

PUBLIC CONTRACTS REVIEW BOARD

Case 1026 – 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, OK 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 – OK Ltd

Mr Paul McAlister	Representative
Ms Maria Valletta	Representative
Dr Michael Tanti Dougall	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

Ms 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

Other Interested Parties

Ms Felicia Camilleri	Representative from Technoline Ltd
Ms Damaris Lofaro	Representative from Technoline Ltd

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

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd, opened by saying that this is an appeal with regards to a hearing aid which was rather technical to explain. Firstly, he stated that he did not agree with the contents of the Reasoned Letter of Reply issued by the Central Procurement and Supplies Unit and the Department of Contracts dated 20 February 2017.

The latter stated that the Appellants had no right to compare and contrast the product which they had submitted against the product which Med-El Elektromedizinische Geraete GmbH Unita' Locale submitted and this irritated a lot Dr Tanti Dougall who continued to explain that if one had to simply on advertisement in Malta, comparisons and shortcomings of the competitions were always raised.

The bases of the arguments filed in the Reasoned Letter of Reply do not hold water according to the Appellants, who wanted to know what the Contracting Authority had in mind. The Reply was irrelevant for the purpose of this Appeal which was a very detailed one in order to show the Public Contracts Review Board that the arguments raised by OK Ltd were in favour of what they based on the Appeal.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, requested whether this can be considered as a preliminary plea.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this was not a preliminary plea and requested the Appellants to continue their opening submissions.

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd proceeded by explaining that there were two arguments, the first argument was that the device had to be applied to all ages. One cannot simply state that the device applies for people over 5 years of age because if children of even one day are identified by professional persons at Mater Dei Hospital that they need a hearing aid, the device proposed can be implanted.

In the past, there used to be implantations where the wire used to appear and this had nothing to do with the purpose of this Appeal. This implantation was without wireless and was something which was state of the art. On the contrary, the device submitted by the Appellants can be implantated from birth.

Dr Michael Tanti Dougall explained then that the second argument was a technical one, whether the product submitted by Med-El Elektromedizinische Geraete GmbH Unita' Locale actually carried the technicalities which have been requested by the Tender Document. According to his clients and this was also submitted with pictures in their Letter of Objection dated 25 January 2017, this doesn't exist whilst the product submitted by OK Ltd was the product that can provide this interchangability of the processor.

With regards to the Reasoned Letter of Reply issued by the Central Procurement and Supplies Unit and Department of Contracts, Mr Paul McAlister, representing the Appellants, said that although the information should become public once submitted, the Contracting Authority liked to withhold such information.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, objected to this statement by saying that it was not public information but it was confidential information.

Mr Paul McAlister on behalf of OK Ltd then proceeded by submitting a document to the Public Contracts Review Board which covers another product in the range.

Dr Christopher Mizzi, the Legal Representative for the Public Contracts Review Board, queried whether this was a product for theirs for which Mr Paul McAlister for the Appellants replied that this was a product which might be in the product list of the Recommended Bidders.

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd, explained that the document was being presented to show that the product presented by his clients was far superior to any other product. Since the details were not provided, that was a compare and contrast analysis which was already started in the Appeal.

Mr Paul McAlister, representing the Appellants added that it was comparing another product which Med-El Elektromedizinische Geraete GmbH Unita' Locale may feel that it could be a bone conduction solution.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, intervened by saying that this was in no way a compare and contrast exercise. The Evaluation was not done in a compare and contrast solution.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, commented that there was a procedure and that in their submissions; OK Ltd gave enough information, much more than expected which illustrated what their technical capabilities are and that information should be enough for this Board to evaluate their Appeal.

Mr Paul McAlister, on behalf of OK Ltd, said that the Tender Document requested a bone conduction hearing aid. This was a device which passes the outer and middle ear and it directs stimulation to the inner ear of the person. This stimulates the cochlear nerve reserve and eventually allows the person to hear.

The only product in the product range submitted by the Recommended Bidders was the bone bridge as submitted in the Letter of Objection dated 25 January 2017 and this bypassed both parts. The first point was that the product requested must have a choice of processors and wearing configurations.

