

PUBLIC CONTRACTS REVIEW BOARD

Case 1152 – CT 2026/2015. Tender for the Supply of Bone Conduction Hearing Devices

Hearing of the case following direction of the Court of Appeal on 18th July 2017. Case first heard by the Public Contracts Review Board on 23rd February 2017.

The publication date of the call for tenders was the 23rd October 2015 whilst the closing date of the call for tenders was the 3rd December 2015. The estimated value of the tender (exclusive of VAT) was € 145,500

There were two (2) bidders on this tender.

OK Ltd filed an appeal on 27th January 2007 against the decision of the Central Procurement and Supplies Unit to award the tender to Med-El Elektromedizinische Geraete Gmbh Unita Locale. A deposit of € 1,200 was paid.

The Court Appeal having heard the submissions of the Appellant directed the PCRB to consider whether the two contested offers were technically compliant.

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

The attendance for this public hearing was as follows:

Appellant – OK Ltd

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| Dr Michael Tanti Dougall | Legal Representative |
| Mr Adrian Stivala | Representative |
| Mr Paul McAlister | Representative |

Recommended Bidder – Med-El Elektromedizinische Geraete Gmbh Unita Locale

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| Dr Nadine Lia | Legal Representative |
| Mr Mark Bondin | Representative |
| Mr John Jaccarini | Representative |

Contracting Authority – Central Procurement and Supplies Unit

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|----------------------------|--------------------------------|
| Dr Stefan Zrinzo Azzopardi | Legal Representative |
| Dr Marco Woods | Legal Representative |
| Ms Marika Cutajar | Chairman Evaluation Board |
| Ms Pauline Miggiani | Member Evaluation Board |
| Mr Jonathan Pullicino | Procurement Officer |
| Dr Alison Anastasi | Assistant Director Procurement |

Department of Contracts

Dr Christopher Mizzi

Legal Representative

In a brief introduction, Dr Charles Cassar, Chairman of the Public Contracts Review Board stated that this hearing was being held solely to follow the Appeal Court directive to consider whether the two bids were technically compliant, and for this purpose had appointed an expert witness.

Ms Martha Pace (550391M) testified on oath that she was an Audiologist whose specialisation was hearing rehabilitation, covering hearing aids, cochlear implants and similar appliances. Her qualification included a B.Sc. in Communications Therapy and a Masters in Audiological Science, and was employed full time in that capacity at Mater Dei Hospital. She confirmed that she was not involved in any way in the decision on the award of the tender.

Ms Pace dealt in detail on the Report she submitted to the Board, and tabled at the hearing, analysing the products offered by both bidders, from which she had concluded that subject to a clarification of a particular specification on the product submitted by the Recommended Bidder, their bid was technically compliant. There were several question marks on the Cordelle system offered by the Appellant including the fact that it was an analogue system which meant it could only be adjusted manually. She clarified that she had been in touch with both manufacturers to clarify details on their literature and had used the same methodology in attesting the products. She had done this, in preference to contacting the local firms, so that she maintained impartiality.

Witness confirmed that until she was approached by the PCRB to act as an expert witness she was not aware that the case had gone to the Court of Appeal.

Dr Michael Tanti Dougall, Legal Representative for the Appellant, pointed out his client could now, due to the time lapse since the original tender, deliver a more technologically advanced product. The Chairman said that it was not permissible at this stage to introduce new factors.

Dr Stefan Zrinzo Azzopardi, legal Representative for the CPSU, said that, to a certain extent, the report submitted by the expert was inconclusive, as it indicated that further clarification was required. He therefore suggested a re-evaluation based on the original hearing, the decision of the Appeal Court and this present hearing.

Dr Nadine Lia, Legal Representative for the Preferred Bidder said that there was no point in a re-evaluation as the Appellant product was not compliant, and this was clear from the expert's report. If any clarification was required they were prepared to supply it.

In answer to a question by the Chairman of the Board, Ms Pace, still under oath, stated that the product offered by Appellant was not 'up to spec'.

In concluding the hearing the Chairman said that the Board would consider all the necessary aspects in reaching its decision, thanked the parties for their submissions and declared the hearing closed.

Appearing for OK Limited, (the Appellants): Dr Michael Tanti Dougall

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Dr Marco Woods

In accordance with the decision of the Court of Appeal dated 18 July 2017, whereby the same court decided that this Board, (in a different composition), should establish whether the offers of both OK Limited and Med-El Elektromedizinische Geraete GmbH (the Preferred Bidder), are technically compliant, this same Board appointed an expert in the field to arrive at its adjudications in this regard. The Board appointed an expert namely, Ms Martha Pace, an Audiologist a specialist in hearing rehabilitation, including hearing aids, who submitted her report in this regard. This Board would point out that this report forms part of the documentation leading to its conclusions.

From the expert's report and analysis thereof, the conclusion arrived at was that the Preferred Bidder's offer was technically compliant given a clarification on a particular item, while the Appellant's offer was not "*up to spec*". In this regard, it was made clear that the Preferred Bidder's offer required a clarification on a particular item, however it was also established that no rectifications were needed to their offer to render it technically

compliant. At the same instance, it was also noted that the Appellants informed this Board that they can supply a much more modern and sophisticated equipment to achieve the Contracting Authority's objective. In this respect, this Board opines that such a recommendation/proposal by the Appellant is not the issue of this hearing.

During the latter, the Contracting Authority suggested that a re-evaluation, taking into account all the points raised by the technical expert would be an appropriate solution to this issue. In this regard, this Board would again point out that its remit is to assess whether both offers were technically compliant and in this respect, this same Board would confirm that from the expert's report, it has been confirmed that the Appellants' product is not up to specs while the Preferred Bidder's offer is within the parameters needing a particular clarification.

In view of the above, this Board,

- a) Confirms that OK Limited's offer is not technically compliant;**
- b) Recommends that the deposit paid by the same Appellants, in the first instance, is to be forfeited;**

c) Confirms that Med-El Elektromedizinische Geraete GmbH Unitá'

Locale's offer is technically compliant;

d) Recommends that the Preferred Bidder's offer is to be reintegrated in

the evaluation process and for the Central Procurement and Supplies

Unit to obtain the necessary clarification as mentioned by the expert.

Dr Charles Cassar
Chairman

Mr Richard A Matrenza
Member

Mr Anthony Vassallo
Member

19^h July 2018