



The Chairman declared that if the Appellant wanted more time to examine the replies made by the Contracting Authority, since these were filed just the day before, the Board would give an adjournment.

Dr Richard Camilleri on behalf of the Appellant asked for an adjournment on the basis of the emails exchanged with the Department of Contracts and because Appellant wanted the opportunity to prepare the case. However, he said that he would not object if a witness who came from abroad be heard first.

Dr Nadine Lia for Prohealth Limited explained that the person who came from overseas purposely for this hearing was not a witness but a company representative.

Dr Stefan Zrinzo Azzopardi for the Contracting Authority declared that the authority had an interest to obtain the product subject of this tender and so desired the adjournment to be as brief as possible.

The Board adjourned the hearing for the 13<sup>th</sup> October at 11.00am.

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## **Second Hearing:**

On 13 October 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members re-convened a Second Public Hearing to continue discussing this objection.

The Attendance for this Public Hearing was as follows:

### **Appellant – Medina Healthcare Ltd**

Mr Andrew Cutugno	Representative
Mr John Soler	Representative
Dr Richard Camilleri	Legal Representative

### **Recommended Bidder – Prohealth Ltd**

Mr Mark Bondin	Representative
Mr Stephen Jones	Representative
Mr Andrew Paris	Representative
Dr Nadine Lia	Legal Representative

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

Ms Ruth Saliba	Chairperson, Evaluation Board
Ms Claudia Muscat	Secretary, Evaluation Board
Mr Noel Abela	Member, Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

### **Department of Contracts**

Dr Christopher Mizzi	Legal Representative
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The Chairman invited the Appellants' representative to make his submissions.

Dr Richard Camilleri, for Medina Healthcare Ltd, opened his submissions by stating that the Objection referred only to offer TID 47361. He had to point out this since the Letter of Rejection mentioned the two offers which the Appellant has submitted, namely TID 47361 and TID 47359.

This Tender, continued Dr Camilleri, was based on a Product called "*Medipal Disinfectant Wipes*" whose product number was S625110MPCE. The Financial Bid Form submitted by his clients showed clearly that they were offering for a "*Medical Alcohol Free Cleaning and Disinfectant Flow Rec*" and it showed also the above-mentioned product number. Both the Financial Bid Form and the Sales Quotation showed that appellant was offering these wipes.

The first part of the Appellant's Objection dealt with the reasons why their offer was discarded. Dr Camilleri said that this Letter of Rejection referred to a completely different product from the one submitted by his clients. He contended that the first reason for rejection given in the Letter of Rejection dated 23 August 2016, which stated that "*Under the conditions of this test, the Pal Dry Wipes (W15 037) caused an unacceptable level of irritation*" should be ignored as the latter product was not mentioned in the Appellant's submissions and it is different from the one which they were offering.

Dr Richard Camilleri continued that the first part of the Reasoned Letter of Reply filed by the Contracting Authority does not have any value since it dealt with Pal Dry Wipes which were not offered by the Appellant.

With regards the Reasoned Letter of Reply filed by Pro Health Ltd which stated that the Appellant's tender should have been disqualified anyway if extra documents were submitted with his offer, he contended that this is incorrect and that there were several Court of Appeal decisions which support this argument.

Here Dr Camilleri reminded the Board that his client's offer was € 22,000 cheaper than the Recommended Bidder's. In many cases there are suppliers who issue Literature which contains a certain range of products, not just of a particular product. The reasons which the Contracting Authority gave with regards to the Pal Dry Wipes cannot be valid in this context.

The product number in the Sales Quotation Form and in the Financial Bid Form, which are the key parts of the Appellant's offer, can be used for the Toxicological Risk Assessment which was offered with the product submitted by Medina Healthcare Ltd.

The Appellants have submitted everything requested by them in the Tender Document and if they had submitted any extra information, this was to be discarded. That a substantially cheaper tender was rejected because of this meant going against the Principle of Proportionality. Contrary to what Prohealth Ltd was stating, Medina Healthcare's offer was not being altered or deviated and neither there was any contradicting information.

