



17th October 2023

Public Contracts Review Board
Notre Dame
Ravelin, Floriana,
Malta

Pharma-Cos Limited

vs

[i] Department of Contracts; and

**[ii] Active Ageing and Community
Care**

REMEDIES BEFORE CLOSING DATE OF CALL FOR COMPETITION

This is a reasoned application for Lot 1, Lot 2 & Lot 3

CT 2238/2023

Tender Name: Supplies – The supply, delivery and distribution of incontinence products for senior citizens and persons with disabilities in Malta – Active ageing and community care

REASONED APPLICATION

Whereas, the Department of Contracts (hereinafter DOC) issued a call for “Supplies – The supply, delivery and distribution of incontinence products for senior citizens and person with disabilities in Malta – Active Ageing and Community Care” [hereinafter ‘the Tender’]

Whereas Messrs. Pharma-Cos Limited (hereinafter Appellant company) feels aggrieved by the contents of tender, and thereby is submitting its objection in accordance with article 262 of the Public Procurement Regulations (PPR) within the time-frame and accompanied with the relative payment (hereby enclosed as DOC1) based on the following grievances:

1. Lack of predictability - ambiguity

1.1 In accordance with the European Court of Justice in the names of Costa and Cifone:

“ ... must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority’s discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure”.

1.2 Also, in the European Court of Justice case Commission v Netherlands, the concept of clarity has been further emphasized and discussed. The ECJ held that,

*‘In that case the CJ ruled that a requirement that suppliers should comply with “criteria of sustainability of purchases and socially responsible business”, including by contributing to improving the sustainability of the coffee market and environmentally, socially and economically responsible coffee production, and should state how they meet those criteria, violated this clarity requirement: **neither the standards laid down nor information to be provided were clear**².*

- 1.3 The appellant company submits that, the tender document, as drafted, is in breach of article 38 of the PPR, and notwithstanding multiple clarifications, the tender document fails the ambiguity test, as follows:-

1.3.1 Quantities – Tender document versus reality

- 1.3.1.1** The tender document in **provision 3.2** [page 4] indicates that,

‘The tenderer must offer the whole of the quantity or quantities indicated for each lot. Under no circumstances will tenders for part of the quantities required be taken into consideration. Each lot may form a separate contract and the quantities indicated for different lots will be indivisible’

- 1.3.1.2** On its part, the Financial Offer (for all Lots) requests a unit price, as well as specific quantities (vide financial offer form enclosed as **DOC2**);

- 1.3.1.3** It is well known however that, the items requested in all lots, are delivered in packs and not in single units [loose nappies], and thus the execution of the contract as proposed is not feasible nor practicable;

For clarities sake, whilst the contracting authority shall request the products in specific quantities, all economic operators are bound to supply in packs [and consequently charge for units which the end user is not be eligible for] – thus there is an impossibility to perform and thereby actions should be taken in accordance with article 262[1][a] of the PPR;

- 1.3.1.4** For all intents and purposes, through clarification number 4 this matter was requested, however such question remained unanswered;

1.3.2 Tender as proposed is in breach of the Guidance for Good Distribution - MA

- 1.3.2.1** The Medicines Authority has developed a 'Guidance for good distribution practice in relation to medical devices', wherein *inter alia* it clearly states that handling of medical devices shall be such which does not damage, tamper with, or in any manner deteriorates the packaging;
- 1.3.2.2** The handling of units, as proposed in the tender [vide above] blatantly infringes the guidance documents of the Medicine's Authority, and as a consequence the packaging of the products that will be delivered to the end-users shall be *de minimis* deemed to be tampered with;
- 1.3.2.3** In addition, whilst the tender document has requested conformity to the CE marking, the distribution in loose packs renders the CE marking redundant;

1.3.3 Technical offer form not consistent with the tender specifications

- 1.3.3.1** The tender specifications, *inter alia* in specifications 1.2, and 1.6 to 1.7.6 requests an online web-based application, to supply the contracting authority with monthly updated lists for scheme 'A' and scheme 'B';
- 1.3.3.2** For some very odd reason, this is not however included within the tender technical offer form template provided, nor in any other technical offer – on the contrary all other tender specifications are included within the tender offer form;
- 1.3.3.3** Whilst indeed mention of same is within the literature list, it is the tender offer which calibrates the offer by the economic operator, and the literature is only there to corroborate that a technical offer is compliant – without the technical offer, the economic operator is not bound to supply the web-based application, nor can the contracting authority exclude an economic operator for its failure to offer the web application!

- 1.3.3.4 As such, the tender document is requesting literature of a requisite which is non-existent in the tender specifications.

