Independent Review Panel

Decision No. 03/21

In the matter of:

IBL HealthActiv Ltd

(Applicant)

v/s

Ministry of Health and Wellness

(Respondent)

(Cause No. 03/21/IRP)

Decision

INDEPENDENT REVIEW PANEL MAURITIUS

A. History of the case

On 9th July 2020, the Ministry of Health and Wellness (the **"Respondent"**, the **"Public Body"**, or the **"Ministry"**), invited bids, for the Supply, Installation and Commissioning of 128-Slice CT Scanner for Radiology Department Victoria Hospital ("Project"). The Project bore Procurement Reference: **MHPQ/EQ/2020-2021/Q8.**

There were eight offers submitted by six bidders including the Applicant, IBL HealthActiv Ltd and the Successful Bidder, Ducray Lenoir Ltd.

B. Evaluation

A Bid Evaluation Committee was set up by the Ministry to evaluate the bids received and to identify the lowest evaluated substantially responsive bid. The Bid Evaluation Report was completed on 8th January 2021.

C. Notification of Award

On 14th January 2021, the Public Body in response to the Invitation for Bids informed the Applicant, that an evaluation of the bids received had been carried out and the particulars of the selected bidder are as mentioned below:

Item No	*Description*	*Qty*	*Amount (MUR) Excluding VAT*	*Bidder and Address*
1.	***Supply, Installation and Commissioning of 128-Slice CT Scanner – Option 1***	*1 Unit*	***30,500,000.00***	***Ducray Lenoir Ltd, 19, Poivre Street Port Louis***
Total amount			***30,500,000.00***	

D. The Challenge

On 20th January 2021, the Applicant challenged the procurement proceedings on the following grounds:

*"For a CT scanner to **acquire** 128 slices in one single rotation with a set of 64 detectors only, the two following criterias must be met mandatorily, namely:*

*a. The x-ray tube should have a flying/dynamic/smart focal spot in **zdirection/deflection** (From front to back of the gantry). And*

b. The slice collimation should have at least 128 slices x slice thickness

This technology is available only on specific models from each manufacturer. Reference have been made 3 family of CT Scanner from two manufacturers, namely, Ingenuity, iCT from Philips and Definition from Siemens.

As per annex 1, namely datasheet of CT scanner

Make: Philips

Model: Ingenuity family CT scanners, From the Philips website https:www.usa.philips.com/healthcare/product/HCNOCTN193/ct-5000-ingenuity-ct-scanner/documentation, the ***CT 5000 Ingenuity*** *system refers to Ingenuity Diamond Select, which is a rebranding of the* ***Ingenuity 128 system*** *(Refer to annex 2,3)*

At page 11 of annex 1, specification of the x-ray tube, no reference has been made to flying/dynamic focal spot in the x and z direction. On the same page, we take note that the slice collimations available are 64(128)x0.625mm = 40mm and 40(80)x0.625mm =25mm which clearly shows that the equipment ***does not acquire*** *128 slices as requested in the technical specifications of the tender document but rather* ***reconstruct 128 slices.***

The above information is verified from annex 4, the US FDA certificate ref K 160743 where the page 6 of 9, No. of Slices, ***"With a reconstruction process and reduction in ("windmill") artifacts, 128 slices can be achieved from the 64 detectors."***

At page 6 of 9 of the FDA certificate, for x-ray tube, there is flying/dynamic/smart focal spot in the x-direction only which is from left to right of the scanner.

As per annex 5, reference is made to CT Scanner

Make: Philips

Model: iCT range

at page 8 of the technical data sheet, specifications for x-ray tube, it clearly mentions the presence of a flying/dynamic/smart focal spot in x and z direction. The slice collimation at page 8 clearly demonstrate that the system can acquire 128()256)x0.625mm.

