PUBLIC CONTRACTS REVIEW BOARD

Case 2019 – CT2117/2022 – Supplies - Tender for the Supply of Basic Dressing Packs

4th December 2024

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for and on behalf of Medina Healthcare Limited, (hereinafter referred to as the appellant) filed on the 27th May 2024;

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 6th June 2024;

Having heard and evaluated the testimony of the witness Mr Patrick Ghigo (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Medina Healthcare Limited;

Having heard and evaluated the testimony of the witness Ms Miriam Wubbels (Nurse at Mater Dei Hospital) as summoned by Dr Matthew Paris acting for Medina Healthcare Limited;

Having heard and evaluated the testimony of the witness Mr Andrew Cutugno (Representative of Medina Healthcare Limited) as summoned by Dr Matthew Paris acting for Medina Healthcare Limited;

Having heard and evaluated the testimony of the witness Ms Miriam Wubbels (Nurse at Mater Dei Hospital) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Mr Patrick Ghigo (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 the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sittings of the 18th June 2024 and 26th November 2024 hereunder-reproduced.

Minutes

Case 2019 – CT 2117/2022 – Supplies – Tender for the Supply of Basic Dressing Packs.

The tender was issued on the 4th December 2022 and the closing date was the 16th February 2023

The estimated value of this tender, excluding VAT, was € 568,277.50.

On the 27th May 2024 Medina Healthcare Ltd filed an appeal objecting to their disqualification on the grounds that their bid was deemed to be technically non-compliant.

A deposit of € 2841 was paid on this lot.

There were seventeen bids.

On the 18th June 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Medina Healthcare Ltd

Dr Matthew Paris	Legal Representative
Dr Zack Esmail	Legal Representative
Mr Andrew Cutugno	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Ms Maria Curmi	Secretary Evaluation Committee
Mr Patrick Ghigo	Evaluator

Department of Contracts

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

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

Dr Matthew Paris Legal Representative for Medina Healthcare Ltd (Medina) requested that witnesses be heard.

Mr Patrick Ghigo (300874M) called to testify by the appellant stated on oath that the Tender Evaluation Committee (TEC) consisted of himself as Evaluator, Ms Cutajar (Chairperson) and Ms Curmi (Secretary). He evaluated first the two cheapest offers. After checking that all necessary documents had been submitted and everything was conforming at this stage, samples were requested. ISO 13485 which was required established that what was requested was provided and gave the assurance that the product could be marketed locally. The ISO certificate has no bearing on the sturdiness and grip of the product. Samples were requested to corroborate the offer. At least five samples were provided by both bidders which were sent to end users for testing. Witness did not test samples but after their report witness checked samples for himself and tested forceps. He demonstrated how an ideal pair of forceps should work. In his view the use of the word sturdy referred to a forceps that gave a good grip. Witness concluded that the sample forceps provided did not give a good grip. Referred to tender specification 1.1 (page 19) and asked why that clause was mandatory witness stated that it was necessary to ensure that the procedure was sterile and nurses were fully aware of this need.

Questioned by Dr Camilleri Legal Representative for the Central Procurement and Supplies Unit (CPSU) witness stated that he occupied the position of a Senior Nurse at Mater Dei Hospital (MDH) and confirmed that he had checked the sample after testing by end-users.

Further questioned by Dr Paris witness said that he was not aware if there were more than one end users involved.

Ms Miriam Wubbels (311976M) called to testify by the appellant stated on oath that she was a practice nurse, on tissue viability at MDH, and was involved both in the drafting of the tender and in the testing of the equipment, which testing was shared with other nurses. The CPSU delivered the samples in a sealed box and two lots of samples were tested. Referred to the reasons given for not accepting the product witness explained how the product was used to clean lines on internal organs of the body such as the heart and kidneys and that unless the forceps were solid a gap would open and the dressing would slip off and the process would have to start all over again. Referred to technical specification 2.1.2 witness explained that the wording had been explored a hundred times every time such a tender is issued in an effort to find the right word – 'sturdy' is the best definition thought of. Questioned whether yield strength and fracture point had been checked witness said that the ISO certification requested in the tender dictates what plastic material has to be used in medical products. She was not aware if the required ISO certificates had been submitted by bidders as this was the work of the TEC – as far as witness is aware all pertinent ISO standards are requested in tender dossiers. In the case of flimsy forceps the two arms cross over each other referred to as crossed feet – these crossed feet impinge on the grip of the forceps, since forceps handle different thickness materials, and if it happens the outcome could cause harm to the patient.

