

UFFIĊĊJU TAL-AVUKAT TAL-
ISTAT
CASA SCAGLIA, 16
TRIQ M.A. VASSALLI
IL-BELT
MALTA



OFFICE OF THE STATE ADVOCATE
CASA SCAGLIA, 16
M. A. VASSALLI STREET
VALLETTA
MALTA



Public Contracts Review Board
Notre Dame Ditch
Floriana, FRN 1601

Cases 114, 115 & 116

24th of October 2023

Reply of the Director of Contracts to the application of Pharma-Cos Limited in terms of Reg. 262 of the Public Procurement Regulations (S.L. 601.03) in relation to the call for tenders CT2238/2023 Supplies – The supply, delivery and distribution of incontinence products for senior citizens and persons with disabilities in Malta

1. Preliminaries

1.1. By means of its application under Reg. 262 of the Public Procurement Regulations, Pharma-Cos raises the following ten (10) claims:

(i) that Art. 3.2 of the Instructions to Tenderers and the Financial Offer Form are amended so that supplies are procured in pack not in units (loose items);

(ii) that the procurement of the supplies in units rather than pack is in breach of the Guidance for Good Distribution issued by the Medicines Authority;

(iii) that the technical offer forms are inconsistent with Art. 1.2, 1.6 and 1.7 of the Technical Specifications;

(iv) that the authorities must issue clarification notes on the Technical Specifications relating to the web application (Art. 1.2 and 1.7.1) and that the price for the web application should be separate from the price of the supplies requested;

(v) that the contracts should be awarded on the basis of the best price-quality ratio (BPQR) instead of the cheapest price;

(vi) that different contracting authorities should not use different procurement procedures for the procurement of the same supplies (with specific reference to call for tenders SPD3/2022/045 and MGOZ NP 02/2023);

(vii) that the tender is one for services not one for supplies;

(viii) that there should be a turnaround time from date of order to date of supply;

(ix) there should be service level objectives to ascertain that the service offered by the contractor is in accordance with required standards;

(x) that the call for tenders should request a licence for the distribution of medical devices.¹

1.2. Pharma-Cos also requests that two other pending appeals in relation to call for tenders SPD3/2022/045 and call for tenders MGOZ NP 02/2023.

1.3. In this reply the Director of Contracts shall:

- firstly, state the relevant facts leading up to the filing of this applications;

- secondly, put forward the reasons for the inadmissibility of the application with respect to claims (ii)-(x);

- thirdly, submit that the first claim of Pharma-Cos is unfounded.

- fourthly, submit the reasons why the request for the joinder of the other pending appeals in relation to other procurement procedure cannot be entertained.

2. The relevant facts

2.1. The Director of Contracts, as the authority responsible for the tendering process, and the Active Ageing & Community Care, as contracting authority, published the call for tenders in question on the 11th August 2023.

2.2. While the original closing date for submissions of tenders was on the 28th September 2023 this was first extended until the 19th October 2023 and again until the 31st October 2023.

2.3. Within the Clarification Period a total of five (5) Clarification Notes were issued.

2.4. The Clarification Period ended on the 29th September 2023.

2.5. On the 12th October 2023, Pharma-Cos filed an application for the issue of a warrant of prohibitory injunction before the Civil Court First Hall, with reference number 1960/2023JVC in the names *Pharma-Cos Limited v. Id-Dipartiment Ġenerali tal-Kuntratti et*, attempting to suspend the procurement process (see **Doc. DC1**).

2.6. By its decree of the 12th October 2023, the Civil Court provisionally acceded to the application for suspension of the procurement process until final determination (see **Doc. DC2**).

2.7. On the 17th October 2023, seeing that Pharma-Cos had disrupted the procurement process, the Director of Contracts extended the deadline for the call for tenders until the 30th November 2023, by means of Clarification Note no. 6, in order to allow prospective tenderers to react accordingly after the outcome of the application for a warrant of prohibitory injunction (see **Doc. DC3**).

