

## PUBLIC CONTRACTS REVIEW BOARD

### Case No. 346

**CT/2174/2010; DH/1688/08**

**Title: Tender for the Supply of a Full Field Direct Digital Mammography Unit and a Stereotactic Biopsy Unit**

This call for tenders was published in the Government Gazette on 20<sup>th</sup> August 2010. The closing date for offers was 26<sup>th</sup> October 2010.

The estimated value of this tender was €600,000.

Four (4) tenderers had originally submitted their five (5) offers.

Messrs Triomed Ltd filed an objection on 9<sup>th</sup> September 2011 against the decision of the Department of Contracts to recommend tender award to Fuji Italia Srl.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Edwin Muscat and Mr Joseph Croker as members convened a meeting on Wednesday 11<sup>th</sup> November 2011 to discuss this objection.

#### **Triomed Ltd**

Dr John Gauci	Legal Representative
Mr Alex Vella	Representative
Mr Carmel Cascun	Representative
Engineer Okkis Arissian	Representative of Hologic Corporation

#### **Fuji Italia Srl**

Dr Antoine Cremona	Legal Representative
Dr Julianne Portelli Demajo	Legal Representative
Mr Giovanni Valtorta	Representative

#### **Ministry of Health, the Elderly and Community Care (MHEC)**

Dr Adrian Mallia	Legal Representative
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#### **Adjudicating Board:**

Dr Nadine Delicata	Chairperson
Mr Joseph Psaila	Member
Mr Mario Caruana	Member
Mr Mark Borg	Member
Ms Carmen Harkin	Secretary

#### **Department of Contracts**

Mr Nicholas Aquilina	Representative
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After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr John Gauci, legal representative of Triomed Ltd, the appellant company made the following submissions:-

- i. by letter dated 2<sup>nd</sup> September 2011, his client was informed by the Director General (Contracts) that the company's bid was not successful as it was not the cheapest offer and that the tender was recommended for award to Fuji Italia Srl as the cheapest compliant bidder;
- ii. the recommended tender was not technically compliant as the machine offered was not upgradable to the Tomosynthesis feature as was requested:
  - a. under 'The Dedicated Mammographic Unit' (g) 'Others' (page 38) of the tender document it was stated that "Tomosynthesis should be included"; and
  - b. by way of Clarification No. 2 dated 5<sup>th</sup> October 2010 which stated:

*"Furthermore with respect to Tomosynthesis, this is not required to be included in the offer. However, the machine offered must be able to include the Tomosynthesis feature via a simple upgrade, and shall not involve changing of the machine completely should the Government opt to install it in the future."*
- iii. Tomosynthesis was not a trade name but it was a type of technology or process consisting of a number (15 or so) of successive images, each taken at a slightly different angle along an arc across the breast, whereby what was hidden behind a fibro-glandular tissue in one image might be visible in another if the angle is slightly different. This process was very useful in detecting cancer at its early stage;
- iv. there were four tenderers, three of whom were able to offer the Tomosynthesis upgradability with the exception of the recommended tenderer;
- v. in its submission dated 12 October 2011 in reaction to the letter of appeal, the recommended tendering company conceded that the solution it offered did not use the Tomosynthesis technology but used a different technology, namely the Fuji stereo digital mammography (SDM) which the recommended tenderer claimed was a equivalent;
- vi. the technology offered by the recommended tenderer worked in such a way as to produce two images of the breast from two different angles which would create an impression of a 3D so much so that one had to then wear a pair of special spectacles to see the image in 3D;
- vii. the solution offered by the recommended tenderer was different from what was requested so much so that it could not offer Tomosynthesis upgradability

whereas his client's Hologic proposal did include the upgradability feature to Tomosynthesis technology as, repeatedly, requested in the tender specifications;

- viii. the recommended tenderer also failed to seek a clarification from the contracting authority in this respect, namely that the company's solution was not upgradable to the Tomosynthesis technology; and
- ix. a UK National Health Service (NHS) booklet title 'Digital Breast Tomosynthesis' issued in September 2010 indicated that most UK suppliers did offer Tomosynthesis but not Fuji;

Dr Adrian Mallia, representing the contracting authority, made the following remarks:-

