



Public Contracts Review Board
Department of Contracts
Notre Dame Ravelin
Floriana, VLT2000

31 January 2023

Dear Chairman,

Re: **SUPPLIES – NEGOTIATED PROCEDURE 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 (THE “NEGOTIATED PROCEDURE”)**

1. We have been instructed by our clients, **Krypton Chemists Limited (C8933)** (the “**Applicant**”), to lodge an application for a pre-contractual remedy in terms of Regulation 262 of the Public Procurement Regulations (the “**PPR**”) in connection with the above-captioned Negotiated Procedure.

A. Factual Background

2. On 25 January 2023, the Services Gozo Directorate (the “**Contracting Authority**”) issued a negotiated procedure whereby the Applicant, amongst others, was invited to participate in the Negotiated Procedure.

3. The subject-matter of this call for competition are the following supplies which is meant to provide the Contracting Authority with a six-month supply for an Estimated Procurement Value of €280,051:

Item No	Item Description	Estimated Quantity Required for twelve (12) months period
1	Children Diaper Medium	800
2	Children Diaper Large	800
3	Children Diaper Extra-Large	2,000
4	Children Pull Ups Large	200
5	Children Pull Ups Extra Large	1,500
6	Adult Diaper Small	7,000
7	Adult Diaper Medium	50,000
8	Adult Diaper Large	90,000
9	Adult Diaper Extra Large	70,000

10	Adult Diaper Extra Extra Large	2,000
11	Adult Diaper Extra Extra Extra large	800
12	Adult Pull-Ups Small	1500
13	Adult Pull-Ups Medium	28,000
14	Adult Pull-Ups Large	61,000
15	Adult Pull-Ups Extra-Large	28,000
16	Adult Female Pads Normal	43,000
17	Adult Female Pads Extra Absorbent	55,000
18	Adult Male Pads	3,500
19	All in One Adult Pad – Extra Extra Absorbent	800
20	Inco-Sheets	50,000

4. The Contracting Authority has reserved the right to increase the quantities being requested.
5. Although in varying quantities, the products subject-matter of this Negotiated Procedure are equivalent to the products which the same Contracting Authority had currently sought to procure under Tender Ref. No. SPD3/2022/010 entitled “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” (the “**Previous Tender**”).
6. This Negotiated Procedure is not divided into lots and is structured in the same manner as the Previous Tender, that is, either the bidder makes an offer for all of the products being procured or none at all.¹ The justification provided by the Contracting Authority is the following:

This negotiated procedure is not divided into lots, and must be for the whole of quantities indicated. Bids will not be accepted for incomplete quantities. This cannot be divided into lots as the deliveries cannot be supplied by different suppliers. Separating the supplies into Lots is not feasible due to the small amount of Paediatric, Bariatric and also the small amount of Scheme B beneficiaries which are entitled to these supplies within Gozo and in view that this would result in different locations for the distribution of supplies from where the beneficiaries collect their entitlement.

7. The justification for the failure to divide the Negotiated Procedure into lots is also copied verbatim from the Previous Tender with the exception of eight new words being: “*the small amount of Paediatric, Bariatric and also the small amount [of Scheme B beneficiaries]*”.

¹ See Clause 3.1 on “Lots”, p. 4 of the Negotiated Procedure.

8. As this Honourable Board will recall, the Applicant had already filed an application to obtain a pre-contractual remedy insofar as the Previous Tender was concerned, namely:

to declare that the Contracting Authority's decision not to divide the Tender into lots, including and not limited to the bundling of certain items within the "whole of quantities", is unlawful and/or discriminatory, and consequently, to order its setting aside and/or removal from the Tender by whatsoever means necessary, including but not limited to, the correction or cancellation of the Tender.

9. Briefly, the Applicant had argued that the decision of the Contracting Authority not to split the Previous Tender into lots and to bundle certain specialised items within the "whole of quantities" to be supplied were unduly restricting competition on the market and were discriminatory in nature.

10. This Honourable Board had agreed with the submissions made by the Applicant and in upholding the latter's concerns and grievances, ordered the same Contracting Authority to either:

a) *cancel the tender dossier and **re-issue in different lots** (emphasis added) as per point (d) above; or*

b) *modify the existing tender and split into lots as per point (d) above.*

11. For the sake of clarity, the said point (d) of Decision Number 1731 of the Public Contracts Review Board ("**Decision 1731**") on page 6 stated as follows:

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.

