



**Public Contracts Review Board
Notre Dame Ditch
Floriana, FRN 1601
Malta**

23 June 2023

Dear Sirs,

Re: 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 - REF. SPD3/2022/045 - (the "Tender").

1. We have been instructed by our clients, **Krypton Chemists Limited (C8933)** (the "**Recommended Bidder**") to lodge a response to the objection lodged by **Pharma-Cos Limited (C-2804)** (the "**Appellant**") on 14 June 2023 (the "**Appeal**") in connection with Lot 1, Lot 2, and Lot 3, of the above-captioned Tender.
2. By means of a recommendation notice published on 5 June 2023, the Sectoral Procurement Directorate on behalf of the Ministry for Gozo (the "**Contracting Authority**") recommended the Recommended Bidder for the award of Lot 1 and the Appellant for the award of Lot 2 and Lot 3 of the Tender.
3. This appeal is unfounded in fact and in law and should be dismissed in its entirety by this Honourable Board for the reasons as set out below and as may be further adduced in the course of proceedings.
4. At the outset, and before the grounds of appeal are addressed on the merits, the Recommended Bidder cannot but submit that the Appeal is vexatious and abusive and that it is only intended to bring down this Tender—whatever it takes, whatever the cost.
5. The Appeal is motivated by the Appellant's disagreement with this Honourable Board's decision of 27 May 2022 in Case 1731. This decision had ordered the Contracting Authority to split the subject-matter of this Tender into lots to promote genuine competition—as the Contracting Authority has correctly done in this Tender. This decision is final and definitive (*res judicata*).
6. The Appellant *evidently* wants to have the whole market for itself. The Appellant was (and might still be) the incumbent supplier for all products subject-matter of this Tender and it has no appetite to compete on the merits rather it is fighting tooth and nail to retain the *status quo*.

7. The Appellant has already attempted to *cancel* this Tender¹ by way of its application for a pre-contractual remedy which was decided definitively and thus paved way for the submission of bids and their evaluation.

The Appellant did submit a bid for all Lots forming part of this Tender and therefore accepted the terms and conditions of this Tender and waived to any further right of challenge against the Tender. The Appellant simply cannot accept the reality that the Recommended Bidder has been recommended for award of Lot 1 fair and square.

8. For these reasons, and from a cursory look at the grounds of appeal, it is clear that the Appellant has, by means of this very Appeal, thrown the proverbial kitchen sink at this Honourable Board.

The Appellant has raised, as shall be explained further in detail below, grounds of appeal which are simply inadmissible and which are, quite frankly, manifestly frivolous.

This was done with the sole attempt to block this Tender—whatever it takes, whatever the cost.

A. Preliminary Plea: Inadmissibility of the Appeal against Lot 2 and Lot 3

9. By means of this preliminary plea, the Recommended Bidder submits that the Appeal is inadmissible insofar as it concerns Lot 2 and Lot 3.
10. *First*, the Appellant does not have standing (*locus standi*) to lodge an appeal against Lots 2 and 3 given that it has not been harmed or risk being harmed by an alleged infringement or by any decision of a contracting authority. It is contradictory, if not surreal, that the Appellant is appealing *a/so* from Lots 2 and 3 given that these were awarded to the Appellant.
11. *Second*, the Appellant has failed to identify the infringements or decision complained of and on what basis it ought to be quashed in terms of Regulation 270 of the PPR.
12. For the above reasons, and for others that may be adduced in the course of proceedings, the Recommended Bidder requests this Board to dismiss the Appellant's Appeal in so far as it challenges the proposed award in Lot 2 and Lot 3 to the Appellant.

B. First Ground of Appeal: The Related Tender

13. By means of its first ground of appeal, the Appellant requests that "*the procedures of the [T]ender are halted*" on the basis that there are ongoing proceedings in the form of a pre-contractual remedy before this Board in relation to a negotiated procedure with reference number MGOZ/NP02/2023 (the "**Negotiated Procedure**").

