

PUBLIC CONTRACTS REVIEW BOARD

Case 1920 – CfT020-3981/23 (CPSU6705/23) - Supplies - Tender for the Supply of Non-Adherent Tulle Dressing Containing Silver – Lot 2

9th October 2023

The Board,

Having noted the call for remedies filed by Mr Matthew Arrigo acting for and on behalf of Krypton Chemists Limited, (hereinafter referred to as the appellant) filed on the 22nd August 2023;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 28th August 2023;

Having heard and evaluated the testimony of the witness Mr Matthew Arrigo (Representative of Krypton Chemists Limited) as summoned by Dr Calvin Calleja acting for Krypton Chemists Limited;

Having heard and evaluated the testimony of the witness Ms Beatrice Panzeri (Representative of Urgo Medical Italia) as summoned by Dr Calvin Calleja acting for Krypton Chemists Limited;

Having heard and evaluated the testimony of the witness Ms Miriam Wubbels (Representative of the Central Procurement and Supplies Unit) as summoned by Dr Leon Camilleri acting for the Central Procurement and Supplies Unit;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 5th October 2023 hereunder-reproduced.

Minutes

Case 1920 – CfT 020-3981/23 – Supplies – Tender for the Supply of Non-Adherent Tulle Dressing containing Silver

LOT 2 – 10cm x 10cm

Remedy before Closing Date of a Call for Competition

The tender was issued on the 16th August 2023 and the closing date was the 29th September 2023. The estimated value of this Lot, excluding VAT, was € 23,600.

On the 22nd August 2023 Krypton Chemists Ltd filed a request for remedy against the Central Procurement and Supplies Unit as the Contracting Authority objecting to the lack of tolerances in sizes specified in the tender document.

A deposit of € 118 was paid on this Lot.

On the 5th October 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a virtual public hearing to consider the request for remedy.

The attendance for this public hearing was as follows:

Appellant – Krypton Chemists Ltd

Dr Calvin Calleja	Legal Representative
Mr Matthew Arrigo	Representative
Ms Lorraine Galea	Representative

Contracting Authority – Central Procurement and Supplies Unit (CPSU)

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Ms Marika Cutajar	Representative
Ms Maria Curmi	Representative
Mr Edmond Balzan	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Calvin Calleja Legal Representative for Krypton Chemists Ltd referred to the written submissions and re-iterated that the Appellant was offering to meet all the tender criteria except Specification 2.10 in regard to the dimension of the dressings. It was now requesting that the dimensions be widened by allowing a certain tolerance. The Contracting Authority, however was insisting on the dimensions remaining unchanged. This was narrowing competition.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit (CPSU) said that imposing a condition in a tender does not necessarily limit competition; this is normal in every call and does not give anyone an unfair advantage. One needs to have a definite yardstick and there is a problem of where to set the tolerances if one agrees to it. The Authority insists on the dimensions as stated staying in the tender and cannot accept tolerances that suit one particular economic operator. This creates discrimination and opens the tender to further appeals from other operators.

Mr Matthew Arrigo (188094M) called to testify by the Appellant stated on oath that this type of tender is issued practically every year.

Ms Beatrice Panzeri (CA 108816K- Italian) called to testify by the Appellant stated on oath that she is an employee of Urgo Medical Italia and is a clinical nurse having graduated from University in Milan. Krypton Chemists are the local representatives for Urgo whose product meets the tender requirements and can be cut to any size required. The size of the dressing has to be related to the type of wound and is immaterial as long as the medical objective is met. Extending the size of the dressing on a wound does not have any impact. On the other hand there are certain wounds, like leg ulcers, that require larger dressings. Tolerance in sizes is common in EU states and allows for a bigger size at a lower price.

Ms Miriam Wubbels (311966M) called to testify by the Contracting Authority stated on oath that she has been employed as tissue viability nurse at Mater Dei Hospital for 11 years. She holds a Masters degree in tissue viability. She explained that the product is required to treat infected superficial

wounds in different sizes according to the size of the wound. Standard sizes are used to meet the most common wounds.