¹ This Reply shall continue to refer to this numbering since the application of Pharma-Cos fails to clearly number and specify its own claims.

2.8. On the 19th October 2023, Pharma-Cos withdrew its application for a warrant of prohibitory injunction (see Doc. DC4).

2.9. On the 20th October 2023, Pharma-Cos filed the present appeal before this Honourable Board.

3. Inadmissibility of claims (ii)-(x)

3.1. Pharma-Cos raises a total of ten (10) claims in its application. Pharma-Cos makes no attempt to identify, for each of its claim, one of the five (5) grounds for which the remedy before closing date of a call for competition may be invoked according to Reg. 262(1) of the Public Procurement Regulations; that is:

(a) to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform; or

(b) to determine issues relating to the submission of an offer through the government's e-procurement platform; or

(c) to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or

(d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or

(e) to cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued.

3.2. It is only with respect to its first claim (*Quantities – Tender document versus reality*) that the application specifically identifies the ground for appealing – that is, Reg. 262(a). For the rest of the nine (9) claims no legal ground is cited.

3.3. The Director of Contracts submits that this on its own is sufficient for this Honourable Board to declare the application inadmissible with respect to claims (ii)-(x). It is neither the role of this Honourable Board nor that of the Contracting Authorities to try to elucidate what the applicant's claims are.

3.4. Even so, and without prejudice to the above, the claims (ii)-(x) of Pharma-Cos are inadmissible because they do not fall within any of the grounds of Reg. 262(1)(a)-(e). It would appear that this is why Pharma-Cos fails to ground these claims on any provision of law; precisely because there is no legal basis to put forward such claims.

3.5. The case law of the Court of Appeal has already held that the remedy of Reg. 262 cannot be used by prospective tenderers to interfere in the drafting and design of a call for tenders. The remedy is not an invitation to prospective tenderers for them to offer their views on the call for tenders. In the judgment *Koperattiva Ghawdxija tal-Indafa Pubblika Limitata v. Kunsill Reġjonali Ghawdex et* (Appeal no. 369/22/1, 26 October 2022, para. 8-9) the Court of Appeal considered that:

Din il-Qorti trid tirmarka mill-bidu li dawn l-ilmenti ma jolqtux l-interessi tas-soċjeta` appellanti peress illi huma materji ta' amministrazzjoni interna, u bl-ebda mod ma jilledu xi drittijiet tagħha. Dawn l-allegazzjonijiet ma jolqtux il-konkurrenza fis-suq u ma jagħmlux hsara lil xi oblatur partikolari għax japplikaw għal kulhadd.

F'dan il-każ, il-Kunsill Reġjonali Għawdex approva bla riservi s-sejha u aċċetta li jkun l-awtorita` kontraenti responsabbli. Peress illi, kif inghad, din is-sejha kienet parti minn eżerċizzju nazzjonali fejn il-gbir tal-iskart ser jieqaf ikun lokali u jsir reġjonali, kellu jkun hemm koordinazzjoni bejn is-sitt Kunsilli Reġjonali u dan l-irwol hadu d-Dipartiment tal-Gvern Lokali li kiteb it-tender bil-konsultazzjoni tal-Kunsilli Reġjonali b'korrispondenza mad-Dipartiment tal-Kuntratti. Finalment, ir-responsabbilta` aħħarja hija ta' kull Kunsill Reġjonali, u għall-fini ta' din il-kawża, dik Għawdxija li approvat u nidiet il-proċess relattiv. Id-diskussjonijiet, ovyament, setghu nholqu għax kien hemm divergenza ta' opinjonijiet, pero`, fl-aħħar mill-aħħar, sar qbil, forsi anke kompromessi, u d-dokumenti għas-sejha nħargu fuq ir-responsabbilta` tal-Kunsill Reġjonali Għawdex li sejjer imexxi l-proċess bhala l-awtorita` kontraenti.

