

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1731 –SPD3/2022/010 – Supplies - Framework Agreement for the Provision of Incontinence Diapers Pull-Ups, Pads and Inco sheet for Senior Citizens and Persons with Special Needs for the Ministry for Gozo**

27<sup>th</sup> May 2022

The Board,

Having noted the call for remedies filed by Dr Clement Mifsud Bonnici on behalf of Ganado Advocates acting for and on behalf of Krypton Chemists Limited, (hereinafter referred to as the appellant) filed on the 29<sup>th</sup> March 2022;

Having also noted the letter of reply filed by Ms Joyce Farrugia acting for Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 4<sup>th</sup> April 2022;

Having heard and evaluated the testimony of the witness Mr Matthew Arrigo (Representative of the Appellant) as summoned by Dr Calvin Calleja acting for the Krypton Chemists Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 24<sup>th</sup> May 2022 hereunder-reproduced.

### **Minutes**

#### **Case 1731 – SPD3/2022/010 – Framework Agreement for the Provision of Incontinence Diapers, Pull-Ups, Pads and Inco-Sheet for Senior Citizens and Persons with Special Needs for the Ministry for Gozo**

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

The tender was issued on the 4<sup>th</sup> March 2022 and the closing date was the 11<sup>th</sup> May 2022. The value of the tender, excluding VAT, was € 579,750.

On the 29<sup>th</sup> March 2022 Krypton Chemists Ltd filed a Call for Remedies against the Services Gozo Directorate as the Contracting Authority claiming that the tender specifications are discriminatory.

A deposit of € 2,898.75 was paid.

On the 24<sup>th</sup> May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

### **Appellant – Krypton Chemists Ltd**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Matthew Arrigo	Representative

### **Contracting Authority – Services Gozo Directorate**

Ms Doreen Camilleri	Representative
Ms Christabel Farrugia Grech	Representative
Mr Marnol Sultana	Representative

### **Department of Contracts**

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Calvin Calleja Legal Representative for Krypton Chemists Ltd said the Contracting Authority had resisted splitting this tender into lots leading to a reduction in competition.

Dr Mark Anthony Debono on behalf of the Contracting Authority said that it would be relying on the written submissions.

Mr Matthew Arrigo (188094M) called as a witness by the Appellant testified on oath that he was an Assistant Chemist and a Director of Krypton Chemists. His company were the exclusive suppliers of Egosan full adult range of incontinence products in Malta. They offered different ranges in different sizes. This adult range was offered by seven economic operators with one bariatric supplier and one supplier of paediatric products. The Contracting Authority did not accept that it was not feasible to have only one supplier for the whole range of product. In the past there were times when there were more than one suppliers and the adult range could easily be done by a different supplier.

Mr Marnol Sultana Representative for Services Gozo Directorate said that the winner of the tender had to set up a distribution centre and the Authority could not follow the request to split the tender into lots as the paediatric and the bariatric quantities were too small to warrant opening their own distribution centre. The Authority was following previous offers and indeed Krypton had tendered previously. Splitting into lots meant that clients requiring different sizes had to call at different distribution centres.

Dr Calleja stated that the feasibility issue was not a principle of Public Procurement. The issue of inconvenience which the Authority claims can be overcome by the way the tender is operated. The way the current tender is operated reduces competition – there are two special categories but the rest is general use. In percentage terms the special items are minimal. Pharmacos are presently supplying the products and the technical specifications in the tender meet exactly the specifications of their products in measurement and absorption requirements – this excludes everyone else from the common range. Reference was made to PCRB Cases 1719 and 1315 – the former dealt with the removing of barriers to competition and that the decision to split into lots had to be justified whilst in the latter the Board ruled that there was no justification not to split tender and open competition.

Dr Clement Mifsud Bonnici Legal Representative for Krypton Chemists Ltd stated that the Authority had to justify their claim of lack of feasibility as this was restricting competition. The principle is that whoever alleges must prove the point which is not the case here. There was no reason why the Authority should go to only one supplier – they could easily tie up the distribution through the main supplier. Competition leads to cheaper prices.

Mr Sultana disagreed that the terms of the tender were specific as tolerances were allowed in all cases. Moreover suppliers had tendered in the past on the same terms as now.

The Chairman noted that there were no further submissions and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 24<sup>th</sup> May 2022.

Having noted the call for remedies filed by Krypton Chemists Limited (hereinafter referred to as the Appellant) on 29<sup>th</sup> March 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD3/2022/010 listed as case No. 1731 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Mr Marnol Sultana

Whereby, the Appellant contends that:

- a) The Applicant submits that the tender specifications which do not split the Tender into lots and which bundle certain specialised items within the "whole of quantities" to be supplied are unduly restricting competition on the market and discriminatory in nature. These tender specifications put economic operators who might manufacture and/or supply specialised items for paediatric persons and for bariatric patients at an unfair advantage and is discriminating against economic operators who do not manufacture and/or supply such items--effectively foreclosing them from their relevant market. This will also harm the Contracting Authority who will have less economic operators competing against each other, and therefore, potentially higher price and possibly inferior service levels. The tender specifications are at odds with the Contracting Authority's duties in Regulation 39 of the PPR to "treat economic operators equally and without discrimination" and to design the procurement model in such a way that "artificially narrows competition". These duties emanate from the fundamental general principles of public procurement law as developed by the EU Directives and case-law of the Courts of Justice of the European Union.
- b) The Applicant submits that the principle of competition is of constitutional importance to public procurement and it is important that competition on the market—whether public or a neighbouring private market—is fostered. If there is no or limited competition, it is the contracting authority which suffers by obtaining higher offers, bad quality supplies or services or possibly no offers at all.
- c) The Contracting Authority provided various reasons for not splitting the Tender into lots. The Applicant submits that none of these reasons constitute valid justification to insist on a tender specification which is artificially narrowing competition and this for the following reasons:
  - i. ***“Tender cannot be divided into lots as the deliveries cannot be supplied by different suppliers”***. The Applicant submits that this is no good reason against the division of lots, in particular, since it is physically and logistically possible that the contractor of each lot supplies Paediatric Persons (Children), Bariatric Persons and/or Senior Citizens as per the obligations of Article 29 of the Special Conditions.
  - ii. ***“Separating the supplies into Lots is not feasible due to the small amount of Scheme B beneficiaries which are entitled to these supplies within Gozo [...]”***. The Applicant submits that the matter of feasibility should not trump the promotion of genuine competition which is a constitutional principle of public procurement, and ultimately, the objective of the Tender itself which attempts to emulate real market conditions of competition. In any case, and even if this Honorable Board were to admit that feasibility is a factor to be considered at all, there are other, more proportionate options, which can be pursued by the Contracting Authority, as shall be submitted during proceedings.
  - iii. ***“Separating the supplies into Lots is not feasible [...] and in view that this would result in different locations for the distribution of supplies from where the beneficiaries would***

