

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1148– CFT 020 – 6099/17. Tender for the Supply of Cannula IV**

The publication date of the call for tenders was the 7<sup>th</sup> February 2017 whilst the closing date of the call for tenders was the 27<sup>th</sup> February 2017. The estimated value of the tender (exclusive of VAT) was € 69,120.

There were nine (9) bidders on this tender.

Cherubino Ltd filed an appeal on 23<sup>rd</sup> February 2018 against the Contracting Authority's decision to reject the tender on the grounds that there was an invalid Declaration of Conformity and that the sample provided proved to be faulty. A deposit of € 400 was paid.

On 22nd March 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Cherubino Ltd**

Dr Danica Caruana	Legal Representative
Dr Francis Cherubino	Representative

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

Dr Marco Woods	Legal Representative
Ms Marika Cutajar	Chairman Evaluation Board
Mr Donald Attard	Member Evaluation Board

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, welcomed the parties and stated that the Board had received late notice that the Contracting Authority had revoked the tender, without giving any reason. If the appellant had revoked their decision to appeal this would have been acceptable, but not otherwise.

Dr Marco Woods, Legal Representative of the Central Procurement and Supplies Unit said that he had been advised that the Contracting Authority could not identify the individual who had tested the sample provided by Appellants nor could they verify the result of the test. They therefore had to revoke the tender.

Dr Danica Caruana, Legal Representative for Cherubino Ltd stated that the procedure followed by the Contracting Authority was not normal. Her clients were the only party to appeal and they were not aware of what had motivated the Authority to take this step of revoking the award.

Ms Marika Cutajar (469772M) testified on oath that she was the Chairman of the Evaluation Committee. She said that the first objection arose when the evaluator had been advised that the sample had proved faulty as it had sheared the vein. When the evaluator requested the name of the individual who had carried out the test, the evaluator was advised that the identity of that individual was not known. Witness also suggested that the next step would be to have a complete re-evaluation of the complete tender.

Dr Danica Caruana pointed out that since the alleged shearing of the vein incident had only occurred with her client's sample it must be deduced that the award of the tender had been revoked because of their appeal.

Dr Francis Cherubino, representative of Cherubino Ltd, emphasised that his Company could not accept a situation where because the Contracting Authority could not identify the person who had tested the sample, and therefore of the allegations made, the whole tender was open to re-evaluation of all bids. Cherubino Ltd was the only entity to appeal and they were the only ones who had a '*loco standi*' as far as the Board and this tender was concerned. It is not acceptable that a person could not be identified, and on that basis a decision made to revoke the tender, and start the re-evaluation process all over again. The person who tested the sample had to be found, called to give evidence before the Board, with the appeal proceeding normally thereafter. That person must be found and made to carry responsibility for the decision.

The Chairman said that it is up to the Board to examine the facts thanked the parties for their submissions and declared the hearing closed.

**This Board,**

**Having noted this Objection filed by Cherubino Limited, (hereinafter referred to as the Appellant) on 23 February 2018, refers to the contentions made by the same Appellant with regards to the award of Tender of Reference CFT 020-6099/17 listed as Case No 1148 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit, (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Danica Caruana**

**Dr Francis Cherubino**

**Appearing for the Contracting Authority: Dr Marco Woods**

**Whereby, the Appellant contends that,**

- a) With regards to option A, the Contracting Authority's reason was contested in view of allegations made that Cherubino Limited submitted an invalid declaration of conformity. In this regard, the Appellants**

**maintain that they submitted the requested information in conformity and within the stipulated conditions.**

- b) With regards to option B, the Appellants insist that the reason why the vein was sheared on penetration was not due to the quality of the product but rather to the incorrect application of same.**

**This Board also considered the Contracting Authority's "*Letter of Reply*" dated 2 March 2018 and its verbal submissions during the hearing held on 22 March 2018, in that:**

- a) The Central Procurement and Supplies Unit contends that due to the nature of the product, the declaration of conformity had to make reference to the notifying body together with the name and number of the latter and the same declaration had to include a description of the intervention carried out on the product. In this respect, the Appellants' submission did not conform with such requirements;**

**b) The Central Procurement and Supplies Unit also maintain that, from tests carried out, it was found that the Appellants' product was unsuitable for its intended purpose.**

**This same Board also noted the testimony of the witness namely, Ms Marika Cutajar, Chairperson of the Evaluation Board, duly summoned by the same.**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witness, opines that the two issues which merit consideration are (a) the declaration of conformity and (b) suitability of the Appellants' product.**

**This Board informed the parties that it had received notification that the Contracting Authority will be revoking the award, subject to this Board's direction and in this regard, the Central Procurement and Supplies Unit was requested to give reasons for such cancellation, so that the Chairperson of the Evaluation Board was called to testify and enlighten the Board of such a change in decision. The reasons given by the witness can be quoted as follows:**