With regards the choice of processors, the product offered by Med-El Elektromedizinische Geraete GmbH Unita' Locale had only one processor which was the sound processor where on the other hand, the Tender Document clearly stated there must be a choice in processors. On the other hand, continued Mr McAlister, OK Ltd submitted a product which had three choices of processors for this type of hearing implant.

With regards to the wearing configurations, the Appellants said that Med-El Elektromedizinische Geraete GmbH Unita' Locale's product could be eared only by placing it with a magnet with a processor connected to it on the head. On the inside, one should have a second magnet which had to attract the system.

Mr Paul McAlister continued to explain that there was no other way to attach the Recommended Bidder's product. In the case of the cochlear's product, one can attach it to what was called as the soft band, a headband which was connected to it and one can also connect this to an abutment implant so that in having a magnet under the skin, one will have a pin sticking under the skin depending on the surgical implications.

The Appellants continued by saying that in the case of the wearing options with the soft band, a child from day one can use the product on his or her head by using the latter without any surgical needs and still getting the same outcomes. On the other hand, the product submitted by Med-El Elektromedizinische Geraete GmbH Unita' Locale, can only be implanted at the age of five years. Any clinician can confirm that the best age for children, especially those born with profound hearing to actually gain proper hearing was between the ages of 0 and 3.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, commented that therefore there was a reason why OK Ltd were saying that the Recommended Bidder's product can only be used from five years upwards.

Mr Paul Mc Alister, representing the Appellants, said that their product can be used with children from day 1 if needed by attaching to this soft band and allowing them to get access to sound, hence stimulating the brain and the outcomes with these children will be far superior to with those using the Recommended Bidder's product.

In order to counter any further arguments, there was no point in the Tender Specifications of the speech processor which stated that the outside processor must be connected to the implant. The latter will give the exact same reliability and performance on the outside through the soft band as if it was connected to the implant.

The product submitted by OK Ltd can be used with patients who are under the age of 5 years, continued Mr McAlister. On the other hand, if the patient is over the age of 60 years and has heart conditions where he cannot undergo general anaesthetic, the product submitted by Med-El Elektromedizinische Geraete GmbH Unita' Locale cannot be used because it had to be implanted under general anaesthetic while their product can either be worn through a soft band on the outside, and therefore it can still be used while on the other hand, this procedure can be also done under local anaesthetic, hence hitting the whole patient pool. On the other hand, the situation with the product submitted by the Recommended Bidders can find patients who might not want to go invasive operations and are under the age of five.

With regards the power output, Mr McAlister explained that there the Tender Document requested a power range of 40 to 45dB, 50 to 55dB and 55 to 65dB. Clinically, it is understood that when an output of 55 to 65dB was requested, it was requested throughout the hearing frequencies, which were the low sounds such as the hums and the high frequencies such as bells and whistles.

The Tender Specifications requested something between 55 and 65dB. Both products considered do not arrive to 65dB. The product which OK Ltd have listed in their Letter of Objection dated 25 January 2017 only arrives until 45dB whereas the other product starts in 45dB and not in all frequencies, hence having the risk of not hearing even very low sounds. The latter product gradually grows until 65dB. This information could be found on the manufacturer's Literature in their website.

OK Ltd continued explaining that if there was a patient in hospital who was expecting a decent health care service from our professionals which they do try to offer, one could not discriminate against a patient because he was either under five years of age or else had a heart condition or cannot undergo surgery and therefore could not be implanted, hence could not listen and hence could not be part of society. The product submitted by Med-El Elektromedizinische Geraete GmbH Unita' Locale was technically not compliant and was also going to undermine some patients.

