

# PUBLIC CONTRACTS REVIEW BOARD

## Case 1025 – CT 2026/2015 – Tender for the Supply of Bone Conduction Hearing Devices

The Publication Date of the Call for Tenders was 23 October 2015 whilst the Closing Date for Call of Tenders was 3 December 2015. The Estimated Value of the Tender, (Exclusive of VAT) was € 145,500.00.

Three (3) Bidders have submitted offers for this Tender.

On 27 January 2017, Technoline Ltd filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Med-El Elektromedizinische Geraete GmbH Unita' Locale for the price of € 260,000 (Exclusive of VAT) against a deposit of € 1,200.

On 23 February 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

### Appellant – Technoline Ltd

Ms Felisia Camilleri	Representative
Ms Damaris Lofaro	Representative
Mr Ivan Vassallo	Representative
Dr Thomas Bugeja	Legal Representative

### Recommended Bidder – Med-El Elektromedizinische Geraete GmbH Unita' Locale

Mr Gionata Conni	Representative
Mr John Jaccarini	Representative

### Contracting Authority – Central Procurement and Supplies Unit

Mr Marika Cutajar	Chairperson, Evaluation Board
Ms Marthese Bonello	Secretary, Evaluation Board
Dr Anthony Fenech	Member, Evaluation Board
Ms Pauline Miggiani	Member, Evaluation Board
Mr Mario Said	Member, Evaluation Board
Ms Michelle Camilleri	Representative

### Department of Contracts

Ms Alicia Vella Lethridge	Procurement Manager
Dr Christopher Mizzi	Legal Representative

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

Dr Thomas Bugeja, the Legal Representative for Technoline Ltd opened by submitting that the Tender was being awarded with the Most Economically Advantageous Tender, also known as MEAT criteria. His client's offer was the cheapest one at a price of € 4,220/item which was € 2,000 cheaper than the other bidders.

Dr Bugeja continued by saying that in the Letter of Rejection dated 17 January 2017, the Central Procurement and Supplies Unit *inter alia* stated that,

*“the Tender submitted by your company was found to be technically not compliant as follows:-*

*Item offered has no wireless connectivity option as requested in Section 4 – Technical Specifications of the Tender Document”*

Technoline Ltd's Appeal was based on the fact that this consideration made by the Contracting Authority that their product did not have wireless connectivity was not true because the product which they had offered has the functionality of a wireless connectivity. The product submitted already offers this function and this can be eventually confirmed by one of the Appellants' representatives.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board queried whether the Central Procurement and Supplies Unit could have noticed that the wireless connectivity unit could be eventually found in the product submitted by the Appellants.

Dr Thomas Bugeja, the Legal Representative for Technoline Ltd replied that from the documentation itself, there wasn't a specific document regarding the connectivity since this was a function which in these types of products was always present.

Dr Bugeja then proceeded by referring to the notes for Clause 7.1 of the Tender Document which stated,

*“Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five working days of notification”*

It was common practice, according to the Appellants, that when there was an ambiguity in a submission by any particular Bidder, the Contracting Authority was obliged to seek any clarifications. Had the latter done so, the Appellants would have immediately replied since the submitted product had the wireless connectivity.

Dr Thomas Bugeja then proceeded to refer to point 2 of the Reasoned Letter of Reply dated 6 February 2017 issued by the Department of Contracts and the Central Procurement and Supplies Unit wherein it was stated that,

*“The Technical Specifications display a list of requirements amongst which is a Connection with Microlink FM Receiver and Wireless Connectivity both being two distinct features. The CA can attest that the Appellant's product does have the Microlink FM Receiver; however it lacks the Wireless connectivity aspect as being a different feature than the former.”*

Dr Bugeja argued that from the information which he currently had, the Microlink FM Receiver was the equipment which gives the connectivity and when the latter happens, the patient has the connection with the Bluetooth or wireless connection. Therefore, the FM receiver was the way from which the equipment gives the wireless connectivity.

