



Public Contracts Review Board
Notre Dame Ravelin
Floriana VLT2000
Malta

29 October 2023

Dear Sirs,

Re: Tender for the supply, delivery and distribution of incontinence products for senior citizens and persons with disabilities in Malta – Ref. CT2238/2023 (the “Tender”)

1. We have been instructed by **Krypton Chemists Limited** (C-8933) in its capacity as an interested party (the '**Interested Party**') to lodge the present reply in response to the application filed by Pharma-Cos Limited (the '**Appellant**') in relation to Lot 1, Lot 2, and Lot 3 of the Tender.
2. The Interested Party was loath to intervene in proceedings which, at face value, do not appear to be of concern to its interests. After all, the Appellant has lodged an application in terms of Regulation 262 of the PPR which *prima facie* appears to have been done to address certain elements.
3. However, the wider context to these proceedings reveals an altogether different intent and purpose to these proceedings: the Appellant is not using, but *abusing*, of rights which the law provides to guarantee the existence of effective and rapid remedies in the field of public procurement.
4. The Interested Party shall be raising preliminary pleas to invite this Honourable Board to examine the conduct of the Appellant. In addition to its preliminary pleas, the Interested Party shall be supporting the submissions made by the Department of Contracts and the Contracting Authority in their respective letters of reply to this appeal.
5. This application is not an end in itself to achieve any of the six goals in paragraphs (a) to (e) of Regulation 262 to the Public Procurement Regulations (the '**PPR**'). Rather, Regulation 262 of the PPR is being abused of as a means to an end, an end which is anathema to the existence of the public procurement framework in itself: to continue benefitting from subsequent extensions, variations and/or direct order/s from the Contracting Authority.
6. The troubling part is that the Appellant does not bother to hide this underlying intent in its written submissions. As it stated in its court application for a prohibitory injunction

(the 'Injunction') which was filed (and withdrawn)¹ a few days prior to the submission of this application:

***I-intimati qhandhom kuntratti viġenti, u/jew jistà jsiru ulterjorment proċeduri ta' direct order mas-soċjetà rikorrenti** [emphasis added] u/jew ma' terzi biex jinqdeu kif jixtiequ, u għalhekk ma hemm l-ebda perikolu li l-intimati, jew minn minnhom, ser jispicċaw mingħajr provvista tal-prodotti mixtieqa, u per konsegwenza ma hemm l-ebda preġudizzju li l-intimati ser isofri konsegwenza ta' dan il-mandat.*

7. The Interested Party humbly calls upon the PCRB to decide its preliminary pleas first and foremost. It is important for this Honourable Board to discipline the Appellant and other economic operators who might be tempted to engage in similarly abusive conduct on the correct use of procurement remedies: no entity, big or small, should be allowed to ride on the good intentions of the legislator to achieve an end which the remedy did not intend.
- A. **Preliminary Pleas: The Appellant's application is inadmissible because, as a fundamental principle of Maltese law, no appellant should be allowed to gain an advantage through its own abusive behaviour and, in any case, the right of action is extinguished.**
8. The Appellant's conduct, including the content of this application itself, is purportedly and overtly to rewrite certain aspects of the tender. As both the Department of Contracts and the Contracting Authority plead in their replies, the Appellant has no right to insist that certain tender clauses are written in a certain way 'just because'. This is not the purpose of Regulation 262 of the PPR, which is intended to serve one of six limited circumstances envisaged in paragraphs (a) to (e) of that Regulation.
9. This unlawfulness in itself masks a darker, and in the Appellant's humble opinion, graver intent: to stall the issue of a new tender at all costs in order to keep benefitting from direct orders in its position as incumbent operator of the supplies under procurement.
10. The Interested Party is laying out a chronological timeline in explanation of its preliminary pleas:
 - a. the Tender was issued on 11 August 2023 with a deadline of 28 September 2023;
 - b. the deadline for submission of an application in terms of Regulation 262 PPR was 12 September 2023;²
 - c. the Tender's closing date for the submission of bids was extended to 19 October 2023 by way of Clarification Note 1 and then extended to 31 October 2023 by way of Clarification Note 5;
 - d. on 12 October 2023, and after the Appellant's right of action in terms of Regulation 262 of the PPR was extinguished, the Appellant obtained the issue of a warrant of prohibitory injunction before the First Hall Civil Court where it claimed that the

¹ The application for the issue of the injunction and withdrawal are attached to the reply of the Department of Contracts as 'Document DC1' and 'Document DC4'.

² The law reads: "within the first two-thirds of the time period allocated in the call for competition for the submission of offers".

Contracting Authority can prevent the prejudice caused by the injunction by granting it more direct orders (see paragraph 6 to this reply). The Appellant submits that this Injunction was hopeless given that similar requests in the past have been rejected by the Court, and therefore, this Injunction was vexatious and abusive;

- e. in reaction to the Injunction, and on 17 October 2023, the Department of Contracts issued an extension of the deadline for submission of bids up until 30 November 2023 by means of Clarification Note 6:

*“The Contracting Authority would like to inform prospective bidders that the cT in caption is being **suspended due to a warrant of prohibitory injunction 1960/2023.**”*

The new deadline for submission of offers is going to be extended to 30/11/2023 at 09.30am.”