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd said that contrary to what has been requested specifically and whoever wrote the Tender knew exactly what was required, the product selected does not fall under those specifications. His clients have mentioned the two points which in a nutshell were:

- a) The psycho-social aspect; wherein children can suffer a lot from not having an adequate hearing device if they have a similar problem;
- b) The technical aspect; wherein the Tender specifically requested that all requirements should be respected, which was not the case with the product submitted by Med-El Elektromedizinische Geraete GmbH Unita' Locale;

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, replied that he disagreed with the submissions made by OK Ltd who were contesting the fundamental features of the Reasoned Letter of Reply dated 20 February 2017. He continued by saying that he had never met an appeal, previously which was filed before the Public Contracts Review Board, that contested the eligibility of the Recommended Bidder.

Normally the Appellant brings up pleas regarding his own submissions and in this case, the submissions made by OK Ltd in front of the Public Contracts Review Board should be dismissed by the latter, given the fact that according to Dr Mizzi, the Appellants have made submissions which were similar to an advertising campaign.

Dr Mizzi was not convinced that the Appellants have brought any arguments which show that the Evaluation Board had not done its job properly. If OK Ltd was claiming the latter, then they should have done so and not compare and contrast the products of different competitors.

In this case, Dr Mizzi wanted to stress that the Evaluation Report was not carried out as a comparison exercise. The Evaluation Report is drawn out in a way that the Bidder is compared only to the Technical Specifications. The submissions are kept separately and these are segregated as one can see through the Electronic Public Procurement System and the Public Contracts Review Board was submitted with all the information for him to evaluate.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, asked whether the offer submitted by Med-El Elektromedizinische Geraete GmbH Unita' Locale catered for children under five years of age for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that the Tender Document requires hearing aids for children and adults. The ages were not specified but he was informed from the medical sphere that the ages between 1 and 5 were considered as infants and thus one had to be careful as OK Ltd were implying that these hearing aids should cater for new borns and children below 5, which was not the case.

Dr Mizzi felt that such technical features have been already asserted by the Evaluation Board and the result was that there was a Recommended Bidder; Med-El Elektromedizinische Geraete GmbH Unita' Locale.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether in doing so, had the Evaluation Board took into consideration that this can be used for all children for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that this can be asked directly to one of the members of the Evaluation Board.

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd countered that Dr Mizzi said that he was not convinced but that at the end of the day, the Appellants had to convince the Public Contracts Review Board. In the Reasoned Letter of Reply dated 20 February 2017, they should have addressed OK Ltd's issue regarding children. The Health System in Malta does not say adults or 5 years upwards but addresses all patients.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that it addresses Children and Adults. In the Reasoned Letter of Reply issued by the Department of Contracts and the Central Procurement and Supplies Unit, Dr Mizzi had only mentioned this part that the Appeal was not admissible as it was and that he firmly believed that the Public Contracts Review Board should give a ruling on the issue. The other bits of the technical aspect were left out from the Reasoned Reply in order to give importance to that plea submitted by the Appellant.

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd replied that this was a Tender Process which was being challenged. The product which was recommended for award does not fall into the specifications of what has been requested in the Tender. In the Appeal, these lacks of specifics were identified. If the product does not fall within the specifications and the product had to be compared and contrasted with the product OK Ltd were actually offering which was completely technically compliant, Dr Tanti Dougall was legally obliged to explain to the Public Contracts Review Board through a compare and contrast process that the product submitted by his clients falls within the Tender Specifications and therefore it is superior to what has been cited. Dr Tanti Dougall felt that the Maltese patient deserved the best.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that it would be difficult for the Evaluation Board to carry a compare and contrast exercise, even if it is not done in a Procurement cycle. In this case, the Evaluation Board did not even assess technically the Appellants' submission because there is a particular concession, which was also written in the Evaluation Report where Tenders issued by the Central Procurement and Supplies Unit are evaluated technically only if they are the cheapest.

In this case, the Public Contracts Review Board should find that no technical assessment for OK Ltd and therefore the answers of the Evaluation Board have to be seen in that perspective.

Dr Anthony Cassar, the Public Contracts Review Board Chairman, commented that so far it was established that there was no Technical Evaluation. Dr Christopher Mizzi, the Legal Representative for the Department of Contracts added that OK Ltd's offer was not the cheapest but the third cheapest, hence why the Evaluation Board did not delve into the Technicalities.

