# PUBLIC CONTRACTS REVIEW BOARD

## Case 1585 – CT 2537/2020 – Lot 5 – Tender for the Supply of Complete Enfit System (or Equivalent)

## Remedy before Closing Date of a Call for Competition

**21st June 2021**

The Board,

Having noted the publication date of the call for tenders was the 20th January 2021 whilst the closing date was the 13th April 2021 (extended). The estimated value of the tender (Lot 5) (exclusive of VAT) was € 89,625.

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 Ltd (C8933), (hereinafter referred to as the appellant) on the 22nd February 2021;

Having also noted the Reasoned Letter of reply filed by Dr Marco Woods on behalf of Central Procurement and Supplies Unit on the 26th February 2021;

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

Having heard and evaluated the testimony of the witness Mr James Harrison who is an International Sales Manager at the firm Medicina who are represented in Malta by Appellant's firm;

Having heard and evaluated the testimony of the witness Mr Matthew Arrigo who holds the office of Director at the Appellant's company;

Having heard and evaluated the testimony of the witness Mr Jesmond Seychell a Senior Specialised Nurse at Mater Dei Hospital and an advisor in the preparation of this tender;

Having heard and evaluated the testimony of the witness Ms Marika Cutajar a procurement employee and the chairperson of the prospective evaluation committee on this tender;

Having noted and evaluated the minutes of the Board sitting of the 17th June 2021 hereunder-reproduced.

**Minutes**

## Case 1585 – CT 2537/2020. Tender for the Supply of Complete Enfit System (or Equivalent) – LOT 5

The tender was published on the 20th January 2021 and the closing date was the 13th April 2021. The value of Lot 5 of the tender was € 89,625.

On the 22nd February 2021 Krypton Chemists Ltd filed an appeal against Central Procurement and Supplies Unit as the Contracting Authority in terms of Regulation 262 of the Public Procurement Regulations in respect of Lot 5 of the tender.

A deposit of € 448.13 was paid.

On 17th June 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

**Appellant – Krypton Chemists Ltd**

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

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

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| Dr Marco Woods | Legal Representative |
| Ms Marika Cutajar | Representative |
| Mr Jesmond Seychell | Representative |
| Mr Eman Gravino | Representative |

**Department of Contracts**

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| Mr Nicholas Aquilina | Representative |

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 asked Appellant's representative to make his submissions.

Dr Clement Mifsud Bonnici Legal Representative for Krypton Chemists Ltd stated that this remedy was being sought regarding the way that the tender requirements have been bundled. Lot 5 in particular bundles commodities, which are discarded after use, with equipment which is lasting. This has the effect of discriminating against potential bidders. Two witnesses will provide further details on this aspect.

Mr James Harrison (UK Passport No. 520007239) called as a witness by the Appellant testified on oath that he is the International Sales Manager at the firm Medicina, manufacturers of the Enfit system which is the standard that has been in use since 2016 to allow feeding without using intravenous methods and hence leads to increased safety. Witness stated that syringes and extension tubes are considered as commodities whilst pumps are capital equipment. A couple of companies offer both commodities and pumps but the majority of manufacturers offer an either/or option due to the difficulty of combining both products. Krypton Chemists are the Malta representatives of Medicina which enjoys a high percentage of sales of this equipment in the UK market in both the public and the private sector. The primary use of the system is the feeding of patients. There is no such thing as a common size in syringes such that there are usually separate groupings for syringes, tubes etc.

At this stage Dr Woods objected to the witness being asked questions about the private sector as he stated that this tender was about a public contract.

Dr Mifsud Bonnici asked for it to be recorded verbally that "Dr Clement Mifsud Bonnici was not being allowed to ask questions relating to the private market sector".

Mr Harrison continuing with his testimony and in reply to a question from Dr Woods said that when he used the phrase 'a couple of companies' earlier in his testimony he was using a figure of speech not an exact number.

Mr Matthew Arrigo (188094M) called as a witness by the Appellant testified on oath that he is a Director of Krypton Chemists Ltd, importers of medical devices. He stated that the Company does not import equipment as this is electrically powered which means the employment of technical people, stocks of spare parts and other related needs. It is totally different to dealing in disposables and small medical items. In past tenders feeding tubes used to be procured separately. Witness said that retailers of equipment are not considered as competitors but as dealers in a different line of business.

Mr Jesmond Seychell (161567M) called as a witness by the Contracting Authority testified on oath that he is a Senior Specialised Nurse in feeding at Mater Dei Hospital. The Enfit system is used to feed neonates and preterm babies and the focus is on avoiding medical and human error in the specialist unit and with safeguarding lives.