12. The end-result had been the cancellation of the Previous Tender by the Contracting Authority and the re-issuing of the call for competition² in accordance with the guidelines given by this Honourable Board in Decision 1731, that is to say, the products subject-matter of the Previous Tender were now segregated into three separate lots for the paediatric, adult, and bariatric ranges respectively in the Current Tender.

13. As this Honourable Board will be aware, the Current Tender is under appeal before the Court of Appeal³ and is awaiting judgement which is scheduled to be delivered on 14 February 2023.

² Tender Reference Number SPD3/2022/045 entitled "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" (the "**Current Tender**").

³ Case Reference Number 434/2022/1 in the names of: "*Pharma-Cos Limited vs Services Gozo Directorate et*".

14. Having cancelled the Previous Tender on the instructions given to it by this Honourable Board, and awaiting the Court of Appeal's judgement in respect of the appeal lodged by another economic operator, Pharma-Cos Limited (C2804), the Contracting Authority has issued this Negotiated Procedure whereby the products for the paediatric, adult, and bariatric ranges have once more not be split into respective lots.
15. On 27 January 2023, the Applicant exercised its rights in terms of Regulation 38 of the PPR and submitted a request for clarification as to why the Contracting Authority has yet again decided to issue a Negotiated Procedure for different streams of products which is not divided into lots contrary to the instructions of this Honourable Board in Decision 1731.
16. In submitting its request for clarification, the Applicant even suggested that the Contracting Authority amend the tender specifications to abide by the instructions of this Honourable Board in terms of Decision 1731 and in order to promote genuine competition.
17. On 30 January 2023, the Applicant received the Contracting Authority's clarification whereby the Contracting Authority stuck to its decision not to divide this Negotiated Procedure into lots:

The Contracting Authority would like to confirm the terms and conditions as originally published in this negotiated procedure. This interim procedure is being processed to cover a limited period of six (6) months to ensure continuity of service to our clients/patients. In line with the provisions of the Public Procurement Regulations and the General Rules Governing Tendering, an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them.

18. The Applicant is aggrieved by the fact that the Negotiated Procedure is not split into lots and by the reasons used by the Contracting Authority not to and further the Applicant is aggrieved by the bundling of specialised items for paediatric and bariatric (obese) persons within the "whole of quantities", some of which are items which may only be procured from one or two economic operators on the market and represent the lowest share of the procurement value as per the following:
 - a. incontinence items 1-5 for paediatric persons account for 1.07%;
 - b. incontinence items 10-11 for bariatric persons account for 0.57%; and
 - c. the remaining items for the normal adult range accounts for 98.36%.
19. For reasons which shall be explained in further detail below and during the proceedings, the Applicant submits that these tender specifications are discriminatory in favour of one or two incumbent operators and are liable to artificially narrow competition on the market which is contrary to the fundamental principles of public procurement.
20. This artificial narrowing has already been proven by the Applicant during the sitting held by this Honourable Board on 24 May 2022 with respect to the Previous Tender. In fact, the Board noted in point (b) of its rationale in Decision 1731 that:

Reference is made to the testimony under oath of Mr Matthew Arrigo (emphasis added) 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.”

[...]

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 (emphasis added).

21. The deadline for submission of tenders is 3 February 2023. This means that in accordance with Regulation 262 of the PPR, the deadline for lodging any applications for pre-contractual remedies lapses on 31 January 2023.

22. Having already exhausted its right to request clarifications from the Contracting Authority to no avail, the Applicant has no option but to file this application in terms of Regulation 262 of the PPR on the basis of the following grounds of objection.

B. Ground of Objection

23. The Applicant submits that the tender specifications which do not split the Negotiated Procedure 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.

24. 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.

25. 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.

26. 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.

27. As opined by AG Stix-Hackl in C-247/02 *Sintesi SpA* on 1 July 2004:

32. The Court has consistently held that the directives, just like Community law in general, are designed, first, to eliminate practices that restrict competition and, second, to open up the procurement market concerned to competition, that is to say to ensure free access in particular for undertakings from other Member States.

