

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1791 – SPD3/2022/045 – 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**

**4<sup>th</sup> October 2022**

The Board,

Having noted the call for remedies filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for and on behalf of Pharma-Cos Limited, (hereinafter referred to as the appellant) filed on the 29<sup>th</sup> July 2022;

Having also noted the letter of reply filed by Ms Christabelle Farrugia Grech acting for the Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 3<sup>rd</sup> August 2022;

Having noted the call for remedies filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Krypton Chemists Limited, (hereinafter referred to as the Interested Party) filed on the 3<sup>rd</sup> August 2022;

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 27<sup>th</sup> September 2022 hereunder-reproduced.

### **Minutes**

**Case 1791 – SPD3/2022/045 – 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 7<sup>th</sup> July 2022 and the closing date was the 9<sup>th</sup> August 2022, extended to 14<sup>th</sup> September 2022. . The estimated value of the tender, excluding VAT, was € 525, 750 for Lot 1. .

On the 29<sup>th</sup> July 2022 Pharma-Cos Ltd filed a Call for Remedy against the Services Gozo, Ministry for Gozo as the Contracting Authority objecting to the contents of the tender as re-issued in relation to Lot 1.

A deposit of € 2,628.75 was paid.

On the 27<sup>th</sup> September 2022 the Public Contracts Review Board composed of Mr Kenneth Swain Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

### **Appellant – Pharma-Cos Ltd**

Dr Matthew Paris	Legal Representative
Mr Gordon Zammit	Representative

### **Contracting Authority – Services Gozo, Ministry for Gozo**

Dr Tatianne Cassar Scicluna	Legal Representative
Ms Joyce Farrugia	Representative
Ms Christabelle Farrugia	Representative
Mr Marnol Sultana	Representative
Mr Silvio Cini	Representative

### **Interested Party – Krypton Chemists Ltd**

Dr Calvin Calleja	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Mr Matthew Arrigo	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 and invited submissions.

Dr Matthew Paris Legal Representative for Pharma-Cos Ltd said that here we are dealing with a tender where the Ministry for Gozo decided on the process necessary to meet the requirements of the tender but which are not acceptable to the Appellant. The Appellant is not trying to change the previous decision of the PCRB although the Ministry claims it is. The PCRB's only decision was regarding distribution and they directed that lots had to be split but the Ministry claims otherwise. The end-user is not a clinical person. The interested party's difficulty is the lack of know how in handling the end user. There are also financial consequences as higher costs are involved whilst the aspect of competitiveness is lacking. What is happening is the creation of a joint venture post-award without knowing the consequences of the cost of storage, distribution, liability etc. These shortcomings have to be clarified. The lack of predictability leads to the end-user suffering.

Dr Tatianne Cassar Scicluna Legal Representative for the Ministry for Gozo said that the Contracting Authority had to follow the decision of the PCRB. The previous tender had to be cancelled as it could not be modified. There was nothing different to the Board's decision in the distribution process proposed.

Dr Calvin Calleja Legal Representative for Krypton Chemists Ltd referred to the PCRB's decision and stated that it was up to the Authority to implement it.

Dr Clement Mifsud Bonnici Legal Representative for Krypton Chemists Ltd said that the Appellant was complicating matters unnecessarily as the tender was clear. The Ministry used their discretion in setting out the distribution process. There is no point in trying to prolong matters.

Dr Paris referred to Regulation 262 of the PPR and to the Board's decision of the 27<sup>th</sup> May 2022 when they decided on the matter of the distribution not the splitting of lots – this was not *res judicata*. The Appellant is imploring that the tender is not clear and the only remedy is to come to the Board to

avoid further problems. The decision is to be made by the buyer not the seller. The Authority has to explain in detail how the distribution is to be carried out. There is missing information on storage, insurance, liability and all the obligations are presently on the bidder. Clarification is necessary.

Dr Cassar Scicluna said that the PCRB were very clear on the distribution and how the Authority had to proceed. Most of the points raised by Appellant are covered in the terms of the tender – if any point is still not clear there are possible remedies.

Dr Calleja stated that the responsibility of distribution rests on the winner of Lot 1. Clause 1 of the Instructions makes this clear. Clause 7.4 deals with the delivery note and it is obvious that the responsibility lies with Lot 1. The matter is not complicated and Clauses 5 and 6 of the Terms of Reference cover the question of quantities and ample stock. Appellant is attempting to dictate the terms of the tender.

Dr Mifsud Bonnici said that the Appellant was complicating matters by creating doubts. The relationships are clear. Bilateral law is clear on transfers of goods from one party to another. If appeal is upheld and the tender cancelled there will be further scope for additional remedies to be sought and thus lengthen the process.