- a. the appellant company was not disqualified during the adjudication process but what happened was that the appellant company's offer was not the cheapest;
- b. what had to be determined was whether the end result of both solutions, namely the Tomosynthesis technology proposed by the appellant company and the SDM technology proposed by the recommended tenderer, were equivalent;
- c. the contracting authority deemed that both technologies would, in the end, produce the same output;
- d. page 38 of the tender document and the eventual clarification made no explicit reference to equivalent solutions but requested Tomosynthesis technology. Nevertheless, one had to note that page 35 of the tender document in bold print read as follows:

*"Where in this tender document a standard is quoted it is to be understood that the contracting authority will accept equivalent standard. However, it will be the responsibility of the respective bidders to prove that the standards they quoted are equivalent to the standards requested by the contracting authority."*

- e. in drawing up tender specifications, the contracting authority had to be careful to indicate its requirements in all necessary details but then it had to leave the door open for different solutions that would produce requested outcome;
- f. Tomosynthesis and SDM were, in fact, different processes; and
- g. a contracting authority was obliged by regulations to accept a solution that produced the requested output even if through different processes.

Dr Joseph Psaila, a member of the adjudicating board, under oath, gave the following evidence:-

- i. both the Tomosynthesis and the SDM technologies were acceptable to the contracting authority;
- ii. the aspiration of the contracting authority was that, in the future, it would have the technology whereby one could spot, so to say, something hidden behind a cloud and for that purpose the contracting authority used the term ‘Tomosynthesis’ in the tender document;
- iii. the contracting authority included the Tomosynthesis upgrade in Clarification No. 2 so that it would avoid the expense of having to replace the equipment in the event it opted to move on to the Tomosynthesis technology; and
- iv. he confirmed that, albeit the Tomosynthesis technology produced images similar to those of a CT Scan and that the Fuji solution did not operate on the same lines, yet, what the contracting authority was after was a 3D output.

Mr Mario Caruana, another member of the adjudicating board, remarked that the contracting authority was, ultimately, after 3D imaging and it turned out that all bidders provided 3D imaging even if by means of different technologies.

Dr Gauci pointed out that one was not dealing with different standards – as provided for in page 35 of the tender document - but one was dealing with different technologies and, in his letter of objection, he had cited from an online article promoting the Fuji solution that stated “*The Fuji approach marks a departure from in-depth imaging with tomosyntheses.*”

The Chairman Public Contracts Review Board remarked that one had to adjudicate with the information presented at the closing date of the tender, namely 26<sup>th</sup> October 2010, and one should not take into account technologies that developed since then otherwise one would be shifting the goalposts.

Dr Antoine Cremona, legal representative of the recommended tenderer, made the following submissions:-

- a. his client’s solution did not have the Tomosynthesis upgrade;
- b. according to the tender document, the contracting authority was, effectively, procuring a 2D Mammography Unit and not a unit with Tomosynthesis, if anything, with an upgrade feature for the future;
- c. it was the duty of the contracting authority to draw up the specifications to suit its precise requirements but, in so doing, it should allow the market to propose the solutions/processes that would satisfy those requirements. Also, it should certainly not present its requirements in such a way as to fit a particular product to the exclusion of the rest;
- d. at page 38 of the tender document, under ‘Advanced Features’, it was stated, among other things, that:

*“Compatibility with advanced features in development are telemammography (the provision for rapid transmission of images) and various forms of 3D reconstruction will also be required to be installable at a future date”;*

- e. the ‘various forms of 3D reconstruction’ included the Tomosynthesis, which was one of the processes whereby one obtained 3D imaging, and other processes, such as the SDM offered by Fuji, that, likewise, led to the same result, namely, 3D imaging, or even better; and
- f. what the contracting authority had in mind was upgradability to 3D imaging.

At this point Dr Psaila (a) confirmed that the ‘Advanced Features’, besides the computer aided detection (CAD) included also 3D reconstruction which reinforced the need for Tomosynthesis and (b) considered SDM to qualify as one of the ‘various forms of 3D’.