Questioned by Dr Calleja, witness stated that the size of the wounds varies and that there are other sizes of this product on the market. 'On paper there is no difference in sizes' replied the witness.

This concluded the testimonies.

Dr Calleja said that the Authority claims that it has to draw a line somewhere but this cannot be considered in a vacuum but within the principles of the Public Procurement Regulations and decisions of the European Courts, citing the principles established in the *Cassar Petroleum* case and CJEU C 84/94 on proportionality and achieving the desired objectives. The objective of the tender is obtaining non-adherent tulle dressing - Appellant is not aware if there are other suppliers and hence there is no proportionality. Size is immaterial so long as the characteristics of the product are met. In reality if the size is not met then there is lack of competition, falling foul of PPR 39(3) and the Authority is obliged to protect and promote competition (CJEU 247/02). According to the testimony of Ms Panzeri it is beneficial to widen sizes as it allows wider use of dressings.

Dr Camilleri said that although Appellant claims that size is not important for practical purposes the tender specifications have to be followed. No proof has been submitted that the Authority is intending to give any economic operator an advantage. Witness stated that size 10cm x 10 cm is common and standard and no proof has been provided that this is not so or that that size is not the most common. The Authority had to draw the line somewhere – Appellant is merely claiming that the size should be drawn to meet its product. Following the dictum in PCRB Cases 1832, 1833 and 1834 if any allegation is made proof must be provided. It is reasonable to confirm the tender specifications.

Dr Calleja noted that the Appellant was not requesting that the tender should meet its sizes but to leave the tender terms open. Proof has been provided from member states that the practice is to allow tolerance.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 5th October 2023.

Having noted the call for remedies filed by Krypton Chemists Limited (hereinafter referred to as the Appellant) on 22nd August 2023, refers to the claims made by the same Appellant with regard to the tender of reference CfT020-3981/23 (CPSU6705/23) listed as case No. 1920 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Whereby, the Appellant contends that:

- a) In Section 3 - the Specifications Section - Lot 2: 10x10cm, there is no information on any applicable +/-tolerances being considered by the contracting authority, hence there was a need to submit the following clarification request. *“With reference to Lot 2, Spec No. 2.10, “Size: 10cm x 10cm”, please advise if any +/- tolerances in cm are being considered whereby there are other alternatives on the market with size 10x12cm which comprise of the same intended use and equivalent functional performance. For your consideration please and if rejected, kindly confirm the clinical reason/s for such.”* The Contracting Authority replied that *“Unfortunately, it is not acceptable that the product should be according to the published specification. The reason from a Clinical point of view a wound product has to be big enough to cover the entire wound/ wound bed. For this reason and also cost effectiveness this product is requested in two different sizes, to avoid wastage and/or contamination of the product. The 2 sets of measurements are intended not to overlap. That way we cover different scenarios where the product size is neither too big for a small wound or too small for a large wound. This may be more of a technical reason rather than a clinical one but the size is a “part of a set of specifications”.*
- b) Pending Clarification Response from the Contracting Authority - The above clarification response, does not address, in full, the original clarification request submitted by the economic operator. On 10 August 2023, it was thus necessary that a further clarification request (Clarification Request No. 2) was submitted by our company in order to cover any shortcomings identified in the clarification response from the contracting authority. The time period for lodging a Public Contractual Remedy, as per PPRs lapses on 22nd August 2023. To date, no clarification response has been received from the contracting authority, leaving us with no other option but to submit the pre-contractual remedy in subject.
- c) Consideration for a +/- tolerance - Firstly, the clarification response from the contracting authority states that the wound product has to be big enough to cover the wound. This is not accurate because our clarification request refers to size 10cm x 12cm, which covers the minimum dimensions requested. The second reason given is that the product is requested in two different sizes with two sets of measurements to prevent overlapping. Our clarification request targeted Lot 2 only and in any case, the proposed size 10x12cm does not overlap with Lot 1, Size 5x5cm. The Contracting Authority also stated that the specifications ensure that *“the product size is neither too big for a small wound or too small for a large wound”*. However, if the product size is 'too big', then it can simply be cut to the size of the wound, which is after all a tender specification in Clause 2.7. Further to Spec No. 2.7, any excess can simply be cut to fit the size of the wound. In fact, the Contracting Authority admitted that there is no clinical reason not to accept our product, and that the reasons given are technical: *“This may be more of a technical reason rather than a clinical one but the size is a ‘part of a set of specifications’”* From our experience with public procurement processes, technical

