



06th February 2023

Public Contracts Review Board
Notre Dame Ravelin,
Floriana,
Malta

Krypton Chemists Limited [C-8933]

Vs

Services Gozo Directorate

MGOZ NP 02/2023

Tender Name: 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

REASONED REPLY

Whereas, the Services Gozo Directorate (hereinafter “**SGD**”) issued a call for tenders “*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*”

Whereas, Messrs. Krypton Chemists Limited (hereinafter “**Krypton**”) filed a procedure in accordance with article 262 of S.L. 601.03 on the 31st January 2023;

Whereas, Messrs. Pharma-Cos Limited (hereinafter “**Pharma-Cos**”) are hereby submitting their reply in accordance with S.L. 601.03;

a. Artificially narrowing down competition

1. Krypton *inter alia* claims that SGD is ‘artificially narrowing competition by

‘... discriminating against economic operators who do not manufacture and/or supply such items – effectively foreclosing them from their relevant market’

2. In substantiation of such a claim, Krypton referred to decision 1731 decided by this Honourable Board on the 24th May 2022 and specifically to the testimony by Matthew Arrigo;

3. Pharma-Cos submits that, the Public Contracts Review Board [hereinafter ‘PCRB’] were misled by Krypton during the hearing of the 24th May 2022, in particular:

i. Since Pharma-Cos, as the incumbent supplier of incontinence diapers pull-ups, pads and inco-sheets², does not furnish SGD with incontinence diapers pull-ups, pads and inco-sheets from the same manufacturer and/or brand [*vide hereunder concept of demand aggregation*];

ii. That the procurement was designed to favour the product by Pharma-Cos , with a view of excluding competition;

iii. That the practice of aggregation as per SPD3/2022/045 will lead to higher prices and inferior service levels;

¹ Vide page 5 of appeal

² For Senior Citizens and Persons with Special need

- iv. That the tender as constructed will invariably lead that it will be awarded to a specific manufacturer
4. The statements by Mr Arrigo, in particular that one supplier may provide the bariatric and paediatric products, whilst being incorrect, was deemed to be sufficient to justify the claim by Krypton, when in actual fact the incumbent suppliers are not supplying all products from the same brand/manufacturer;

b. Procurement efficiency with demand aggregation

1. Whilst Krypton claims that aggregation by SGD is 'artificially narrowing competition', Directive 2014/24/EU in recital 59 in unequivocal terms holds that:

There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs.

[added emphasis]

2. It is known and accepted that aggregation strategies by contracting authorities generate positive effects over the competitive process, which inherently fosters competition between economic operators, lowers purchasing prices, suppresses duplication of procedures, generates economies of scale, recues public expenditure and produces a better value for money in public procurement³;
3. Undeniably, aggregation must be controlled to ascertain that competition is not restricted in any manner and this *inter alia* through the inclusion of a number of mitigating factors, which could include:
 - i. Not including onerous technical and professional abilities;
 - ii. Limiting the impositions of economic and financial standing;
 - iii. Providing adequate justification in accordance with article 34 of S.L. 601.03;

³ Recital 15 of Directive 2004/18/EC

- iv. Ensuring that the design is such which allows for competition, and which is not done with the intention of favouring any particular manufacturer;
4. In addition, reference is hereby being made to the European Code of Best practices facilitating access by SMEs to Public Procurement contracts [SEC(2008)2193], wherein it is clear that the fragmentation into lots should only be imposed if,

‘ ... it is appropriate and feasible in the light of respective works, supplies and services concerned’.

5. Reference is hereby being made to the decision **Il-Kamra Maltija Ghan-negozji z-Zghar u Medji v Onor. Prim Ministru** [27th July 2007], wherein it was held that:

“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 jagħżel x’irid. Mhux imħolli lil min jista’ jressaq offerta f’tali sejha li jagħżel jew jiddetta x’imissu jew x’ma jmissux jaċċetta dak jew dik l-enti li lilu jew lilha ssir l-offerta (bħallikieku l-bejjiegh jista’ jiddetta lix-xerrej x’imissu jixtri u mhux x’għandu bżonn jixtri)”

6. The same is also emphasised by **Professor Sue Arrowsmith**, in her publication *The Law of Public Utilities Procurement* [Third Edition], wherein it was held that:

“For technical and professional ability, as with economic and financial standing, the CJ (i.e Court of Justice) has stated it is in principle for individual states to set the levels of standing required (Joined Cases C-27-29/86 S.A. Constructions et Enterprises Industrielles (CEI) vs. Société Co-Operative (CEI and Bellini) and Case 31/87 Gebroeders Beentjes B.V. vs. The Netherlands). For example, it is for the authorities to decide what kind of past experience is necessary for an economic operator to undertake particular types of public works.”



Thus and thereby and for all the reasons which will be brought before the Public Review Contracts Board, Pharma-Cos Limited hereby requests this Hon. Board to reject in its entirety the requests made by Krypton Chemists Limited.

A handwritten signature in black ink, appearing to read 'M Paris', is written over a faint, dotted-line signature.

Avv. Matthew Paris
matthew@dalliparis.com

Requested Testimony by: [i] Representative of the Contracting Authority;
[ii] Representative of Pharma-Cos Limited;
[iii] Secretary of the PCRB;