The Director General (Contracts) granted a concession to Tenders issued by the Central Procurement and Supplies wherein contracts are not delved into all technical submissions but delve only in the cheapest technical offer. In this case, there were two offers which were technically assessed since the first offer was not technically compliant and so the Evaluation Board went for the second cheapest. OK Ltd's bid was the third cheapest and hence was not evaluated technically.

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd, argued that what he had just heard from Dr Mizzi was unbelievable since whoever drafted the Tender, who should know exactly what was required, went into detail on the contents of the required hearing aid. If the Technical Specifications requested three choices of processors, therefore all offers should

have been evaluated and the product submitted by Med-El Elektromedizinische Geraete GmbH Unita' Locale had to be rejected since it did not satisfy the Technical Specifications.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that the latter has been informed that there was a concession from the Director of Contracts that they were only delved into the Technical Specifications for the cheapest offer.

Dr Michael Tanti Dougall, the Appellants' Legal Representative disagreed with this statement and rebutted that there was no objection if the norm was that but the Tender was way off and should have stated that it was going to be awarded to the cheapest hearing aid and not to the best hearing aid.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked what the Award Criteria was for which Dr Christopher Mizzi from the Department of Contracts replied that it was the cheapest technically compliant offer.

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd countered that this was completely wrong and that this was a miscarriage of justice.

Mr Paul McAlister, representing OK Ltd, added that there was another offer which was cheaper than the one of Med-El Elektromedizinische Geraete GmbH Unita' Locale. This offer was shown not to be technically compliant and Mr McAlister had not delved into his company's technical features because he was sure that the feature meets all Technical Criteria requested by the Tender.

However, if the first cheapest was taken out, Med-El Elektromedizinische Geraete GmbH Unita' Locale was the next cheapest technical compliant. On the other hand, in this Public Hearing, OK Ltd gave enough technical proof that the current Recommended Bidder was not technically compliant according to the Technical Specifications.

This was what the Appellants were contesting because what was being requested and what there was in Med-El Elektromedizinische Geraete GmbH Unita' Locale's offer were far off from each other. Mr McAlister wondered how can a Government entity turn round and rule against its own laws where children from new borns till 18 years do not have a choice of processors and do not have various wearing configurations.

OK Ltd continued arguing that there were two other main points which so far no arguments were given in that regard. Mr McAlister was trying to show that the Evaluation Board might have overseen these points because in that case, the Tender should have been awarded to them as the next Bidders who were the cheapest and full technically compliant.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, remarked that the Evaluation Board wasn't in a position to assess the Technical Specifications.

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd wondered what did the Evaluation Board members were engaged to do then if not to follow the Technicalities of the Tender and whether that hearing aid is for the benefit of the Maltese people throughout all their lives. If the Evaluation Board wanted the cheapest Bid without delving into all these technicalities they should have gone for the cheapest offer.

There was a contradiction. If the first two bids, which were cheaper and technically not compliant, why was one of them chosen asked Dr Tanti Dougall who wondered then why this Public Hearing was submitted. He continued by arguing that the role of the Public Contracts

Review Board was to review the mistakes done by the Evaluation Board and thus he was expecting this Board to do so.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, said that the role of the Public Contracts Review Board was to find out whether the correct procedures were followed or not in awarding Tenders.

Dr Michael Tanti Dougall, the Appellants' Legal Representative, said that although he was representing his clients' interests for the benefit of the best product possible.

At this point, Ms Marika Cutajar, a Principal from the Central Procurement and Supplies Unit, who was also the Chairperson of the Evaluation Board for this Tender holding the ID Card No 469772 M was summoned by the Chairman of the Public Contracts Review Board to testify before the latter under oath.

Following Ms Cutajar's testimony, Dr Michael Tanti Dougall, the Legal Representative from OK Ltd said that he was going to ask the Chairperson of the Evaluation Board what did she meant by the words "*fully compliant*" in view of what has been submitted. He was sure that the witness had a copy of the very detailed Letter of Objection which he had submitted on behalf of his clients which clearly illustrated why the product submitted by Med-El Elektromedizinische Geraete GmbH Unita' Locale was not compliant because of its functions which are too basic to be adopted in the best interest of the public.