**Question:** *“Għaliex għamiltu deċiżjoni pero’ f’ daqqa waħda rrevokajtuha?*

*Dak biss li rridu nkunu nafu halli naghmlu s-sentenza.”*

**Witness:** *“Bażikament saret l-ewwel deċiżjoni minhabba dak il-punt tal-*

*objection, “shear the vein”. Dan l-Evaluator ikun ha l-*

*informazzjoni minghand min ipprova s-sample. Issa meta lil dan*

*ghednilu, li pprova s-sample biex jitla’ jixhed, dan qalilna, “Mhux*

*jien ipprovajtu s-sample u ma nafx lil min tajtu.”*

**From the above testimony, this Board is, first of all, convinced that the decision to revoke the award was triggered by the objection filed by Cherubino Limited and secondly, this Board finds it very strange that the person who actually performed the necessary tests on the Appellants’ product cannot be identified.**

**In view of the above, this Board:**

- i) Summons all the technical persons involved, in whatsoever manner, in the testing of Cherubino Limited’s product;**

**ii) Adjourns the hearing of this Appeal to Tuesday 10 April 2018 at 09:30am wherein this Board will hear the testimony of the witnesses to be summoned by this same Board;**

**iii) Will, during the second hearing, consider the two main issues raised by Cherubino Limited.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Richard A Matrenza  
Member

*23<sup>rd</sup> March 2018*

## **Second Hearing**

The publication date of the call for tenders was the 7<sup>th</sup> February 2017 whilst the closing date of the call for tenders was the 27<sup>th</sup> February 2017. The estimated value of the tender (exclusive of VAT) was € 69,120.

There were nine (9) bidders on this tender.

Cherubino Ltd filed an appeal on 23<sup>rd</sup> February 2018 against the Contracting Authority's decision to reject the tender on the grounds that there was an invalid Declaration of Conformity and that the sample provided proved to be faulty. A deposit of € 400 was paid.

On 10<sup>th</sup> April 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

### **Appellant – Cherubino Ltd**

Dr Danica Caruana	Legal Representative
Dr Francis Cherubino	Representative

### **Recommended Bidders – Pharma-Cos Ltd**

Dr Matthew Paris	Legal Representative
Mr Stephen Attard	Representative

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

Dr Stefan Zrinzo Azzopardi	Legal Representative
Dr Marco Woods	Legal Representative
Ms Marika Cutajar	Chairman Evaluation Board
Ms Yana Galea	Secretary Evaluation Board
Ms Krystle Refalo	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and mentioned that this second hearing was called to hear the evidence of the witnesses involved with the testing of the Cannula.

Dr Matthew Paris, Legal Representative of Pharma-Cos Ltd stated that he was not present at the previous hearing so he now wished to enquire whether the Board were seeking revocation or clarification of the tender, as up to this stage his clients were the preferred bidder.

The Chairman said this hearing would examine if the tender could be cancelled as so far there was not enough proof regarding the tests carried out and the testers had not been identified – hence the calling of further witnesses.

Dr Danica Caruana, Legal Representative for Cherubino Ltd, said that the Board was hearing two appeals on two bid offers, and on both of which her clients had received letters of rejection. Option (a) concerned an invalid declaration of conformity which she claimed followed the requirements of the Contracting Authority and had been used previously in other bids as well as in other European countries. There was no obligation at law that the name of the notifying authority had to appear on the declaration of conformity. In the case of Option (b) serious allegations had been made about ‘shearing of veins’ and this was not acceptable. The person who had carried out the tests had to be identified, and the way tests were carried out established.

The Chairman of the Board asked for the witnesses to give their evidence.

Mr Philip Mizzi (347162M) testified on oath that he was a Charge Nurse in the Operating Theatre at Mater Dei Hospital. He said that the Cannula testing was carried out by a clinician and user, usually a doctor. He had passed the sample to a doctor for evaluation but had not done the testing himself. The email (dated 1<sup>st</sup> March 2018) which he tabled in this regard was challenged by the Legal Representative of the Appellant as it was dated after the letter of rejection had already been issued. A further email dated 13<sup>th</sup> June 2017 did not show the size of the Cannula tested nor whether one or two sizes had been tested. Finally witness testified that the Cannula to which the reference ‘came out too easily’ was made was produced by a firm called Disposale.

Mr Robert Schembri (296465M) stated on oath the he was a Charge Nurse in the Operating Theatres at Mater Dei Hospital, and that he had not carried out any tests on Cannula IV sizes 14G and 18G. Samples were tested by others, normally a doctor. He could not recall who advised him that the sample did not meet the required standard. Witness was referred to an email written by him the previous August in which he had stated that ‘the sample received previously clinically tested’ was not recommended but could not recall who had given him this information. He confirmed that samples when received were passed on – generally to Dr Gatt, the Chairman of the Anaesthesia Board, and again stated that he could not recall who had given him the information that the samples were faulty.