The above information is confirmed by annex 6, the US FDA certificate Ref: K162838, at page 6 of 9, x-ray tube – dynamic focal spot in x and ***z deflections****. For collimations available on the system: 128x0.625mm, thus confirming that the iCT range of scanners acquires 128 slices in one rotation.*

However, the iCT range of scanners from Philips does not comply with line item 8 from the technical data specifications required in the tender (d) Tilt of at least least ±30 degrees.

The system quoted by IBL Ltd from Siemens, namely

Make: Siemens,

Model: Definition Edge complies fully with the technical specifications required as per the tender documents.

As per annex 7, at page 5, the z-sharp technology (flying spot) clearly explains how the system is able to acquire double the numbers of slices that is 128 slices from 64 detectors. At page 6, the collimations available are 128x0.6mm which reconfirms that the system has the ability to acquire 128 slices.

The slice acquisition mode can be verified on the exam protocol while performing a CT scan. The ministry has two CT scanners installed at SSRN Hospital and J.Nehru hospital from the Siemens Definition family. The collimation available when performing the acquisition can be verified at the specified sites as they are 128 slices scanners with the z-sharp technology.

Thus, the contract should be awarded to IBL Ltd Healthactiv for the offer of Siemens Definition Edge as we fully meet the technical specifications required in the tender document.

In accordance with regulations 48,49,50 and 51 of the Public Procurement Regulations 2008, in case of an unsatisfied response to our challenge, we may apply for a review to the Independent Review panel"

E. The Reply to Challenge

On 22nd January 2021, the Public Body made the following reply to the challenge and stated that:

"The selected bidder has submitted documentary evidence from the manufacturer certifying that the model proposed complies with line Specification 10(c) of the technical specifications."

F. Grounds for Review

On 27th January 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

"GROUND 1

C1. It is the contention of the Applicant that the Respondent and its Bid Evaluation Committee failed to properly compare the specifications of the CT scanner model CT Ingenuity 5000 Premium, make Philips with the equipment submitted by the Applicant. The Respondent failed to properly examine and evaluate bids that specifically meet the qualification criteria for the Project as per Section 38 of the Act and as per the criteria of the bidding documents.

*C2. It is the Applicant's contention that the specifications of the CT Scanner of the Successful Bidder does not meet the specification described under section 10 c) of the bidding documents (**ANNEX D**), i.e the scanner is not equipped with a Multi-slice detector technology capable of acquiring 128 slices per 360*

*degree gantry rotation, as evidenced by the US FDA certificate herewith annexed and marked **ANNEX E.***

C3. *It is the Applicant's contention that the fact that the scanner model Ingenuity CT 5000 Premium is not capable of acquiring 128 slices per 360 degree gantry rotation, but instead is capable of reconstructing 128 slices per 360 degree gantry rotation from an acquisition of 64 slices of raw data. The difference means that the said scanner generates 64 additional slices from the raw data (reconstruction), by computer processing, to reach 128 slices, whereas the scanner proposed by the Applicant captures (acquires) 128 slices of raw data at source.*

C.4 *It is the Applicant's contention that with a scanner capable of acquiring 128 slices per 360 degree gantry rotation is faster, more accurate and will be better suited for the intended use at Victoria Hospital.*

C.5 *It is the Applicant's contention that the aforesaid difference is a major deviation from the specifications required by the Respondent.*

GROUND 2

C5. *The specific model of the scanner selected by the Respondent does not appear on the website of the US FDA.*

C.6 *Approval certificates by the US FDA were amongst the documents required by the Respondent in the bidding document, as evidenced in **ANNEX F.***

C7. *It is further submitted that Applicant's bid, contrary to the Successful Bidder, does not meet the specifications under section 10 c) of the bidding documents and that the bid should have been awarded to the Applicant."*

H. The Hearing

The hearing on the merits was held on 15th February 2021.

The Applicant was represented by Mr B. François, Barrister together with Ms I. Lecordier, Barrister. They were instructed by Mr Attorney D. Boolauky.

The Respondent was represented by N. Jeewa, Ag. Principal State Counsel instructed by State Attorney.

The Successful Bidder was in attendance during the hearing of 15th February 2021.