1.3.4 Technical specifications for web application are ambiguous

- 1.3.4.1 The tender specifications for web application are ambiguous, as follows:

User Access: Sections 1.2 and 1.7.1 of the tender document describes what functionality is expected by the Contracting Authority, however it does not indicate how many users will require access to the system and to what extent. Please provide a specific list of the different user-types that will require access to the system, their expected permission levels, and the expected volume of users that will require access to the system throughout the course of the contract – taking into account any expected growth.

Lead Time for New Beneficiaries and/or Changes to the Beneficiary Product Prescription: Section 1.2 of the tender document states that the beneficiary data (including their product prescription, we assume) will be updated periodically by the Continence Nurse Advisors, in real-time by the web-application. Whilst the minimum buffer stock will be adhered to, the Contracting Authority understands that the Contractor cannot anticipate what changes will occur in the future, and thus, cannot have an unlimited supply of all the different products. Therefore, it is being assumed that a minimum lead time will be discussed and agreed upon with the Contracting Authority, to ensure that new requests or changes to the beneficiaries' product entitlement are handled within a specific timeframe, giving the Contractor a reasonable timeframe to address any necessary changes to the stock.

Manage Orders: Section 1.7.1 states that 'the system will automatically generate monthly product orders'. Is the Contracting Authority expecting the Contractor to have a fully automated order fulfilment process, with no interaction with the beneficiary? Please provide a step-by-step process indicating how beneficiaries will apply and receive their products, and how the system should interact during this process. Specifically we need to understand what channels the beneficiaries will be expected to interact with (e.g.^m

telephone/online form etc) and what resources the Contractor needs to allocate to support this process.

Managing requests to change the beneficiaries' product prescription: Given that changes to the product prescription need to be authorised by the Contracting Authority, can we assume that the beneficiaries must make such a request to the Contracting Authority directly and the Contractor will be notified about the changes through the web application?

Integration Capabilities: Given that the web application will be owned and administered by the Contractor, it is being assumed that no integrations to the Governments systems are required, and any and all integrations that may be required by the Contractor shall be handled directly at his/her discretion so long as the supply/deliver processes are respected.

Demo: In order to provide a demo for the tender process, the Contractor will be required to invest in additional licences and professional service fees. Please clarify (a) that the demo does not need to represent the entirety of the solution (as this would require the actual setup and configuration of the end solution before the tender is actually awarded) and (b) that one user license will suffice for a period of two (2) months for the tender evaluation purposes

1.3.4.2 In view of the aforesaid and without prejudice to provision 1.3.3, *de minimis*, the contracting authority must issue clarification notes to address the ambiguities herein defined.

1.3.4.3 In addition to the aforesaid, it is the opinion of the appellant company that the price for the web application should be separate from the price of the lots service requested.

2. Award criteria – ensuring the effective competition

2.1 The tender document in provision 6, stipulates that the sole criteria for award shall be “the price ... satisfying the administrative and technical criteria”;

- 2.2 Whilst indeed permissible, it is the position of the appellant company, that the award criteria is not appropriate in the circumstances, and it would be more appropriate to have a best price quality ratio [BPQR] award criteria;
- 2.3 Article 239 of the PPR discusses the concept of effective competition, and thus ensuring that whenever the Government is involved, it shall procure the most economically advantageous offer, which offer might not be the cheapest option, but the best priced when confronted with quality;
- 2.4 So much is BPQR a better tool to analyse offers, that through Policy note # 08, the department of contracts declared that [as opposed to the previous rigid approach towards BPQR],

“Through this procurement policy note, this Department intends to open up its position provided that the Contracting Authority is in a position to demonstrate they are able to define clearly and in great detail how points will be awarded for the technical aspect of the tender so that evaluation can be carried out objectively, transparently and fairly.”

- 2.5 In the procurement under review, one of the main characteristics of the diapers is the absorption capacity – so much so that, the Contracting Authority developed a minimum absorption capacity [vide tender document pages 26 to 33];
- 2.6 It is the position of the appellant company that, for the Contracting Authority to purchase the most economically advantageous offer, without distorting effective competition, it is to change the award criteria from a price only to a BPQR, award criteria. This would ensure that wheresoever a product offered is of a better quality, it is given a better rating as opposed to the ones that merely satisfy the requirement;
- 2.7 The aforesaid is even more relevant when, the target audience are vulnerable persons that are either senior citizens and/or people with disability who are incontinent [tender document page 19]. In pursuit of the above, the Court of Appeal, made it clear that everyone must be cautious in matters dealing with vulnerable people. In fact, in the case **V.J.Salomone Pharma Limited vs Direttur tad-dipartiment tal-kuntratti et.**³ it was made clear that:

‘Mhux biss, izda f’kwistjoni ta’ natura delikata bhal ma hi l-oggett ta’ dan il-kuntratt pubbliku u cioe’ il-provvista

³ Appell Civili Numru. 54/2012

ta' medicinali lill-pazjenti li ikunu ghaddew minn operazzjoni serja bhalma hi dik ta' trapjant ta' organi, il-Bord messu mexa b'iktar kawtela ...'