(emphasis added).

- 3.6. These considerations of the Court of Appeal apply to all of the claims (ii)-(x).
- 3.7. Claim (ii) - that the procurement of the supplies in units rather than pack is in breach of the Guidance for Good Distribution issued by the Medicines Authority:

It is not for Pharma-Cos to decide whether the call for tenders must strictly abide by the *Guidance for good distribution practice in relation to medical devices*, which is in any case simply 'guidance' and not a binding document. Whether the call for tenders conforms strictly to that guidance does not affect the prospective tenderer's interests or rights; it is sily a matter of internal administration to decide whether to comply with that Guidance or not.

- 3.8. Claim (iii) - that the technical offer forms are inconsistent with Art. 1.2, 1.6 and 1.7 of the Technical Specifications:

Pharma-Cos contends that since the technical offer forms do make any mention of the online web-based application that is requested inter alia in Art. 1.2, 1.6 and 1.7 of the Technical Specifications, then, there is an inconsistency. Firstly, this suggestion is ludicrous since the requirements for a web-based application are clearly stated in Art. 1.2, 1.6 and 1.7 of the Technical Specifications and specific literature has been requested in the Technical Offer Forms. Secondly, it is not for the prospective bidder to decide how the authorities draft their call for tenders; and for good reason, since the applicant is evidently under the mistaken assumption that the Technical Specifications and the Literature List do not form part of the Tender Document or that they do not constitute binding conditions.

The conditions relating to the web-based application apply to all bidders and the call for tenders has been issued under the responsibility of the respective authorities, nowhere does Reg. 262 entitle Pharma-Cos to intervene in the drafting of the Technical Offer Forms.

- 3.9. Claim (iv) - that the authorities must issue clarification notes on the Technical Specifications relating to the web application (Art. 1.2 and 1.7.1) and that the price for the web application should be separate from the price of the supplies requested:

Under this claim Pharma-Cos effectively submits questions for clarifications under Reg. 38(2) of the Public Procurement Regulations, even though the Clarification Period ended on the 29th September 2023. It is quite suspicious that its questions only arise now. It is even more suspicious considering that Pharma-Cos is the incumbent contractor.

Even so, Art. 1.7 of the Technical Specifications are sufficiently comprehensive. The arguments made by Pharma-Cos are rather intended to tweak the final contract conditions as it sees fit. Again, the Technical Specifications apply to all bidders, it is not for any prospective candidate to dictate how the web-application should function or even to give its opinion on what the technical specifications should be.

As for its suggestion that the price for the web application should be separate, again, the fact that the web application must be offered together with the supplies procured is a discretionary decision of the contracting authority which is not subject to review by this Honourable Board according to Reg. 262.

3.10. Claim (v) - that the contracts should be awarded on the basis of the best price-quality ratio (BPQR) instead of the cheapest price:

Once again, Reg. 262 does not entitle prospective tenderers to draft the call for tenders themselves or to decide on how the contracting authority should make its acquisitions. The use of one award criterion instead of another is at the sole discretion of the contracting authority. The award criterion applies to all tenderers and does not affect the interests and/or rights of the Pharma-Cos.

3.11. Claim (vi) - that different contracting authorities should not use different procurement procedures for the procurement of the same supplies (with specific reference to call for tenders SPD3/2022/045 and MGOZ NP 02/2023):

Again, if Reg. 262 does not entitle prospective tenderers to decide themselves on how to organise the procurement procedure it definitely does not entitle them to force different contracting authorities to adopt the same procurement practices. The different procurement procedures are open to all interested economic operators under the same conditions, the fact that different procedures/contracting authorities use different methods does not affect the interests and/or rights of the Pharma-Cos.