Dr Paris stated that Appellant has every right of appeal. The product in question is for the use of vulnerable people and any ambiguity needs to be addressed. Unclear clauses have been identified and in certain cases there are contradictions. The tender is creating unregulated obligations and the Appellant is merely requesting clarification of certain unclear clauses and the PCRB is being requested to deal with these points.

Dr Calleja, in conclusion, stated that there are storage facilities available other than at the CPSU – there is no need for contracts or joint ventures to fulfill the tender. The obligation is carried out at the point of delivery and the detailed reply submitted covers fully the points raised.

The Chairman thanked the parties for their 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 27<sup>th</sup> September 2022.

Having noted the call for remedies filed by Pharma-Cos Limited (hereinafter referred to as the Appellant) on 29<sup>th</sup> July 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD3/2022/045 listed as case No. 1791 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Matthew Paris

Appearing for the Contracting Authority: Dr Tatianne Cassar Scicluna

Whereby, the Appellant contends that:

- a) Lack of predictability [creates ambiguity] - In each and every procurement, it is fundamental that provisions, criteria, conditions and any other condition stipulated within the tender document are clear and unambiguous. The clarity will ensure predictability as well as ensure that the tender document adheres to the fundamental procurement principle of transparency. It is the appellants view that the tender as re-issued does not satisfy this latter standpoint, in that it is neither clear, nor precise and definitely not unequivocal in the manner in which it has been drafted. Whilst acknowledging that the contracting authority upheld the recommendation by the PCRB to shift 'responsibility onto the economic operator who would be awarded the largest lot' the contracting authority has presented a procurement document which is riddled with inconsistencies, unanswered positions, ambiguous criteria as well as crafted a watch and wait procurement.
- b) Storage - insurance – Risk - The tender document in provision 1.1 holds that, *“Further to the supply of the items for Lot 1, the successful contractor shall also be responsible for the storing, transportation and distribution of all the items listed under all lots.”* It thereafter in provision 12.1 suggests that, the supplies shall be insured against any kind of damage. The contractor shall be responsible for any damage or loss of supplies whilst in transit to the Distribution Centre and/or to the beneficiaries. It finally in provision 29.1 suggests that the contractor [presumably of Lots 2 and 3] shall bear all risks relating to the supplies until provisional acceptance at destination [being the distribution centre]. The above provisions show inconsistencies as to who will be responsible for what and till what stage.
- c) Delay penalties - The tender document in provision 19.1 makes it clear that it is the obligation of the awarded contractor of LOT 1 to manage stock levels, in that it held that, *“The awarded contractor of Lot 1 must have ample stock to always satisfy demand and an expected buffer stock list is available within Section 3 - Technical Specifications of this dossier. The awarded contractor will also be provided on a monthly basis with an updated list of entitled beneficiaries under Scheme A with their respective product entitlement.”* In provision 21.1, the tender document imposes a penalty for whosoever breaches provision 19.1, by stating that, *“Further to the provisions of the General Conditions, a daily penalty of one hundred Euro [€100] shall be charged to the Contractor per day of delay on the period of Execution stipulated at article 19.1 of these Special Conditions and in the event of any failure to satisfactorily provide the requested supplies as stipulated in this Contract within any timeframes agreed in writing with the Contracting Authority,”* On its part, provision 29.5 of the tender document indicates that, *“The contractor of Lot 1 must ensure that at all times there is enough number of supplies at the Distribution Centre to be set up by the contractor, for the collection of items by the beneficiaries on a monthly basis.”* The tender document seems to absurdly suggest that, the defaults and breaches done and committed by the contractors for Lot 2 and Lot 3, including but not limited to the failure to supply the necessary stock, are to be absorbed by the contractor for Lot 1. The above provisions

not just unclear and unequivocal, but absurd to say the least! The situations presented above are ambiguous and unclear and in accordance with article 262 [1][d] of the PPR, *“(d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure”*.

- d) Tender violets (sic) the clarity requirement - An important requirement within tender documents and public procurement in general is the adherence to the clarity requirement, in that criteria and obligations are clearly spelt out on how these are to be met. It is clear through the wording of the tender document, that a contractual relationship is being forged, on the one hand between the Contractor of Lot 1 and on the other hand the Contractors of Lot 2 and Lot 3, and this in view of the collection of the stocks from, the risk/insurance consideration, the penalties allocation, and other similar situations.

The tender in provision 3.1 [order of precedence of contract documents] lists the documents forming part of this tender document: a) The contract b) The Special Conditions c) The General Conditions d) The Contracting Authority's technical specifications and design documentation e) The Contract's technical offer, and the design documentation f) The financial bid form g) The tender declarations in the Tender Response Format h) Any other documents forming part of the contract.

