

PUBLIC CONTRACTS REVIEW BOARD

Case 1032 – CFT 019-10104/16 – Tender for the Supply of Foldable/Injectable Lenses

The Publication Date of the Call for Tenders was 19 February 2016 whilst the Closing Date for Call of Tenders was 4 April 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 107,500.

Six (6) Bidders have submitted offers for this Tender.

On 24 February 2017, Cherubino Ltd filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to AMAS Ltd for the price of € 107,500 (Exclusive of VAT) against a deposit of € 540.

On 28 March 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 – Cherubino Ltd

Mr David Cherubino	Representative
Dr Danica Caruana	Legal Representative
Dr Adrian Delia	Legal Representative

Recommended Bidder – AMAS Ltd

Mr Andrew Borg	Representative
Ms Janica Cachia	Representative
Dr Robert Tufigno	Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

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

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

Dr Adrian Delia, the Legal Representative for Cherubino Ltd opened by reminding everyone concerned that on 4 October 2016, the Public Contracts Review Board in a different composition has convened a Public Hearing on a Tender which was precisely on the same thing. The discussion was regarding lenses on a spectrum with a range.

In that Hearing, the Public Contracts Review Board heard all submissions, understood that there was a clarification from the supplies which was an honest and genuine clarification and took the relevant decision. In the meantime while the Public Contracts Review Board was taking a decision on that Tender, another one was issued for low amounts, as Dr Delia himself had anticipated and today the discussion was regarding this second Tender issued.

Dr Adrian Delia referred to Page 6 of the Decision of Case 987 issued by the Public Contracts Review Board in a different composition which *inter alia* stated that,

“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 justifiable established that the Appellant’s offer was technically compliant both in this Tender and in the Second Tender”

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board queried whether the Second Tender was the same as the Tender which was being discussed. Dr Adrian Delia, the Legal Representative for Cherubino Ltd replied that the latter was quoting the decision which was taken then in front of all the witnesses that both Tenders issued were the same.

Dr Delia continued by saying that his clients wanted to ensure that the Central Procurement and Supplies Unit buy whatever they really need. He also wanted to remind the room that the difference in the price was not a negligible one. Cherubino Ltd submitted a price of € 69,875 whilst AMAS Ltd quoted € 107,500, a difference of 35% which has to be avoided since it was already known that the product submitted by Cherubino Ltd was deemed to be compliant.

Dr Adrian Delia continued by suggesting that if in the first Tender, the Public Contract Review Board ordered that his clients were to be re-integrated in the Evaluation Process and the latter were wondering why the Second Tender was issued, the first Tender still was not awarded six months after the decision taken by the Public Contracts Review Board. Technically, this Tender had to be cancelled while the first Tender should have been awarded.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit submitted that the point of departure should be the Technical Specifications of the Tender in question. Whatever was decided in the previous Tender was irrelevant to this Tender since he did not have the documentation required for the Public Contracts Review Board to decide whether Cherubino Ltd were compliant or not.

The previous Tender regarded a cancellation and whether there was the legal basis for the cancellation to take place or not. In the first Tender the Appellants, according to Dr Zrinzo Azzopardi, were trying to draw a sanction for the fact that a second Tender was published at Objection stage but he was wondering how the Public Contracts Review Board could decide whether a Bidder was technically compliant or not without having any documentation in front of him.

The Contracting Authority's Legal Representative continued by saying that the Tender required Foldable Injectable Lenses hydrophobic implants with length of 13mm and a diameter of between 5.5mm and 6mm. The Diopter range had to be between -5.0D and +40.0D including half sizes.

Dr Stefan Zrinzo Azzopardi then referred to a letter from Cherubino Ltd's Technical Offer which *inter alia* states that

"Here by confirm that we can supply Eyecryl Plus ASHFY600 between -0.5D to 40.0D with incremental 0.5 for Tender in Malta"

If *de minimis* for the Appellant was between -5.0D to -0.5D, the Central Procurement and Supplies Unit felt that the latter did not know what they were talking about. What was offered in the Tender Document was not compliant and today the Public Contracts Review Board has the documents available for its members to examine.