The crucial point was that the arguments submitted in their Appeal, one by one were not event contradicted, continued Dr Tanti Dougall. When he read the Reasoned Letter of Reply issued by the Central Procurement and Supplies Unit and the Department of Contracts dated 20 February 2017, Dr Tanti Dougall felt that it was not on.

OK Ltd had to show that its product was compliant. According to Dr Tanti Dougall, the reply does not hold on and that his clients had to show that its product was compliant. He was wondering what further submissions from the Reasoned Letter of Reply were produced during this Public Hearing to contradict what has been proven regarding the Technicalities submitted from the Appellants who were fully compliant with the Tender Specifications.

Dr Michael Tanti Dougall does not believe that any hearing aid should discriminate between infants, minors and adults. If the Tender wanted to discriminate, it could have done so and state clearly what did the Central Procurement and Supplies Unit really want. The Appellants were submitting that all their arguments should be upheld by the Public Contracts Review Board.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, pointed out that although OK Ltd's offer was not technically assessed no one can exclude that it was not technically compliant after all, as agreed by the Contracting Authority.

Dr Christopher Mizzi, the Legal Representative for the Director of Contracts, added that there was a reason why it was said that the Appellants' Technical Submission was compliant was to continue the Electronic Public Procurement System software since otherwise the latter would stall.

Mr Gionata Conni from Med-El Elektromedizinische Geraete GmbH Unita' Locale submitted that he wanted to speak technically about three points. With regards the sound processor, Mr Conni their sound processor comes in two different versions; the Samba High and the Samba Low.

The Recommended Bidders said that an abutment is an implant which was not skin friendly. Another request from the Tender was that the device does not have to harm the skin. An abutment is a sole implant that makes a hole in the skin so there is a whole skin and this cannot be defined as skin friendly. According to the Technical Literature, the abutment is not a skin friendly solution. Med-El Elektromedizinische Geraete GmbH Unita' Locale also pointed out that soft bands cannot be defined in hearing implants.

Dr Michael Tanti Dougall, the Legal Representative for OK Ltd argued that what the Recommended Bidders have submitted does not add much value to what was previously submitted but it confirms his clients' stance that the technicalities have not been respected.

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.

This Board,

Having noted this Objection filed by OK 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 Michael Tanti Dougall

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellant contends that:

a) Med-El Elektromedizinische Geraete GmbH Unita' Locale's offer was not technically compliant since the devices which they were offering did not cater for patients under the age of 5 years.

Since the Tender Document requested that the device is for children and adults, the latter's offer should have been discarded on technical grounds as it did not comply with this basic requirement while on the other hand, OK Ltd's device catered for all ages;

b) The Recommended Bidder's offer failed to address the Technical Requirements relating to choice of sound processors, wearing options and power range. Since these features were mandatory and they were not adhered to Med-El Elektromedizinische Geraete GmbH Unita' Locale's offer was technically non compliant;

c) The Central Procurement and Supplies Unit should have compared both OK's and Med-El Elektromedizinische Geraete GmbH Unita' Locale's offer in order for them to discover the supremacy of the Appellant's Bid over the awarded device in all Technical Aspects and application thereof.

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) The Central Procurement and Supplies Unit contends that OK Ltd was contesting the technical submissions made by Med-El Elektromedizinische Geraete GmbH Unita’ Locale whilst, at the same time, they were not aware of the technical details of the awarded device.**

In this regard, the Contracting Authority insist that the Evaluation Board compared the technical data of the Recommended Bidder’s offer to the requested Technical Specifications in the Tender Document and did not compare an offer against an offer.

- b) The Contracting Authority also maintains that the Tender Document requested that the device is to be utilised on children and adults. In this regard, the Central Procurement and Supplies Unit, on advice from the medical field, established that the ages are as follows:**

- i) From birth up to five years are to be considered as infants;**
- ii) From five till eighteen years are to be considered as children**

iii) From eighteen years upwards are to be considered as adults.