Dr Mifsud Bonnici intervened to say that scaremongering on this scale is not acceptable as this appeal is to do with procurement.

The Chairman backed Dr Mifsud Bonnici's comments and requested witness to stick to the objects of the tender.

Mr Seychell proceeding with answering further questions said that the pumps are not purchased but leased to the medical authorities – only consumables are paid for. For safety reasons disposables like syringes and tubes used for enteral feeding have to be compatible with pumps. Witness agreed that the appeal was justified and hence the decision of the Authority to split Lot 5 into two sub-lots and to separate syringes from pumps. There are nine brands of pumps which meet the tender requirements.

Questioned by Dr Mifsud Bonnici witness said that he was involved as an advisor in the preparation of the tender and in the eventual drafting in the course of which he had sought advice from the Chairpersons of the specialist departments at the Hospital on the safety aspects. There was no need to obtain disposables, which are generally of proprietary brands, from the same manufacturers as the equipment as long as they were compatible. Witness confirmed that the Hospital was not buying equipment only commodities. Asked if there were any international guidelines regarding procurement of equipment and patient's safety witness said that such guidelines do not exist.

Dr Woods objected that questions were being asked connected to the contents of documents filed yesterday which the Board had decided were not admissible due to late submission. Further, there was no right to ask questions referring to practices abroad.

Dr Mifsud Bonnici said that the PCRB ruling was on documents filed late but there cannot be any objection to the asking of questions.

The Chairman ordered a recess of a few minutes to enable the Board to consider this objection.

After the recess the Chairman said that the Board had considered the objection raised and agreed that questions were allowed so long as they were not directly pertaining to the documents referred to.

Mr Seychell continuing with his testimony stated that the syringes and pumps had to have ISO recognition. Some market research had been carried out prior to issuing the tender but that did not include finding out the practice followed in other countries.

Ms Marika Cutajar (469772M) called as a witness by the Contracting Authority stated on oath that she was employed by the medical authorities in the procurement of medical devices. She was not involved in the setting out of the tender but expected to be the chairperson of the prospective evaluation committee. She stated that there had been no previous calls for the Enfit system but there were several other brands of pumps in use at the Hospital.

Dr Mifsud Bonnici in his submissions said that he was resting on the points made in the appeal letter. There was a distinction between manufacturers which specialized in equipment and agents and distributors of commodities. There were six manufacturers that produced both, but if the products were segregated there are several others and that would open competition – why should one limit competition to six firms when one could open it to 10 or 12? This restricts not only the number of manufacturers but also of distributors. EU Directive 2014/24 particularly Article 78 recommends the splitting of tenders into lots to increase participation, while in PCRB Case 1315 it was held by the Board that segregation would enable more economic operators to participate. The standards in this tender are already high but the bundling of equipment and commodities is restricting Appellant from participating. In the National Health Service in the UK the practice is to use different suppliers and it is not acceptable to use the risk of harm as a factor. The OECD Paper No 2 stresses that the division of lots is important but then the bundling of different products together as in this tender goes against the principle of public procurement.

Dr Woods said that Appellant cannot rely on what was stated in the PCRB Case quoted as each case is different since circumstances are not the same. The Contracting Authority understands the point of the appeal but there are at least six companies which could compete and that does not limit competition. No company could compete on all lots and it is difficult to understand Appellant's claim that they do not deal in pumps. Witness Mr Seychell is an experienced specialist who carried out market research and explained the reason for splitting up Lot 5 – it is up to the Board to decide if they accept the proposed splitting of Lot 5 and whether there is enough competition. This was the only appeal lodged with the Authority.

Dr Mifsud Bonnici pointed out that Appellant is no longer involved in the distribution of pumps – their interest is in having open competition.

The Chairman thanked the parties for the submissions and declared the meeting closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sittings of the 17th June 2021.

Having noted this 'Call for Remedy' filed by Krypton Chemists Ltd (hereinafter referred to as the Appellant) on 22nd February 2021, refers to the request for remedy with regards to the tender of reference CT 2537/2020 – Lot 5 listed as case No. 1585 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: Dr Marco Woods

Whereby, the Appellant contends that:

*a)* The Technical Specification for Lot 5 which is for the supply of ENFit Syringes, ENFit Extension Sets and Enteral Syringe Pumps.

*i.* ENFit Syringes, ENFit Extension Sets are classified by the industry as 'commodities' since they are used and thereafter disposed of after use on each different patient. The Enteral Syringe Pumps are classified by the industry as 'equipment' rather than 'commodities'. The appellant submits that this tender specification is discriminatory in favour of or selects manufacturers and is liable to artificially narrow competition in the market – contrary to the fundamental principles of public procurement.

