to testify by the Appellant stated on oath that there were two options offered in the tender – either two independent machines or a hybrid unit. His company opted to offer option 2 i.e. the hybrid unit which technologically is preferable as the laser is used to pulp or continuous use. Appellant is aggrieved as there was no justification to cancel the tender after the price was made public thus causing them damage and puts them at a disadvantage once the tender is reissued.

Questioned by Dr Camilleri witness stated that a Thulium laser can be to pulp but also for continuous use.

Mr Stephen Mattocks (67162M) called to testify by the Appellant stated on oath that he is a Consultant Urologist of 25 years' experience and was a member of the Tender Evaluation Committee (TEC) and an end user of the equipment in question. He detailed the composition of the TEC and the roles they played in the evaluation. He was involved in the clarification notices sought but not in the drafting of the tender. Witness could not recall the exact details of the offers, but he recalls that some offered one type of equipment and others another. He explained the use of lasers and the importance of the unit doing both functions but principally the facility to fragment stones which is its main use in Malta. One must therefore make sure that the machine is designed for this purpose – flexibility is required in the use of the machine with fragmenting being the priority. Thulium laser is mainly used for soft tissue treatment and Holmium for fragmenting stones. Option 2 in the tender gave the flexibility to do both functions.

Mr Mattocks continuing his testimony said that the Authority had recommended cancellation as it required technology that will be in use for the next ten years. The specifications for this tender were drafted in 2021 and since then there has been advances in technology and it was essential that the most up to date technology is chosen as it will be in use for the next ten years. Thulium fibre laser is the most recent product on the market. Witness agreed that the TEC had considered Clarification Note 2 but pointed out that with medical apparatuses a period of years of use is required to ensure that there are no harmful effects on patients and one needs to be conservative to ensure that no harm is caused, so one has to align advancement with the need not to cause harm – flexibility in choice is necessary. Witness further stated that the TEC had met at least 10 to 15 times and that Cherubino had offered option 2 in the tender. The TEC had looked at this offer and matched it with up to date technology and it made sense to realign the requirements with the latest technology. What Cherubino offered [witness quoted text from offer] was soft tissue surgery use but the major use is fragmenting stones – there was the need for flexibility.

In reply to a question from Dr Farrugia Zrinzo, witness said that the latest Thulium advance can be used for both functions but tender did not specify that Holmium was on offer.

Mr Ivano de Laude (ID – CA 37540LZ) called to testify by the Appellant stated on oath that he was a dealer in laser products and had 25 years' experience in Urology care. He was a supplier to Cherubino and was aware of the tender requirements. Cherubino was offering the latest version Thulium hybrid laser which was suitable for both functions as it can work as a Thulium and Holmium laser – the Revolut HDL was the most versatile system and covers both systems and is not only for soft tissue use. Witness was referred to journal articles filed with the submissions which state that the latest system was better than Holmium in fragmenting stones.

In reply to questions from Dr Farrugia Zrinzo, witness said that he was involved with and helped in the tender submission but could not recall if there was any reference to functionality in the tender. The unit offered by Cherubino offers both types of laser beams and only the Thulium crystal can do both operations.

Dr Fabrizio Mele (ID-CA 1939ACD) called to testify by the Appellant stated on oath that he was a Urologist at a Turin Hospital and that he delivered treatment using both Thulium and Holmium lasers. A high energy beam was used for stone fragmentation. Witness said that Thulium was the best laser for treatment of soft tissue, but the HDL laser offers the possibility of treating both problems. It has a high range of uses through change of frequencies and therefore meets the requirements of the tender.

In reply to questions from Dr Farrugia Zrinzo, witness said that he had not seen the tender document and was not involved in the bid. The machine offered does not have a Holmium laser as the Thulium is superior to it.

Questioned by Dr Debono witness said that the high range of modulation of power allows use the unit in different situations, whilst in reply to a question from Dr Cherubino witness said that the system offered is the best way to fragment stones.

Engineer Jesmond Farrugia (541664M) called to testify by the Authority stated on oath that he was one of the evaluators and an Operations Manager at Mater Dei Hospital specialising as an electronic technician. He stated that in the course of the evaluation process the TEC realised that a more modern technology existed than that specified in the tender and therefore they recommended cancellation to enable the more modern technology to be embraced. The tender asked for two sources but the new technology uses solely Thulium which can be used for both.

Engineer Patrick Borg Cardona (323669M) called to testify by the Authority stated on oath that he was an electrical engineer and the Chairperson of the TEC. He pointed out that there was also an error in the tender showing an overlap in the frequency of the Thulium and Holmium systems and that on this basis alone the Cherubino offer would have failed.

This concluded the testimonies.

Dr Paris said that from the evidence heard it was clear that this was not a case of economic parameters changing but a discrepancy in the tender documents and neither the economic nor the technical parameters changed. Once no parameters changed, we might as well stop there and re-evaluate the tender. The decision to cancel the tender is wrong and cannot be substantiated. If as claimed there is an error in the tender that is not a reason to cancel. The TEC cannot act as the Contracting Authority - its sole role is to evaluate. Evidence has been provided that the TEC and the Authority acted jointly, and one should refer to Policy Note 14

which defines clearly the role of the TEC whose object is not to vet but to scrutinize offers in line with the tender.

The tender, continued Dr Paris, offered options – option 2 offered a hybrid system covering both systems offered in option 1. The Authority realised that the Cherubino offer was what was required in option 2 and Clarification Note 2 dated 23 August 2022 widened the specifications to make acceptable a product that was equal or better so long as the functionality was met; so the technical advancement was met. On the proportionality principle, Court of Appeal Case /2019 Cateressence was cited where it was held that discretion cannot be abused especially once prices were divulged as competition was removed at that stage. Why go to the extreme of cancellation? Dr Mele in his testimony confirmed that the product offered is superior to what is in the market and EU documentation was submitted backing that fact.