- f. on 18 October 2023, just a day after the Department of Contracts suspended the Tender, the Appellant withdrew the Injunction by means of a note of withdrawal;
- g. on 20 October 2023, the Appellant filed this present application in terms of Regulation 262 of the PPR which was dated 17 October 2023—the same day of the Tender’s suspension.
11. The Interested Party respectfully submits that this timeline bears testimony to the abusive conduct of the Appellant to cling on to its position as incumbent operator, and to prevent the Contracting Authority from fulfilling its obligation to guarantee effective competition on the market.
12. This is corroborated by the content of the Appellant’s application. As the Department of Contracts and the Contracting Authority contend, the claims raised by the Appellant do not attempt to achieve any one of the six goals for which Regulation 262 of the PPR was created. Rather, the Appellant sets out a substantial amount of suggested improvements to the tender document: no less than ten **suggestions** have been put forward in its application.
13. None of the claims put forward were ever raised by the Appellant prior to this application by means of clarification requests. The only exception is the first claim on the alleged impossibility of supplying the product in quantities rather than in packs which formed the subject-matter of a clarification published by the Contracting Authority on 14 September 2023.
14. The Appellant only deemed fit to raise these grievances in respect to the Tender at this stage, having failed, either deliberately or out of negligence (although the Appellant is no stranger to procurement proceedings), to exercise its right to request clarifications earlier or to file this application earlier within the limitation period provided for at law.
15. From a strictly legal perspective, the Interested Party submits that the Appellant’s application is inadmissible at law because:

- a. First, the limitation period for the exercise of the right of action provided for in Regulation 262 of the PPR had lapsed, and, therefore, the terms of the Tender became final and definitive.
 - b. Second, the Appellant's application contravenes the overriding principles of *ex turpi causa non oritur* and *fraus omnia corrumpit*, and therefore, this Honourable Board should not consider this present application.
16. The Interested Party submits that the deadline for the filing of the application in terms of Regulation 262 of the PPR had already lapsed when the Appellant obtained the issue of the Injunction. Therefore, and by application of the general principles of EU and Maltese law of legal certainty and legitimate expectations, that right of action was extinguished.
 17. The Appellant must be arguing that its right of action was "revived" when the Department of Contracts, in reaction to the Injunction—which was provisionally upheld by the Court, suspended the Tender and extended the closing date until the Court decides the Injunction on a definitive basis.

The Appellant frantically withdrew its hopeless Injunction and immediately filed this present application.
 18. This is unprecedented skulduggery which should NOT be tolerated by any judicial body.
 19. The Appellant cynically abused of its extraordinary remedies in civil procedural law to re-open a door that was closed shut and which it elected not to pass through when it was wide open for "*the first two-thirds of the time period allocated in the call for competition for the submission of offers*".
 20. Substantively, the Department of Contracts did not extend the closing date of submissions, but suspended the Tender due to the Injunction. It is a known fact that the suspension of a Tender is not possible on ePPS, and therefore, the Department of Contracts customarily extends the closing date to achieve this objective. This does not mean that, as a consequence of the suspension of the Tender caused by the Injunction, the Appellant's right of action in terms of Regulation 262 of the PPR was "revived".
 21. Further, and given that the right of action in terms Regulation 262 of the PPR had extinguished, the other economic operators have acquired "legal certainty" and "legitimated expectations" which will be *expropriated* by this Honourable Board if this application is considered.
 22. The principles of "legal certainty" and "legitimate expectations" are general principles of EU and Maltese law and have been expressly recognised as so by the CJEU:
 - a. *the principle of legal certainty, which is a fundamental principle of EU law and requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly;*³

³ C-796/18 *Informatikgesellschaft für Software-Entwicklung (ISE) mbH* (28 May 2020), para 70.

b. *the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, inter alia, that rules of law be clear and precise and predictable in their effect, especially where they may have negative consequences on individuals and undertakings.*⁴

23. In any case, and without prejudice to the issue on the extinction of the right of action in terms of Regulation 262 of the PPR, the Appellant's cynical exploitation of the extraordinary remedies available to it under civil procedural law was intended:
- a. to "revive" a right of action in terms of Regulation 262 of the PPR; and
 - b. to maintain its incumbency on the market.

This falls short of the express and implied legal duties imposed on the Appellant under Maltese and EU law, as a plaintiff and given its position on the market, and should not be tolerated.

On this basis, and in application of the overriding principles of *ex turpi causa non oritur* and *fraus omnia corrumpit*, and therefore, this Honourable Board should *not* consider this present application.

24. The PCRB has in the past frowned upon an economic operator's abusive conduct and declared that no appellant should be allowed to obtain an advantage illicitly. The Interested Party submits that that the purpose of Regulation 262 of the PPR is not to get an unjust advantage, but to obtain an effective and rapid remedy as provided by the Remedies Directive.⁵
25. It is clear that the Appellant is not seeking to obtain legitimate judicial protection of its rights, but to protract the procurement procedure as much as it can in its favour.

The 'concerns' raised by the Appellant were: (a) not voiced at clarification stage (b) not raised during the "*the first two-thirds of the time period allocated in the call for competition for the submission of offers*" and (c) has only filed this application following a suspension of the Tender in view of the Injunction it filed earlier which, to say the least, was neither the right remedy nor the right forum insofar as procurement procedures are concerned.

26. This is conduct that should not be sanctioned by the Board because it defeats the purpose of legal framework governing procurement. It is not the right of economic operators to dictate tender conditions, and it is certainly not the right of incumbent operators to forestall the procedure for a new tender to keep on benefitting from its current contracts.

THEREFORE, for the above-mentioned reasons and for other reasons which may be brought during the proceedings, the Interested Party respectfully requests the Board to declare the

⁴ C-98/14 *Berlington* (11 June 2015), para 77.

⁵ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

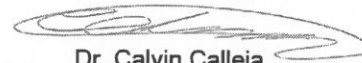


Appellant's application in terms of Regulation 262 of the PPR to be inadmissible and to dismiss it in its entirety, save for any declaration, order, or decree that it deems fit in the circumstances.

Yours sincerely,
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