I. Findings

There were two lengthy grounds for review that have been set out above in Part F of this judgment. In essence, Ground 1 is a contention that the model (and configuration) proposed by the Successful Bidder is not technically compliant as per the Bidding Documents. Ground 2 takes issue with the fact that the specific scanner on offer from the Successful Bidder does not appear on the website of the United States Food and Drug Administration (**"US FDA"**) - a requirement of the Bidding Documents.

We will address Ground 2 first.

What specific product has Ducray Lenoir proposed?

Much has been said before the Panel during the hearing as to what exactly was being offered by the Successful Bidder. We note that soon after the notification to unsuccessful bidders, the Applicant sought information from the Ministry on this score. The response of the Ministry to the Applicant is dated 15th January 2021, by way of a letter produced by the Applicant before the Panel, and indicates that the make is 'Philips', the model is 'Ingenuity CT 5000 Premium' and the country of origin is 'USA/The Netherlands/China and various parts of the world'.

The Ministry's position is that the model proposed by Ducray Lenoir is of the Philips Ingenuity CT family and the configuration is 'CT 5000 Premium' and that the clearances submitted, from the European Union and the US FDA, are compliant with the Bidding Documents.

The Applicant, by way of annexures to its Statement of Case and documents produced during the testimony of its representative, has provided us with a considerable amount of literature – brochures of Philips Ingenuity CT products, printouts of web pages and US FDA documents amongst others. Mr Francois submitted that it is clearly established, through those documents, that the CT 5000 Premium is not clearly specified on the US FDA website.

Annexed to the Applicant's Statement of Case (and in the bid of the Successful Bidder) is the US FDA approval by way of a letter dated 8th August 2016. We are given to understand that the US FDA approvals, known in the radiology field as a section 510(k) premarket notification of intent to market, are published on the US FDA website and to them are attached the relevant documentation submitted by manufacturers.

The approval bears reference K160743 and takes the form of a comparison between the proposed, or new, product and a predicate, already approved, product. For the Philips Ingenuity CT model, or family, of scanners, the predicate device was the 2003 scanner described as the Philips Plus CT Scanner. When applying, we find that Philips described the Ingenuity CT as a family with three available configurations, the Ingenuity CT – 128, the Ingenuity Core – 64 and the Ingenuity Core^{128} – 128.

We will now set out our findings after having gone through the bid of the Successful Bidder, the clarifications relating to its bid, the documents put before us and the testimony of witnesses on all sides.

The bid was submitted on 12th August 2020 and Option 1 of Ducray Lenoir was for 'PHILIPS Ingenuity CT 5000 Premium'. As required, a Manufacturer's Authorization Form by Philips was to be included in the bid and had to relate to the proposed bid by that manufacturer's distributor. That Form was under the signature of Jan Weg, Export Sales Manager of Philips, the Netherlands (which, we can, without controversy, term the 'Head Office' of Philips). On the Form, it is clearly indicated that Ducray Lenoir is authorised to provide the 'Philips Computed Tomography – Philips Ingenuity CT, 128 – slices'.

Attached to the bid was also the brochure for the Philips Ingenuity CT family (from an unknown year), a 15-page document; it describes, seemingly in descending order of specifications, the 'Ingenuity Elite' followed by the Ingenuity Core[128], Ingenuity Core, Ingenuity Flex[32] and finally, the Ingenuity Flex. A note appearing below the configurations table reads: *'Note: system configurations and optional features may vary by region, price and availability'*

Then, we see that the Successful Bidder attached the brochure for the specific configuration it proposed, the CT 5000 Premium. A 16-page document, it reads as follows:

'Own the day

Computed Tomography 5000 Ingenuity Premium Specifications'

On the top left, below the Philips logo, it reads:

'Computed Tomography

5000 Ingenuity'

It seems to us clear that Philips uses the names '5000 Ingenuity' and 'Computed Tomography 5000 Ingenuity Premium' interchangeably. That brochure for what the Successful Bidder and the Ministry describe as 'CT 5000 Premium' is from December 2019. On its back cover, we read:

"The Philips Computed Tomography 5000 Ingenuity Premium is a configuration of the Ingenuity CT." Besides, as will become more apparent below, the CT 5000 Premium can be configured for 'up to 128 slices' – Page 8 of the brochure.

