

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 984 – CT 2123/2015 – Tender for the Supply of Complete Nutritional Preparation for Children Over One (1) Year of Age**

The publication date of the Call for Tenders was 16 February 2016 whilst the Closing Date for Call of Tenders was 5 April 2016. The Estimated Value of the Tender was € 227,920 (Exclusive of Vat).

Two (2) Bidders have submitted offers for this Tender.

On 12 September 2016, Cherubino Ltd filed an Objection against the decision of Central Procurement and Supplies Unit against a deposit of € 1, 700.

On 29 September 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Cherubino Ltd**

Dr Francis Cherubino	Representative
Dr Danica Caruana	Legal Representative
Dr Adrian Delia	Legal Representative

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

Dr Ian Ellul	Member, Evaluation Board
Mr Mark Zammit	Representative

#### **Department of Contracts**

Dr Christopher Mizzi	Legal Representative
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The Public Contracts' Review Board Chairman, Dr Anthony Cassar, started the Public Hearing by remarking that the Reasoned Letter of Reply has arrived late. In fact the Letter was filed at the Board's offices on 28 September 2016, one days prior to the Public Hearing and was forwarded to the Appellants only when they entered the Hall for the Public Hearing.

Dr Adrian Delia, on behalf of Cherubino Ltd, requested some time for him and his client to study the Letter of Reply. The Public Contracts Review Board acceded to their request.

Following the end of the study period by Cherubino Ltd, Dr Anthony Cassar, Chairman Public Contracts Review Board asked the Contracting Authority to clarify the 2<sup>nd</sup> Paragraph of the Letter of Rejection dated 2 September 2016 which said, "*The product offered by Cherubino Ltd (Fortini Multi-fibre), is a nutritionally complete preparation for children aged 1-6 years or weighing 8-20kgs. In view of the fact that this product is not specifically indicated as nutritionally complete, (sole source of nutrition), in the entire sub population of children, (ie as defined by the European Medicines Agency having an age less than 12 years), the offer is not recommendable.*"

Dr Adrian Delia, for Cherubino Ltd, here intervened and said that they filed the Objection for that particular reason. He continued by stating the definition of complete and sole in this context. By complete it was meant that the product was 100% and had all the fibres and nutritions which a person needed during the day. By sole it meant that during the day you may take only this product. It was important to note, that here we are talking of children who have certain health conditions and cannot eat solid foods.

The product supplied by the Appellants, according to Dr Delia, was both sole and complete for children between 1 and 6 years of age but for children between 7 and 12 years of age it was neither recommended nor logical to use the product as sole and complete since the more that the volume of a person grows, the more supplies it needs.

Dr Delia continued by saying that the suppliers recommend that the product submitted by the Appellant is to be considered as a sole supply for children between the ages of 1 and 6 years of age. The Contracting Authority was saying that sole and complete are the same thing. So far, medicine was not yet advanced enough to make fluids as soles.

Dr Christopher Mizzi, on behalf of the Department of Contracts, said that the reason why Cherubino Ltd was disqualified was that the product offer did not conform with the Technical Specifications requested. The Contracting Authority was bound by the Tender Specifications and if the Appellants thought that the Tender Document did not reach the market expectations, they should have filed a Pre-Contractual Concern.

The Appellants, continued Dr Mizzi, cannot supply further information at this stage since the Evaluation Board cannot evaluate further.

Dr Adrian Delia, for Cherubino Ltd, continued by saying that one of the documents submitted with the offer said that the product offered, Fortini 1.0 Multifibre, can be used to supplement the diet of children who have nutritional problems or else consumed as sole for children between the ages 1-6.

At this point, Dr Ian Ellul, ID 296980 M, a member of the Evaluation Board was called to testify under oath.

Dr Adrian Delia, for Cherubino Ltd asked the witness what his client's offer had wrong. Dr Ellul replied that they wanted a complete balanced nutritional ready to drink liquid for children from the age of 1 year onwards. It was a recognised fact by the European Medical Agency that by the word children indicated ages from 2 till 12. One here than had to see what was the meaning of complete.

The 1<sup>st</sup> article of the EU Directive 199/21 explains clearly what does nutritional complete, sole and incomplete meant. Complete is a sole resource. When the Appellant's offer was evaluated, it was clear that the product can be used as a supplement to supplement children's diet and used as a sole source for children between 1 and 6 years of age.

The Appellant's offer says that one must also see the precautions, "*due to the fibre contents*" since this product has fibre included in it. "*In case of more than 4 bottles per day,*" continued the precaution statement, "*one must use caution*". This was the reason why this product is to be used as a supplement. The declaration presented by the manufacturer in the Objection, continued Dr Ellul, agrees completely with the decision of the Contracting Authority.

Dr Adrian Delia, for Cherubino Ltd, asked the witness whether there was anybody in the local market which satisfied the requested criteria for which the witness replied that the Evaluation Board after seeing that both offers did not satisfy the requested criteria, has decided to cancel the offer.

When pressed by Dr Delia to answer this question, the witness replied that his only task was to evaluate what was referred to him in the file. Dr Delia then asked whether Fortini 1.0 multifibre may be used for children between the age between 7 and 12 as a sole source for which the reply was that the product can be only used as a sole source for the age between 1 and 6. The Evaluation Board, continued Dr Ian Ellul, abided by the EU Directive 199/21.

