

PUBLIC CONTRACTS REVIEW BOARD

Case 1804 – CT2342/2021 – Supplies - Complete Enfit System (Or Equivalent) – Lot 13 – Enteral Feeding Sets for use with Portable (lightweight) Enteral Feeding Pumps (on loan – free of charge)

29th November 2022

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of Dalli Paris Advocates acting for and on behalf of Cherubino Limited, (hereinafter referred to as the appellant) filed on the 26th September 2022;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 5th October 2022;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as DoC) filed on the 4th October 2022;

Having heard and evaluated the testimony of the witness Mr Jesmond Seychell (Member of the Evaluation Committee) as summoned by the Board;

Having heard and evaluated the testimony of the witness Dr Francis Cherubino (Representative of Cherubino Limited) as summoned by Dr Matthew Paris acting for Cherubino Limited;

Having heard and evaluated the testimony of the witness Mr Geoffrey Axiak (Nurse – Saint Vincent de Paul) as summoned by Dr Matthew Paris acting for Cherubino Limited;

Having heard and evaluated the testimony of the witness Mr Jesmond Seychell (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Cherubino Limited;

Having heard and evaluated the testimony of the witness Mr Jesmond Seychell (Member of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

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 sittings of the 27th October 2022 and 17th November 2022 hereunder-reproduced.

Minutes

Case 1804 – CT 2342/2021 – Tender for the Supply of Complete Enfit System (or Equivalent)

Lot 13 – Enteral Feeding Sets for use with Portable (lightweight) Enteral Feeding Pumps (on loan)

The tender was issued on the 5th January 2022 and the closing date was the 8th February 2022. The estimated value of the tender, on Lot 13, excluding VAT, was € 1,200,000.

On the 26th September 2022 Cherubino Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer on Lot 13 was not compliant since it failed to adhere to the mandatory requirements.

A deposit of € 6,000 was paid covering bid 13.

There were four (4) bids.

On the 27th October 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a 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
Ms Lara Khan	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Mr Jesmond Seychell	Member Evaluation Committee
Mr Emanuel Gravino	Member Evaluation Committee

Recommended Bidder – Prohealth Ltd

Dr Alessandro Lia	Legal Representative
Mr Mark Bondin	Representative

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 Matthew Paris Legal Representative for Cherubino Ltd said that the tender had certain mandatory specifications and Appellant submitted what the Contracting Authority requested. When following exclusion further information was requested the Department of Contracts (DoC) submitted the tender offer form. According to the Authority Appellant failed to meet the requirements of a stepped adaptor laid down in 3.7.27 in the Technical Offer. The DoC failed to give further information requested and Appellant was left with no alternative except to submit this appeal. The Board is now being requested to order the divulging of the information as to how specification 3.7.27 has been satisfied.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit noted that recourse should be sought from the DoC.

Dr Alessandro Lia Legal Representative for Prohealth Ltd said that his understanding is that the information requested relates to the product which is the same as that offered by the Appellant who

offered an extra item to satisfy the tender. The Evaluation Committee (EC) can provide the necessary confirmation that the product satisfies the tender.

Mr Jesmond Seychell (161567M) called to testify by the Board confirmed on oath that he was a member of the EC which had evaluated three samples submitted. Triomed sample was the cheapest offer but failed the tests. Cherubino and Prohealth provided identical product but Cherubino's offer was more expensive. The tender requested a product in line with specification 3.7.27 and the adaptor had to be part of the set not separate.

Dr Paris then referred the witness to the technical offer of both Appellant and preferred bidder and directed witness' attention to the Product Description in Section II where Appellant had four items listed and the preferred bidder only three. Witness stated that the first three steps in each offer satisfied the tender. Witness gave a demonstration of the product and said that the Enlock adaptor fits the funnel adaptor as indicated in Item H in Product Code 12267446 (Doc 1) in the tender submissions. According to the witness the transitional adaptor had to be part of the unit. The Enlock adaptor provided by Prohealth is a dual one and satisfies the tender.

In reply to a question from Dr Camilleri witness explained that the step adaptor fits any funnel adaptor.

Questioned by Dr Lia witness stated that the items submitted by both Cherubino and Prohealth satisfied the tender requirement.

Dr Francis Cherubino called to testify by the Appellant stated on oath that he deals with his Company's tenders. He explained that the tender requested a stepped adaptor. The Enlock adaptor and the stepped adaptor are different in shape and description [demonstrated by an actual sample of the product]. The tender does not ask for an Enfit but for a stepped adaptor to be compliant. As a result of following correctly the tender terms Cherubino's bid ended up the more expensive one. Even the product manufacturer's make a distinction between Enlock and a stepped adaptor. In specification 5 on Lot 13 the tender specifically asks for 'a transitional adaptor consisting of male ENFit on one end and a stepped adaptor on the other' and this is what was offered according to the witness. Documents 3 and 4 were tabled indicating the difference in the adaptors.