Dr Caruana expressed concern that their clients' bid had been rejected purely on hearsay and untraceable allegation.

Dr Stefan Zrinzo Azzopardi, Legal Representative of the CPSU, wanted to make it very clear that his interest was to ensure that the tender process was transparent and that the process did not favour any one bidder. He undertook to personally locate Dr Gatt to establish the facts and who had actually carried out the tests.

Dr Francis Cherubino mentioned that the emails presented during the hearing referred only to size 18G Cannulas and it was not acceptable to generalise on both sizes of Cannulas. He expressed concern that the use of the word 'previously' used in one of the emails could refer to any time in the past and reminded the Board that they had to consider the submissions made on the two different offers.

In concluding the hearing the Chairman said that the Board took allegations very seriously but it was essential to find the right person who had tested the products to conclude this case. He thanked both parties for their submissions.

### **Third Hearing**

The publication date of the call for tenders was the 7<sup>th</sup> February 2017 whilst the closing date of the call for tenders was the 27<sup>th</sup> February 2017. The estimated value of the tender (exclusive of VAT) was € 69,120.

There were nine (9) bidders on this tender.

Cherubino Ltd filed an appeal on 23<sup>rd</sup> February 2018 against the Contracting Authority's decision to reject their tender on the grounds that there was an invalid Declaration of Conformity and that the Cannula sample provided proved to be faulty. A deposit of € 400 was paid.

On 5<sup>th</sup> June 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard Matrenza as members convened a public hearing to discuss the further submissions.

The attendance for this public hearing was as follows:

#### **Appellant – Cherubino Ltd**

Dr Danica Caruana	Legal Representative
Dr Francis Cherubino	Representative

#### **Recommended Bidder – Pharma-Cos Ltd**

Dr Matthew Paris	Legal Representative
Mr Stephen Attard	Representative
Mr Marcel Mifsud	Representative

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

Dr Marco Woods	Legal Representative
Ms Marika Cutajar	Chairman Evaluation Board
Mr Donald Attard	Member Evaluation Board

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, welcomed the parties and reminded them that the purpose of this hearing was to identify the person who had tested the samples of the Cannula which were claimed to be faulty. This point was explained to the witness called by the CPSU.

Dr David Gatt (316564M) testifies on oath that he was an anesthetist at Mater Dei Hospital and it was not known who had carried out the tests of the Cannula samples that were claimed to be faulty.

The Chairman thanked the witness and apologized that the CPSU had wasted his time.

Dr Matthew Paris, Legal Representative of Pharma-Cos Ltd stated that only the appeal of Cherubino Ltd should be considered and the PCRB should not consider cancellation of this tender. If the CPSU felt that there was a case for cancellation they should make the decision and not place the responsibility on the PCRB. If the procedure is about to be changed, said Dr Paris, his clients will use the additional rights open to them.

The Chairman stated that all that the Board had asked was for the person testing the Cannula to be identified – it was the Board’s duty ‘ex-officio’ to investigate where there were irregularities.

Dr Francis Cherubino mentioned that the original rejection was based on two points- the invalidity of the DOC and the faulty cannula. Although the facts regarding the DOC had been discussed and decided at a previous hearing he was now withdrawing his firm’s appeal regarding the alleged ineligibility of the DOC and appealing solely on the Evaluation Committee’s rejection of their bid on the grounds that their cannula samples were faulty.

The Chairman thanked the parties for their submissions and declared the hearing closed.

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**This Board,**

**Having noted this Objection filed by Cherubino Limited, (hereinafter referred to as the Appellants), on 23 February 2018, refers to the contentions which were made by the same Appellants with regards to the award of Tender of Reference CFT 020-6099/2017, listed as Case No 1148 in the records of the**

**Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit, (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Danica Caruana**

**Dr Francis Cherubino**

**Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi**

**Dr Marco Woods**

**Whereby, the Appellants contend that:**

- a) **With regards to Option A, contrary to what the Contracting Authority alleged, their “*Declaration of Conformity*”, stated the notifying body namely, “*Norvegion Accreditation/DNV*”. In this regard, the Contracting Authority’s reason for rejection of the Appellant’s offer is incorrect;**
  
- b) **With regards to Option B, the Appellants reject the alleged accusation that their product sheared the vein when tested.**

**This Board has also noted the Contracting Authority’s “*Letter of Reply*” dated 2 March 2018 and its verbal submissions during the Public Hearings held on 22 March 2018, 10 April 2018 and 5 June 2018, in that:**