*33. **The principle of competition is therefore one of the fundamental principles of Community law on the award of public contracts.***

*34. It fulfils several protective purposes. **Firstly, the principle of competition is aimed at relations between the undertakings themselves, that is to say the candidates or tenderers. There is to be parallel competition between them when they respond to a call for tenders.***

35. Secondly, the principle of competition concerns the relationship between the contracting authorities which must be classified as undertakings and the undertakings, in particular the conduct of a contracting authority in a dominant position on the market vis-à-vis the undertakings or of an undertaking in a dominant position on the market vis-à-vis the contracting authority, and the assessment of that conduct in the light of Article 82 EC.

*36. **Thirdly, the principle of competition is designed to protect competition as an institution.***

28. 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.

29. The Contracting Authority must have split the Negotiated Procedure into lots to promote genuine competition, and therefore, this tender specification is in conflict with:

- a) the objectives of the EU Directives;
- b) the PPR; and

c) Decision 1731 of this Honourable Board.

30. On this point relating to Lots, the PPR reads as follows:

Regulation 33

Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

Regulation 34

Where a tender has an estimated value which falls under regulation 9(1)(b), contracting authorities shall provide an indication of the main reasons for their decision not to subdivide into lots, which shall be included in the procurement documents or the individual report referred to in regulation 113.

31. Therefore, and although a contracting authority enjoys a margin of discretion to determine whether: (a) to issue a procurement procedure with separate lots; and (b) if it does issue such a procedure, the size and subject-matter of such lots. However, and if a contracting authority elects not to issue a tender which is not separated by lots, it must justify itself why it is doing so.
32. In this case, the Contracting Authority provided various reasons for not splitting the Negotiated Procedure 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:
- a. ***"This [negotiated procedure] 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.
 - b. ***"Separating the supplies into Lots is not feasible due to the small amount of Paediatric, Bariatric and also the small amount of Scheme B beneficiaries which are entitled to these supplies within Gozo [...]"***. The Applicant submit 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 Honourable 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.

One such option was explored and recommended by the Board in point (e) of Decision 1731 and which was implemented by the Contracting Authority in the Current Tender with Reference Number SPD3/2022/045 whereby:

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.

c. ***“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.

33. Nor is the 'alternative', for lack of a better word, suggested by the Contracting Authority in its clarification dated 30 January 2023 appropriate:

“[...] an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them”.

34. The right of economic operators to team up with other economic operators in the form of a joint venture or via subcontracting is not mutually exclusive of the right to participate in a call for competition on its own steam, where possible.

35. Nor do these rights belonging to economic operators absolve a contracting authority of its duty to segregate a tender procedure into lots and enhance competition, where possible.

36. Therefore, for the above-mentioned reasons, the Applicant requests this Honourable Board to order the amendment or removal, as the case may be, of the above-mentioned tender specifications in terms of Regulation 262 PPR *inter alia* paragraphs (a) and (c).

THEREFORE, for the above-mentioned reasons and for other reasons which will be brought during the proceedings, the Applicant respectfully requests the Board, save for any declaration, order or decree that it deems fit in the circumstances:

- a. to declare that the Contracting Authority's decision not to divide the Negotiated Procedure into lots, including but not limited to the bundling of certain items within the "whole of quantities" is unlawful and/or discriminatory, and consequently, to order its setting aside and/or removal from the Negotiated Procedure by whatsoever means necessary, including but not limited to, the correction or cancellation of the Negotiated Procedure; and
- b. to refund in full the deposit paid upon the filing of this application in terms of Regulation 262(2) of the PPR.

Yours sincerely,
Ganado Advocates



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Eurozone-SEPA payment

You have authorised this payment

The status for payment 26976IP022J2 is: Forward dated instruction received by bank

Pay from	KRYPTON CHEMISTS LTD MT MTHBMTCA006-050587-001 EUR
Instruction reference number	26976IP022J2
Transaction type	Eurozone-SEPA payment
Total amount	EUR 1,400.26
Expected value date	Tue 31 Jan 2023 This is the date we expect to debit your account. Please ensure that the debit account has enough funds, otherwise the payment will be rejected.
Total entries	1

Transactions

Entry	Beneficiary	Payment details	Amount (EUR)
1	Beneficiary name: Cashier Malta Government IBAN: MT55MALT011000040001EURCMG5001H Reference: MGOZ NP 02/2023		1,400.26

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