¹ The application filed by the Appellant on 28 July 2022 in Case 1791 reads as follows:

*"NOW THEREFORE, whilst reserving the right to put forward further submissions, **the Appellant company hereby requests:** [...] **To cancel**, modify, remove, set aside and/or in any other manner give any other direction in accordance with article 262 of the Public Procurement regulations; [...]"*

14. This ground of appeal is inadmissible and should be dismissed at the outset by this Board because it does not challenge an alleged infringement of public procurement law. For a ground of appeal to be admissible in terms of Regulation 270 of the PPR, it must target an infringement or decision which has been perpetrated by the Contracting Authority after the submission of bids and during the evaluation of the Tender.
15. The fact that there exists a separate Negotiated Procedure for the procurement of the same supplies under similar or equivalent conditions is a *non-sequitur* and does not amount to an infringement of public procurement law in the conduct of this Tender process. The Negotiated Procedure process cannot have any impact on the Tender process, and vice-versa.
16. The remedy that the Appellant seeks to achieve by means of this first ground of appeal is a suspension of the award process of this Tender until the pending proceedings regarding the Negotiated Procedure are completed.
17. Suspension of the award process is strictly permitted by the Public Procurement Regulations (S.L. 601.03) (the "PPR") only in the instance of an objection filed before this Board and in the case of an appeal from this Board's decision to the Court of Appeal. This suspensory effect is a means to an end, that is, to allow the allegation of infringement to be resolved via an effective and rapid remedy.
18. The suspensory effect is not, and cannot be, a remedy in itself. If the Board upholds this request and grants this remedy, this would deprive the remedy being sought of its effective and rapid nature.
19. For these reasons, and for others that may be brought in due course, this ground of appeal ought to be dismissed.

C. Second Ground of Appeal: Breach of Article 34 of Chapter 13 of the Laws of Malta

20. By means of the second ground of appeal, the Appellant claims that the Recommended Bidder has made allegations in its regard which are capable of prejudicing its business or trade.
21. This ground of appeal is also inadmissible because it is addressed to the Recommender Bidder's conduct and not the Contracting Authority's.
22. This Honourable Board is not competent *ratione materiae* to hear and decide grievances, as spurious as they may be, between private economic operators on purported breaches of the Commercial Code, even if they arise out of proceedings before this Board.
23. On the other hand, the Civil Courts are competent to determine such grievances, and in fact, the Appellant filed its grievance by way of a judicial protest dated 22 February 2023 numbered 802/203 (attached and marked as "Document KCL1") before the First Hall Civil Court.
24. Without prejudice to the foregoing, this ground of appeal is unfounded on the merits. The Recommended Bidder did not spread any news capable of prejudicing the Appellant, and the Appellant has failed to prove otherwise. The Appellant's allegations

are contested and have been made without the proper context of: (i) the full transcript of the testimony of Recommended Bidder's representative; and (ii) the exhaustive documentary evidence submitted in that case.

25. For Lot 3, Pharma-Cos Ltd submitted a technically compliant offer which meets exactly the specifications in measurements and absorption requirements and the opening results on EPPS, confirm that the appellant is the sole bidder since no other economic operators were included in the list of participants.
26. For these reasons, and for others that may be brought in due course, this ground of appeal ought to be dismissed.

D. Third and Fourth Ground of Appeal: The Distribution Centre

27. By means of the third and fourth ground of appeal, the Appellant claims that any bidder who participated in this Tender process should have owned a distribution centre at the time of the submission of the bid.
28. This ground of appeal is unfounded in fact and in law. The requirement under Clause 1 of *Section 3 – Specifications/Terms of Reference* reads:

The successful tenderer of Lot 1 must provide a Distribution Centre in Gozo, so that persons entitled to this service, can collect on a monthly basis, the specified items (listed under Lots 1, 2 and 3) from this centre.

29. The wording used in the Tender is deliberate and unequivocal: it is incumbent on the **successful tenderer** to provide a distribution centre in Gozo.
30. Therefore, it is incorrect for the Appellant to state that the “tenderer” must have *ab initio* owned a distribution centre in Gozo at the time of the submission of its bid. This is corroborated by the use of the future tense in the Tender documents, including the Tenderer's Technical Offer Form which requires the tenderer to confirm by way of a self-declaration that: “*the distribution centre provided **will** be located in Gozo [...]*”.
31. In any case, and *in arguendo*, it would have been disproportionate for the Contracting Authority to require tenderers, to have in place a distribution centre at the time of the submission of their bids. Any condition or criterion imposed in the Tender must be proportionate to the value and objectives of the subject-matter of the contract. It would have been further contrary to the Contracting Authority's duty to promote genuine competition—with which it complied when it split this Tender into Lots.
32. For these reasons, and for others that may be brought in due course, these grounds of appeal ought to be dismissed.

E. Fifth Ground of Appeal

33. By means of the fifth ground of appeal, the Appellant claims that this Tender process creates regulatory issues to the detriment of the end-user.
34. This is the first time that the Appellant is raising such a claim, in spite of the fact that it had the opportunity to file a pre-contractual remedy, as it in fact did. For this reason, this

ground of appeal is simply inadmissible in terms of Regulation 270 of the PPR and this is a matter that should have been raised in terms of Regulation 262 of the PPR.