Mr Okkis Arissian, Managing Director of Hologic in Europe, under oath gave the following evidence:-

- i. the tender document was very clear in its requirements and took into account its future needs;
- ii. Tomosynthesis technology represented an additional tool for diagnostic work in the best interest of the patient as it encompassed a precise technique that gave particular results;
- iii. Hologic could have offered cheaper machines but which were not upgradable however Hologic offered a machine that was upgradeable to Tomosynthesis technology as requested by the client;
- iv. the Tomosynthesis technique produced images using slices with a specific degree more or less similar to a CT Scanner and, by looking at the slices, one could isolate the micro-classifications or a particular disease whereas the other techniques originated from the video industry whereby one would take two images and to analyse them one had to wear special glasses; and
- v. Tomosynthesis technology had been approved by the Food and Drug Administration (FDA) and by European bodies which demanded rigorous tests and he called upon the other competitors to produce such approvals with regard to the products offered.

Dr Psaila remarked that, at the time, he was not aware of any finished trials – there were some still in progress - that demonstrated that one technique was superior to the other.

Dr Gauci concluded by saying that:

- a) contrary to what Dr Cremona was claiming, literature was available that demonstrated that Siemens and General Electric both offered Tomosynthesis

technology and so did at least six other firms mentioned in an NHS publication titled 'Digital Breast NHSBSP Publication No. 69' Tomosynthesis' and that proved that Tomosynthesis was not a trade mark but a technology used by different manufacturers;

- b) no evidence had emerged that the solution proposed by the recommended tenderer was upgradable to Tomosynthesis technology;
- c) the recommended tenderer did not ask for a clarification prior to the closing date of the tender as to whether its proposal, which by its representative's admission at the hearing, was not upgradable to Tomosynthesis, was in line with what the contracting authority had in mind;
- d) the contracting authority had to stick to its request as laid down in the tender document and it was not acceptable that it would contemplate developments that occurred in the sector during the 12-month adjudication period since that would shift the goalposts;
- e) the contracting authority was asking for a machine upgradable to a particular technique and, as a consequence, the onus was on the recommended tenderer to convince the contracting authority that its proposal was equivalent to the Tomosynthesis technology, even though, according to Dr Psaila there was no way how to compare the two systems; and
- f) in the circumstances, the award to Fuji Italia Srl should be withdrawn and the tender awarded to his client.

On his part Dr Cremona concluded that:-

- a) what was being procured through this call for tenders was a mammographic unit and not Tomosynthesis technology;
- b) the upgradability to Tomosynthesis technology meant an upgrade to 3D imaging which was not achievable solely through Tomosynthesis technology so much so that under 'Advanced Features' at page 38 of the tender document reference was made to 'various forms of 3D' and rightly so because the contracting authority was obliged to consider different alternatives that would lead to the requested result; and
- c) his client's submission was considered administratively and technically compliant and thus, having overcome those hurdles, the remaining criterion was the price and at that his client's offer was the cheapest.

Dr Mallia concluded by stating that that what one had to deliberate on was whether the decision arrived at by the contracting authority was a reasonable one. He added that the evaluation board was obliged to consider equivalents and it had found the two offers submitted by the recommended tenderer and the appellant company as having met its requirements.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection dated 30<sup>th</sup> September 2011 and through the verbal submissions made during the hearing held on the 11<sup>th</sup> November 2011, had objected against the decision of the Department of Contracts to recommend tender award to Fuji Italia Srl;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) the appellant company was informed by the Director General (Contracts) that the company's bid was not successful as it was not the cheapest offer and that the tender was recommended for award to Fuji Italia Srl as the cheapest compliant bidder, (b) the recommended tender was not technically compliant as the machine offered was not upgradable to the Tomosynthesis feature as was requested, (c) Tomosynthesis was not a trade name but it was a type of technology or process (a process which is very useful in detecting cancer at its early stage) consisting of a number (15 or so) of successive images, each taken at a slightly different angle along an arc across the breast, whereby what was hidden behind a fibro-glandular tissue in one image might be visible in another if the angle is slightly different, (d) there were four tenderers, three of whom were able to offer the Tomosynthesis upgradability with the exception of the recommended tenderer, (e) in its submission dated 12 October 2011 in reaction to the letter of appeal, the recommended tendering company conceded that the solution it offered did not use the Tomosynthesis technology but used a different technology, namely the Fuji stereo digital mammography (SDM) which the recommended tenderer claimed was a equivalent, (f) the technology offered by the recommended tenderer worked in such a way as to produce two images of the breast from two different angles which would create an impression of a 3D so much so that one had to then wear a pair of special spectacles to see the image in 3D, (g) the technology offered by the recommended tenderer did not offer Tomosynthesis upgradability, (h) the recommended tenderer also failed to seek a clarification from the contracting authority in this respect, namely that the company's solution was not upgradable to the Tomosynthesis technology, (i) one was not dealing with different standards – as provided for in page 35 of the tender document - but one was dealing with different technologies and, in his letter of objection, he had cited from an online article promoting the Fuji solution that stated "*The Fuji approach marks a departure from in-depth imaging with tomosyntheses.*", (j) the recommended tenderer did not ask for a clarification prior to the closing date of the tender as to whether its proposal, which by its representative's admission at the hearing, was not upgradable to Tomosynthesis, was in line with what the contracting authority had in mind, (k) the contracting authority had to stick to its request as laid down in the tender document and it was not acceptable that it would contemplate developments that occurred in the sector during the 12-month adjudication period since that would shift the goalposts, (l) the contracting authority was asking for a machine upgradable to a particular technique and, as a consequence, the onus was on the recommended tenderer to convince the contracting authority that its proposal was equivalent to the Tomosynthesis technology, even though, according to Dr Psaila there was no way how to compare the two systems and (m) the appellant company's submission was