We note that the Bid Evaluation Committee (**"BEC"**) thoroughly assessed the bids of the various bidders and the relevant bid (Option 1) of the Successful Bidder was the subject of 4 sets of clarifications. On each occasion, Ducray Lenoir sought official correspondence and clarifications from Philips South Africa, which we may describe as the regional office for Mauritius.

In the clarifications sent by the Successful Bidder on 27th November 2020, we find the European Union Declaration of Conformity for 'Model/Configuration' described as:

'Ingenuity

CT/Core/Core128'

That Declaration is dated 4th September 2019.

Then, we find a letter dated 26th November 2020 from one Beatrice Davies-Hakeem, the CT & DXR Sales & Market Africa Manager of Philips of Johannesburg. She unequivocally states that, 'The Philips Ingenuity 5000 do comply with all below tender questions (128 slices CT scanner for Victoria Hospital)'. Besides, she mentions in paragraph 1 that 'Initial Product release date (Ingenuity CT 5000 Premium): Year 2019 as per CE certificate. Physical manufacturing date will be done from the ordering period.'

We gather that the CE certificate referred to is the European Union CE mark certificate referred to in Item 5 of the Schedule of Requirements of the Bidding Documents.

In a letter dated 9th December 2020, in response to another clarification sought by the Ministry, Beatrice Davies-Hakeem again refers to the product as the 'Philips Ingenuity 5000'.

The Ministry then sought further clarifications in respect of Item 10(b) of the Schedule of Requirements (number of detectors on the z axis). Beatrice Davies-Hakeem replied, through a letter dated 29th December 2020, that the, 'Philips Ingenuity 5000 does comply with section 10(b) below. (128 slices CT scanner for Victoria Hospital)'. She then adds, 'Please find attached to this letter a section of the DMS service manual for **Philips Ingenuity CT** highlighting the detector disposition in the system' (**our emphasis**) That DMS service manual extract is *ex facie* from year 2011. Again, we see that senior people of the Philips multinational conglomerate consider the CT 5000 Premium as being part of the Ingenuity CT model family.

The final clarifications sought by the Ministry also addressed item 10(c) of the Schedule of Requirements which will be the focus of our determination under Ground 1, further below. This time the answer to the Ministry came in the form of a 'STATEMENT' from the Head Office, Philips – Netherlands and is dated 6th January 2021 (there was a typographical error on the letter read 6th January 2020 but was clarified, without objection, by the representatives of Ducray Lenoir).

That Statement certifies, in bold text, that: "**System proposed (Ingenuity CT 5000) has a minimum of 64 rows of independent detectors and that the machine has Multi Slice Detector Technology capable of acquiring 128 slices per 360-degree gantry rotation**". The Statement of Philips – Netherlands was produced by the Ministry before us. At some point, Mr Francois tried to make an issue, or a distinction, between Ingenuity CT 5000 Premium and Ingenuity CT 5000 between brackets. We find that this is a red herring, of sorts.

Attached to the letter of Philips – Netherlands was page 8 of the 2019 CT 5000 Premium brochure to establish that its NanoPanel^{3D} detector was capable of acquiring *'up to 128'* slices.

On the whole, we find that Philips – Netherlands had authorised the supply of Philips Ingenuity CT – 128 slices on 12th August 2020 by Ducray Lenoir. Consistently, its regional office of South Africa then allowed and referred to the product as Philips Ingenuity 5000 and even expressly referred to a manual for 'Ingenuity CT' to explain a matter regarding the Ingenuity 5000 product. Finally, Philips – Netherlands itself describes the product as Ingenuity CT 5000.