Dr Zrinzo Azzopardi admitted that his clients have made a mistake when sending the first Letter of Rejection sent by Cherubino Ltd, which was then eventually corrected wherein it *inter alia* stated that,

"this offer is for dioptre range from plus 5.0D to plus 30.0D" later modified to

"-0.5D to plus 40D"

This mistake does not change the fact that the Technical Specifications say -5D to plus 40 when the Appellants offered -0.5D. This was way too obvious in the eyes of the Contracting Authority continued Dr Stefan Zrinzo Azzopardi.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Tender which was being discussed in this Public Hearing was totally different separate from the one which was previously decided. The Central Procurement and Supplies Unit agreed with this statement.

On the other hand, Dr Adrian Delia, the Legal Representative for Cherubino Ltd said that separate as in Contract number yes but completely different for the object which the Contracting Authority wanted to buy no since it was the same subject except in the amounts requested.

The Appellants were not suggesting that they were interpreting that they were going to give -0.5D. It was true that there was a mistake in the description but there was also a clarification. Cherubino Ltd's range was from -5.0D.

Mr Carmel Esposito, a member of the Public Contracts Review Board, quoted Case 987, the decision taken by the latter as differently composed on 11 October 2016 which *inter alia* stated that,

"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"

Dr Adrian Delia for Cherubino Ltd noted that in that statement the Appellants have pointed out the mistake for -0.5D. In fact the clarification was sought and it resulted that the item being offered had a dioptre range of -5 to +40. He was mentioning the previous Tender since

the Public Contracts Review Board should be aware that his clients' product was coming from the same supplier and not from a different one.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that it was now established that this was a different Tender.

Dr Adrian Delia for the Appellants said that previously, the Public Contracts Review Board did not have all the documentation available.

Dr Stefan Zrinzo Azzopardi for the Contracting Authority countered that if one had to go by the book, the sentence which Dr Adrian Delia was mentioning was not to be considered to be admissible with regards to this Public Hearing which was discussing the Technical Compliance and not the cancellation of the Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board warned that if the discussion was about a different Tender, the discussion had to be about it.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd argued that he never said that he was talking about a different Tender but the fact that this was another Tender does not mean that the merit of the two Tenders was not the same.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Technical Specifications were the same for which Dr Adrian Delia for the Appellants agreed whilst Dr Stefan Zrinzo Azzopardi for the Contracting Authority did not.

The latter continued by arguing that the question in the previous case was regarding the half sizes which was covered when this Tender was issued from the beginning. The Appellants, therefore, could not insist that everything has remained the same.

Dr Adrian Delia, on behalf of Cherubino Ltd, insisted that this is a different Tender with a different file number for a different number of products. With regards the Tender Specifications, Dr Delia referred to Clause 1.1 of the Technical Specifications in both Tender Documents which showed that they were exactly the same and which *inter alia* state that the Product Specifications were,

“Foldable/ Injectable Lenses hydrophobic implants with length of 13mm and a diameter of between 5.5mm and 6.0mm. Diopter range of -5.0D to +40.0D including half sizes. The range of half dioptres must include the largest possible range and must include from plus 6.0D to plus 30.0D”

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit submitted that the Data Sheet which the Appellant presented showed that the fact that there was a separate Tender could not stop the Contracting Authority, if there was the need to procure another Tender if there was an item which was pending.

The process saw a Tender being issued for different quantities and the question here was whether what was submitted fall under the parameters, which was not the case, hence Cherubino Ltd was deemed not to be Technically Compliant, hence it being discarded.

Dr Robert Tufigno, the Legal Representative for AMAS Ltd, submitted that firstly if there was another offer which was cancelled from another Tender, this was completely irrelevant to the Tender which was currently being discussed. If one had to see the specifications which were required and what Cherubino Ltd was submitting, one would recognise immediately

that the latter's offer was not compliant since the Technical Specifications stated that the range should be from -5.0D to +40.0D including half sizes.

Dr Robert Tufigno then wanted to see what the specifications which the Appellants had submitted were. They did submit from -5.0D but they wrote -0.5D which eventually was a typing error. If one sees their data sheet, one would see that the specifications were from +5.0D to +30D while the Tender Document required from -5.0D. From AMAS Ltd's point of view, it would have been an insult to intelligence to deem the two Tenders as the same ones.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd remarked that it was not possible for him not to refer to the other Tender. Dr Zrinzo Azzopardi was correct in saying that there was a different Tender and that it had different issues but that the discussion was for the same product.