In reply to a question by Dr Alexia Farrugia Zrinzo witness stated that the transitional adaptor was specifically requested in the tender and directed her attention to Page 50 Item 5 in the tender dossier.

Questioned by Dr Lia witness re-iterated that the tender specifically requested an additional adaptor, but said he was not aware if this stepped adaptor was registered under a trademark. He agreed that the adapter offered came from another company than the main supplier but noted that there was no restriction in the tender that it should come from the same company. Witness referred again to the illustrations in Doc 3 and Doc 4 which indicate clearly the difference in adaptors.

At this stage the Chairman noted that there were several other witnesses still to be heard and the Board was restricted on time. He therefore deferred the hearing to the 17th November 2022 at 12.00 noon.

End of Minutes

SECOND HEARING

On the 17th November 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to further consider this appeal.

The attendance for this public hearing was as follows:

Appellant – Cherubino Ltd

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative
Ms Lara Khan	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Mr Jesmond Seychell	Member Evaluation Committee

Recommended Bidder – Prohealth Ltd

Dr Alessandro Lia	Legal Representative
Mr Mark Bondin	Representative

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 requested resumption of submissions.

Dr Paris requested the testimony of further witnesses.

Mr Geoffrey Axiak (154471M) called to testify by Cherubino Ltd testified on oath that he has been a nurse for 27 years laterally at Saint Vincent de Paul. He demonstrated the use of the adapter and explained that if it does not fit properly there could be spillage of liquid including release of stomach acids which leads to skin burn. He has tested five adapters and the way they fit with the Enlock system which resulted in three fitting loosely and coming away easily, one needs pressure to fit and one fits easily. Enlock which was tried on all alternatives does not fit properly and is risky to use as it comes off easily because it is not graduated.

In reply to questions by Dr Camilleri witness stated that he had been requested by Cherubino Ltd to prepare a report on products tested that were in use throughout (Doc 1). He was not cognisant of the tender specifications – he was simply requested to carry out a study on Endlock. He agreed that the adapter requested is stepped.

Questioned by Dr Lia witness said that he did not have any particular relations with Cherubino Ltd – he was requested to carry out a report on a Government tender as he is a Government employee. The adapter offered by Cherubino Ltd, according to the witness, has been in use of years but the Enlock was hardly used and agreed that it is often referred to by different names. Witness was not aware of the tender requirements. He agreed that the Compat product comes as a set but the one he tested is

made up of different parts. He could not explain why the connector is referred to as a stepped adapter which to his knowledge referred only to one product.

Further questioned by Dr Paris witness said that the Enlock was used to join parts together – a thread and an adapter.

Mr Jesmond Seychell (165167M) called as a witness by Cherubino Ltd testified on oath that he was one of the Evaluators and at evaluation stage had not seen the document shown to him by Dr Paris (Doc 4).

Mr Jesmond Seychell still on oath was called as a witness Prohealth Ltd. He explained that Enlock is a threaded connector used in the past in a nutrition device or in a IV cannula. Enfit which is a type of Enlock is a dedicated product that does not match with IV or other devices. Funnel connections are no longer produced as all connections are Enfit type hence the need for adapters. The new sets will be used at Mater Dei, Mount Carmel, elder and community homes Karin Grech and Gozo General Hospital. CPSU wanted to reduce the number of items in use and, to reduce confusion, was not looking for a set and a separate adapter. The dual connector offered by both bidders was offered to satisfy the 2 in 1 need of Enlock and funnel. Contac comes in one set to meet the principal use. The Compat offer is in one set and meets the principal use.

Asked by Dr Farrugia Zrinzo how the tender requirements were met by the product offered witness said that the offer was of a stepped adapter which satisfies both Enlock and funnel. [Witness demonstrated various fittings some of which he explained were no longer in use.]

In reply to questions from Dr Paris witness stated that the Authority requested the adapter to enable the existing stocks to be used. Documents presented by Prohealth stated that there could be some incompatibilities in use, however up to 20 samples provided by bidders tested during the evaluation were found to be compatible and there were no incompatibilities found. There was no limitation as far as compatibility was involved as suggested and items referred to by Mr Axiak were no longer on the market. The funnel is not part of the feeding tube as it is only required for gastric draining.

This concluded the testimonies.

