

# **PUBLIC CONTRACTS REVIEW BOARD**

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## **Case 1305 – CT 2326/2018 – Tender for the Supply of Drug Eluting Stents**

### **Call for Remedies before the Closing Date of a call for Competition**

The publication date of the call for tenders was the 30th January 2019 whilst the closing date of the call for tenders was 26<sup>th</sup> March 2019. The estimated value of the tender (exclusive of VAT) was € 505,600.

On the 3<sup>rd</sup> April 2019, Cherubino Ltd filed a Call for Remedy against the Department of Contracts as Contracting Authority claiming that the cancellation of the tender is prejudicial.

On 30<sup>th</sup> April 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Cherubino Ltd**

Dr Francis Cherubino	Legal Representative
Mr Paul Calleja	Representative

#### **Department of Contracts**

Dr Franco Agius	Legal Representative
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#### **Others – Central Procurement and Supplies Unit**

Dr Marco Woods	Legal Representative
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Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Franco Agius Legal Representative of the Department of Contracts stated that there was a preliminary point to consider – namely that the objection should be rejected as it was entered out of date. A remedy should have been entered before the 26<sup>th</sup> March 2019 which was the closing date of the tender whereas it was entered on the 3<sup>rd</sup> April, a week after the closing date. According to Regulation 262 of the Public Procurement Regulations a remedy can only be sought before the closing date of a tender.

Dr Francis Cherubino Legal Representative of Cherubino Ltd said that the closing date was the 26<sup>th</sup> March with a clarification issued at the last minute on the 25<sup>th</sup> March. Cherubino Ltd's appeal is against the cancellation of the tender and hence there was no chance to appeal before as no action was possible earlier since prospective bidders could not know that the tender was going to be cancelled.

The Chairman mentioned that a remedy had to be sought prior to the closing date of a call for competition, and at the most Cherubino Ltd should have sought an objection rather than a remedy.

Dr Cherubino re-iterated that his firm could only appeal after the notice of cancellation was issued as the only remit of their appeal was within a very short time span. It was the function of the Public Contracts Review Board to hear complaints raised by tenderers on cancellations (Regulation 87) – otherwise Appellants were faced with a situation where they cannot raise an objection as it was not possible to pay a deposit and they cannot go to the Appeal Court.

Dr Agius intervened to point out that if Cherubino Ltd filed an objection it would still not be valid as it would be outside the appeal period.

Dr Cherubino said that the merits of the appeal do not change but it was regrettable that the practice of the issuing of tenders leaves much to be desired with last minute clarifications, extensions and cancellations being excessive and abusive.

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

**This Board,**

**having noted this 'Call for Remedy Prior to Closing Date of a Call for Competition' filed by Cherubino Limited (herein after referred to as the Appellants) on 3 April 2019, refers to the claims made by the same Appellants with regard to the Tender of reference CT 2326/2018 listed as Case No 1305 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants: Dr Francis Cherubino**

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

**Appearing for the Department of Contracts: Dr Franco Agius**

**Whereby, the Appellants contend that:**

- a) **there were various extensions to the closing date of this tender and on the very last day of submissions, Appellants were informed that due to a change in parameters, the tender was being cancelled. In this regard, Appellants contend that they should be made aware of the substantial changes in the tender specifications in order to establish whether such changes could have been implemented through a clarification.**

**This Board also noted the Contracting Authority's 'Letter of Reply' dated 12 April 2019 and its verbal submissions during the hearing held on 30 April 2019, in that:**

- a) **The Authority insists that such a 'Call for Remedies' is invalid, as such applications can only be made prior to the closing date of submission.**

**This Board would respectfully refer to Regulation 262 of the Public Procurement Regulations wherein, it is stated that:**

*“Prospective candidates and tenderers may, prior to the closing date of a call for competition, file a reasoned application before the Public Contracts Review Board.”*

**In this particular case, the closing date for the submission of offers was 26 March 2019, well after the closing date of the call for competition. In this regard, this Board has no other option but to dismiss this call for remedies.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*14 May 2019*