3.12. Claim (vii) - that the tender is one for services not one for supplies:

The tender is issued by the contracting authority. It is its discretion to decide on what it needs to buy. In this case it has used its discretion to procure supplies not services. It is definitely not the case 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*”. It is rather Pharma-Cos which is failing to understand its place in this procurement procedure. As the Civil Court First Hall has held in its decree *Il-Kamra Maltija ghan-Negozji Żgħar u Medji v. L-Onor. Prim Ministru et* (Warrant of Prohibitory Injunction no. 834/2007/1, 27 July 2007, page 9):

Huwa principju aċċettat u misterni li min jagħmel sejha għall-offerti – kemm jekk ikun enti privata u kif ukoll jekk ikun enti pubblika jew statali – għandu kull jedd jagħżel x’irid. Mhux imħolli lil min jista’ jressaq offerta f’tali sejha li jagħżel jew jiddetta x’imissu jew x’ma jmissux jaċċetta dak jew dik l-enti li lilu jew lilha ssir l-offerta

(bhallikieku l-bejjeġh jista' jiddetta lix-xerrej x'imissu jixtri u mhux x'ghandu bżonn jixtri).

This reasoning was adopted by the Court of Appeal in its judgment *V.J. Salomone Pharma Ltd v. Central Procurement and Supplies Unit et* (Appeal no. 336/19, 28 February 2020, page 16).

3.13. Claim (viii) that there should be a turnaround time from date of order to date of supply:

Pharma-Cos attempts here to change not only the tendering criteria but the conditions of the contract to be finally awarded. As has stated in the last preceding point, it is not for any prospective tenderer to decide what the contracting authority needs to buy. Additionally, the current call for tenders is not a procedure with negotiation. Should Pharma-Cos dislike the contract conditions it remains free not to submit an offer.

3.14. Claim (ix) there should be service level objectives to ascertain that the service offered by the contractor is in accordance with required standards:

The preceding comment applies also here. The alleged absence of service level objectives applies to all tenderers and in no way does it affect the interests and/or rights of the Pharma-Cos.

3.15. Claim (x) that the call for tenders should request a licence for the distribution of medical devices:

Firstly, the suggestion of Pharma-Cos is irresponsibly given and ill-thought out. The supplies to be procured by the present call for tenders do not even seem to fall under the definition of "medical device" under the Medical Devices Regulation (2017/45). In any case, if an economic operator has obligations derived from law in the conduct of its business, such as having the necessary licences to conduct the business, then, a call for tenders need not necessarily request those same obligations. If there is a legal requirement for the distribution of incontinence products to be covered by a licence, then, the contractor must continue to abide by the law irrespective of whether the call for tenders has reproduced legal requirements.

As such, the absence of any licensing requirement in the tender applies to all tenderers indiscriminately and does not affect the interests or rights of Pharma-Cos. If, outside of the call for tenders, there is a legal requirement to be licensed then such legal requirement also applies to all tenderers.

4. Claim (i) is unfounded

4.1. Turning now to the only claim that has been framed within one of the grounds of Reg. 262, that is, sub-regulation (a):

to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform

4.2. Pharma-Cos claims that there is an impossibility to perform the contract since the price is quoted in units but the economic operators are bound to supply in packs.

4.3. The call for tenders clearly requests specific quantities of each items and Clarification Note 4 confirms that the contractor must make available the quantities needed. There is no impediment for the eventually chosen contractor to supply quantities even if the contractor himself acquires the items in packs.

4.4. Without prejudice to the above, this seems to be another instance where Pharma-Cos is simply attempting to redraft the tender.

5. Pharma-Cos's request for the joinder of the other pending appeals

5.1. Pharma-Cos has also requested that this Honourable Board hears and decides this present application together with two pending cases in relation to the call for tenders SPD3/2022/045 and call for tenders MGOZ NP 02/2023.

5.2. Even if the supplies to be procured by means of the other procurement procedures are incontinence items, they are distinct procurement procedures with different contracting authorities. They do not even raise the same merits. The request for joinder makes no sense at all and should be rejected.