*ii.* The design of Lot 5 in its current form is intended only for a limited number of economic operators who are able to supply items 1-7 and item 8.

*iii.* These products form part of separate product markets being the supply of equipment relating to ENFit systems and that of the supply of commodities relating to ENFit systems. These are separate, but interlinked markets in which different undertakings/economic operators are active

*iv.* The tender specifications are at odds with the Contracting Authority's obligations 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 it does not *"artificially narrows competition"*.

*v.* As per C0247/02 – The principle of competition is therefore one of the fundamental principles of Community law on the award of public contracts.

*vi.* There are no 'international guidelines' for hospitals in the way hospital nutrition is delivered in hospitals.

This Board also noted the Contracting Authority's Letter of Reply dated 26th February 2021 and its verbal submission during the virtual hearings held on 17th June 2021, in that:

a) The necessary market research was carried out by CPSU prior to issuing of the Tender.
b) As per Appellant's same letter, 6 suppliers were indicated who are capable of providing items as listed in Lot 5. Therefore, the said application ought to be rejected on the mere fact that *ex admissis* by the applicants.
c) Without prejudice – the CPSU proposes a further subdivision of the technical specifications as listed in Lot 5, with the creation of Lot 5A which contains the syringes and Lot 5B which contains the 50ml to 60ml syringes compatible to be used with the pumps, the ENFit Extension Sets and the actual Enteral Syringe Pumps.

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 witnesses duly summoned, will consider Appellant's grievances, as follows, in their entirety:

- The Board notes that:
    i. Lot 5 is requesting devices and products which can be classified as either 'equipment' or 'commodities'. That there is a clear distinction between these two types of categories. 'Commodities' are a single use product, in this case being the syringes, whilst the 'equipment' is referring to the Enteral Syringe Pumps which are to be used on more than on one occasion.
    ii. There are suppliers in the market which either trade solely in the 'equipment' sphere of the ENFit system, others who trade solely in the 'commodities' sphere of the ENFit system, whilst others doing their trade on both the 'equipment' and 'commodities' products covering the ENFit system. Whilst the Board notes the grievance by the Appellant of the tender *"unduly restricting competition on the market and discriminatory in nature"*, it also notes that according to market research carried out by both the appellant and the contracting authority, there are multiple firms which are in the business of supplying both types of categories. Moreover, the Board notes the statement under oath, of Mr Mathew Arrigo that whilst they operate only in the 'commodities' category of such system, they view other firms operating in the 'equipment' category as not being competitors but rather as colleagues. In this respect, the Board hence notes that there are numerous suppliers who operate in both categories of such system and the others who operate in 'just' one

category. Hence, prima facie, no restriction of competition and / or discrimination has been done.

iii. This is the first tender being issued for an ENFit system in Malta.

iv. Out of six different types of syringes, only one (50ml to 60ml) syringe (commodity) will be used with the Enteral Syringe Pumps (equipment). However, it is also important to note that approximately 42.8% of annual consumption of syringes is prospected to be for the 50ml to 60ml syringes.

v. The Contracting Authority is proposing that Lot 5 is subdivided into 2 categories, namely Lot 5A and Lot 5B. Lot 5A is to include all syringes which will not be used with the Enteral Syringe Pumps, whilst Lot 5B is proposed to include the 50ml to 60ml syringes together with the ENFit Extension Sets for use with Enteral Syringe Pumps and the Enteral Syringe Pumps. This will ensure total compatibility of the syringes which will be used alongside the Enteral Syringe Pumps. This proposal, the Board opines, goes a long way in ensuring that economic operators are treated equally and without discrimination. Moreover, it is broadening the scope of competition within this specific Lot.

After considering these main points to this case, the Board does not uphold the Appellant's grievances but finds itself in favour of the proposal put forward by the Contracting Authority to subdivide Lot 5 into 2 categories, namely Lot 5A and Lot 5B as prescribed above.

**The Board,**

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

a) Does not uphold Appellant's Letter of Objection and contentions but;

b) Directs the Contracting Authority to remedy the tender document, notified through a clarification, to subdivide Lot 5 into 2 categories, namely Lot 5A and Lot 5B as per its own Reasoned Letter of Reply of 22nd February 2021.

c) In view of the above considerations, the Board furthermore orders half the deposit paid by the appellant upon filing of this call for remedies should be refunded.

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| **Mr Kenneth Swain** | **Mr Lawrence Ancilleri** | **Mr Carmel Esposito** |
| **Chairman** | **Member** | **Member** |