If the Contracting Authority was not sure on whether the product submitted by the Appellants gave a wireless connectivity the latter had every right and obligation to seek clarification insisted the Appellants. On this basis, the Appellants had the cheapest offer and therefore should have been awarded the Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Appellants whether they have submitted a product wherein the Contracting Authority could have noticed that it included wireless connectivity.

Ms Felisia Camilleri, representing Technoline Ltd replied in the affirmative while adding that if there was an ambiguity, a clarification from the Central Procurement and Supplies Unit should have been sought and a reply would have been sought. In the Technical Literature submitted there was nothing indicating that the product had a wireless connectivity but there were other things which were requested in the Tender Document which was not offered as Technical Literature since they offer a product and these were features which were included in it.

Dr Thomas Bugeja, the Appellant's Legal Representative added that in the Reasoned Letter of Reply there was an admission by the Contracting Authority that the Microlink FM Receiver exists. If there is a Microlink FM Receiver, therefore there is also the Wireless Connectivity, which is why Technoline Ltd did not specifically point the latter issue out since it was already implied.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts submitted that he absolutely disagrees with Dr Bugeja's submissions since the Technical Specifications have two particular specifications on this point. Firstly, there was the issue of wireless connectivity and secondly the connection with Microlink FM receiver was a separate issue.

The Contracting Authority admits that the connection with Microlink FM receiver was submitted but the problem was with the wireless connectivity. One does not link with the other and the FM Microlink receiver was a separate thing from the other things submitted.

Dr Mizzi continued by saying that the Appellants argued that if one has the Microlink FM receiver; the other things come subsequently which was not true since these were two different specifications. Besides, the Technical Offer was found in Note 3 and not in Note 2 as alleged by the Appellants. It was true that Note 2 concerns the Technical Literature but these parameters apply only if one recognises the missing Literature if something results in the offer.

If the offer, which is Note 3 and therefore not rectifiable, the Wireless Connectivity does not result to be present, therefore there was no missing Literature which had to be rectified as Note 2. The wireless connectivity had to come out in Note 3 under the heading "*Technical Offer*" and it was then that the Central Procurement and Supplies Unit was obliged, under the parameters of Note 2, to ask for a rectification of that particular Literature.

Dr Christopher Mizzi continued by saying that he was not convinced that the offer submitted by Technoline Ltd included wireless connectivity. At this point, Ms Pauline Miggiani, a Speech Language Therapist at Mater Dei Hospital holding ID Card 391386 M and member of the Evaluation Board for this Tender was summoned to testify under oath by the Department of Contracts and the Central Procurement and Supplies Unit.

Following Ms Miggiani's Testimony, Dr Thomas Bugeja, the Legal Representative for the Central Procurement and Supplies Unit submitted that in her testimony, the witness was aware that the product connects with the FM receiver but there was no information whether it connects with other things.

Technoline Ltd felt that this was an assumption because the product connects with the wireless connectivity of other products and therefore should there were any doubts, the Contracting Authority should have sought a clarification, Technoline Ltd would have replied and hence stay as the cheapest compliant offer. The FM Microlink which was mentioned in here states that it has the wireless connectivity.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Technical Literature which the Appellants sent to the Contracting Authority indicated this for which Dr Thomas Bugeja and Ms Felisia Camilleri, representing Technoline Ltd replied that the Literature was not submitted on this particular point.

Ms Camilleri added that this was done in the same way that Literature for other items, such as the instrumentature. In order for this product to function, first of all there had to be a surgery where something had to be inserted in the patients' head and eventually the product would be used from the outside thanks to an electromagnet.

When the Appellants have submitted their offer for this Tender, they did not submit the Technical Literature for every object and accessory which the product has such as the instrumentature used for this product and the Roger X which gives the wireless connectivity since these are accessories. They have given general Literature on the product and not on the accessories.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, then asked whether the Appellants' product in order to be exactly according to the Technical Specifications had to have these accessories.