The Central Procurement and Supplies Unit confirm that the Recommended Bidder's offer did cater for children as it can be used on ages from five upwards;

c) The Contracting Authority maintains that the Evaluation process was to be carried out in a proper and just manner in that, the awarded device was the second cheapest and fully compliant and this procedure was in accordance with the Public Procurement Regulations in all aspects.

This same Board also noted the Testimonies of the witness namely, Ms Marika Cutajar duly summoned by the Chairman of the Public Contracts Review Board.

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

1. With regards to OK Ltd's First Grievance, this Board, after having examined the relevant documentation and heard submissions made

by all parties concerned, would like to first and foremost refer to Note 1, Section 4 of the Technical Specifications wherein it was clearly denoted that the device is to be applicable for children and adults.

In this regard, this Board justifiably notes that the interpretation of the word “*Children*” has been taken to mean children of all ages, whilst, in actual fact the medical classification of children is regarded as to a different scale of ages as follows:

1a. From birth till five years are classified as infants;

1b. From five till eighteen years are classified as children;

1c. Over 18 years are classified as adults.

This statistical information has been extracted from the “*Convention on the Rights of the Child*” published by the United Nations General Assembly dated 12 December 1989 and also from medical papers, one of which is specifically dealing with Paediatric Age Categories to be used in differentiating between listing on a Model Essential Medicines List for Children.

In this regard, this Board opines that there are clear medical yardsticks regarding the classification of ages and the age when a person can be considered as a child.

The Tender Document requested this device for children and adults. This Board justifiably notes that Med-El Elektromedizinische Geraete GmbH Unita' Locale's offer did cater for children aged five years upwards so that from this Technical Aspect, his Bid was compliant and this Board is credibly satisfied that the product offered by the latter is suitable for its utilisation, the latter of which is specifically requested by the Tender Document.

- 2. With regards to the Appellant's Second Contention, this Board would like to respectfully point out that the latter is stressing the issue of comparing his offer with that of the Recommended Bidder. In this regard, this Board also noted that OK Ltd contend that prior to the award, the Evaluation Board should have carried out this comparison.**

This Board would like to justifiably state that the evaluation of Tenders are not carried out by comparing one offer to another but each offer is evaluated in its own rights by assessing its compliance with special reference to the conditions as dictated in the Tender

Document. This Board could not find any evidence that this procedure was not applied by the Evaluation Board besides the fact that the Appellant's technical assessment was not even carried out.

At the same instance, the Central Procurement and Supplies Unit gave credible justification on why the Appellant's offer was not technically evaluated. This Board would also like to point out that it is not its jurisdiction to assume doubt on the decision taken by the Evaluation Board but rather to verify that the correct and proper procedures were adopted in awarding the Tender.

In this regard, this Board, after hearing credible submissions, is justifiably convinced that in their deliberation, the Evaluation Board have adjudicated the offers in a fair and just manner. This Board also took into consideration the fact that during the drafting of the Tender Document, medical advice was sought in order to acquire the best possible device for the benefit of the patient.

In this respect, this Board opines that the offer of Med-El Elektromedizinische Geraete GmbH Unita' Locale was adjudicated in a just and proper manner and that the Technical Specifications of the same fell within the parameters of the conditions as dictated in

the Tender Document. In this regard, this Board does not uphold the Appellant's Second Contention.

- 3. This Board would like to also point out that although OK Ltd raised the “*Psycho-Social*” aspect issue, it is convinced that the Central Procurement and Supplies Unit in choosing Med-El Elektromedizinische Geraete GmbH Unita' Locale's offer, is not, in any way, limiting the application of this device to a particular age group capriciously.**

This Board is also convinced that, since the Contracting Authority took medical advice, the latter field has other more suitable devices and care to cater for the age group up to five years of age. In this regard, this Board does not uphold OK Ltd's Third Contention.

In view of the above, this Board finds against OK 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