

Lot 2



14th June 2023

Public Contracts Review Board
Notre Dame
Ravelin, Floriana,
Malta

Pharma-Cos Limited

vs

[i] Department of Contracts;

[ii] Ministry for Gozo - Services
Gozo Directorate;

[iii] Krypton Chemists Limited

REASONED LETTER OF OBJECTION

SPD 3/2022/045

Tender Name: Supplies – Framework agreement for the provision of incontinence
diapers, pull-ups, pads and inco-sheets for senior citizens and persons with special needs
for the Ministry for Gozo

This is an appeal against the decisions for Lot 1 & Lot 2 & Lot 3



Whereas, the Ministry for Gozo - Services Gozo Directorate (hereinafter "SGD") issued a call for "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" in three different Lots (hereinafter "the tender" or "the lots");

Whereas, by means of a Public Contracts Review Board (hereinafter "PCRB") decision dated 27th May 2022 [Case 1731], the grievances brought forward by Messrs. Krypton Chemists Limited were upheld and the tender was withdrawn;

Whereas, by means of a PCRB decision dated 4th October 2022 [Case 1791], the grievances brought forward by Messrs. Pharma-Cos Limited were *partially* upheld, whilst the ensuing Court of Appeal decision dated 14th February 2022 [434/22/1] the grievances brought forward by Messrs. Pharma-Cos Limited (hereinafter "Pharma-Cos") were *partially* upheld;

Whereas, separately [but related] the Ministry for Gozo - 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", following which Messrs. Krypton Chemists Limited (hereinafter "Krypton") on the basis of article 262 of the Public Procurement Regulations (hereinafter "PPR") filed a remedy before closing date, which procedure is *sub judice* before the PCRB [Case 008] (hereinafter "the related tender");

Whereas, following the evaluation of the tender, the Department of Contracts (hereinafter "DoC") by means of a letter dated 5th June 2023 held that:

'Thank you for the recommendation for award of the above-captioned procurement.

Kindly note that the recommendation for award of the above-captioned procurement

- Lot 2 has been accepted in your favour for the price of €29,000 excluding VAT;*
- Lot 3 has been accepted in your favour for the price of €25,550 excluding VAT;*

However, we regret to inform you that the offer submitted for Lot 1 was not the cheapest priced offering satisfying the administrative and technical criteria. Lot 1 was recommended for award to 000188858 Krypton Chemists Ltd for the amount of €471,310 excluding VAT';



Messrs. Pharma-Cos Limited (hereinafter Appellants) feel aggrieved by the decision of DOC or whosoever, in relation to LOT 1 & LOT 2 & LOT 3 and thereby is submitting three objections in accordance with article 270 of PPR within the time-frame and accompanied with the relative payment (hereby enclosed as DOC1 – DOC3) based on the following grievances:

1. Preliminary: *Safeguarding all rights in relation to the related tender*

1.1 Whilst 'the tender' and 'the related tender' are distinct procedures, the characteristics are identical, so much so that,

- 1.1.1 the procurement relates to the same provision of incontinence diapers, pull-ups, pads and inco-sheets for senior citizens and persons with special needs; and
- 1.1.2 the parties involved in the dispute are the same; and
- 1.1.3 the facts in dispute are likewise the same;

1.2 It is thus imperative that the procedures of the tender are halted, since Pharma-Cis risks being harmed with the decision to award the Lots, and this pending the decision of the PCRB [and potentially the Court of Appeal] in relation to the related tender – in particular when one considers the reply by SGD dated 3rd February 2023;

1.3 The outcome of the decision of the related tender, will have an impact on the procedures *de quo*, without which, the tender shall be awarded and all rights herein reserved shall be impaired;

2. Preliminary: *Breach of article 34 of Chapter 13 of the Laws of Malta*

2.1 Reference is additionally made to judicial letter with number 802/2023 filed by Pharma-Cos against Krypton whereby reference was made to procedures before the PCRB [case 1731];

2.2 Pharma-Cos called upon Krypton and made reference, in particular, to statements made by its representatives, which statements were not only erroneous but also allegedly made in bad faith, which are in breach of *inter alia* article 34 of Chapter 13 of the Laws of Malta;



2.3 In this context, one cannot not make specific reference to PCRB decision 1731, which decision is *inter alia* based on a **misleading premise**, presented to it[PCRB] by Krypton,

“Pharma-Cos are presently supplying the products and the technical specifications in the tender meet exactly the specifications of their products in measurement and absorption requirements – this excludes everyone else from the common rage”.