Ms Felisia Camilleri, representing Technoline Ltd replied that the accessories were offered free of charge as part of the products and which eventually has the wireless connectivity. The product concerned was the Roger X and could be used not only with the product submitted but also with other accessories. This was a receiver.

Dr Thomas Bugeja, the Legal Representative for the Appellants submitted that there were more Technical Specifications of the product for which no documentation was submitted and these were not raised as points of disqualification since the Central Procurement and Supplies Unit already were using the products and therefore they already knew what these included and what not. What eventually happened was that since the Central Procurement and Supplies Unit did not have any information about the wireless connectivity, they assumed that the product supplied by his clients did not have any, hence the offer being disqualified.

Ms Felisia Camilleri for Technoline Ltd added that what might have happened was that the product which they actually have, the Sophono itself does not have this feature since whoever supplied them with this product does not have this device.

Mr Ivan Vassallo also on behalf of Technoline Ltd explained that the Contracting Authority was accepting that there was an FM receiver; therefore there were no problems in that regard. The problem was with regards to connectivity. Mr Vassallo added that the FM receiver was also wireless and therefore the wireless connectivity was already present.

The Central Procurement and Supplies Unit did not specify this factor, continued Mr Vassallo and should have added that they needed the wireless connectivity used for the FM receiver. These two specs were supplementary and complementary to each other at the same time.

Dr Thomas Bugeja, the Appellant's Legal Representative, added that the FM receiver was wireless in itself. If the Contracting Authority had any doubts, they should have sought a clarification.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts countered that the Appellants mentioned a particular apparatus which managed to send in wireless connectivity, which was the FM receiver and not the wireless connectivity. He still hasn't seen how the product submitted by Technoline Ltd can obtain what the Contracting Authority stated as wireless connectivity, did not feature in their submission and that the Public Contracts Review Board knew that the Evaluation occurs on what was submitted by the Bidders.

Dr Mizzi continued by saying that the witness has submitted her testimony based on her experience on this product but notwithstanding the issue, the Evaluation was done on the submissions and the Public Contracts Review Board can see the Technical Offer of Technoline Ltd and see that the evaluations were made on what the latter submitted.

Therefore, if the wireless connectivity was not submitted, the Central Procurement and Supplies Unit was not even obliged to ask for a rectification since the product does not feature in the Technical Offer.

The FM receiver and the Wireless connectivity were two separate items, continued Dr Mizzi. If there was a problem from the Economic operator on how to interpret the wireless connectivity, they could have filed a Pre-Contractual Concern before the Public Contracts Review Board where at that point in time it would clarify what was eventually needed.

It was not the scope for similar clarifications to be done at Evaluation Stage since at that stage, the only thing the Contracting Authority had to do was to evaluate on what was submitted. If there were any problems, this should have been done prior to the Closing Date of Tenders.

Dr Thomas Bugeja, the Legal Representative for Technoline Ltd submitted that there was no need for clarifications since the points were clear. The question was whether FM receiver gave wireless connectivity and the answer was yes.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Contracting Authority whether the fact that there was an FM receiver does mean that there was a wireless connectivity facility for which Ms Pauline Miggiani, representing the Central Procurement and Supplies Unit replied that it was not a facility and that the wireless is needed in order to be connected with the FM system.

Ms Miggiani also added that if the Appellants said that the wireless connectivity was implied in their product and that the catalogs of the hearing aids say that the latter was present that does not mean it will connect with the FM system but it only means that the product can connect with the mobile, television or any other device. That was the reason why the FM system was a separate one.

Dr Thomas Bugeja, the Legal Representative for Technoline Ltd countered that once there were other specifications which were not directly submitted as literature but were assumed that they exist, one had to either assume or else request a clarification. If the Contracting Authority requested a clarification on the wireless since by the words FM receiver, the

Appellants understood that this included wireless, which in fact does exist, if the clarification was made, they would have replied positively.