Whilst on its part, Section 4 of the tender documents lists the following as supplementary documentation; 4.1 - Draft Contract Form, 4.2 - Specimen Performance Guarantee, 4.3 - Specimen Tender Guarantee, 4.4 - Specimen Pre-financing Guarantee, 4.5 - Specimen Retention Guarantee, 4.6 - General Conditions of Contract, 4.7 - General Rules Governing Tendering.

There is no mention whatsoever of the agreements between the Contractors, nor a specimen copy of such agreement has been provided. The fact that the conditions of such agreement between these parties have not been laid out, violets (sic) the clarity requirement as enunciated by the European Court of Justice. In addition to the aforesaid, it potentially creates an impossibility to properly execute the contract, as per article 262 [1][d] of the PPR, *“(a) to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform.”*

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 29<sup>th</sup> July 2022 and its verbal submission during the virtual hearing held on 27<sup>th</sup> September 2022, in that:

- a) The Contracting Authority hereby submits that the manner in which the call for competition has been reissued is legally grounded and based on the decision of this Honourable Board's dated 27<sup>th</sup> May: 2022 (Case 1731-SPD3:2022:010). In fact following a call for remedies filed by Krypton Chemists Limited on the 29<sup>th</sup> March 2022 (vide ref: afore-mentioned). this Honourable Board after

evaluating the case and hearing the necessary witness, arrived to the following decision: “a) To uphold the Appellant's concerns and grievances; b) To order the contracting authority to either: i. cancel the tender dossier and reissue in different lots as per point (d) above; or ii. modify the existing tender and split into lots as per point (d), above.”

- b) However, in this case, since the Contracting Authority could not modify the previous tender without first cancelling it, it proceeded to cancel the previous tender and re-issue it as per point (d) of the judgement that read: “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 to 11) related products respectively”.
- c) It follows that, should the Contracting Authority have decided not to follow the above-mentioned decision, it would have acted arbitrarily, and contrary to Article 268 of the Public Procurement Regulations that stipulates that: “The Contracting Authority shall abide by the decision of the Public Contracts Review Board in the shortest time possible and where the contracting authority fails to implement the decision of the Public Contracts Review Board the latter may report the matter to the Minister responsible for that contracting authority”.
- d) In view of the above, the Contracting Authority hereby submits that it has acted in accordance with this Honourable Board's decision and abided with the law.

This Board also noted the Interested Party's Reasoned Letter of Reply filed on 3<sup>rd</sup> August 2022 and its verbal submission during the virtual hearing held on 27<sup>th</sup> September 2022, in that:

- a) The Interested Party categorically contests the cancellation of this Tender. Contrary to the Applicant's claims, the Tender is clear and comprehensive and there is no doubt or ambiguity at least in the mind of the Interested Party as to the requirements and specifications of this Tender.

Therefore, the Applicant's first grievance is unfounded and misguided since there is no ambiguity or error to be clarified or removed in terms of Regulation 262(1)(d). The respective contractor's responsibility is clearly and unequivocally set out in the Tender, inter alia by means of the following:

- a. Economic operators, including the appellant, are aware of the usages of commercial documents in supply contracts. In this sector it is well known that a delivery note is the accredited document where, after such note is signed, the supplier is no longer responsible for the supplies;
- b. Clause 7.4 of the Tender stipulates that a delivery note must be provided by the respective contractor upon each and every delivery;
- c. Clause 29.5 of the Tender states that in addition to a delivery note, an official must also be presented for each separate delivery;

d. Clause 13 of the Tender provides the mandatory requirements for all contractors that *“the supply and delivery of the diapers, pads, pull ups and inco-sheets at Distribution Centre shall commence within four (4) weeks from order to start supplies following date of last signature on the contract [...] The ordered consignment is to be delivered at the Distribution Centre during the first week of every month in the required quantities”*;

e. Clause 19.1 of the Tender unequivocally states that it is the obligation of the Lot 1 contractor to manage stock levels by means of a buffer stock whilst Clause 19.1(d) notes that penalties may be imposed should the ordered supplies not be delivered in the agreed timescales. The unilateral interpretation which arises from this is, in accordance with the underpinning principle regulating the entire Tender, that the penalties for failure to supply in terms of the agreed timescales will be attributed to the responsible contractor, whether under Lot 1, Lot 2 or Lot 3. On the other hand, the failure to effect delivery is necessarily attributable to the Lot 1 contractor, who has agreed to take on such responsibility in the first place(!)