Referred to the term aseptic technique (Technical specification 1.1) Ms Wubbels stated that this technique demands that every object is sterile and if anything is dropped the whole process has to be restarted. Nurses are constantly reminded to follow the aseptic technique and this is included in their skills handbook. Witness next explained the meaning of debridement and the role of the forceps in this process and also their use in the cleaning of central lines inserted in different organs. When referred to paragraph 10 of the CPSU's letter of reply which mentioned that the forceps were not fit for debridement, witness partly replied only about the need to remove sutures.

In reply to a question from Dr Camilleri, witness stated that the forceps were generally not strong and difficult to use to clean wounds.

Mr Andrew Cutugno (517355M) called to testify by the appellant stated on oath that he has 35 years' experience in the medical field but he is not medically qualified. He stated that the rejection letter refers to the word flimsy. The intended use of the product is wound management and this is decided by the manufacturer. He explained how the product is used and that this is a single use product. He displayed a sample of the same product offered in the bid manufactured by Fuquing Health Products Co Ltd represented by Shanghai International GmbH in Germany – Product Code 28844EO. He demonstrated the use and strength of the forceps and how it should be applied on the patient. In the case of debridement a different product has to be used as confirmed by a MDH document issued to nurses.

Ms Miriam Wubbels called to testify by the Contracting Authority, still under oath stated that she had been a nurse since 1987 and has been using aseptic technique that long, and a Head Nurse since 2011. She explained that the product in question is used to clean wounds and to clean lines inserted in veins, arteries and other organs. The problem witness and other testers found is that when the forceps are closed a gap opens and the suture slips. She was asked to confirm the manufacturer, code number etc of the sample she was about to demonstrate. The manufacturer was stated as Darsur China Healthcare Co Ltd. At this stage Ms Wubbels realised that she did not have the right sample.

After a short discussion between the legal representatives of both parties witness was asked to leave the hall.

Dr Paris pointed out that the sample provided was none other than that of the preferred bidder.

The Chairman said that the demonstration had barely started but it was already clear that the forceps were of a different colour.

Dr Paris requested that he be allowed to cross examine the witness but Dr Camilleri objected as he had not completed his examination.

The Chairman said that due to the unusual matter that has arisen he was adjourning the hearing to another date and meanwhile he was directing that the transcript of Ms Wubbels testimony be provided to both parties so that when the hearing resumes everyone will be au fait with what had been said in evidence. He then thanked the parties and adjourned the hearing.

End of Minutes of first hearing

SECOND HEARING

On the 26th November 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Ing Damien Gatt as members convened a public hearing to consider further this appeal. The attendance for this public hearing was as follows:

Appellant – Medina Healthcare Ltd

Dr Matthew Paris	Legal Representative
Mr Andrew Cutugno	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Mr Patrick Ghigo	Evaluator

The Chairman welcomed the parties and noted that since the first hearing there have been changes in the Board composition and asked the parties if they were prepared to accept the Minutes of the first hearing as a true record and to proceed on that basis. There was no objection to this process.

The Chairman noted that the first hearing was adjourned at the stage where Ms Miriam Wubbels was testifying at the request of the Contracting Authority. Dr Leon Camilleri resumed his questioning.

Ms Miriam Wubbels (311976M) said that she had encountered problems with forceps provided in the samples from Shanghai International Manufacturers (Model 28844EO) submitted by Medina Healthcare Ltd. She re-iterated that the problem she and other end-users had encountered was that when the forceps are closed a gap opens which means that the dressing slips out and the process would have to be repeated. Since these forceps were used in sterile processes such as cleaning of lines on internal body organs the forceps had to be sturdier to avoid dressings slipping and the tips of the forceps crossing over. Witness demonstrated the forceps action and confirmed that she had tested the forceps personally.

Questioned by Dr Paris, witness stated that she was an end-user of the product which was also tested by other nurses who use the product. No written report was produced on the findings of the sample tests. The nurses in question tested the samples and communicated their findings to the witness. The nurses involved were not aware that the testing was in connection with a tender.

Mr Patrick Ghigo (300874M) called to testify by the Contracting Authority stated on oath that he was a Senior Nurse and was an evaluator of the tender. He had checked that the offered product had all the necessary certificates. He had passed on the samples to the end-users for testing and had also checked the samples personally and concluded that the forceps did not meet the standards required regarding sturdiness based on article 2.1.2 of the tender.

This concluded the testimonies.