3. Identical products - Inconsistent procurement procedures

3.1 The subject matter of this tender is also the subject of two [2] other pending procurement, namely SPD 3/2022/045; MGOZ NP 02/2023; – all of which are pending appeals before this Honorable Board;

3.2 Whilst all procurement procedures are distinct from each other, consistency in the procurement of identical products is fundamental, to ascertain that the principles of proportionality and transparency are safeguarded;

3.3 Hereunder is matrix which outlines some of the inconsistencies:

	SPD3/2022/045 [pending award objection]	MGOZ NP 02/2023 [pending pre- contractual]	CT2238/2023 [current]
Split into Lots	YES	NO	YES
Multiple distribution centers	NO	NO	YES
Delivery by largest lot	YES	NO	NO

3.4 The above shows that the same matter and the same clauses have been modified on a number of occasions, thus creating uncertainty and vagueness;

3.5 For all intents and purposes, it must be said that, this latest procurement CT2238/2023 is the one which is the most detrimental to the end-users [senior citizens and people with disability], since the end result of this procurement could be six [6] distribution centres, from which end-users might require to collect their respective allocation. To this end, the appellant company is reserving its rights to the fullest extent possible, to request the Commission for the Rights of Persons with Disability, in accordance with article 22(1)(f) of Chater 413 of the Laws of Malta;

4. Other

4.1 It must be pointed out that, pending before the PCRB are an additional two [2] other appeals, which deal with identical matters – It is thus being proposed that all such appeals are heard within the same time period and decisions are released instantaneously, thus ensuring that the decisions are not contradictory;

4.2 It is also imperative to note that the different versions produced by the different governmental departments, thus confirming that each solution proposed in the preceding tender document was not satisfactory – In a trial and error approach, the various Government departments are seeking to make amends in every subsequent procurement procedure release, but the more it seeks to change, the more it is creating confusion and leading to an ineffective procedure!;

4.3 It is to be pointed out that the Contracting Authority is failing to understand that this tender is for the provision of service and not for the supply of a product, and thereby this procurement is to be treated as such;

4.4 Additionally, the tender fails in addressing operational issues in relation to distribution, including but not limited to:

- There is no turnaround time from date of order to date of supply;
- There are no service level objectives to ascertain that the service offered by the awarded bidder is in accordance with the required standards;

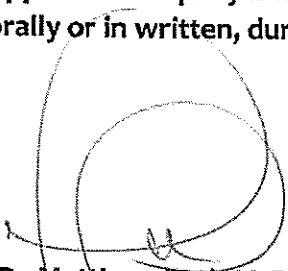
4.5 Finally, it is the position of the appellant company that tender fails in requesting a license for the Distribution medical devices, thus ensuring that whosoever will be awarded the agreement is adequately licensed.

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

- i. **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;**

- ii. In accordance with article 90[4] of the PPR, take such interim decisions as required;
- 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.



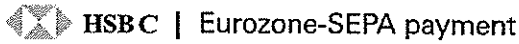
Dr Matthew Paris LL.D
matthew@dalliparis.com

- Requested Testimony by:**
- (i) Representatives of the Department of Contracts, Active Ageing and Community Care;
 - (ii) Representative of Pharma-Cos Limited;
 - (iii) Representative of Commission for the Rights of Persons with Disability;
 - (iv) Representative of the Medicine's Authority;

Lot 1 – Paediatric Incontinence Products is €438,700.00 excl. VAT.
Lot 2 – Adult Incontinence Products is €7,189,000.00 excl. VAT.
Lot 3 – Bariatric Incontinence Products is €132,300.00 excl. VAT.