Dr Camilleri insisted that if there was any extra information, this was just to be ignored. The evaluation had just to concentrate only on the product "*Medipal Disinfectant Wipes*".

The Chairman asked whether there was any reference to the Additional Literature in the Financial Bid and the Technical Data of the product submitted by Medina Health Care. Dr

Richard Camilleri on behalf of the Appellant replied that the offer was for one product only, namely the “*Medipal Disinfectant Dry Wipes*” together with the product number. In the Technical Literature submitted there was the complete information about the latter but there was also some extra information. In fact, had the Appellants submitted incomplete information, they would have been disqualified on those grounds.

The second part of the Objection raised by Medina Healthcare Ltd regarded the Toxicological Risk Assessment on the product offered, continued Dr Richard Camilleri. It was almost impossible that a product of this nature gave no irritation or was absolutely non-irritant as the reasoned letter of reply submitted by Prohealth Ltd contended. The Recommended Bidder submitted that it was mandatory in the Tender Document. He contended that even water could be an irritant. He mentioned people like hairdressers and hospital cleaners who can be subject to hand eczema

Dr Camilleri then submitted a report named “*Cosmetic Safety Assessor Opinion*”, which said that these products contain a substance called pHMB which is an irritant substance but when it becomes much diluted, the substance become insignificantly irritable. He denied claims made by Prohealth Ltd that appellant had wanted Central Procurement and Supplies Unit to disqualify the Recommended Bidder’s offer. He explained that the Tender had asked for a product that could be used without gloves, but the product must be shown to be non irritant to the skin. This Board had to ignore what was insignificant or negligible since this referred to a product W15037 that was not the product offered by appellant. The Appellant’s product was Technically Compliant.

Dr Camilleri said that in the Letter of Reply by Prohealth Ltd, the Letter of Objection was criticised because it referred to the Safety Data Sheet Report of Clinell, a product which Prohealth Ltd supplied and which was currently being used in hospital. This Safety Data Sheet Report says that gloves are to be used for prolonged use and if irritation develops, medical advice should be sought. The report said also that, “*a Toxicological Risk Assessment considers this product unlikely to cause significant irritation*”. By comparison, the Appellant’s product’s Toxicological Risk Assessment “*The product is supplied may cause only minimal skin irritation even if exposure is prolonged or repeated.*”

Dr Camilleri disagreed with the Recommended Bidder’s contention that these comparisons regarding the latter’s product had to be discarded as they break the confidentiality principle. Dr Camilleri not only disagreed with this but also asked the Board to order the Contracting Authority to mention the name and product number which Prohealth Ltd were submitting since a brand name was there for the general public. Once the Tender was awarded this product was going to be available in the market and anyone could make comparisons and see where it matches with the product offered by the Appellants.

If the products are examined and the results show that both products offered conform, then the Appellants would accept the decision. But from the technical information which is available, it is very unlikely that the product supplied by the Recommended Bidder is zero irritant.

Finally, Dr Richard Camilleri said that contrary to what Prohealth Ltd and the Department of Contracts contend, this Board is perfectly empowered by the Public Procurement Regulations to enter into every aspect of the tender including the Technical Evaluation. The Chairman remarked that this is a Review Board who is empowered to appoint a Technical Expert

should it be deemed that the Technical Evaluation made was not satisfactory enough. This Board has also the right to enter into all technicalities.

Dr Richard Camilleri for Medina Healthcare Ltd said that the Reasoned Reply sent by the Central Procurement and Supplies Unit shows that it was an honest reply and that they have seen all the Technical Literature submitted by the Bidders. He was questioning whether all Technical Information was really submitted, whether the Recommended Bidders submitted the latest Safety Data Sheet with their offer and whether the substances contained in Prohealth Ltd's product caused any irritations since it is difficult that the products currently available have zero irritation.