A second witness, Mr Mark Zammit, ID 45874 M, in charge of the Technical Evaluation Section of the Central Procurement Supplies Unit was called to testify under oath.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked whether the items requested in the Tender Document exist for which the witness replied that the Tender showed that the product requested does not exist but that he cannot give any guarantees regarding the matter since it is the Central Procurement and Supplies Unit which makes the specifications.

Dr Adrian Delia, for Cherubino Ltd, said that the Tender Document defined that the Contracting Authority requested a complete balanced nutritional ready to drink liquid for oral feeding of children from 1 year onwards.

Mr Zammit agreed with the Technical Specifications used in the Tender.

Dr Christopher Mizzi for the Department of Contracts then asked the witness what is the difference between complete and sole for which Mr Mark Zammit replied that the EU Directive was clear. The product which Cherubino Ltd submitted states clearly that it is nutritionally complete for the ages between 1 and 6 and incomplete from 7 years upwards.

The issue, continued Dr Adrian Delia for Cherubino, is for the ages between 7 and 12 where the Contracting Authority is saying that complete and sole are the same. We are not saying

so and our manufacturer, Nutritia, one of the main manufacturers for this type of product in the world, is specifically saying that these two definitions are not the same. The EU Directive 199/21 is saying that nutritionally incomplete means that the product is not suitable to be used as sole source of nourishment.

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 12 September 2016 and also through their verbal submissions during the Public Hearing held on 29 September 2016 had objected to the decision taken by the Pertinent Authority, in that:**

- a) **Cherubino Ltd contends that the product which they offered did conform to the specifications as laid out in the Tender Document. They are also maintaining that the product did cater for the nutritionally needs of children from 1 to 12 years in the sense that it was both "*sole*" and "*complete*" for both children between 1 and 6 years and for children between 7 and 12 years.**
  
- b) **Cherubino Ltd insist that there is a difference between "*sole*" and "*incomplete*" and this issue should be addressed to define the meaning of both words.**

**Having considered the Contracting Authority’s “Letter of Reply” dated 28 September 2016 and also their verbal submissions during the Public Hearing held on 29 September 2016, in that:**

- a) Central Procurement and Supplies Unit contend that the Technical Specifications dictated that the product should be composed of a complete balanced nutritional ready to drink liquid for children aged between 1 and 12 years and in this regard the Appellant did not offer such a product;**
  
- b) Central Procurement and Supplies Unit also maintain that from the documentation submitted by the Appellant, it was evidently clear that the product did not satisfy the needs of children aged between 7 and 12, as the Appellant’s offer was considered as a supplement for this age group.**

**Reached the following conclusions:**

- 1. With regards to Cherubino Ltd’s First Grievance, this Board, after having examined the relative documentation and heard submissions by both parties concerned, opines that, it became clearly established that the Appellant’s product catered “*completely and sole*” for**

children between 1 and 6 years of age and “*completely*” but not “*sole*” for children between 7 and 12 years of age.

Children between 1 and 6 years could take this liquid solely, i.e. without any other food supplement while those between 7 and 12 years have to take it with a supplement.

The manufacturer’s statement, namely, “*due to fibre contents,*” and “*in case of more than 4 bottles per day*”, caution should be taken, means that it is advisable that for children between 7 and 12 years, when children needs more nutritional liquids, the product can be used as a supplement in order for the product offered by Cherubino Ltd is not “*sole*” source for children between 7 and 12 years.

The Tender Document dictated specifically that the product must be a “*sole*” source of nutrition for children between 1 and 12 years, whilst the offers received by Central Procurement and Supplies Unit, did not cater for such conditions. In this regard, this Board does not uphold Cherubino Ltd’s First Grievance.

2. With regards to the Appellant’s Second Grievance, this Board would like to again, emphasise the difference between “*complete*” and

**“sole”. By any definition, the word “complete” means fully composed, in that if the Tender Document dictated what the nutritional liquid must contain, the product to be offered must include all these ingredients. In other words, the product must be composed of all the nutrition as dictated in the Technical Specifications.**

**The word “sole” is clearly defined as “on its own”. In the Tender Document, it is dictated that this nutritional liquid can be taken on its own without the need of having a supplement of food with it.**

**From the manufacturer’s statement, Cherubino Ltd’s product satisfied only the requirements of children aged between 1 and 6 but for the age group between 7 and 12, the same product “can be taken as a supplement” but not “solely” i.e. on its own only. In this regard, this Board recognises the fact that there is a huge difference between “complete” and “sole”.**

**At the same instance, this Board is pre-occupied about the fact that Central Procurement and Supplies Unit did not confirm that such a product exists on the market. It also appears that a more defined Technical Specification of the product is to be endorsed in the**

**Technical Document to avoid any ambiguities and misinterpretation of the Technical terms being referred to.**

**In view of the above, this Board upholds Central Procurement and Supplies Unit's decision to cancel the Tender and issue a fresh one clearly indicating what is actually required and its uses. Since the Tender is being cancelled, this Board recommends that the deposit paid by the Appellant is to be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*4 October 2016*