specifications must be drafted in such a way as to widen competition as much as possible, which is even beneficial to the Contracting Authority whereby it can procure an equivalent device for a cheaper price. Section 3 - the Specifications Section - Lot 2: 10×10cm, as drafted, are discriminatory and are artificially narrowing competition on the market.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 28th August 2023 and its verbal submission during the virtual hearing held on 5th October 2023, in that:

- a) CPSU submits that the applicant's claim that the specifications are artificially narrowing competition is unfounded in fact and at law. CPSU submits that in purchasing any product, but especially medical devices which come in sizes, a line has to be drawn somewhere and is drawn at a point in all similar tenders. Such limit should not be considered as a limitation but an indication of the exigencies of the contracting authority.
- b) As explained its clarification reply (sic) the contracting authority is seeking to purchase dressing in 2 sizes 5x5 and 10x10, to cater for different situations and to that these dressing sizes do not overlap. The applicant requested the contracting authority to consider a plus or minus tolerance. Such a tolerance, let's use the example of 2 centimetres plus or minus in both lots, could lead to a 7cm dressing in the first lot and an 8cm dressing in the second lot which would lead to the procurement of almost identical dressing sizes despite the contracting authority's intentions of having 2 different sizes. In anticipation to an argument that the contracting authority should have included plus tolerance only, if this was of 2cm, this could still lead to potentially a 7cm and a 10cm, which is still not what the contracting authority was after.
- c) Moreover; what the applicant is requesting is an ad hoc specification for its product. If the Contracting authority permitted a 10%/1cm plus or minus tolerance, the applicant's product would evidently still not be up to the requested size requirement, If the contracting authority allowed for a 20%/2cm increase tolerance, suppliers of different larger size dressing could potentially object claiming discrimination in their product's regard.
- d) The contracting authority's main argument is therefore that a line should be drawn somewhere and drawing a line is not artificial narrowing of competition, now (sic) discrimination of any kind. The drawn line the natural condition (sic) imposed by a contracting authority in order to procure what it needs.
- e) In conclusion, CPSU submits that the sizes chosen are standard sizes and do give room for a competitive process, as always was the case in previous calls with the same sizes.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances.

- a) Relevant to this appeal is regulation 39(3) of the Public Procurement Regulations ("PPR") which states that *"The design of the procurement shall not be made with the intention of excluding it from the scope of these regulations or of artificially narrowing competition. Competition **shall be considered** to be artificially narrowed where the design of the procurement is made with the **intention of unduly favouring or disadvantaging certain economic operators.**"* (bold & underline emphasis added)
- b) Therefore, what goes against the spirit of the law is the **intention** of either favouring or disadvantaging a specific economic operator.
- c) Whilst it true that the appellant provided proof that a number of procurement procedures in Spain and Italy allowed for a tolerance level of +/- 20%, +/-25% and +/-30% respectively this does not necessarily mean that a tolerance level must always be provided.
- d) What needs to be proven is that a particular specification, in this case specification 2.10 as per page 19 of the tender dossier, is going against a specific regulation the PPR.
- e) It is this Board's opinion that:
 - i. The Contracting Authority was not intentionally favouring or disadvantaging a specific economic operator when it requested a standard size of the dressing.
 - ii. No proof was provided that the 10cm x 10cm is not a standard size of this particular product.
 - iii. No proof was provided that only a limited number of economic operators can provide such a product.
 - iv. No proof was provided on how the tolerance level of +/- 20% was arrived at. A natural question that comes to mind is "why not a tolerance level of +/- 10%? 15%? 25%?"

Therefore, this Board is of the opinion that the specification as listed in clause 2.10 is not unlawful and / or discriminatory in nature.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold the Appellant's concerns and grievances;
- b) that the deposit is not to be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Dr Vincent Micallef
Member