Dr Paris said that the fact that there was only one evaluator when the normal practice is to have three highlights that this evaluation was not in order. There was nothing documented on sampling to ensure a proper analysis and no respect for the tender specifications – it is therefore essential to have the offers re-evaluated by three persons. On page 19 specification 1.1 it is clearly indicated what is required. Ms Wubbels testimony broadened the use of the product beyond the tender and the testers did not limit themselves to the basis of the tender. In respect of specification 2.1.2 on the matter of the grip there was no definition of what was meant by 'sturdy' or of the strength and durability of the plastic. The CPSU in their reply of 6th June 2024, paragraphs 8, 9 and 10 introduced 'debridement' which the tender wording does not extend to as confirmed by the witness. Appellant's offer was judged on points not included in the tender. Specification 1.1 requests aseptic techniques and the intended use was not for debridement. The evaluation was not correct and the sampling was not carried out correctly and it is the PCRB's function to examine that the evaluation was correctly done and to see if there were any shortcomings.

Dr Camilleri stated that the evaluation was a simple one and there are very many other tenders which were evaluated by just one person – this is not irregular or unlawful so long as the evaluator is qualified. In this case the evaluator went one step further and tested the product himself. Ms Wubbels tested and tried out the product with others, who were not *au fait* with the tender, and all confirmed the decision. Admittedly specification 1.1 states that the product is required for cleaning and dressing but one asks is it possible to clean a wound without debridement? On specification 2.1.2 the evaluation was correctly carried out by testing the product on patients and Ms Wubbels is well qualified and experienced to decide on the robustness of the product. There is no alternative except to reject this appeal since if only one specification is not met then the decision is clear. Mr Ghigo in his testimony said that a report was submitted. If the rejecting of the outcome result of sampling is not accepted then the whole system will be downgraded.

Dr Paris said that this product is used daily by vulnerable persons and it has long been held that decisions involving medical products require more care and attention – this was not so in this case. This tender is similar to a previous procurement where there were no complaints on a similar product.

Dr Camilleri pointed out that in the previous tender there were different evaluators.

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

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 18th June 2024 and 26th November 2024.

Having noted the objection filed by Medina Healthcare Limited (hereinafter referred to as the Appellant) on 27th May 2024, refers to the claims made by the same Appellant with regards to the tender of reference CT2117/2022 listed as case No. 2019 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Matthew Paris
Appearing for the Contracting Authority:	Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo
Appearing for the Department of Contracts:	Dr Mark Anthony Debono

Whereby, the Appellant contends that:

a) ***Product on offer satisfies the tender specifications -***
The tender document in page 19 - spec. no. 2.1.2 required that the offer includes two forceps which are made of "sturdy plastic" and which have a "good grip". Medina submitted an offer, as confirmed through the tender offer form, the technical literature, as well as through the samples produced, which is fully compliant with this technical specification. Notwithstanding the aforesaid, the DOC proceeded to reject to) the offer by Medina on the wrong premise that, *"The forceps with this product are flimsy and without any hold"*. Medina rejects the reason for rejection as totally unfounded and incorrect, and holds that the evaluation committee reached a wrong conclusion in the product review.

b) ***Sample list to verify compliance with technical specifications 3-1.1 -***
In accordance with the sample list enclosed with the tender documents, samples had to be reviewed and analsyed in accordance with technical specification 3.1.1. Nowhere within specification 3.1.1 [as per above] does the tender refer to "sturdy plastic" or about a "good grip", and thereby any exclusion on such matter based on a review of the sample is incorrect and not in accordance with tender document. The analysis and review of the sample had to be based on the compliance with specification 3.1.1 and no other - anything else done by the evaluation committee would be in breach of the doctrine of self-limitation, which is clear that no new parameters are be introduced,

unless these are dictated by the tender document itself. The exclusion, based on the reason of rejection, is in blatant breach of the doctrine of self-limitation and thereby in breach of the public procurement regulations.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 6th June 2024 and its verbal submission during the hearings held on 18th June 2024 and 26th November 2024, in that:

a) ***Product on offer satisfies the tender specifications -***

Specification 2.1.2 states that: *"Two forceps made of sturdy plastic, having serrated tips and a good grip to be able to grip swabs and soft tissue".* After this evaluation process it was concluded that *"The forceps with this product are flimsy and without any hold"*. This will be clearly shown and explained by the evaluation committee The forceps are needed to hold the dressing to clean the wound which may consist of one or two swabs. But we also need it to hold devitalised tissue or skin for sharp debridement. A strong and solid plastic forceps is important in order to ensure a grip of the dressing which goes from the pack to the patient and mitigate risks of contamination. The samples submitted by the objector were evaluated by the evaluation committee and were also given to an end user with vast experience in the use of these products, Practice Nurse Miriam Wubbles and to other clinicians who all provided the same feedback; that either you switch to use sterile gloves and work with the hands if one is going to clean the wound, or use a sterile metal forceps, which then has to be cleansed and re sterilized if debridement is necessary, as the forceps in the pack is not fit for its purpose.

