

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1370 – CT 2064-2019 – Tender for the Supply of Quantity One (1) Endo Urology Multi-Functional System (Lithotripter)**

#### **Remedy before Closing Date of a Call for Competition**

The publication date of the call for tenders was the 3rd June 2019 whilst the closing date is still open. The estimated value of the tender (exclusive of VAT) was € 635,593.23.

On the 2<sup>nd</sup> July 2019 Cherubino Ltd sought a Remedy against the Central Procurement and Supplies Unit as the Contracting Authority requesting widening of the tender specifications.

On 17<sup>th</sup> October 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Cherubino Ltd**

Dr Francis Basile Cherubino	Legal Representative
Mr Paul Calleja	Representative

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

Dr Marco Woods	Legal Representative
Mr Stephen Muscat	Representative

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

Dr Francis Basile Cherubino Legal Representative of Cherubino Ltd said that the Lithotripter was a medical instrument used to remove stones from the kidney and the ureter by non-invasive means. There are two types of systems – integrated and non-integrated. Technology has moved away from integrated systems in recent years and the three main manufacturers have discontinued producing them. The tender requirements for an integrated Lithotripter cater for only one manufacturer; a non-integrated system where the components are put together gives more flexibility and allows the instrument to be used for other functions without making any difference to the patients as the outcome is exactly the same.

Eng Chris Attard Montalto (260567M) called as a witness by the Public Contracts Review Board testified on oath that he was the person who drew up the specification of the tender. The tender was seeking specialised equipment manufactured only by some three firms worldwide. The tender specified a flat panel detector unit instead of an image intensifier. This uses high frequency sound waves to break the stones and is technologically modern compared to the old technology of the image intensifier - it lowers the radiation levels required and produces better and cleaner pictures. Flat panel integrated system is less complex and is advantageous in operating theatre use.

Dr Cherubino said that as issued the tender for an integrated system with flat panel detector can only be matched by one manufacturer as others have discontinued making them. Non-integrated systems could lead to three or four companies competing as against only one for an integrated system. There is no medical justification for opting for the integrated unit.

Eng Attard Montalto pointed out that a non-integrated system affects the flow in operating theatres as it leaves less clear floor space and his objective is to improve safety by leaving a floor as clear as possible. Flat panels give greater benefit over image intensifiers and as far as he is aware there are two suppliers of integrated systems.

He later confirmed that at the time the tender was written there were two suppliers – Dornier and Storts.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that the appeal was originally based on clause 2.2 of the technical specification i.e. regarding the flat panel detector, and this cannot be changed as the flat panel is a requirement. Appellant had now introduced clause 1.1 to argue in favour of a non-integrated system. The CPSU are entitled to decide what equipment it needs, and witness had confirmed that there was more than one supplier. The Appellant had not substantiated his claim that there was only one manufacturer of this equipment.

Dr Cherubino reminded the Board of the principles of Public Procurement Regulations and of the obligation to appeal if the tender was restrictive. He tabled an illustration showing various permutations of the two types of equipment (Doc 1). There was only one supplier who could meet the specifications requested and as the tender stands there was no transparency and no level playing field. The Board must look at the current situation not at that of three years ago when the tender was written. There is no valid reason why the tender should not be less restrictive by allowing bids for both integrated and non-integrated type of systems.

The Chairman said that the Board required proof of the claim that only one manufacturer produced the integrated system and Appellant was to produce written evidence that this was so by noon of Thursday 24<sup>th</sup> October 2019.

He then thanked the parties for their submissions.

End of Minutes

## **Decision**

**This Board,**

**having noted this ‘Call for Remedies Prior to Closing Date of Call for Competition’ filed by Cherubino Ltd (herein referred to as the Appellants) on 2 July 2019, refers to the claims made by the same Appellants with regard to the Tender of reference CT 2064/2019 listed as case no 1370 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants: Dr Frances Basile Cherubino**

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

**Whereby, the Appellants contend that:**

- a) The fact that the tender document stipulated that the equipment must be integrated, will limit the Public Procurement to only one supplier. A non-integrated system will give the same results, will open up competition, and at the same time, allow more flexibility for the equipment to be utilised for other functions. In this regard, Appellants also maintain that manufacturers have discontinued making integrated systems, so that the limitation to only integrated systems will be limited to only one manufacturer.**