considered to be, administratively and technically, compliant and thus, having overcome those hurdles, the remaining criterion was the price and at that the said appellant company's offer was the cheapest;

- having considered the contracting authority's representative's submissions, namely that (a) the appellant company was not disqualified during the adjudication process but what happened was that the appellant company's offer was not the cheapest, (b) what had to be determined was whether the end result of both solutions, namely the Tomosynthesis technology proposed by the appellant company and the SDM technology proposed by the recommended tenderer, were equivalent, (c) the contracting authority deemed that both technologies would, in the end, produce the same output, (d) albeit page 38 of the tender document and the eventual clarification made no explicit reference to equivalent solutions but requested Tomosynthesis technology, yet one had to note that page 35 of the tender document in bold print, *inter alia*, stated that "*Where in this tender document a standard is quoted it is to be understood that the contracting authority will accept equivalent standard. However, it will be the responsibility of the respective bidders to prove that the standards they quoted are equivalent to the standards requested by the contracting authority.*", (e) in drawing up tender specifications, the contracting authority had to be careful to indicate its requirements in all necessary details but then it had to leave the door open for different solutions that would produce requested outcome, (f) Tomosynthesis and SDM were, in fact, different processes, (g) a contracting authority was obliged by regulations to accept a solution that produced the requested output even if through different processes, (h) the aspiration of the contracting authority was that, in the future, it would have the technology whereby one could spot, so to say, something hidden behind a cloud and for that purpose the contracting authority used the term 'Tomosynthesis' in the tender document, (i) the contracting authority included the Tomosynthesis upgrade in Clarification No. 2 so that it would avoid the expense of having to replace the equipment in the event it opted to move on to the Tomosynthesis technology, (j) albeit the Tomosynthesis technology produced images similar to those of a CT Scan and that the Fuji solution did not operate on the same lines, yet, what the contracting authority was after was a 3D output and it turned out that all bidders provided 3D imaging even if by means of different technologies and (k) (1) confirmed that the 'Advanced Features', besides the computer aided detection (CAD) included also 3D reconstruction which reinforced the need for Tomosynthesis and (2) considered SDM to qualify as one of the 'various forms of 3D';
- having also given due consideration to the recommended tenderer's representative's submissions, namely that (a) the said recommended tenderer's solution did not have the Tomosynthesis upgrade, (b) according to the tender document, the contracting authority was, effectively, procuring a 2D Mammography Unit and not a unit with Tomosynthesis, if anything, with an upgrade feature for the future, (c) whilst it was the duty of the contracting authority to draw up the specifications to suit its precise requirements yet, in so doing, it should allow the market to propose the solutions/processes that would satisfy those requirements, (d) the 'various forms of 3D reconstruction' included the Tomosynthesis, which was one of the processes whereby one obtained 3D imaging, and other processes, such as the SDM offered by Fuji, that, likewise, led

to the same result, namely, 3D imaging, or even better, (e) what the contracting authority had in mind was upgradability to 3D imaging and (f) the recommended tenderer's submission was considered administratively and technically compliant and thus, having overcome those hurdles, the remaining criterion was the price and at that his client's offer was the cheapest;