b) ***Sample list is to verify compliance with technical specifications 3.1.1 -***

DOC and CPSU respectfully submits that this third grievance is not only unfounded in fact and at law, but also frivolous. The objector in this grievance states that the samples could have only been used to attest to the compliance of technical specification 3.1.1, which is part of the general technical specifications, under the title standards, and relates to medicinal products. The Instructions to tenderers to which the objector agreed when filing its submission, clearly state in page 6 of the tender document, that:

> *Tenderer's Technical Offer (Note 3)*
>
> *Literature as per Form marked "Literature List' to be submitted with the Technical offer at tendering stage. The scope of the literature is to corroborate a fully compliant technical offer. (Note 2)*
>
> *Samples as per Form marked 'Samples List' may be requested during the adjudication stage to supplement the technical offer submitted. If requested, the Samples must be submitted within ten (10) working days of being notified to do so.(Note 3). If Samples are not submitted within the specified timeframe offer will not be considered further.*

It is amply clear that samples are an Integral part of the technical offer and are requested to supplement the technical offer and thus to substantiate all technical specifications! Clause 3.1.1

which is cited by the objector is clearly not applicable in this case because it deals with medicinal product when the product requested is a medical device, moreover samples are never limited to attest to only one of the technical specifications. As this Board will surely understand, the Section relating to specifications in the tender is Section 3, and the technical specifications of the specific product being requested is 1,1. It is evidently clear that 3.1.1 refers to section 3 clause 1.1.

This situation, does not lead to any breach of principle of self limitation, as the tenderers are well aware, even from attesting to the instruction to tenderers cited above and from the provisions of the General Rules Governing Tenders, that samples are requested corroborate the technical compliance of the offers submitted. The General Rules Governing Tenders clause 16.3 clearly state that: *"Wherever applicable in the procurement documents, and also in terms of Regulation 12 (1) (b) of S.L. 601.03, tenderers may be requested to submit samples so that the Evaluation Committee will corroborate the technical compliance of the offers received. In case of different options provided by the same bidder, respective samples for respective offers should be provided as requested. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified."*

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.

a) This Board notes that the General Rules Governing Tenders duly allow the testing of samples. This emanates from paragraph 16.3 which clearly states that *"Wherever applicable, tenderers may be requested to submit samples so that the Evaluation Committee* ***will corroborate the technical compliance of the offers received****. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified."*

b) Both the rejection letter, dated 17th May 2024, as well as Product Specification 2.1.2 of the Tender dossier refer to the terms 'sturdy plastic' and 'good grip'. In respect to these terms the Contracting Authority, in its Reasoned Letter of Reply, stated *"After this evaluation process it was concluded that "the forceps with this product are flimsy and without any hold". This will be* ***clearly shown and explained*** *by the evaluation committee."*

c) It must be duly emphasised that during the testimony, under oath, of Ms Miriam Wubbels of 18th June 2024, the forceps used to demonstrate the flimsiness of the forceps and their alleged 'crisscrossing' effect were none other than the sample provided by the recommended bidder.

d) It is the opinion of this Board that during Ms Wubbels' testimony of 26th November 2024, when the demonstration centred around the sample of the appellant, no evidence was forthcoming to show and prove that the sample of the appellant was in fact 'flimsy' and 'without any hold'.

e) Therefore, it is the opinion of this Board that while any Contracting Authority is well within its rights to request samples for testing, such testing should thoroughly respect the criteria of the tender being evaluated.

f) Once that these facts have been ascertained, this Board opines that it is immaterial to enter into further arguments raised in reference to debridement.

Finally, this Board upholds the grievances of the appellant.

The Board,

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

a) To uphold the Appellant's concerns;

b) To cancel all the Letters of Rejection dated 17th May 2024;

c) Directs that a re-evaluation process be carried out by a newly formed Evaluation Committee composed of at least three member apart from the Chairperson and Secretary, whereby the Members are to have experience in the use of the product in subject matter. The newly composed Evaluation Committee is also to take into consideration this Board's findings;

d) Directs that the Appellant's offer be reintegrated in the re-evaluation process;

e) Directs that the deposit paid by Appellant be reimbursed.

Mr Kenneth Swain	**Dr Damien Gatt**	**Mr Lawrence Ancilleri**
Chairman	**Member**	**Member**