Dr Paris said that Cherubino and Prohealth submitted similar offers – if the pertinent clause had not been specifically included in page 50 of the tender Cherubino would not have included a stepped adapter. There was no obligation anywhere that the product had to be a set from the same manufacturer and the tender document confirms this point. PCRB Case 1665 presented an identical situation when it dealt with the question as to whether a product had to be from one single source. Contrariwise, when so wanted, this requirement is clearly stated as in CT 2279/2021 where it was clearly specified that the product had to be provided from a single source. The document filed by Dr Lia was issued on 7th November 2021 a few days after the Board's hearing. At that time Compat was stating that the Enlock was not stepped but the version changed after then. Contrary to what was claimed the compatibility issue is not standard or a pure disclaimer. Once it is stated that it is not compatible it renders the product non-universal and the need arises for the stepped adapter which was requested to use the existing stock during the transition period. Up to now not all equipment is compatible and hence the request for the stepped adapter. This point is proven by the CPSU call for Enfil transitional adapters (CPSU tender 5989/2022). Mr Axiak carried out an exercise on compatibility and his conclusions match the declaration that the product is not compatible.

Dr Lia said that Cherubino made a mistake in the understanding of the term 'set'. If the words in the tender were not clear they should have requested a clarification. The product they offered is not a set as the parts come from different manufacturers. The word 'set' defines itself and the offer fails on this point. The single pack offered fits present and future product. The Compat document was not required at the evaluation stage as it is not relevant to the tender request. Witness clearly said that the offer satisfies the requirements.

Dr Camilleri stated that it is a fact that Cherubino's offer was not the cheapest and hence they were not awarded the tender. Claims regarding 2 in 1 were not part of the issue as this was matter of price. Demonstrations were given twice that Prohealth's offer meets the requirements of the tender and fulfills the function required by the CPSU. Once the product conforms to the tender there is no reason why it should not be chosen. The name of the various parts is immaterial to the tender outcome. The Authority requested a stepped adapter and a stepped adapter was offered, and there is no reason to refuse that offer. The reference to the CPSU tender for supply of funnels, which Appellant referred to, is for drainage equipment not for the product requested in this tender and the document presented regarding Compat is not relevant to the tender whatever date there is on it. A disclaimer clause is standard in regard to products of this type and pretty common.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 27th October 2022 and 17th November 2022.

Having noted the objection filed by Cherubino Limited (hereinafter referred to as the Appellant) on 26th September 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2342/2021 listed as case No. 1804 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 J Farrugia Zrinzo
Appearing for the Preferred Bidder:	Dr Alessandro Lia

Whereby, the Appellant contends that:

- a) Recommended bidder not compliant -

In the item product specifications 5, [for Lot 13] the tender document imposes that:

“The set should also include a transitional adaptor consisting of male ENFit on one end and a stepped adaptor on the other. This backup connector will be attached to the female ENFit of the set itself in case of delayed ENFit system transition and/or as needed.”

It is the submission of the appellant company that the product offered by the recommended bidder does not adhere to this mandatory requirement and as a consequence the recommended bidder is in breach of this mandatory selection criteria;

b) Doctrine of self-limitation -

The doctrine of self-limitation is an important public procurement principle which has been referred to by this honourable Board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document, this will ensure predictability and transparency.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 5th October 2022 and its verbal submission during the hearings held on 27th October 2022 and 17th November 2022, in that:

a) Preliminary Submissions

CPSU preliminary submits (sic) that the objection was filed in terms of regulation 270 of the Public Procurement Regulations (PPR) which states that: *“... may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints.”*

CPSU submits that the objector's application fails to comply with this basic requirement as it does not give any reasons for its complaints but merely makes an allegation which is not based with any reasons.

The present appeal is only a fishing expedition, intended to attempt to find some reasons to ride on in order to further their appeal application. This is not the procedure which the PPR intends and therefore CPSU submits that this reason is enough for the appeal application to be rejected.

Without prejudice to the above, CPSU submits that it should be allowed to present further submissions, orally and in writing to any new submissions made by the objector.

b) First Ground of Appeal

CPSU submits that the product offered by the recommended bidder is compliant to all technical specifications as published, including the stepped adaptor, as will be further explained by the evaluation committee during the sitting.

c) Second Ground of Appeal

The objector here alleges that the principle of self-limitation has not been followed by the evaluation committee however failed to indicate where and how this principle was breached.

CPSU submits that in evaluating this tender the evaluation committee has adhered to all fundamental principles of public procurement, namely those of equal treatment, proportionality and self limitation.

