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25th October 2023

**The Secretary**  
**Public Contracts Review Board**  
**Notre Dame Revlin**  
**Floriana VLT 2000**

**Pharma-Cos limited**

**Vs**

**Department of Contracts; and**  
**Active Ageing and Community Care**

**CT 2238/2023 - Tender for the Supply, delivery and distribution of incontinence products for senior citizens and persons with disabilities in Malta - Active ageing and community care, (the 'Tender'), Lot 1, Lot 2, and Lot 3.**

**Reply to Reasoned application filed by Pharma-Cos Limited as a Remedy before the closing date of call for competition.**

I write to you for and on behalf of the Active Ageing and Community Care (hereinafter the 'Contracting Authority') in connection with the above captioned Tender, and particularly with reference to the application filed by Pharma-Cos limited (hereinafter the 'Appellant').

Appellant has filed the objection as a remedy before the closing date of a call for competition on the basis of the points as postulated in its application.



**BEZZINA**  
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To this effect, the Contracting Authority is rebutting this objection and the arguments stipulated therein will be addressed in this reply.

**1. Lack of Predictability – ambiguity.**

**1.1. Tender Document vs reality**

In this regard, the Contracting Authority hereby submits that, the Appellant is incorrect in saying that the requirements of the tender document will make it impossible for the bidders to perform and by extension comply with the tender requirements.

It is evident from the wording used in the tender document itself, that what the CA is actually requesting is a minimum quantity to be supplied by the tenderer. At no stage or part of the tender document did the CA require that specific quantities are to be supplied, but it merely established a minimum quantity which could easily be met by the tenderer.

Indeed the appellant's argument is fallacious since if the minimum quantity required in the tender document is met, then such tenderer would be compliant irrespective of whether such products are delivered in single units or packs.

**1.2. Tender in breach of the Guidance for Good Distribution**

The argument submitted by the CA above renders the appellant's argument on this issue moot and redundant, since as already stated, a tenderer may submit an offer of a quantity of packs (as opposed to units) and still be compliant with the tender requirement.

Additionally, and without prejudice to the above, the Guidance for good distribution practice in relation to medical devices does to incorporate or refer to incontinence products. As a matter of fact, the very definition of 'medical devices' provided by the

document excludes any reference to incontinence products and consequently, such items are not deemed as medical devices.

Therefore, the appellant's argument in this regard is also incorrect.

**1.3. Technical offer form not consistent with the tender specifications.**

At the outset, it is pertinent to clarify that this tender was issued for the provision, supply and distribution of incontinence products. Therefore, and rightly so, the requirements of the technical offer form are only limited to the provision of such incontinence products.

That being said, the tender document indeed required the provision of an on-line web based application. Contrary to what is being argued by the appellant, a tenderer is still deemed to be compliant with this requirement if in his submission, particularly the technical literature, the tenderer includes the provision of a web-based application.

In fact, the evaluation committee may still determine whether a tenderer is compliant with this requirement if and once a web-based application is provided as required in the tender requirements. If no such web-based application is included, then naturally the tenderer would be disqualified. Additionally, once in substance, the technical literature submitted is in compliance with this requirement, then it follows that a tenderer may indeed be compliant.

**1.4. Technical Specifications for web application are ambiguous.**

The Contracting Authority submits that the requirements and the technical specifications with respect to the web application are clear and sufficient for all bidders to submit their offers and be in compliance with same requirements.

**2. Award Criteria - ensuring effective competition.**

With respect to this ground of appeal, the Contracting Authority humbly submits that such ground cannot be entertained by this honourable tribunal since it is not contemplated as one of the specific circumstances contemplated in Regulation 262 of the PPR.

Additionally, and without prejudice to the above, as evident from the tender document itself and as already stated in this reply, the tender was issued for the provision, delivery and distribution of incontinence products. The tender also prescribed minimum requirements which the bidders were to satisfy. Therefore, all bidders who meet the minimum requirements, be it in terms of quantity and/or quality, then such will be compliant with the tender requirements. In such circumstance, the award criterion chosen in the tender document (price only) is sufficient for the purposes of this tender.

**3. Identical products – Inconsistent procurement procedures.**

The appellant argues among other things, that “*the same matter and the same clauses have been modified on a number of occasions, thus creating uncertainty and vagueness*”.

With all due respect, as the appellant himself states, such tender procedures are currently pending proceedings (sub judice) and one cannot definitively conclude that such tenders are creating uncertainty and vagueness.

In the absence of definitive decisions by the PCRB or the Court of Appeal, such conclusions by the appellant cannot be made.

Also, the Contracting Authority submits that the merits of each of the tender procedure quoted, besides the present one, do not form part and have nothing to do with the merits of the present appeal.

Moreover, it is up to the department issuing the tender document to structure the tender document in a manner which would suit its needs and at the same time following the PPR and legal principles.

THEREFORE, in view of the above and for other reasons that may be adduced at law at the sitting to be set by this Board, the Respondent Contracting Authority humbly requests that this Board, save for any other declaration, order or decree it may deem fit:

- a. Declare the applicant's objection as unfounded both at law and in fact and consequently rejects the objection;
- b. Rejects the applicant's request to be refunded in full the deposit paid upon filing of the application.



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