We must state that little in terms of guidance was provided by the Ministry and the Successful Bidder about the issue save that queries from the Panel during the hearing unravelled clarification that the CT 5000 Premium was the newer (2019) nomenclature of the flagship configuration of the Ingenuity CT models. In fact, assistance was given by the Applicant which provided us with a walkthrough (with printouts) of the Philips (usa.philips.com) American website. One of those pages, or part of a page rather, produced by the Applicant, displays the product as the CT 5000 Ingenuity. However, as per Mr Oozeerally (witness for the Applicant), by clicking on the documentation tab on the CT 5000 page, one is then referred to the 'Diamond Select – Ingenuity 128 CT'. The Applicant has produced a printout of the 2-page brochure of the Ingenuity 128 CT available on the website which brochure, we note, is from 2017.

On the basis of the evidence before the Panel and of the testimony, we find, on balance, that the CT 5000 Premium nomenclature (and its different forms containing '5000' as set out above) is no different from the CT or CT 128 name. To us, the CT 5000 is more likely than not the newest name chosen by Philips since 2019 to describe the Ingenuity CT – the flagship configuration of its Ingenuity CT family. Under a different or older name, CT or CT -128, that product had been approved by the US FDA in August 2016.

We will now address the other ground for review, Ground 1 which is the central issue of this case.

The 'acquiring' conundrum?

Mrs Mungur-Burhoo, Biomedical Engineer and member of the BEC, gave evidence on behalf of the Ministry. She explained that when the public body had settled the Bidding Documents, one of the underlying goals was to have as many solutions, or technologies, to meet the needs of the Ministry. Too narrow the requirements, the more likely only certain types of scanners would be compliant and the more likely the procurement process would have been, in her words, tailor-made - thereby defeating the purpose of competitive bidding. She also stressed on the marked improvement this procurement exercise will bring – the current scanner available to the Ministry being a single slice one.

The Panel notes that the Bid Document has listed out the different components of the CT Scanner System and has detailed the Technical Specifications related to each of the 39 listed Items. These include the specifications, amongst others, for the Gantry,

the Patient Table, Detectors (Item 10), X-Ray Generator, X-Ray Tube, Computer System/Reconstruction (Item 14), Image Quality and Image Storage.

Item 10 – Detectors is further broken down under sub-sections 10(a) to 10(d) specifying respectively solid state detector technology using low-dose with high resolution acquisition, the minimum number of rows of independent detectors in the z-axis (64 Nos), number of slices to be acquired per rotation and the minimum z axis coverage per rotation.

Here, Item 10(c) of the Schedule of Requirements is, without doubt, the centre of the present dispute before the Panel. It reads:

"Multi-slice detector technology capable of acquiring 128 slices per 360 degree gantry rotation"

The Applicant understood from that phrase that the CT Scanner should have the capability to capture 128 slices worth of raw data to produce 128 slices per 360 degree gantry rotation. The latter considers that the scanner proposed by the Successful Bidder is not in conformity with the requirements for Item 10(c) as the same captures 64 slices worth of data, but produces 128 slices after a reconstruction process.

The Ministry, on the other hand, avers that it has not specified how the 128 slices are to be obtained but has specified the technical requirements for the detectors, the X-Ray Tube and all the quality requirements of the other components of Scanner System. Here, their concern is to have as "end product" 128 slices which meet all the image and other quality requirements specified in the schedule of technical requirements. The Respondent also pointed out that there is a specific item regarding reconstruction (Item 14), where the parameters regarding reconstruction are equally detailed. Mrs Mungur-Burhoo stressed on the fact that even the Applicant has recourse to reconstruction to arrive at the 128 slices specified.

The Applicant also produced before us a document from Philips' website titled *'Ingenuity Data Acquisition and Sampling'* and relies on a few lines on the first page to try and establish that the product offered by the Successful Bidder was not compliant because, amongst other things, it uses dynamic z-focal spot to reconstruct the raw data into 128 slices. We note, however, that Philips – Netherlands, Head Office, in its correspondence sent to the Ministry as a final clarification in its letter of 6th January 2021 (referred to above, under Ground 2), also relies on that same document and highlights, on the second page, the sentence, *'to provide twice the number of rows of detector date (e.g, for a 64-channel scanner, this produces 128 slices of image data)'.* Philips – Netherlands thus clearly states that the product is compliant specifically with Item 10(c).