This Board also noted the DoC's Reasoned Letter of Reply filed on 4th October 2022 and its verbal submission during the hearings held on 27th October 2022 and 17th November 2022, in that:

a) Preliminary

As a preliminary submission, the DoC submits that in terms of regulation 239(1) of the Public Procurement Regulations, 2016, the decision for the recommendation of an award is a decision taken by the Contracting Authority.

b) Recommended bidder not compliant

The DoC submits that it is the Tender Evaluation Committee appointed by the Contracting Authority which conducts the process of the evaluation of tender offers in accordance with the procedure laid down in rule 16 of the General Rules Governing Tenders. The technical compliance of tender offers in accordance with the Tender Document Specifications requires that Tender Evaluation Committees are provided with the appropriate information and evidence from tenderers. In terms of article 232(k)(ii) of the Public Procurement Regulations, 2016, evidence that a tender offer is compliant can occur inter alia through: "*Certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.*" The DoC submits that the objection is being addressed to a single item, namely a transitional adaptor, the technical compliance of which is to be proven by reference to the Tender Evaluation Report in accordance to the information provided in the technical offer, the evidence submitted and which results from the technical literature together with any sample, should this have been requested by the same Technical Evaluation Committee.

c) Doctrine of Self-Limitation

While the doctrine of self-limitation should be upheld, the DoC submits that the appellant refers the principle of self-limitation by reference to a decision of the Public Contracts Review Board without stating, clarifying nor proving how the Tender Evaluation Committee is, in the present case, actually in breach of the principle 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.

Initially this Board will list down what it considers to be most relevant to these proceedings. These are:

- a) Specification 3.7.27 of the Technical Offer Form (Section 2) which stated *"I confirm that the feeding sets being offered also include a transitional adaptor consisting of male ENFit on one end and a stepped adaptor on the other. This backup connector will be attached to the female ENFit of the set itself in case of delayed ENFit system transition and/or as needed"*.
- b) Section 3 – Specifications – of the Tender dossier – Lot 13 – page 50 – whereby in point 5 it is stated *"the set should also include a transitional adaptor consisting of male ENFit on one end and a stepped adaptor on the other. This backup connector will be attached to the female ENFit of the set itself in case of delayed ENFit system transition and/or as needed."*
- c) Mr Jesmond Seychell's testimony under oath whereby he stated:
 - i. *"the first three steps in each offer (Cherubino & Prohealth) satisfied the tender."*
 - ii. *"the Enlock adaptor fits the funnel adaptor as indicated in Item H in Product Code 12267446 in the tender submissions"*
 - iii. *"The Enlock adaptor provided by Prohealth is a dual one and satisfies the tender"*
 - iv. *"The dual connector offered by both bidders was offered to satisfy the 2 in 1 need of Enlock and funnel. Contac comes in one set to meet the principal use. The Compat offer is in one set and meets the principal use"*
 - v. *"Documents presented by Prohealth stated that there could be some incompatibilities in use, however up to 20 samples provided by bidders tested during the evaluation were found to be compatible and there were no incompatibilities found. There was no limitation as far as compatibility was involved as suggested"*
- d) Dr Francis Cherubino's testimony under oath whereby he stated:
 - i. *"The tender does not ask for an Enfit but for a stepped adaptor to be compliant. As a result of following correctly the tender terms Cherubino's bid ended up the more expensive one."*

Conclusions

- a) This Board notes that the main bone of contention revolves around the interpretation of points (a) and (b) above, i.e.:
 - i. Specification 3.7.27 of the Technical Offer Form (Section 2) and
 - ii. Section 3 – Specifications – of the Tender dossier – Lot 13 – page 50 – point 5 – fifth bullet point.
- b) This Board agrees with argumentation brought forward by Cherubino's legal counsel in that in the tender there was no obligation that the product had to be a set from the same manufacturer.
- c) It is also a fact, which was not contested, that both the appellant and the preferred bidder submitted similar offers, in that they both included the same 'set' from the same supplier which is made up

of three (3) items, but that the Appellant included a fourth item which it interpreted as a mandatory requirement to be in line with the above-mentioned specifications. This in turn led to their bid to be 'more' expensive than the preferred bidder's.

- d) Therefore, was this fourth item needed to be technically compliant?
- i. Different views and diverging opinions were provided by witnesses.
 - ii. When considering all this content and applying it to this current situation, this Board, finds itself convinced that the evaluation process was correctly carried out with proper diligence whilst also respecting major principles of public procurement.
 - iii. Most relevant to this, was the demonstration provided by Mr Jesmond Seychell, which proved without a shadow of a doubt that the offer as submitted by the Preferred Bidder, was compatible with the requirements and objectives of the tender procedure. Also, a high number of samples were tested during the evaluation stage.
- e) It may, after all, be that the appellant offered a superior product. However, in the opinion of this Board, he did so by exceeding the specifications of this tender document. The 'Criteria for Award' in Section 1 of the tender document are self-explanatory. This was not a BPQR tender.
- f) In the opinion of this Board, the Appellant incorrectly interpreted the specifications requested, did not make use of tools available to him to clarify the situation. Once the evaluation process was done as per normal praxis, according to all the rules governing public procurement and the preferred bidder's offer meeting all administrative and technical specifications, this Board cannot but reject the grievances of the Appellant.

Hence, this Board does not uphold the Appellant's grievances.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member