Fees for appeal

Lot 1 - €2,193.50
Lot 2 - €35,945
Lot 3 - €661.50



You have authorised this payment

The status for payment 88106PZ00X7H is: Forward dated instruction received by bank

Payment summary - Eurozone payment

Pay from

PHARMA-COS LIMITED
MT MTHBMTCA006-068449-001 EUR

Instruction reference number 88106PZ00X7H

Transaction type Eurozone-SEPA payment

Total amount

EUR 661.50

Expected value date

Fri 20 Oct 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

LP1254

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 Reference: CT2238/2023 LOT3	Remittance information: CT2238/2023 LOT3	661.50

DOC 2.1 Extract Financial offer Lot 1

DOC 2.2 Extract Financial offer Lot 2

DOC 2.3 Extract Financial offer Lot 3

FINANCIAL OFFER - LOT 1 Paediatric Incontinence Products

Ref: CT2238/2023

Title: Tender for the Supply, Delivery and Distribution of Various Incontinence Products for Senior Citizen Disabilities in Malta with the Active Ageing & Community Care (AACC)

Financial Bid Breakdown of Costs Lot 1

Item Reference in Section 3 Technical Specifications	Item Code (Catalogue Code Reference)	Description	Qty in numbers	Unit Price inclusive of all Taxes, Charges & discounts applicable, but excluding VAT	First Year
8.1.1.a		Children Diapers Medium	3,894	€0.00	
8.1.1.b		Children Diapers Large	25,779	€0.00	
8.1.1.c		Children Diapers Extra Large	111,915	€0.00	
8.1.1.d		Children Diaper Junior	2,132	€0.00	
8.1.2.a		Children Pull Up - minimum absorption capacity 850mls	50,226	€0.00	
8.1.2.b		Children Pull Up - minimum absorption capacity 1000mls	6,374	€0.00	
8.1.2.c		Children Pull Up - minimum absorption capacity 1100mls	6,556	€0.00	
8.1.3.a		Inco Sheets Large	454	€0.00	
8.1.3.b		Inco Sheets Small	8,470	€0.00	
				Total for First Year	

FINANCIAL OFFER - LOT 2 Adult Incontinence Products

Ref: CT2238/2023

Title: Tender for the Supply, Delivery and Distribution of Various Incontinence Products for Senior Citizens with Disabilities in Malta with the Active Ageing & Community Care (AACC)

Financial Bid Breakdown of Costs - Lot 2

Item Reference in Section 3 Technical Specifications	Item Code (Catalogue Code Reference)	Description	Qty in numbers	Unit Price inclusive of all Taxes, Charges & discounts applicable, but excluding VAT
First Year				
9.1.1		Male Disposable Pad - Light Urinary Incontinence	34,282	€0.00
9.1.2		Male Disposable Pad - Moderate Urinary Incontinence	10,776	€0.00
9.1.3		Female Disposable Pad - Light Urinary Incontinence	153,858	€0.00
9.1.4		Female Disposable Pad - Moderate Urinary Incontinence	340,377	€0.00
9.1.5 a		Adult Diapers (all-in one-diaper) Moderate Absorbent - Extra Small	4,668	€0.00
9.1.5 b		Adult Diapers (all-in one-diaper) Moderate Absorbent - Small	53,690	€0.00
9.1.5 c		Adult Diapers (all-in one-diaper) Moderate Absorbent - Medium	895,913	€0.00
9.1.5 d		Adult Diapers (all-in one-diaper) Moderate Absorbent - Large	1,779,614	€0.00
9.1.5 e		Adult Diapers (all-in one-diaper) Moderate Absorbent - Extra Large	764,446	€0.00
9.1.6 a		Adult Diapers (all-in one-diaper) Heavy Absorbent - Small	7,616	€0.00

FINANCIAL OFFER - LOT 3 Bariatric Incontinence Products

Ref: CT2238/2023

Title: Tender for the Supply, Delivery and Distribution of Various Incontinence Products for S
Persons with Disabilities in Malta with the Active Ageing & Community Care (AACC)

Financial Bid Breakdown of Costs - Lot 3

Item Reference in Section 3 Technical Specifications	Item Code (Catalogue Code Reference)	Description	Qty in numbers	Unit Price inclusive of all Taxes, Charges & discounts applicable, but excluding VAT
First Year				
10.1.1		Female Bariatric Pads	1,043	€0.00
10.1.2 a		Bariatric Diapers Slip Super XXX Large	15,068	€0.00
10.1.2 b		Bariatric Diapers Super XX Large	8,958	€0.00
10.1.3 a		Inco Sheets Small	649	€0.00
10.1.3 b		Inco Sheets Large	387	€0.00
Total for First Year				
Second Year				
10.1.1		Female Bariatric Pads	1127	€0.00
10.1.2 a		Bariatric Diapers Slip Super XXX Large	16,274	€0.00
10.1.2 b		Bariatric Diapers Super XX Large	9,674	€0.00
10.1.3 a		Inco Sheets Small	701	€0.00