According to Dr Paris the cancellation letter gives two reasons for rejection – one that the product needs to be improved and the second was regarding the frequency. If that is followed one should go for the benefit but ignore the overall outcome. Appellant requests the Board to direct a re-evaluation with a fresh body of evaluators and follow the Tideways case decision that the proportionality principle demands recourse to the least onerous course.

Dr Debono referred to Regulation 40 of the Public Procurement regulations Appellant's request for the name of the TEC members as the reason why the information was not provided. On the matter of the cancellation reference was made to Policy Note 14 which gives enough reasons to justify cancellation. There has been considerable technical advancement in the last two years and one doubts if the offer meets these. Clarification Note 2 refers to possible conforming with requirements but still leaves doubts about the parameters to enable a decision thereon. It is far better to have a fresh document to avoid all doubts. As there is doubt if the requirements will be met then cancellation is the right course.

Dr Farrugia Zrinzo said that cancellation was the correct course due to the technical advances. Mr Mattocks had clearly explained this point which was also confirmed by other witnesses. The tender shows the options available. Option 2 requested a hybrid unit and witnesses explained that the same machine offered Thulium and Holmium options but at no stage were the functions combined except in the Thulium crystal as confirmed by witnesses De Laude and Mele. The TEC is tied to the tender requirements and there was no reference in the tender for light or functionality. The reason the Authority chose cancellation, which they are entitled to do, was to obtain a better product.

Dr Camilleri said this whole appeal hinges on technical advantages. The point about proportionality tempts one to ask where is the proportionality if one ignores a product that will cater for the next number of years with effect on both parties. The action of the TEC is not ultra vires as they are entitled to cancel. The TEC consisted of users, and it was clearly explained how better served the users will be through new technology. The Appellant's requests should be denied.

Dr Paris in a final comment said that the technical advance that was being sought was in the product Cherubino was offering. The CPSU have the chance to select the best product on the market.

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

End of Minutes

Decision

This Board noted the objection filed by Cherubino Ltd (herein after referred to as the appellant).

The objection refers to the claims filed on the 25th September 2023 made by the same appellant against the Central Procurement and Supplies Unit (herein after referred to as the contracting authority) regarding the tender CT 2021/2022 listed as case No.1975 in the records of the Public Contracts Review Board, and its verbal submissions during the hearing held on 12th March 2024.

The Board also noted the Contracting Authority's letter of reply filed on the 3rd October 2023 and their verbal submissions and those of the Department of Contracts during the hearing on 12th March 2024, as well as the testimonies of:

Dr. Frances Cherubino cited by the Appellant and

Mr. Stephen Mattocks, Mr. Ivano de Laude, Dr. Fabrizio Mele, Engineer Jesmond Farrugia and Engineer Patrick Borg Cardona all cited by the Contracting Authority

Whereby, the Appellant based their appeal on a preliminary grievance and main grievances.

As a preliminary claim the Appellant contends that Contracting Authority did not answer its request for information about the composition of the evaluation committee,

The Contracting Authority contended that it was never notified of such a request as the information requested was made to the Department of Contracts, that this information is never disclosed anyway and that the lack of disclosure did not affect the notice of cancellation.

The Board proceeded to hear the merits of the appeal.

Main Grievance:

The Appellant contended that;

- A. The cancellation of the tender in terms of General Rule 18.3 was incorrect as there was no change in the economic or technical parameters and the cancellation is not justified as there has been no advancement in technology.
- B. That the evaluation committee acted ultra vires in going against its permitted function
- C. The principle of proportionality was totally ignored as among other points once prices were divulged competition was removed.

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

- A. The cancellation was the appropriate course due to the advances in technology and knowledge.

B. That the Contracting Authority and the Director of Contracts acted within their rights in cancelling the tender under General Rule 18 and did not act ultra vires.

C. The decision to cancel affected equally all bidders who will be given another chance to compete in an eventual issuance of a tender with new specifications in line with technological advancement.

After the Board considered the arguments and documentation submitted by all parties, and the testimonies of the witnesses heard:

This Board opines that,

A. Change in parameters

Change in parameters is denoted considering that;

The original tender specifications requested two options, either a holmium laser (with anti-retropulsion technology, utilized alongside stone basket technology for lithotripsy) and a thulium laser (designated for tissue cutting and ablation with moderate haemostasis in various urological procedures, including bladder, prostatic resection, and ureter sections of the patient), to perform two different functions (option A) or a hybrid machine (holmium/thulium) to perform both functions (option B). Presently, a single thulium laser may effectively fulfil all the services required, thus addressing both functions. This underscores the evolution in technology and its implications for optimizing procurement processes. In the health sector procuring the latest technology is paramount.

B. Evaluation Committee -Ultra Virus

The decision to cancel ultimately lies with the Contracting Authority and the Director of Contracts, as clearly outlined in Article 18 of the General Rules Governing Tenders. This authority's prerogative to cancel the tender process is firmly established. Therefore, both the Contracting Authority and the Central Governing Authority were well within their rights to make this decision, and it cannot be considered ultra vires.

C. Proportionality

While it would have been more appropriate for the tender to be cancelled before prices were disclosed, it's essential to acknowledge that with an eventual call for a new tender necessitating different specifications due to evolving technology, the prices indicated in this tender are unlikely to remain valid. Furthermore, it's crucial to note that the decision was applied equally to all bidders.

In view of the above,

This Board therefore concludes and decides that:

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision to cancel the tender.
- c) Directs that the deposit paid by the Appellant is not reimbursed.

Dr Charles Cassar
Chairperson

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member