**This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 17 July 2019 and its verbal submissions during the hearing held on 17 October 2019, in that:**

- a) The Authority contends that an integrated system will ease the flow in the operating theatres whilst it also allows more clear floor space, thus increasing safety for the staff in the operating theatre.**

**This same Board also noted the testimony of the witness namely, Engineer Chris Attard Montalto duly summoned by the Public Contracts Review Board.**

**This Board has also taken note of the documents submitted by Cherubino Limited which consisted of:**

**Doc No 1 - Permutations of two types of equipment.**

**This Board, after having examined the relevant documentation to this ‘Call for Remedy’ and heard submissions made by the parties concerned, including the testimony of the witness duly summoned opines that, the issue that merits consideration is whether the tender for an ‘Integrated System’ will limit the scope of competition.**

- 1. This Board would respectfully point out that the technical specifications in a tender document should not, in any particular manner, be formulated to limit the scope of competition or provide an advantage to any particular prospective bidder.**
  
- 2. From submissions made, it can be credibly established that the equipment can be supplied in either an integrated system or a non-integrated one. It was also established and confirmed by all the parties that, whichever configuration of the system is chosen, the end result is the same.**
  
- 3. From the testimony of the witness namely, Engineer Chris Attard Montalto, this Board noted that, the only reason why the Authority opted for an integrated system was to reduce, as much as possible, obstruction on the floor area (due to less wiring) during operations. The witness also stated that, at the time of formulating the tender specifications, there were two possible manufacturers of an integrated system namely, 'Dornier' and 'Storts'.**

**4. Appellants, on the other hand, are claiming that, at present, there is only one manufacturer who can provide an integrated system, hence their claim that such dictated specifications will limit completely the scope of competition. In this regard, this Board requested Appellants to provide evidence to substantiate their claim and, in this respect, same submitted a declaration from Dornier MedTech stating that:**

*“Wessling, October 21<sup>st</sup>, 2019*

*Dear Sir/Madam,*

*With reference to your online request for information about Dornier Gemini, we Dornier MedTech Europe GmbH would like to inform you that the integrated urology workstation with lithotripter Dornier Gemini is not CE certified and therefore is not available within the European Union. The Dornier Gemini is FDA certified only.*

*Should you need further information about our latest products available in your region, please do not hesitate to contact our regional office Dornier MedTech Italia S.r.L. on the below contact details.*

*Dornier MedTech Italia s.r.l.  
Via Arrigo Cavaglieri N. 26  
00173 Rome  
Phone: +39-06-72 35 289*

*Fax: 39-06-72 35 302*

*Yours sincerely,*

*Dornier MedTech Europe GmbH*

*Georg Frosch  
Senior Director*

*Orest Buchma  
Sales Manager*

*Dornier MedTech Europe GmbH  
Argelsrieder Feld 7, D-82234 Wessling”*

**From the above declaration, it has been confirmed by Dornier that they do not manufacture integrated systems which are CE certificated so that, such systems which are CE certified can be only supplied from one manufacturer, that is ‘Storts’.**

- 5. The fact that there exist other systems which reap the same result and for which there is more than one possible manufacturer, allows the Contracting Authority to open up the Call for Competition and obtain a ‘Best Value for Money’ product, without rendering undue advantage to the only available manufacturer of such integrated systems.**
  
- 6. One must acknowledge that this procurement involves public funds so that, adherence to the Public Procurement Regulations must be**

**strictly enforced and the technical specifications, as presently formulated, do in fact, restrict the scope of competition and in this regard, this Board opines that the specifications should be more open to other systems of the product being requested by the Authority.**

**In conclusion, this Board opines that:**

- a) The technical specifications, as presently drafted render complete advantage to only one particular manufacturer who can supply the product within an integrated system.**
- b) There exist alternative products which would give the same objective results and for which there is more than one possible supplier.**
- c) The reason given by the Contacting Authority in opting for an integrated system does not, in any credible way, justify the creation of the actual limitation to an open competition.**

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

- i. Upholds Appellants' contentions,**
- ii. directs the Authority to cancel the tender,**
- iii. directs the Authority to issue a fresh tender with technical specifications to include the participation of all types of systems available on the market for such a product.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*7 November 2019*