For all the reasons given above, the application of Pharma-Cos Limited should be dismissed and the deposit withheld.



Av. Daniel Inguanez
daniel.inguanez.2@stuteadvocate.ml

For the Department of Contracts

Av. Mark Anthony Debono
mark-anthony.debono.1@gov.mt

Doc DC.1

Mandat ta' Inibizzjoni

Fil-Prim Awla tal-Qorti Civili

(Rikorrenti) Pharma-Cos Limited (C-2804)

kontra

(Intimati) 1. Direttur Ġenerali tal-Kuntratti Bhalra rapprezentant tad-Dipartiment tal-Kuntratti

2. Ministru għal Anzjanita' Attiva u Kura fil-Komunita'



Rikors ta' Pharma-Cos Limited [C-2804] irrepresentat minn John Soler detentur tal-karta tal-identita' bir-numru 310q80M kif deblament awtorizzat:

Ijngħad bil-qima u jiġi kkonfermat bil-gurament:-

Illi l-esponenti għandu Interess li jktharsu l-feddijiet tal-esponenti;

Illi l-esponenti, sabiex jikkawta d-drittijiet tiegħu, jixteq iżomm l-intimati, jew minn minnhom mill-

Jkompil l-process tas-sejha Supplies – The supply, delivery and distribution of incontinence products for senior citizens and persons with disabilities in Malta – Active ageing and community care bir-numru CT2236/2023 [minn hawn il-quddiem 'is-Sejha'] u/jew jkompil jiddokori l-perjodu għall-għeluq tas-sejha u/jew jilqat l-offerti għas-sejha, bi-għeluq ta' din l-istess is-sejha nhar il-31 ta' Ottubru 2023;

Illi l-intimati, jew minn minnhom, nhar l-11 ta' Awwiissu 2023, hargu sejha pubblika bir-numru ta' referenza CT2236/2023 Supplies – The supply, delivery and distribution of incontinence products for senior citizens and persons with disabilities in Malta – Active ageing and community care [kopja tal-lema qed tigi hawn annessa u rmarkata bhal Dok PC4];

Illi s-soċjetà rikorrenti, bil-faieb li tikkompeti u tissoptometti l-offerta tagħha, intavolat numru ta' talbiet aj termini ta' artikolu 36 tal-L.S. 601.03, fir-rigward tal-specificazzjonijiet indikati fis-sejha;

RIKORRENTI :

[1] Pharma-Cos Limited [C-2804] - Pharma-Cos Warehouse 56-58 Triq Anton Cassar Marsa MRS2294 Malta.

INTIMATI:

[1] Dipartiment tal-Kuntratti- Notre Dame Raveijn, Floriana FRN 1600

[1] Ministru għall-Anzjanita' Attiva- Palazzo Spinola, 46 Triq San Kristofru, Valletta, V.L.T 1464

EZEKUZZJONI:

[1] Dipartiment tal-Kuntratti- Notre Dame Raveijn, Floriana FRN 1600

[KOMPLU]

Il-lis s-soċjetà' esponenti se tiġi ppreġudikata jekk l-intimat ma' jiġix inibit kif inghad hawn fuq:

Illl al termini tal-artikolu 875(2) tal-kap 12 tal-Igġijiet ta' Malta In vista tal-fatt li hemm perikolu serju u imminenti u l-trimejjabbli, din l-Onorabbli Qorti qiegħda tiġi mtiibda sabteux tilqa dan ji-mandat provviżorjament u dana taht dawkl il-provvediment li hekk jidriha xierqa u opportuni.

Av. Matthew Paris
matthew@dalliparts.com
489, Marina Suites, Marina Street, Pietà'

Prokuratur Legali

1 2 OCT 2023

Ilum

Il-konfermat quddiemli bil-gurament wara ll-grafiku l-kontenut, u fil-prezenza ta'

Pl. P. S. S. S. S.

