



**This Board,**

**having noted this Call for Remedies which was filed by Bruker AXS GmbH, (also referred to as the Appellants) before the closing date for competition on 17 September 2018, refers to the contentions made by the same Appellants with regard to the Tender of Reference CT 3092/2017 issued by the University of Malta and listed as Case No 1224 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants:**

**Dr John L Gauci**

**Appearing for the Contracting Authority:**

**Dr Oriella de Giovanni**

**Whereby the Appellants contend that:**

- a) their main concern is that the way the technical specifications were drafted represent an extract from a particular model of one supplier, to the effect that, the Appellants and other prospective Bidders are precluded from participating in this Tender and thus limiting the scope of competition;**

**This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 15 October 2018 and its verbal submissions during the Public Hearing which was held on 23 October 2018, in that:**

a) the University of Malta contends that the technical specifications were compiled in accordance with the requirements to set up a “*centre of excellence*” which will be unique in the Mediterranean. In this respect, the Contracting Authority confirms that prior to the drafting of the technical specifications, the latter carried out market research to ensure that the proper instruments are available and in this respect, there are several companies which can provide such instruments;

This Board has also noted the testimony of the witness, namely, Prof Ulrich Baiche who was duly summoned by the University of Malta.

This Board noted the Appellants’ Legal Advisor’s opening statement, in that:

*“Objector declares that the witness could not come to Malta on the set date and time for the hearing of this objection. However, since the merits of this objection raised by Rigaku Corporation as detailed in the appeal also scheduled for today, the objection raised by Bruker AXS GmbH can be determined by this Board on the basis of the documentation submitted and evidence to be heard today during the Public Hearing of objections raised by Rigaku Corporation”*

**In this regard, this Board examined the relative documentation to this concern and opines that the issue to be considered is the manner in which the technical specifications are stipulated in the Tender Document.**

**i) The Technical Specifications**

**The technical specifications in a Tender Document are not capriciously formulated but are compiled to reflect the precise requirements of the Contracting Authority. In this particular case, through the vivid testimony of Profs Baiche, this Board was made aware of the fact that this is no ordinary procurement requirement, but consisted of specialised X-Ray diffraction instruments for a “*state of the art*” centre which will be unique in the Mediterranean.**

**This Board was also informed that prior to the publication of the technical specifications of this Tender, the University of Malta, through its professional technical advisors, carried out a market research to ensure that what it is requesting, in so far as equipment is concerned, is available on the market and that such equipment can be supplied by more than one supplier. In fact, from the credible testimony of**

**Prof Baiche, it was confirmed that there are several manufacturers, available to all bidders, which can produce such instrumentation.**

**Bruker AXS GmbH maintains that there are four leading suppliers which can supply similar equipment, but the manner that the technical specifications are drawn up, only one supplier can conform with these specifications. The Appellants, through the testimony of Dr Marcus Winter, informed this Board that although certain parts can be obtained from third parties, there are other items which are lock-outs and in this respect, the specifications should be more generic so as to allow a wider choice of equipment.**

**In this particular case, this Board noted from the submissions made, that the Contracting Authority admitted that this was a “*tight tender*” and credible explanations were given for such specific rigid requirements which might tend to advantage in some form or other, a particular economic operator. In this respect, the Board opines that the technical specifications should include a clause to allow “*similar equipment or instruments*” to be considered provided such similar equipment will render the desired results of the Contracting Authority.**

**This Board would also emphasize the fact that there exist circumstances where the Contracting Authority will require highly specialised procurement and which, due to its sophisticated and specialised nature, competition is limited to only a few, prospective Bidders. This does not limit the scope of competition, as the possible suppliers of the same product are also limited. This Board would opine that, as long as the available suppliers of the equipment being requested by the Contracting Authority, are allowed to participate in the Tender, the scope of open competition is not limited or suppressed in any particular way. In this regard, this Board instructs the University of Malta to ensure that the technical specifications are modified in such a manner as to enable the available suppliers of such equipment, to participate in the Tendering process of this procurement.**

**At the same instance, from submissions made by the technical witness, the Contracting Authority confirmed that, as long as the Appellants' equipment fulfilled the same functions as those intended by the Contracting Authority, the latter will be able to participate in this Tender.**

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

**i) instructs the University of Malta to rephrase the technical specifications of the Tender to ensure:**

- that there will not be a limitation of participation from the known suppliers of similar equipment available on the market;**
- such modifications/alterations to be effected through a clarification note;**

**ii) orders the tendering process to continue.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Lawrence Ancilleri  
Member

*1<sup>st</sup> November 2018*