- having also considered Mr Arissian's evidence, particularly, his claim that (a) the tender document was very clear in its requirements and took into account its future needs, (b) Tomosynthesis technology represented an additional tool for diagnostic work in the best interest of the patient as it encompassed a precise technique that gave particular results and (c) Hologic could have offered cheaper machines but which were not upgradable however Hologic offered a machine that was upgradeable to Tomosynthesis technology as requested by the client,

reached the following conclusions:

1. The Public Contracts Review Board feels that tender requirements are set by the contracting authorities and not by the bidders and that, regardless of the fact as to whether a participating tenderer is in full agreement with the content or not, such tenderer has to abide by such terms and conditions. Furthermore, if a bidder is in doubt about the tender specifications or if one's proposal represents a departure from what is required by the contracting authority, one should seek clarifications prior to submitting one's offer.
2. The Public Contracts Review Board argues that an adjudication board has to evaluate and adjudicate a tender on information presented by participating tenderers at the closing date of the tender, in this instance, the 26<sup>th</sup> October 2010. As a consequence, this Board opines that the adjudication board should not have taken into account technologies that developed since then – in so doing this ended up by goalposts being shifted. Undoubtedly, whilst acknowledging that scientific research is an ongoing process, yet this Board is also aware that there are specific applicable terms and conditions, as well as time frames, within which one is expected to deliver.
3. The Public Contracts Review Board acknowledges the content of the inclusion of 'Advanced Features' (page 38 of the tender document) wherein, *inter alia*, it was stated that compatibility "*with advanced features in development are telemammography (the provision for rapid transmission of images) and various forms of 3D reconstruction will also be required to be installable at a future date*" yet, through a clarification note, reference no. 2, dated 5<sup>th</sup> October 2010, any possible misinterpretation of what was being requested was overcome when it was stated that "*with respect to Tomosynthesis, this is not required to be included in the offer. However, the machine offered must be able to include the Tomosynthesis feature via a simple upgrade, and shall not involve changing of the machine completely should the Government opt to install it in the future*". The fact that the appellant company's claim, namely that the "*Fuji approach marks a departure from in-depth imaging with tomosyntheses*" was, not only not contested by all the other parties involved, but was, actually, confirmed by the recommended tenderer's own admission that his client's solution did not have the Tomosynthesis upgrade, cannot pass unnoticed implying that the recommended

tenderer's offer was not in line with the contracting authority's own specifications which placed emphasis on the fact that "*the machine offered must be able to include the Tomosynthesis feature via a simple upgrade*".

4. This Board agrees with the point raised by the contracting authority's representatives, namely that it was the duty of the contracting authority to draw up the specifications to suit its precise requirements and that, in so doing, it should (a) allow the market to propose the solutions/processes that would satisfy those requirements and (b) certainly not present its requirements in such a way as to fit a particular product to the exclusion of the rest. However, the Public Contracts Review Board also acknowledges the fact that there is a certain level of flexibility which one may implement in similar circumstances largely due to the fact that the parameters should be clear '*ab initio*' and not expected to change once the process would have already been launched. All tenderers must participate within a context of level playing field with a clear vision of what a contracting authority is substantially after. This Board feels that, albeit one has to reiterate the circumstantial proviso of an ever evolving scientific field of research, yet one should not be expected to abide by what a contracting authority could have in mind (upgrading to 3D imaging *sine qua non*) but what was actually manifested (tender document including clarifications ... "*the machine offered must be able to include the Tomosynthesis feature via a simple upgrade*") and an evaluation board is duty bound to evaluate on tangible, traceable specifications, terms and conditions.
5. The Public Contracts Review Board feels that the contracting authority could have established more varied, flexible and equally admissible selection and award criteria '*ab initio*' and these would have allowed ample flexibility at evaluation and adjudication stage.

In view of the above this Board finds in favour of the appellant company and, apart from being in the tendering process, it also recommends that the deposit paid by the said appellant company should be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Joseph Croker  
Member

23<sup>rd</sup> November 2011