Mr Carmel Esposito, a member of the Public Contracts Review Board queried whether Technoline Ltd's product connects with devices such as telephones for which Mr Mario Said, a member of the Evaluation Board replied that it would have needed the FM System.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that there is a limitation about the connectivity. Dr Cassar then asked whether the Tender Document requested a universal device for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that there were two specs, the FM receiver and the wireless connectivity. Dr Thomas Bugeja, the Legal Representative for Technoline Ltd countered that this was not clear.

Mr Carmel Esposito, a member of the Public Contracts Review Board queried from which part of the Tender Document this comes out for which Ms Felisia Camilleri, representing Technoline Ltd replied that their product has wireless connectivity. Dr Thomas Bugeja, the Legal Representative for the Appellants added that it is implied and that if one has the FM receiver, one has also the connectivity.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, replied without prejudice that he sympathised with the Appellants on that aspect and that the Contracting Authority was bound with what was submitted and the part of the Technical Offer was Note 3. Ms Pauline Miggiani, a member of the Evaluation Board, said that they did not ask for a clarification because there were other reasons since the product was not up to spec.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Contracting Authority to elaborate on the latter point for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts added that there might have been other reasons but it was only the wireless which was the main issue and that they were going to rest solely on this.

Dr Thomas Bugeja, the Legal Representative for Technoline Ltd objected to this and said it was only the wireless spec which was mentioned and that if the Contracting Authority wanted to open the whole file and see how many things were found to be incorrect, this had to be done for all Bidders.

Dr Christopher Mizzi, the Legal Representative for the Central Procurement and Supplies Unit replied that they were going to rest on what came out on the Letter of Rejection. If the wireless connectivity reason came out, therefore they were going to rest on this.

Dr Thomas Bugeja, the Legal Representative for Technoline Ltd replied that if there were other reasons why his clients were disqualified, therefore the whole process was incorrect.

Ms Damaris Lofaro, representing Technoline Ltd submitted that there was a misunderstanding during the evaluation process wherein there were assumptions which were correct and other assumptions which were not. Unfortunately, the decision was taken on an assumption which was not a correct one. The Contracting Authority thought that this feature did not exist when in reality it did.

At this stage, the Public Hearing was adjourned to Tuesday 7 March 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

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**This Board,**

**Having noted this Objection filed by Technoline Ltd (herein after referred to as the Appellant) on 27 January 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2026/2015 listed as Case No 1025 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Thomas Bugeja**

**Appearing for the Contracting Authority: Dr Christopher Mizzi**

**Whereby, the Appellant contends that:**

- a) **The reason given by the Contracting Authority for rejecting their offer namely that,**

***“Item offered has no wireless connectivity option as requested in Section 4 – Technical Specifications of the Tender Document”***

**was not correct. The wireless connectivity is a function which in these types of products was always present.**

- b) If in doubt, the Contracting Authority should have sought clarification to verify as to whether the Appellant's product satisfy the "*connectivity*" issue or not.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 6 February 2017 and its verbal submissions during the Public Hearing held on 23 February 2017, in that:**

- a) From the documentation submitted by the Appellant, there was no indication that the latter satisfied the "*wireless connectivity*" as stipulated in Section 4 of the Technical Specifications. In this regard, the Central Procurement and Supplies Unit assessed the Appellant's offer on all the documentation submitted which was deficient of the wireless connectivity.**
- b) It could only ask for missing literature on items already submitted by the Appellant in his Technical offer. If the item which in this case was, "*wireless connectivity*", is not present, the Central Procurement and Supplies Unit cannot ask for a clarification in this regard as otherwise, it would be a rectification which was not possible.**

**This same Board also noted the Testimonies of the witness namely, Ms Pauline Miggiani duly summoned by the Central Procurement and Supplies Unit. The Transcript of the latter is herewith attached.**