Bhala xhud ta' l-identita, u pprezentat minn

JOAHN VELLA

19.10.23

Mandat ta' Inibizzjoni



REPUBBLIKA TA' MALTA
MANDAT TAL-QORTI

L:ii

Marx xall tal-Qorti

BILLI għe pprezentat ir-rikors ta' hawn fuq, u jinklorku l-elementi meħtieġa skond ji-Igħi għall-ordnijiet tal-riskruttu:

Inni, għandegħbekk, fuq ir-rikors imsemmi, ordnat jii, b'koppja li tagħti ta' dan ji-mandat ill-imsemmi intimat, inti għandek iżżomm jii-l-intima taħli jagħmel il-bwejleġ imsemmija fi-msemmi rikors li huma ta' heana għar-rikorrent, taht il-pieni li tteċdedd il-Igħi għal min jongoes;

U wara li tegħmel dan, u jekk tilaġe' ma' xi xkiel fl-eżekuzzjoni ta' dan ji-mandat, inti għandek tgħarraf minnufih jii dan ji-Qorti.

Mogħti mi

bix-xiħda ta'

Duttur tal-Igħi,

Onor Joanne Vella Cuschieri LL.D.

tal-Qorti hawn fuq imsemmija.

Ilum,

jum ta'

19.

Onor. Joanne Vella Cuschieri LL.D.

Illi għal parti minn dawn it-talbiet, l-intimati jew minn minhom, ma' wiegħbux u għalhekk baqaw inadempjenti sal-ġurnata ta' dan il-mandat [ara domanda numru 3, li naqgħat mingħajr twegħba annessi u mmarkati bhala Dok PC2], biex b'hekk huwa fatt li d-dokument tas-sejha huwa ambigwu [ta' lanqas partijiet minnu];

Illi jingħad li *ai termini ta' artikolu 38(2) tal-L.S. 601.03*, l-awtoritijiet kontraenti qed jingħataw dritt irragjonevoli li jirrispondi għal tali talba sa "*mhux aktar tard minn sitt ijiem qabel it-terminu perentorju stabbilit biex jiġu riċevuti l-offerti*";

Illi s-socjeta' rikorrenti temmen li dan id-dritt tal-awtorita' kontraenti, qiegħed jilledi d-drittijiet ta' kandidati prospettivi, nkluz tas-socjeta' rikorrenti, u dana stante li kwalsiasi lment dwar sejniet pubbliċi għandhom isiru *ai termini ta' artikolu 262 tal-L.S. 601.03*, "*fl-ewwel żewġ terzi taż-żmien allokat fid-dokument tas-sejha għat-tfigħ tal-offerti*", u per konsegwenza mhux permess li s-socjeta' rikorrenti [u/jew kull kandidat prospettiv] tressaq ilment u tingħata rimedju effettiv dwar tali risposta, kif ikkontemplat fid-Direttiva 2007/66/KE tal-Parlament Ewropew u tal-kunsill tal-11 ta' Diċembru 2007 li temenda d-Direttivi tal-Kunsill 89/665/KEE u 92/13/KEE fir-rigward tat-titjib fl-effettività ta' proċeduri ta' revizjoni dwar l-għoti ta' kuntratti pubbliċi;

Illi jingħad li, artiklu 2 tad-direttiva tghid b'mod car hafna li,

Article 2 Requirements for review procedures

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

Illi in sintezi, l-ilment tas-socjeta' rikorrenti huwa :

L-EWWEL Oblaturi għandhom jissottomettu talbiet għall-informazzjoni entru terminu fiss, izda l-awtorita' kontraenti għandhom sa' mhux aktar tard minn sitt ijiem qabel it-terminu perentorju stabbilit biex jiġu riċevuti l-offerti sabiex iwiegħbu [artikolu 38(2) tal-L.S. 601.03];