Dr Stefan Zrinzo Azzopardi for the Central Procurement and Supplies Unit said that there are many decisions which speak about the Public Contracts Review Board's role. Effectively the Tender process starts with the Tender Document wherein the rules are established. The analysis must be made was regarding whether this Board has the competence to see whether the Evaluation Board acted according to the Tender Document parameters.

This Board has the advantage of having all the documentation submitted by all Bidders available, and could see exactly how the Evaluation Board acted. The Board can finally assess whether the latter Board was reasonable in the awarding of the contract.

The Central Procurement and Supplies Unit had asked for wipes which must be able to be applied using unprotected hands without gloves. The effect of these wipes was *vis-a-vis* whoever was going to use them and whether these can be used with or without gloves. There were two reasons why this was requested. First and foremost, it was to ensure the safety of the product for their employees and secondly to see whether an extra expense for the procurement of gloves is eventually needed. The items could be tested before a decision was taken. All Bidders should know well what they were offering. If the eventual documentation clearly indicates that the needed target wasn't going to be reached then the Contracting Authority had to discard the offer in question.

Dr Richard Camilleri for Medina Healthcare said that although he understood Dr Zrinzo Azzopardi's argument he reiterated that there was no need of gloves to use his client's products.

At this point, Mr Noel Abela, ID 5051667 M, an Infection Control Nurse at Mater Dei Hospital was called to witness under oath.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked the witness whether from the Appellant's document there was a clear indication of what Medina Healthcare Ltd was offering to which Mr Abela replied that the latter offered two products which the Evaluation Board could have clearly identified.

The Chairman Public Contracts Review Board then asked the witness whether he could have referred for the Technical Specifications for which the witness also replied in the affirmative.

Answering questions he replied that the Appellant was stating that in their Technical Documentation there was indicated that the wipes can be used without gloves but that he explained that in every picture found in the Technical Documents submitted by appellant, it could be seen that gloves were used. There was nowhere written in Medina Healthcare's submission that this product can be used without gloves. Mr Abela continued by saying that

he had to work according to the Technical Document requirements and that he as an evaluator has checked whether the Technical Literature states specifically that the wipes can be used without gloves. The Technical Literature submitted by Medina Healthcare Ltd there was also clearly written that the product may cause minimal skin irritation. The Tender Specifications require wipes which are non-irritant.

Replying to the Chairman, the witness said that the product submitted by Prohealth Ltd was non irritant and that the Safety Data Sheet also shows that these products are skin friendly. The wipes are used for disinfection of environmental services but sometimes these are also used on the patients. The Tender Document requested that clear evidence should have been provided to show that the product was dermatologically tested. Replying to Dr Richard Camilleri he confirmed that the preferred bidder's product has been used by the contracting authority for the last five years.

Dr Stefan Zrinzo Azzopardi for Central Procurement and Supplies Unit commented that the Evaluation Board had to consider what was submitted and anything submitted after Tender stage was out of point.

Mr Noel Abela continued that it is true that the Recommended Bidder's Safety Data Sheet was available on the internet and stated that the product was not to be used for skin use. However it was dermatologically tested and approved safe for contact with the skin. Mr Abela continued that note 4.1 of Prohealth Ltd's Technical Offer said that the product is safe for skin contact and that as an evaluator he felt that the product was up to specifications.

Dr Richard Camilleri for Medina Healthcare Ltd then asked whether the witness was in possession of the Safety Data Sheet for his client's product. Mr Noel Abela replied that if it was available it was not present with him at the Public Hearing.

Dr Richard Camilleri continued by asking whether the product submitted by Prohealth Ltd contained PHMB. Mr Noel Abela confirmed that it did. When asked whether the Evaluation Board had compared the composition of both wipes to objectively see whether these can cause some skin irritation, the witness replied that there was no need to make this comparison since the Tender Document had not requested it.

Dr Richard Camilleri, on behalf of the appellant contended that a product that contains PHMB can never result in zero skin irritation. The Contracting Authority, he declared, had to re-check whether they have all the information required.