**This Board, after having treated the merits of this case, arrived at the following conclusions:**

- 1. With regards to the Appellant's First Grievance, this Board, after having examined the relevant documentation and heard submissions by all the parties concerned, including the testimony of the Technical Witness, opines that, the issue at stake, in this Appeal, was whether Technoline Ltd submitted the Technical Information regarding, "*Wireless Connectivity*", in accordance with Section 4 – Technical Specifications and whether the same information was compatible enough to enable the Evaluation Board to form a just and fair assessment to whether the Appellant's product satisfied the Technical Specifications as dictated in the Tender Document.**

**In this particular case, it has been credibly proved that the Appellant failed to submit the specific technical information as requested in Section 4 – Technical Specifications. From the credible testimony of the witness and submissions made by the Contracting Authority, it has been justifiably established that the Evaluation Board had to**

**ensure that each item listed in Section 4 of the Tender was technically compliant.**

**In doing so, and from credible evidence given during the Public Hearing, Technoline Ltd failed to comply with the requirement wherein their product did not contain the “*Wireless Connectivity*” option.**

**On the other hand, the Appellant is maintaining that since his product included an FM Receiver and the Central Procurement and Supplies Unit was well aware of this inclusion, the “*Wireless Connectivity Option*” was also included in the offer.**

**In this latter regard, this Board justifiable opines that by raising this contention, Technoline Ltd is maintaining that the Evaluation Board should have assumed this fact at Evaluation Stage and that in this Board’s opinion, assumptions should never be considered in Public Procurement.**

**This Board credibly noted the Technical Witness’s testimony which stated that the option of the “*Wireless Connectivity*” option meant that the device can be connected to other devices via wireless. At the same instance, it was credibly proved that a device which has the FM**

**system does not necessarily imply that the same can be connected to any other facility via wireless.**

**In this context, this Board justifiably establishes that Technoline Ltd failed to submit the precise information to enable the Evaluation Board to be assured that they had the “*Wireless Connectivity*” option. This Board also noted the latter’s importance, its issue and its relevance in the dictated Technical Requirements so that the submission of the precise details with regards to “*Wireless Connectivity*” was of great importance for the Evaluation Board to determine whether the Appellant’s offer was Technically Compliant.**

**In this instance, it was established that the information submitted by the Appellant indicating that the device had an FM receiver was not sufficient to denote clearly that their offer contained the “*Wireless Connectivity*” option and in this respect, the Evaluation Board had no other option but to consider negatively the Appellant’s device.**

**This Board would like to emphasize the fact that the Evaluation Board can only assess an offer on the information submitted on the same. It cannot assume what is not clearly stated in the submitted Technical Information of an offer.**

**In this regard, this Board would like to also point out that the principle of “*Self Limitation*” must also be strictly adhered to and respected so that what is not contained in a Tender Document cannot be assumed or extended.**

**This Board is justifiably convinced that by including the FM receiver in a particular device, the latter cannot be implied that it has the “*Wireless Connectivity*” option, automatically but the latter feature has to be amply apparent. In this regard, this Board does not uphold the Appellant’s First Grievance.**

- 2. With regards to Technoline Ltd’s Second Contention, this Board would like to respectfully point out that clarifications during Evaluation Stage are only permissible on issues or documentation already submitted and are not allowed on missing documents or information.**

**The missing information from the Appellants consisted of a particular item which formed part of the various components of the Technical nature and in this regard, Note 3 from Clause 7.1 of the Tender Document was applicable. The note says,**

***“No rectification is possible”***

**It has been proved that the detail relating to the “*Wireless Connectivity*” option was missing from the Appellant’s Technical offer, so that neither a clarification nor a rectification was possible. In this regard, this Board does not uphold Technoline Ltd’s second grievance.**

- 3. This Board would like to also point out that Technoline Ltd had all the remedies available to clarify or contest the “*Wireless Connectivity*” issue and in this regard, the Appellant should have sought clarifications prior to submission of his offer and/or raise a Pre-Contractual Concern. In actual fact, the Appellant did not avail himself of such remedies.**

**In view of the above, this Board finds against Technoline Ltd and recommends that the deposit paid by the latter should not be refunded.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*7 March 2017*