35. For the avoidance of doubt, the Recommended Bidder is, and shall continue to remain, fully compliant with the applicable rules and regulations.
36. Without prejudice to the evident inadmissibility of the ground of appeal, the Appellant has failed to prove, or at least even identify, the regulatory deficiencies which allegedly render this procurement process unfeasible.
37. For these reasons, and for others that may be brought in due course, this ground of appeal ought to be dismissed.

THEREFORE, for the abovementioned reasons and for other reasons which may be brought during the proceedings, the Recommended Bidder respectfully requests this Honourable Board:

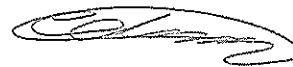
- a. to dismiss the appeal lodged by the Appellant in its entirety;
- b. given the exceptional circumstances of the case, to declare that the Appeal is frivolous, vexatious and/or abusive; and
- c. to order that the deposit is not to be refunded,

save for any declaration, order, or decree, that it deems fit in the circumstances.

Yours sincerely,
Ganado Advocates



Dr. Clement Mifsud Bonnici
(cmifsudb@ganado.com)



Dr. Calvin Calleja
(ccalleja@ganado.com)

Fil-Prim' Awla tal-Qorti Civili

Illum, 22 ta' Frar 2023

Lil: Kryton Chemists Limited [C-8933]
Plot 4, Cantrija Complex
Triq it-Targa
Maghtab, Naxxar

Permezz tal-prezenti, Pharma-Cos Limited C-2804 ta' Pharma-Cos House, Triq Cikku Portanier, Santa Venera, taghmel referenza ghall-

- proceduri quddiem il-Bord ta' Revizjoni dwar il-kuntratti pubblici datata 27th May 2022, bin-numru 1731;
- Dikjarazzjonijiet maghmula abbuzivament, in male fede u inveritjeri fil-konfront tas-socjeta mittenti, bil-hsieb u bl-intenzjoni li taghmel hsara fuq il-kummerc tas-socjeta' mittenti, u dana bi ksur ta' artikolu 34 tal-Kap. 13 tal-ligijiet ta' Malta;

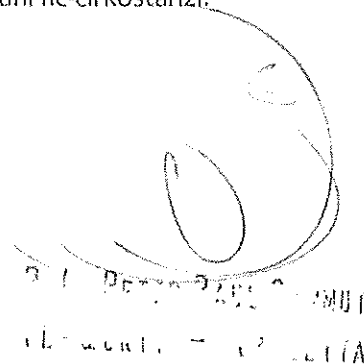
Illi in vista tas-suespost, is-socjeta' Pharma-Cos Limited, qed tinterpellakom sabiex immedjatament u in ogni kaz, sa mhux aktar tard minn hames t'ijiem mid-data ta' din l-ittra, sabiex tiehdu l-azzjonijiet kollha u necessarji sabiex tirrimedja ghal dak li sar u intqal fil-proceduri surruferiti. Fin-nuqqas, is-socjeta' mittenti mhux ser ikollha alternattiva hlief li tiehu l-azzjonijiet kollha u necessarji *ai termini* ta' artikolu 37 tal-Kap. 13 tal-ligijiet ta' Malta, inkluz azzjoni ghad-danni u l-imghaxijiet relattivi, u dana minghajr pre-avviz iehor.

Illi ghal kull buon fini, qedhin jigu ulterjorment innotifikati d-direttur tal-Kuntratti, il-Ministeru ta' Ghawdex kif ukoll id-direttur generali tad-dipartiment tal-kummerc, ghal kull azzjoni li jidhrilhom li huma xierqa u opportuni fic-cirkostanzi.

Bl-ispejjez.

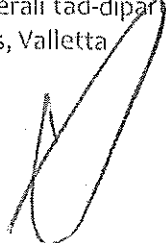


Avv. Matthew Paris
matthew@dalliparis.com



Peter Dimech
DIRETTUR TAL-KUNTRATTI
IL-MINISTRU TA' GHAWDEX

- Notifika:
- [1] Krypton Chemists Limited – Plot 4 Cantrija Complex, Triq it-Targa, Maghtab Naxxar
 - [2] Direttur tal-kuntratti – Notre Dame Ravelin, Floriana
 - [3] Ministeru ghall-Ghawdex – St Francis Square Victoria, Gozo
 - [4] Direttur Generali tad-dipartiment tal-kummerc – Dahlet Gnien is-Sultan Lascaris Bastions, Valletta



27 FEB 2023
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IL-MINISTRU TA' GHAWDEX

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