2.4 Falsely giving the impression of tailor-making and/or that it was supplying one brand, when in actual fact it aggregated multiple brands and products and supplied them as aggregated to SGD;

3. Preliminary: Information re Distribution Centre not provided

3.1 By virtue of an email dated 8th June 2023, Pharma-Cos requested the following information:

“Whilst kindly asking you to send the information requested with urgency, Pharma-Cos Limited is in addition requesting the following information:

- Confirmation that the recommended bidder submitted availability of a Distribution centre;
- The details of the proposed distribution centre by the recommended bidder;
- The title under which the distribution centre is held by the recommended bidder”

3.2 In view of the fact that this information has not been supplied by the DOC until the date of submission of this appeal, Pharma-Cos is hereby reserving its rights to the fullest extent possible to produce additional submissions, documentation and evidence to the PCRB to safeguard its interests and ensure that the legal principle of *audi alteram partem* is upheld;

3.3 In addition, the PCRB is being requested to render an interlocutory decree ordering DOC to furnish the relative and relevant information;

4. Recommended tender must be compliant *ab initio*

4.1 In accordance with article 62 of PPR, a tenderer must be compliant *ab initio*, in particular:

(1) Mingħajr preġudizzju għat-Taqsima VI u għar-regolament 235(2), l-awtorità responsabbli għat-tmexxija tas-sejha għandha tiżgura li operatur ekonomiku jkun mill-bidu nett eliġibbili jikkwalifika għal offerta u għalhekk għandu jkun fil-pussess tal-ħtiġiet kollha stipulati fid-dokumenti tal-akkwist sad-data tal-gheluq għas-sottomissjoni tagħhom

4.2 In this context, it is the submission of Pharma-Cos that Krypton **does not own** a distribution centre which is in conformity with the tender specifications upon submission of the tender;

4.3 Whilst it could have declared that the

“... distribution centre provided will be located in Gozo in an easily accessible location, accessible by public and private transport and on the ground floor.”

It did not or it does not have out of its own resources such a property, and as such it had to either:

- 4.3.1 In accordance with Technical & Professional Ability declare a percentage of sub-contracting proportion; or
- 4.3.2 In accordance with article 235 of PPR, rely on the capacities of third parties; or
- 4.3.3 In accordance with *inter alia* the General Rules Governing Tenders, form a Joint Venture

Either way, Krypton had to submit an ESPD of the entity on which it is relying to satisfy the requirement;

It is the submission of Pharma-Cos that an ESPD was not submitted and thus, the award is in breach of the tender specifications;



5. Regulatory issues, rendering this procurement unfeasible

- 5.1 The manner in which this procurement has mutated following the multiple procedures in accordance with provision 262 of the PPR, has led to a procedure which is dysfunctional and which from a regulatory point-of-view will only create deficiencies to the detriment of the end-user;
- 5.2 The handling of products under Lot 2 and Lot 3, when administered by the recommended bidder for Lot 1, creates regulatory issues for the Responsible Person (*hereinafter "RP"*) of the recommended bidder of Lot 2 and Lot 3;
- 5.3 The tender and its ensuing execution infringes *inter alia* the European Union Good Distribution Practices (*hereinafter "GDP"*) and in turn renders the procurement as designed unfeasible;
- 5.4 The Guidelines of the 5th November 2013, on GDP¹, are strict on the responsibilities of the RP, in particular in relation to the responsibility which shall be retained by such designated person - and this is diametrically the opposite of the expectations nurtured by this tendering procedure;



NOW THEREFORE, whilst reserving the right to put forward further submissions, the Appellant company hereby requests:

- i. To revoke the award letter in relation to Lot 1, dated 5th June 2023, whereby it recommended Krypton Chemists Limited for award;
- ii. In subordination:
 - a. To revoke the award letter in relation to Lot 2 and Lot 2, dated 5th June 2023, whereby it recommended Pharma-Cos Limited for award; or
 - b. To cancel the procurement of Lot 1, Lot 2 and Lot 3 in accordance with article 276[h] of the Public Procurement regulations;
- iii. To do anything which is ancillary and conducive to the proper execution of this decision;
- iv. To refund the deposit paid;

Appellant company is hereby reserving the right to present further evidence, both orally or in written, during the hearing.

Dr Matthew Paris LL.D
matthew@dalliparis.com


Requested Testimony by: (i) Representatives of the Ministry for Gozo


To testify on this tender procedure, during all stages, including but not limited to the drafting phase;

(ii) Representative of Pharma-Cos Limited:

To testify on the product in offer, in particular in relation to the product in offer for this procurement procedure, as well as other facts;

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 **HSB C** | Eurozone-SEPA payment

 You have authorised this payment
The status for payment 38256MG012RX is: Forward dated instruction received by bank

Payment summary - Eurozone payment

Pay from PHARMA-COS LIMITED MT MTHBMTCA006-068449-001 EUR	Instruction reference number 38256MG012RX Transaction type Eurozone-SEPA payment
Total amount	<h1 style="margin: 0;">EUR 400.00</h1>
Expected value date	Thu 15 Jun 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.
Your payment reference	LP1072
Total entries	1

Transactions

Entry	Beneficiary	Payment details	Amount (EUR)
1	Beneficiary name: CASHIER MALTA GOVERNMENT Beneficiary address: NOTRE DAME RAVELIN, FLORIANA FRN 1600, MALTA, IBAN: MT55MALT011000040001EURCMG5001H SWIFT-BIC: MALTMTMT	Remittance information: SPD3 2022 045	400,00