*collect their entitlement*”. The Applicant submits that each beneficiary, whether Scheme A or Scheme B, is a Paediatric Person (Children), Bariatric Person or Senior Citizen, therefore there is no cause for confusion if a beneficiary would have to collect such items from the contractor's location.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 4<sup>th</sup> April 2022 and its verbal submission during the virtual hearing held on 24<sup>th</sup> May 2022, in that:

- a) In terms of article 18 of the Directive 2014/24/EU and Regulation 39 of the Public Procurement Regulations, 2016, the artificial narrowing down of competition, as contended by the objector can only subsist if the (i) design of the procurement procedure (framework agreement) is made with (ii) the intention of unduly favouring or disadvantaging certain economic operators. Whether or not this choice breaches the principles of open competition and limits market access to certain economic operators is a matter which the objector must duly prove. First of all, the Contracting Authority has not artificially narrowed down competition and submissions of the objector cannot be upheld since, in terms of Section IV of the Contract Notice the call for competition involves the use of the open procedure.
- b) Furthermore, in terms of the tender document, the Contracting Authority has provided reasonable and legitimate grounds for the choice in the procurement design. Most certainly, it did not divide the Contracts into Lots intending to narrow down competition as complained of by the objector. As a reasonably and well-informed tenderer, the objector should differentiate among the different procurement designs, whereby Contracting Authorities is lawfully enabled to conclude both framework agreement and contracts divided into separate lots. The Contracting Authority submits that the objector is misguided in the statement that framework agreements and contracts and the choice thereof limit narrowly restrict competition since such agreements have as their objection the participation and inclusion of a multitude of economic operators.
- c) In terms of Recital 60 of the Public Procurement Directive 2014/24/EU, the tenderer should be aware that framework agreements 'are widely used and considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as it is.' Additionally, the European Commission has outlined the advantages of choosing framework agreements since these contribute to the efficiency of the tender and socially responsible public procurement. This means that contrary to the objector's arguments the principles laid down under Regulation 39 for unhindered competition, non-discrimination among economic operators and increased market access to the same cannot be sole criterion upon which Contracting Authorities base their decision in the choice of procurement design.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witness duly summoned, will now consider Appellant's grievances.

- a) This Board will initially make reference to the Public Procurement Regulations ("PPR") which it deems to be most relevant to this case;
  - i. Regulation 39(3) whereby: *"The design of the procurement shall not be made with the intention of excluding it from the scope of these regulations **or of artificially narrowing competition.** Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."* (bold & underline emphasis added)
  - ii. Regulation 53(6) whereby: *"Technical specifications shall afford **equal access** of economic operators to the procurement procedure and shall not have the effect of **creating unjustified obstacles** to the opening up of public procurement to competition."* (bold & underline emphasis added)
- b) Reference is made to the testimony under oath of Mr Matthew Arrigo wherein he stated *"They (Appellant) offered different ranges in different sizes. This adult range was offered by seven economic operators with one bariatric supplier and one supplier of paediatric products."*
- c) Reference is finally made to the Tender Dossier Section 3 Specifications / Terms of Reference, page 18, paragraph 4. Therein a table listing 20 items to be fulfilled and supplied by the eventual economic operator awarded the tender procedure. Items 1 to 5 mainly refer to 'Paediatric' related products which amount approximately to 5% of the whole population of quantities. Items 10 and 11 mainly refer to 'Bariatric' related products which amount approximately to only 1% of the whole population of quantities. The Board opines that enough proof has been presented by the Appellant to ascertain that such Paediatric and Bariatric products can only be provided by one or very few suppliers, thus artificially narrowing competition. On the other hand, items 6 to 9 and 12 to 20, which represent approximately 94% of the population can be furnished by a much larger pool of suppliers.
- d) Therefore, this Board agrees with the argumentation of the Appellant that in this specific case, the tender in question could have easily been issued in separate lots, one (1) to cater for the most used 'Adult' range, i.e. items 6 to 9 and 12 to 20, and two other lots for 'Paediatric' (items 1 to 5) and 'Bariatric' (items 10 and 11) related products respectively.
- e) The issues mentioned by the Contracting Authority, such as those related to the distribution centres, the Board opines, can easily be solved if such responsibility is shifted onto the economic operator who would be awarded the largest lot.

Hence, this Board upholds the Appellant's grievance.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant's concerns and grievances;
- b) To order the contracting authority to either:
  - i. cancel the tender dossier and re-issue in different lots as per point (d) above; or
  - ii. modify the existing tender and split into lots as per point (d) above
- c) after taking all due consideration of the circumstances and outcome of this Call for Remedies, directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member