

3 February 2023

**Reply – Request for Negotiated Procedure – Supply of Incontinence Items for Services Gozo Directorate**

*Reply of the Services Gozo Directorate within the Ministry for Gozo (hereinafter referred to as the “Contracting Authority”) to the call for Remedies made by Krypton Chemists Limited (C8933) (hereinafter referred to as “the objector”)*

1. This reply addresses the objection raised by the objector filed on **31 January 2023** and which the Contracting Authority was notified with on 31<sup>st</sup> January 2023;
2. The said negotiated procedure is estimated to cost €280,051 excl. VAT, covering the following supplies:

PRODUCT	AMOUNT
Children Medium Diapers	800
Children Large Diapers	800
Children Extra Large Diapers	2,000
Children Pull-Ups Large	200
Children Pull-Ups Extra Large	1,500
Adult Diapers Small	7,000
Adult Diapers Medium	50,000
Adult Diapers Large	90,000
Adult Diapers Extra Large	70,000
Adult Diapers XX Large	2,000
Adult Diapers XXX Large	800
Adult Pull-Ups Small	1,500
Adult Pull-Ups Medium	28,000
Adult Pull-Ups Large	60,600
Adult Pull-Ups X Large	28,000

Female Pads Normal	43,000
Female Pads Extra Absorbent	55,000
Male Pads	3,500
All in One Adult Pad Extra Absorbent	800
Inco Sheets	50,000
<b>TOTAL</b>	

The abovementioned supplies are intended to be provided by one economic operator;

3. The Objector contends that this negotiated procedure is similar to a previous tender which was overturned by this Honourable Board;
4. The Objector states that the decision not to split the abovementioned negotiated procedure into lots is prejudicial and since it artificially narrows competition;
5. The contracting authority contends that the objections of the Objector lack legal and factual basis;
6. The Objector insists that the captioned negotiated procedure restricts competition, however he fails to substantiate this claim with a legal argument which states how the Contracting Authority designed the procurement procedure in a way that unduly favours and disadvantages the Objector as provided for in Article 18 of Directive 2014/24EU and Regulation 39 of the Public Procurement Regulations;
7. In referring to Regulation 33 of the Public Procurement Regulations the Objector fails to notice that the Contracting Authority in its discretion can decide how it thinks the procurement procedure should be implemented. The contracting authority refers to in Recital (78) of Directive 2014/24/EU which states the following:

*“The contracting authority should have a duty to consider the appropriateness of dividing contracts into lots while remaining free to decide autonomously on the basis of any reason it deems relevant, without being subject to administrative or judicial supervision. Where the contracting authority decides that it would not be appropriate to divide the contract into lots, the individual report or the procurement documents should contain an indication of the main reasons for the contracting authority’s choice. Such reasons could for instance be that the contracting authority finds that such division could risk restricting competition, or risk rendering the execution of the contract excessively technically difficult or expensive, or that the need to coordinate the different contractors for the lots could seriously risk undermining the proper execution of the contract.” (emphasis added by the contracting authority);*

In this case, the Gozo Service Directorate in its discretion has decided to provide a vulnerable section of Gozo's population a service. It's the Gozo Services Directorate who is in a clear position to ascertain who needs what and how the supplies should be provided. Not to mention that this is an **essential** service, it is only for an **interim period**;

8. In this regard the contracting authority refers to the judgment of the First Hall of the Civil Court *Il-Kamra Maltija ghan-Negozi ż-Żgħar u Medji vs. Onorevoli Prim Ministru et* dated 27th July 2007:

*«Huwa prinċipju aċċettat u mistenni li min jagħmel sejha għall-offerti – kemm jekk ikun enti privata u kif ukoll jekk ikun enti pubblika jew statali – għandu kull jedd jagħzel x'irid. Mhux imholli lil min jista' jressaq offerta f'tali sejha li jagħzel jew jiddetta x'imissu jew x'ma jmissux jaċċetta dak jew dik l-enti li lilu jew lilha ssir l-offerta (bhallikieku l-bejjiegh jista' jiddetta lix-xerrej x'imissu jixtri u mhux x'ghandu bżonn jixtri)» [enfazi miżjuda]*

9. In addition to the above, the contracting authority in no way is it excluding or impeding on the objector to bid in this negotiated procedure. However, one cannot expect that the objector has any say in the drafting of the call for negotiated procedure as this would be in accordance with the exigencies and requirements of the contracting authority. Moreover, the Objector didn't explain why he exclusively only provides certain products. The contracting authority humbly submits that there is nothing stopping the Objector from also supplying products for adults. At no point did the Objector elaborate on why he exclusively provides products for certain ages and weight ranges rather than for adults;
10. The contracting authority also refers to the teachings of the judgment of the Court of Justice of the European Union *Commission of the European Communities v French Republic (C-16/98)* decided on 5 October 2000 wherein it was stated that:

*“The existence of a work must be assessed in the light of the economic and technical function of the result of the works concerned in order to determine whether several lots of a single work have been artificially split. An electricity supply network and a street lighting network have a different economic and technical function and works on the electricity supply and street lighting networks cannot be considered to constitute lots of a single work artificially split.”*

In the abovementioned case the Court of Justice found that works were **not** artificially split between electrification and street lighting as the European Commission alleged. The comparison here, is that the service that the Objector is saying he can't provide is not distinct from the service he is currently providing;

11. In reply to the points made by the Objector in paragraph 32 of his call for remedies:

*“... no good reason against the division of lots & no cause for confusion for beneficiary” (point (a) and (c)).*

In the contracting authority's view this is factually incorrect as stated in paragraph 10 the objector does not have a say in drafting of the call for a negotiated procedure. The contracting authority is also aware of cases in which the services provided

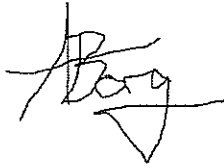
overlap and therefore one economic operator is essential for the smooth functioning of a service for one of the most vulnerable sections of society;

*“... feasibility should not trump the promotion of genuine competition” (point (b))*

As stated previously the objectors did not explain why they can only limit their production to a certain kind of supplies and what's obstructing them from providing other forms of supplies. Notwithstanding this, the Contracting Authority is also of the view as to why the Objector didn't attempt to form a joint venture in order to participate in the negotiated procedure. The Objector seems to only want to impose conditions rather than attempt to meet the contracting authority's requirements;

12. Save other pleas;

THEREFORE the contracting authority humbly submits that this Honourable Board should reject the call for remedies of Krypton Chemists Limited with expenses.

A handwritten signature in black ink, appearing to read 'Av. Anthony Borg'. The signature is stylized with a large 'A' and 'B'.

**Av. Anthony Borg**  
Office of the State Advocate  
Casa Scaglia  
Valletta