In the previous Tender, Cherubino Ltd were eliminated because they were not Technically Compliant, the Public Contracts Review Board as differently composed decided that their offer was to be re-integrated in the Evaluation Process.

The latter did not continue after all and that was the reason why Dr Delia was mentioning the previous Tender. Instead, the Central Procurement and Supplies Unit awarded a second Tender with lower quantities. Dr Tufigno was right in noting that there was a mistake in the original submission, continued Dr Delia but factually the Evaluation Board knew that they were able to provide the requested item because the Appellant's supplier confirmed so.

Dr Adrian Delia continued arguing that his client's Technical Compliance comes out from three things:

- i) The Declaration of the Suppliers themselves;
- ii) The Decision on Case 987 issued on 11 October 2016 by the Public Contracts Review Board as differently composed;
- iii) From the clarification which was made by the Technical Person in the previous case's Evaluation Board.

Mr Carmel Esposito, a member of the Public Contracts Review Board asked whether the Evaluation Board remained the same one for this adjudication for which Ms Ruth Saliba on behalf of the Central Procurement and Supplies Unit answered in the negative.

Mr Esposito then asked whether a clarification was sought for which Dr Adrian Delia, the Legal Representative for Cherubino Ltd replied in the negative since the Central Procurement and Supplies Unit did not sought one and the Appellants assumed that they were already aware of this. The description did not change and that the Clause remained the same one.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Tender Document required the range to be from -5.0D to +40.0D and whether the Appellant submitted lenses from -0.5D to +40 for which Dr Adrian Delia, the Legal Representative for Cherubino Ltd agreed.

The Appellants continued by saying that the Public Contracts Review Board had to be convinced that Cherubino Ltd's product had -0.5D.

Dr Robert Tufigno, representing AMAS Ltd, the Recommended Bidders, said that there was another point which was that the data which was submitted is totally different.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd, said that AMAS Ltd did not have the declaration from the supplier. He also insisted that it was madness to encourage the Contracting Authority to buy something which they didn't need.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit submitted that he did not think that what Dr Delia was suggesting was procedurally correct to compare two Tenders. The latter disagreed and said that the Public Contracts Review Board had the power to make its own verifications should needed.

Dr Zrinzo Azzopardi continued by saying that the legal basis concerning Technical Specifications says that what was submitted in the offer which counts. Here an offer is being considered which the Evaluation Board has deemed that was not Technically Compliant. One had to evaluate only on what was presented at the time of the offer and compare them with the Tender in question. This was the process which the Public Contracts Review Board had to do.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd, agreed with what Dr Stefan Zrinzo Azzopardi has said but added that any clarifications have to be also considered and that he was proving that clarifications were sought and that the Central Procurement and Supplies Unit had the necessary information available.

Dr Robert Tufigno, representing AMAS Ltd, said that the Tender Document required that the product had to be already used as a centre of excellence in EU Countries. He requested the Public Contracts Review Board to consider this fact when making their deliberations

Dr Adrian Delia, on behalf of Cherubino Ltd concluded that this document was already present and submitted with the offer.

At this stage, the Public Hearing was adjourned to Tuesday 11 April 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 Cherubino Ltd (herein after referred to as the Appellant) on 24 February 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CFT 019-10104/16 listed as Case No 1032 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 Adrian Delia

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Whereby, the Appellant contends that:

- a) **His offer was technically compliant and since another decision relating to the same product was confirmed by this same Board as differently composed, the Contracting Authority should consider Cherubino Ltd's offer as technically compliant.**

In this regard, the Appellant maintains that his present offer is exactly the same as that of the previous Tender. As such, his offer should not be discarded on grounds as alleged by the Contracting Authority. However, due to the fact that the latter did not abide by the previous decision taken by this same Board as differently composed on 11 October 2016, this present previous Tender, which represent exactly the same requirement of the previous Tender should be cancelled

- b) In view of the above, the Appellant insists that the previous decision taken by this same Board as differently composed on 11 October 2016, is to be abided upon.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 21 March 2017 and its verbal submissions during the Public Hearing held on 28 March 2017, in that:

- a) The Central Procurement and Supplies Unit contends that the Technical Submissions made by the Appellant did not conform with those dictated in the Tender Document, hence the Appellant's offer was technically non-compliant.**

The Contracting Authority is also maintaining that the Technical Literature submitted by Cherubino Ltd did, in fact, indicate the different specifications from those requested in the Tender Document.