Dr Stefan Zrinzo Azzopardi, Legal Representative Central Procurement Supplies Unit said that effectively the Public Contracts Review Board had to check what was eventually submitted.

Dr Richard Camilleri for Medina Healthcare Ltd said that from the information that he has available and which was submitted with the Tender, there was a heading which was called skin protection which states that no special personal protective equipment, like gloves, was required if used directly.

Dr Nadine Lia for Prohealth Ltd said the Appellant had submitted their offers they should have abided by the Tender Document Specifications, but point 3 of the Specifications, which required dermatological information of the product was not mentioned. On the other hand, as the witness has confirmed in his submissions, Prohealth Ltd did submit the dermatological

information required. The Appellant could have sought clarifications before submitting the tender. Otherwise one had to abide with what was submitted. In their reply, Prohealth Ltd were so fair that they said any further documents submitted could not be part of the Tender. She contended that this Board could enter in the Technical merits of the Tender if this is needed. She insisted that there was no reason why Prohealth Ltd had to be disqualified. This hearing seems to have ended up as a trial by jury of her clients instead of a jury on the Appellant who should have instead tried to justify the reasons why its offer should not have been disqualified.

Dr Anthony Cassar, Chairman Public Contracts Review Board, said that this Board would have to evaluate on the submissions made and that the Evaluation Process was made with the right procedure.

Dr Richard Camilleri, on behalf of Medina Healthcare Ltd explained that the Objection was limited to one offer only since the other offer had submitted the wrong size of wipes and could not be justified. He pointed out that the products which his clients are offering are used in English hospitals. Dr Camilleri wondered how Prohealth Ltd's representatives knew what his clients submitted. He warned that if it results later that the product offered by the Recommended Bidders causes minimal skin irritation, there will be problems.

At this stage, the Public Hearing was closed.

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**This Board,**

**Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 2 September 2016 and their verbal submissions during the Public Hearings held on 29 September 2016 and 13 October 2016 wherein they objected to the decision taken by the Contracting Authority, in that:**

- a) Medina Healthcare Ltd contends that it had submitted the Technical Literature which contained other products but included the product which they were going to offer. In this regard, the Appellant's offer should not be discarded for submitting additional information since their offer is Technically Compliant;**

- b) Medina Healthcare Ltd maintains that there are no “swipes” which does not give irritation, so that the Recommended Bidder’s product cannot have 0 irritation level. The Tender requested that the product has to be used/applied without the necessity of gloves and in this regard, Medina Healthcare Ltd contends that their product can be used without gloves;**
- c) Medina Healthcare Ltd insist that on all Tenders, the name and product number of the Recommended Bidder should be made public once the Tender is awarded as the procurement is a Public Tender and the Public has a right to know what the Procurement is.**

**Having considered the Contracting Authority’s “Letter of Reply” dated 28 September 2016 and their verbal submissions during the Public Hearing held on 13 October 2016, in that:**

- a) Central Procurement and Supplies Unit contend that the Tender requested “Wipes” which can be used without the necessity of gloves. The issue is whether the Appellant’s offer satisfied this condition or not. From the Literature submitted, there was no indication as to whether the Appellant’s product can be used without gloves. The**

**Evaluation Board assessed the Appellant's Offer on their submissions.**

**Reached the following conclusions:**

- 1. This Board, justifiably notes that the contracting authority, in its 'Letter of Rejection' referred to a totally different product, namely that 'Under the conditions of this test, the Pal dry Wipes (W15037) caused and unacceptable level of irritation'. In this regard, this Board cannot ignore the fact that all the comments made by the evaluation committee in its report referred to the incorrect product and in this regard, this Board recommends that;**
  - I. The evaluation committee should evaluate the correct offer that is product of reference number S625110MPCE and in this respect appellants' offer should be reintegrated.**
  - II. The deposit paid by the appellant company should be reimbursed.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*18 October 2016*