

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 987 – eCT 2033/2015 – Tender for the Supply of Foldable/Injectable Lenses**

The Publication Date of the Call for Tenders was 28 August 2015 whilst the Closing Date for Call of Tenders was 8 October 2015. The Estimated Value of the Tender was € 806,250. (Exclusive of Vat).

Five (5) Bidders have submitted Seven (7) offers for this Tender.

On 12 September 2016, Cherubino Ltd filed an Objection against the decision of Central Procurement and Supplies Unit to cancel the Tender against a deposit of € 6,047.

On 4 October 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Cherubino Ltd**

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

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

Ms Ruth Saliba	Chairperson, Evaluation Board
Ms Renee Mifsud	Member, Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

#### **Department of Contracts**

Dr Christopher Mizzi	Legal Representative
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Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Adrian Delia for Cherubino Ltd started by saying that they were not clear whether they were being discarded for Financial or Technical reasons but they assumed that Cherubino Ltd was excluded because of the latter as this was the indication in the Letter of Rejection. When you eventually see in detail what the Reasoned Letter of Reply stated, it then effectively showed that Cherubino Ltd was eliminated for Technical Reasons.

Whilst at Appeals' stage, the Contracting Authority has issued another tender where they have given a new range of lenses to be submitted and ironically, continued Dr Delia, this Tender was given to Cherubino Ltd.

Dr Delia continued by saying that Central Procurement and Supplies Unit were wrong in taking such a decision while another Tender was *sub judice* because if this Board declares that this Tender should not have been cancelled, the reversal would eventually be useless.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked under which parameters this new Tender falls for which Dr Delia replied that the range was not from 1 to 10 but from 2 till 8. If in the first Tender, the Appellant had the range requested by the Contracting Authority, it is completely sure that they have also the range requested in the second bid since the range requested now was less than the one requested before.

Dr Delia argued that therefore, in both Tenders, Cherubino Ltd were compliant both Technically and Financially and by right the cancellation had to be reversed and that the Tender had to be given to his clients. He disagreed with the Reasoned Reply's statement that the Public Contracts Review Board could not change the Evaluation Board's judgement.

The argument was about the range of the lenses, specifically the half sizes. When the range was shortened, Cherubino Ltd still submitted the Tender. Therefore, concluded Dr Delia, the cancellation had to be overturned by the Public Contracts Review Board and the Tender was to be awarded to Cherubino Ltd.

Dr Stefan Zrinzo Azzopardi, Legal Representative for the Public Contracts Review Board, said that it was evident that the only difference between the two Tenders issued was a particular sentence which specified more clearly what was needed. These lenses were used during the cataract operations.

This Tender was cancelled, continued Dr Stefan Zrinzo Azzopardi, because Central Procurement and Supplies Unit required more details in the Technical Specifications so that the latter would receive whatever they required.

At this point, Dr Mario Vella, 409066 M, Chairman in the Ophthalmology Department at Mater Dei Hospital was called to testify under oath.

Dr Vella explained that the specifications were changed because they did not want to go to a system where they have certain types of lenses available for patients to a range which could have been smaller. These lenses were used during operations and determine how much a patient can see better after the latter.

The eyes are measured and through a formula what type of lenses needed is determined. Thanks to the half sizes lenses, continued Dr Vella, better results are given to the patients.

Dr Stefan Zrinzo Azzopardi for Central Procurement and Supplies Unit, asked the witness what was the difference between the two tenders issued for which the witness replied that more patients will be able to get better results.

Dr Adrian Delia for Cherubino Ltd then showed the witness page 16 from the original Tender and page 16 from the new Tender and asked whether these are the Specifications which were being discussed. Dr Vella confirmed.

Dr Adrian Delia then stated that by right the new Tender should not exist since we are still waiting on the judgement regarding the old Tender. He continued by querying whether the witness agreed that the diapoter ranges between -5 and + 40 were in both Tenders for which the Dr Vella agreed.

Dr Delia asked then whether the Foldable Injectable Lenses Hydrophobic Implants with length 13mm and a diameter between 5.5 and 6 was common in both tender for which the witness agreed once again.

Dr Delia queried also whether the issue of half sizes was also in the original Tender. Dr Vella agreed.

Dr Adrian Delia, Legal Representative, Cherubino Ltd, continued by saying that the New Tender had these words, *“The range of half diaopters, must include the largest possible range, and must include from +6 to +30.”* With regards to this statement, Dr Delia asked the witness whether the latter range falls in the original range between -5 and +40. Dr Vella agreed.

Dr Delia continued by saying that the new description was already comprised in the original description and that materially there were no changes in the Tender. He asked the witness whether the new highlight was comprised within.