- a) The Central Procurement and Supplies Unit insist that in accordance with ARES (2015) 1600946-15/04/2015, the “*Declaration of Conformity*” must also include a description of the intervention of the notifying body with reference to the product certified by such body;**
  
- b) The Contracting Authority maintains that, in accordance with tests carried out, the Appellants’ product was found to be unsuitable for the intended specific purpose.**

**This same Board has also noted the testimony of the witnesses namely:**

- 1. Ms Marika Cutajar, the Chairperson of the Evaluation Committee, duly summoned by the Public Contracts Review Board;**
  
- 2. Mr Philip Mizzi, Charge Nurse (Anaesthesia), duly summoned by the Central Procurement and Supplies Unit;**

**3. Mr Robert Schembri, Charge Nurse, (Operating Theatre), duly summoned by the Central Procurement and Supplies Unit;**

**4. Dr David Gatt, Anaesthetist, duly summoned by the Central Procurement and Supplies Unit.**

**This Board, after having examined the relevant documentation to this Appeal and after having heard submissions made by the parties concerned, during the Public Hearings held on 22 March, 10 April and 5 June 2018, including the testimony of the witnesses duly summoned, was informed that Cherubino Limited are withdrawing their Objection with regards to the “*Declaration of Conformity*” on Option (A), so that the issue which has to be considered is the alleged unsuitability of the Appellants’ product.**

**In accordance with the “*Letter of Rejection*” dated 13 February 2018, the Appellants were informed that the samples of their product were found to shear the vein when tested. Prior to establishing whether this allegation is correct or not, this Board wanted to hear the technical opinion of the person who actually conducted the tests on the Appellants’ product. During the First Public Hearing of this Appeal, it was decided by this Board to adjourn the**

**Public Hearing so that this person can be identified and summoned as a witness.**

**During the Second Public Hearing held on 10 April 2018, two witnesses were summoned namely, Mr Philip Mizzi and Mr Robert Schembri both of whom are charge nurses employed at Mater Dei. This Board notes that these two witnesses were not the actual persons who conducted the tests so that the Objective of the deliberation of this Board had not been reached and established.**

**During the Third Public Hearing held on 5 June 2018, this Board was yet again presented with a professional who was totally not involved in this particular Tender, as can be deduced from the Testimony of the witness, Dr David Gatt, as follows:**

**Question: “*Dr Gatt, hawnhekk qeghdin nitkellmu, kif ghadu kemm qal tajjeb hafna è-Chairman, il-Cannulas li kienu ssottomettew samples taghhom il-klijenti tieghi u sussegwentement fl-Objection Letter, ma***

*nafx jekk intix aware to dak li kien intqqal, ir-raġuni għala ma ngħatax dan it-Tender speċifiku kienet li*

*“Samples were found to shear the vein when tested”*

*Int taf liema huwa l-prodott tal-Klijenti tiegħi?”*

**Answer:** *“I don’t think li dawn ġew ipprezentawhom lill-Bacteriology.”*

**Question:** *“Taf min għamel it-test?”*

**Answer:** *“Le”*

**This Board would also respectfully note the testimony of the Chairperson of the Evaluation Committee duly summoned on 22 March 2018, as follows:**

**Question:** *“Għaliex għamiltu deċiżjoni pero’ f’ daqqa wahda rrevokajtuha?”*

**Answer:** *“Bażikament saret l-ewwel deċiżjoni minhabba dak il-punt tal-Objection, “Shear the Vein”. Dak l-Evaluator ikun ha l-informazzjoni minghand min ipprova s-sample. Issa meta’ lil dan*

*ghidnilu li jipprova s-sample biex jitla' xhud dan qalilna, "Mhux jien ippruvajt is-sample u ma nafx lil min tajtu."*

**The above extract from the Testimony of Ms Marika Cutajar, Chairperson of the Evaluation Committee, is somewhat disturbing as the Board is now aware, that apart from not knowing the identity of the person who carried out the tests on Cherubino Limited's samples, there is also missing a proper and detailed report on tests carried out. If such a basic administrative procedure was present, then the identity of the person, on whose opinion the Evaluation Board has rested, would be known and duly summoned to bear witness.**

**From the submissions and testimony of the witnesses, this Board is not convinced that the Evaluation Process was carried out in a transparent and professional manner.**

**In view of the above, this Board:**

- i) Revokes the decision taken by the Central Procurement and Supplies Unit in the award of the Tender;**
  
- ii) Orders that Cherubino Limited's offer is to be re-integrated in the Evaluation Process;**
  
- iii) Recommends that the Evaluation Committee, composed of different members, re-assess, all the bids with proper testing of samples;**
  
- iv) Recommends that the deposit paid by the Appellants should be refunded.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Richard A Matrenza  
Member

*13<sup>th</sup> June 2018*