- b) The second grievance is in substance an extension of the first. It is entitled "Tender Violates the Clarity Requirement" but rather than rooting out ambiguities in the Tender, the Applicant proceeds to lament the absence of a specimen contract between the Lot 1 contractor and the Lot 2 and Lot 3 contractors. Regulation 262(1)(a) of the Regulations clearly states that a pre-contractual remedy may be requested *"to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform"*. The act of setting aside, by its very nature, implies and requires the presence of provisions to be set aside, and not the absence of a specimen contract which the Applicant has taken upon itself to recommend and dictate to this Honourable Board and the Contracting Authority to be inserted as part and parcel of this Tender.

To make matters worse, the Applicant is calling upon this Honourable Board to set aside *"all clauses and conditions which create the impossibility to perform procurement"* without even identifying the very clauses to begin with. Were this Board to accede to the Applicant's demand, and carry out such a unilateral exercise, the remit of its functions in terms of the Regulations would certainly be exceeded. In addition, the Interested Party respectfully submits that requiring collaboration and co-operation between various contractors is not a novel idea which the Contracting Authority, or this Honourable Board for that matter, is rolling out for the first time to economic operators. It is a well-established principle that certain tenders require different successful contractors to work together cohesively towards fulfilling the procurement needs of the particular contracting authority in accordance with their respective contracts.

The Applicant has failed to substantiate its call for yet another tender document which can surely only serve to further complicate matters and delay the procurement procedure for this particular Tender, a demand which directly conflicts with the applicant's overall clamour for clarity. The Interested Party wishes to observe that the Applicant is currently the incumbent operator for the

supply of incontinence diapers, pull-ups, pads and inco-sheet to the Contracting Authority and has every interest in maintaining the status quo.

On a final note, any action undertaken by the Contracting Authority or ordered to be carried out by this Honourable Board must be proportionate in measure. Cancelling the call for competition is certainly the antithesis of proportionality, a drastic and nuclear reaction which would be to the detriment of the Contracting Authority and all economic operators, with the natural and obvious exception of the Applicant as the incumbent supplier.

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

There are two (2) main points / grievances to be dealt with. These are:

1. Storage - insurance – Risk
2. Delay penalties

The other points raised by the Appellant, i.e. 'Lack of predictability' and 'Tender violets (sic) the clarity requirements' are deemed to be supporting arguments, especially considering that the 'tool' to be used to nullify such arguments is the 'delivery note' document which is mentioned multiple times in the tender dossier. The signature of such accredited document is used to transfer responsibility from one party to another.

a) **Storage - insurance – Risk**

The appellant raises questions and doubts on provisions 1.1 (Section 3), 12.1 (Section 2) and 29.1 (Section 2). After hearing all relevant arguments on the matter, this Board opines that such provisions are clear and unambiguous. The point of transfer of responsibility is the delivery note. Provision 1.1. states "*the awarded contractor of Lot 1 shall also liaise with the awarded Contractors of Lots 2 and 3 to collect the supplies from their premises*". Therefore, it is logical to assume that till collection by contractor of Lot 1 from contractors of Lots 2 and 3, it is contractors of Lots 2 and 3 which are 'responsible' for such items. As soon as the contractor of Lot 1 collects such items / supplies and a delivery note is signed, the responsibility shifts onto the contractor of Lot 1.

Hence, this grievance of the appellant is not being upheld.

b) **Delay penalties**

The appellant raises questions and doubts on provisions 19.1 (Section 2), 21.1 (Section 2) and 29.5 (Section 2). This Board opines that in these provisions there may be an element of ambiguity in that it should be clarified by way of clarification note issued by the Contracting Authority that if the Contractors of Lots 2 and 3 do not supply the Contractor of Lot 1 with enough supplies as per the terms of the tender dossier, more specifically as per Sections 2 and 3, then for obvious reasons,



such penalties are to be borne by Contractors of Lots 2 and 3 respectively. i.e. if Contractor of Lot 1 abides by all requisites of the tender, keeps the buffer stock level as required and when he requests re-supply from Contractors of Lots 2 and 3, he is not provided with such supplies, it would be unreasonable to impose penalties on contractor of Lot 1.

This, in the Board's opinion, can easily and practically be solved by way of issuance of a clarification note from the Contracting Authority. Therefore, the principle of proportionality is also being respected and tender procedure can move forward.

Hence, this grievance of the appellant is being upheld.

**The Board,**

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

- a) Not to uphold the Appellant's concerns and grievance on 'storage, insurance and risk';
- b) To uphold the Appellant's concerns and grievance on 'delay penalties';
- c) To order the contracting authority to issue a clarification note on 'delay penalties' grievance in line with the considerations and findings of this Board;
- d) To amend the 'Closing Date of the Call for Tenders' to the 14<sup>th</sup> October 2022;
- e) after taking all due consideration of the circumstances and outcome of this Call for Remedies, directs that half the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member