Dr Mario Vella replied that Dr Delia’s statement was correct but that half sizes do not exist from -5 to +40. They had asked for a clarification to see what range they were to keep since it wasn’t clear what Cherubino Ltd submitted in the original submission.

Dr Adrian Delia then gave the answer which Cherubino gave in the clarification which was, *“Hereby confirm that we can between -0.5 to +40 with incremented 0.5 for tender in Malta.”* He then asked the witness whether he agreed that this range was more than the one requested in the new Tender for which Dr Vella agreed.

Dr Anthony Cassar, Chairman Public Contracts Review Board, remarked that therefore both Tenders agree.

Dr Christopher Mizzi, Legal Representative Public Contracts Review Board asked what difference does the New Tender made from the Original Tender. Dr Mario Vella replied that they did not want to lessen the range. This latter statement was confirmed when Dr Adrian Delia for Cherubino Ltd asked whether the New Tender wanted to shorten the range.

Dr Christopher Mizzi then asked why there was the need to issue the second Tender. The witness replied that there was this need because they wanted to be sure that a particular range was covered.

Dr Adrian Delia then declared that there was no doubt that the cancellation of this Tender is to be declared null and that his clients were to be reinstated. He also asked the Public Contracts Review Board that apart from reinstating Cherubino Ltd, to pronounce themselves on the fact that when there is a Tender under appeal, the Contracting Authority cannot continue to issue Tenders as if nothing happened as we can get into a situation which can be very deteriorating to everyone concerned.

Dr Christopher Mizzi, Legal Representative for Department of Contracts, said that the second Tender was not issued by the Department of Contracts but was issued by the Central Procurement and Supplies Unit whilst Dr Stefan Zrinzo Azzopardi, Legal Representative for the latter, concluded by saying that the evaluation must be made on the cancellation of the Tender.

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 4 October 2016 had objected to the decision taken by the Pertinent Authority, in that:**

- a) Cherubino Ltd contend that since no specific reasons were given by Central Procurement and Supplies Unit for cancelling the Tender, it is being assumed that the same cancellation referred to Technical matters and in this regard, the Appellant maintains that his bid offered Contact Lenses within the range as stipulated in the Tender Document.**

**Having considered the Contracting Authority’s “*Letter of Reply*” dated 3 October 2016 and their verbal submissions during the Public Hearing held on 4 October 2016, in that:**

- a) **Central Procurement and Supplies Unit maintain that the reason for the Cancellation of the Tender was simply due to the fact, that more explanatory Technical Specifications were necessary in order to ensure that the patient is served more efficiently and in this regard, the Authority confirms that the range of “*Disposable Lenses*” should be amplified more, by introducing a “*half-sizes*” range.**

**Reached the following conclusions:**

1. **This Board, after having examined the relative documentation and heard submissions, opines that the issue at stake is whether Cherubino Ltd’s offer falls within the stipulated range of disposable lenses.**

**The diopetre range which was dictated in the Tender Document was “-5.0D to +40.0D, including half sizes”. The Appellant’s offer did in fact offer what was dictated in the Tender Document.**

**During the submissions, this Board noted that the medical expert, (under oath), confirmed that Cherubino Ltd's offer was compliant with what had been dictated.**

**However, this Board cannot but refer to the fact that the latter was made aware that a fresh Tender for the same product was issued. From the testimony given by the Medical Expert, it resulted that this fresh Tender dictated a range of "+6 to +30" and it was confirmed and established that the Appellant's range of "-5.0D to +40D" does in fact, concur with the specifications of "+6 to +30".**

**Apart from the fact that this Board, regretfully notes that a fresh issue of Tender for the same product was made while an Appeal was still pending, this Board justifiably established that the Appellant's offer was technically compliant both in this Tender and in the Second Tender.**

**In this regard, this Board does not find any credible reason or proof as to why the Tender under Appeal was cancelled. In this regard, this Board regards the cancellation of the Tender as unfounded.**

**From the submissions made during the Public Hearing, it was indicated that there might have been some misunderstanding as to the “*half sizes*”, range being offered by the Appellant. However, from the Medical Expert’s Testimony, (under oath), it was clearly established that the Appellant’s Bid, did, in fact, offer the correct range as stipulated both in the Tender under Appeal and also, although not relevant, in the freshly issued Tender for the same product.**

**In view of the above, this Board finds in favour of Cherubino Ltd and recommends that:**

- i) Cherubino Ltd’s offer is to be re-integrated in the Evaluation Process;**
  
- ii) The deposit paid by Cherubino Ltd is to be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Richard A Matrenza  
Member

*11 October 2016*