In the present matter, the Ministry views both bids (Offer A of the Applicant and Option 1 of the Successful Bidder) as compliant and they were the 'finalists', so to speak. In fact, we note that every bid that qualified for technical evaluation (four bidders, six bids) was compliant with Item 10(c) which seems to be in line with what Mrs Mungur-Burhoo suggested about the intention to have as varied solutions and technologies as possible.

Be that as it may, the Applicant makes two overarching points. That the Successful Bidder is not compliant to that Item and, in any case, the 'confusing' phraseology adopted by the Ministry beguiled it into providing, as it did, a considerably better product, far above the requirements of the Ministry, and with a price-tag to match, of course. Indeed, it was not in issue that the Siemens scanner proposed by IBL HealthActiv was superior in its technology and the quality of the raw data it captures per gantry rotation.

It was said that it would capture 384-slice worth of data and reconstruct it below to 128 slices. Seemingly, this would be of a better quality than the Philips scanner which captures 64-slice worth of data reconstructing these, by extrapolation, to the target 128 slices. However, the issue is and has always been: what did the Ministry intend, what did it mean and what were bidders meant to understand from the all-important phrase?

The Oxford dictionary's online service, now known as Lexico, gives as one definition (the definition of relevance here) of the verb 'to acquire':

"Buy or obtain (an asset or object) for oneself."

'To obtain' is defined as:

"Get, acquire, or secure (something)."

The Applicant's contention, reduced to its core component, is that the machine should capture 128 slices (or more) per 360-degree rotation of the gantry while the patient is going through the scanner. The Ministry contends that one gantry rotation of 360 degrees should produce or result into a 128-slice image for each rotation, while or immediately after the patient goes through the machine. In support, the Ministry relies on conformity to a number of quality requirements needed for all the different system components to ensure that the equipment delivers the desired end product, that is, 128 high quality slices images per rotation.

It will be obvious to all that both interpretations of the phrase *in lite* are reasonable, in law. That very fact must operate to defeat the Applicant's contentions. However, we are minded to go further and we find, on balance, that not only was the Ministry's interpretation a reasonable one but it was the correct one going by the definition of the verb 'to acquire' in ordinary English- in the sense of obtaining, as a result, 128 slices.

Necessarily, the secondary point by the Applicant that the confusing phrasing deprived it of the opportunity of making offers for less complex and cheaper solutions cannot succeed, either. We are not prepared to find that Item 10(c) could create such a clear and obvious confusion that would have required an intervention by the Panel.

J. Conclusion

Both Grounds for Review having failed, we accordingly set aside the present Application for being devoid of merit.

K. Observations

We have avoided to take into account or consider, at any stage, the issue of cost estimates in this case and these have not been of any influence on our judgment. The Panel has had the opportunity to address those in the case of **NEC XON (South Africa) v Mauritius Ports Authority, Decision 13/20** and we, here again, form the view that cost estimates, in the current legal framework, are to remain confidential to public bodies.

However, we feel it is warranted to state, here, that the extent to which the Applicant's bid price was above the estimates was of a degree rarely seen in procurement proceedings. When queried by the Panel, Mrs Mungur-Burhoo had no hesitation to state on record that should the Applicant succeed in this application, a possible outcome would be a cancellation of the whole exercise. Of course, there would also have been the possibility of negotiations under the Public Procurement Act and Public Procurement Regulations but the sheer extent of the deviation by the Applicant is yet another indication of how its offer was above the requirements of the Ministry.

A. K. Namdarkhan
(Member)

R. Mungra
(Member)

V. Mulloo
(Member)

INDEPENDENT REVIEW PANEL MAURITIUS

Dated: 25th February 2021