- b) The Contracting Authority insists that the reference to a previous Tender is irrelevant as the Tender which is currently under Appeal is a different one and considerations of the merits should only be carried out on this particular case.**

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

- 1. With regards to Cherubino Ltd's First Grievance, this Board, after having examined the relative documentation and heard lengthy submissions made by all the parties concerned, would like to, first and foremost establish whether the Tender under review is the same one as that on which a decision was issued by this same Board, as differently composed on 11 October 2016.**

From an examination of both Tender CT 2033/2015, (the first Tender) and Tender CFT 016-10104/16, (the present Tender), one cannot but notice that the product being requested in both Tenders is the same. The Technical Specifications of the First Tender states:

“Foldable/Injectable Lenses Hydrophobic Implants with length 13.00mm and a diameter of between 5.5mm and 6.00 mm. Diopter range of -5.0D to +40.0D including half sizes”.

On the other hand, the Technical Data of the present Tender states:

“Foldable/Injectable Lenses Hydrophobic Impants with length of 13.00 mm diameter of between 5.5 mm and 6.0 mm. Diopter range of -5.0D

to +40.0D including half sizes. The range of half dioptres must include the largest possible range and must include from 6.0D to +30.0D”

It is evidently clear that, from the Technical Data of both Tenders, that the characteristic and technical features of the product represent the same Tender requirement. In this regard, this Board would like to refer to the decision taken by the same, as differently composed, on 11 October 2016 regarding the first Tender, (CT 2033/2015) wherein, it was decided that:

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

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

This Board would also point out that during the treatment of the first Tender, this same Board noted that,

“Apart from the fact that this Board, regretfully noted that a fresh issue of the 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".

The second Tender being referred to here above, refers to the present Tender. In this regard, this Board would like to respectfully point out that, at that stage, this same Board had already established that Cherubino Ltd's offer was technically compliant in both offers and although it did not include the cancellation of the new Tender, it did in its deliberation conclude that the Appellant's product was technically compliant and should be considered in the Evaluation Process, the latter action of which, for some unknown reason, was not carried out.

This Board placed great emphasis on the testimony given by the Technical Expert summoned in the hearing of the first Tender, who confirmed that Cherubino Ltd did conform to the Technical Specifications as requested in the Tender Document.

In this respect, since it has been established that the product in both Tenders is the same, the Appellant's product in the Second Tender is also technically compliant. At the same instance, this Board had not been presented with a credible reason as to why its previous decision

on Tender CT 2033/2015 dated 11 October 2016 was not implemented by the Central Procurement and Supplies Unit.

From the submissions made, this Board was not justifiably made aware as to why a new Tender was issued for the same product as that of the previous Tender on which adjudication was made by the Public Contracts Review Board as differently composed.

This Board also notes that although the Central Procurement and Supplies Unit is claiming that this Tender is different from the previous one; no credible evidence was produced to show that the product is different in kind.

- 2. With regards to Cherubino Ltd's Second Grievance, this Board, as stated previously, was not given reasons as to why Tender CT 2033/2015 was not implemented and although we are considering another Tender, the latter is justifiably related to the First Tender which was not contracted yet relating to the same type of procurement which has already been assessed and adjudicated upon.**

At the same instance, this Board does not see any credible justification as to why a new Tender is being assessed whilst a previous one for the same product is still pending.

In view of the above, this Board uphold Appellant's Grievances and recommends that:

- a) The decision taken by the Public Contracts Review Board on Tender Reference CT 2033/2015 on 11 October 2016 is to be implemented and acted upon;**

- b) The deposit paid by Cherubino Ltd is to be fully refunded**

- c) The present Tender under review is to be cancelled as its objectives are satisfied by Tender CT 2033/2015.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

6 April 2017