- IT-TIENI** Is-sitwazzjoni odjerna, minkejja varji kjarifici, numru minnhom baqaw ma' gewx imwiegħba, u l-awtorita' kontraenti skont il-ligi tista tibqa' hekk inadempjaneti sa sitt ijiem qabel l-gheluq tas-sejha, f'dan il-kaz tfisser sal-25 ta' Otturbu 2023;
- IT-TIELET** Kandidati prospettivi pero, kellhom sal-5 ta' Ottubru 2023 sabiex jintavolaw oggezzjonijiet tagħhom *ai termini* ta' artikolu 262 tal-L.S. 601.03, u għalhekk l-ebda oggezzjoni ma' tista titressaq dwar ir-risposti tat-talbiet li ma' gewx imwiegħba;
- IR-RABA'** Illi għalhekk huwa car li ma' jeżisti l-ebda rimedju effettiv, minkejja dak indikat fid-Direttiva 2007/66/KE tal-Parlament Ewropew u tal-kunsill tal-11 ta' Diċembru 2007 li temenda d-Direttivi tal-Kunsill 89/665/KEE u 92/13/KEE fir-rigward tat-titjib fl-effettività ta' proċeduri ta' revizjoni dwar l-ghoti ta' kuntratti pubbliċi;
- IL-HAMES** Illi minhabba n-nuqqas ta' risposti u abbazi tad-dispozizzjonijiet tal-artikolu 38(2) tal- L.S. 601.03, ir-rikorrenti tpoggew fli-impossibilita' li jiksbu rimedju effettiv. Illi fuq dan il-punt, il-Qorti Ewropeja tkellmet diversi drabi fuq dan il-punt¹, fosthom *Francovich and Bonifaci vs Italy (1991)*² fejn jingħad illi Stati Membri ma' jistawx jpoggu permezz tal-ligi domestika lil offerenti f'diffikulta ecessiva jew l-impossibilita' li jinkiseb rimedju effettiv;

Illi s-socjeta rikorrenti temmen li ma' hemm l-ebda raguni valida u sufficjenti li timmerita li t-talbiet tas-socjeta' rikorrenti baqaw mhux imwiegħba, u per konsegwenza d-drittijiet ta' kandidati prospettivi [inkluz dak tas-socjeta' rikorrenti] qed jigu mittiefsa;

Illi ulterjorment jingħad li minkejja dak indikat fis-sejha li, sal-4 ta' Ottubru 2023 kienu ser jingħataw ir-risposti kollha [ara tabella mahruġa mid-dipartiment hawn annessa u mmarkata bhala PC3] risposta għad-domanda numru 2³ fundamentali tas-socjeta' rikorrenti ma' ingħatax, liema domanda/risposta tbiddel kompletament ir-rekwiziti u l-prezz aħhari [*li huwa the only criteria for award – criteria 6*] – biex b'hekk id-drittijiet tal-

¹ Joined Cases C-46/93 and 48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* [1996]

² Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991]

³ "Will the beneficiaries receive full packs or will they receive the combination of full packs and loose nappies. Kindly confirm?" – Clarification Note No. 4

kandidati prospettivi gew kompromessi – dwar dan il-punt, il-Qorti Ewropeja tal-Gustizzja fil-kaz C-230/02 *Grossmann Air Service* [2004] EU:C:2004:93. diga giet mitluba sabiex taghti l-gudizzju taghha, fejn intqal li, “the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665”;

Illi għall-kull *buon fini* jinghad li l-intimati għandhom kuntratti vigenti, u/jew jista' jsiru ulterjorment proceduri ta' *direct order* mas-socjeta' rikorrenti u/jew ma' terzi sabiex jinqdew kif jixtiequ, u għalhekk ma' hemm l-ebda perikolu li l-intimati, hjew minn minnhom, ser jispicaw minghajr provvista tal-prodotti mixtieqa, u per konsegwenza ma' hemm l-ebda preġudizzju li l-intimati ser issofri konsegwenza ta' dan il-mandat;

Illi għalhekk huwa ċar u manifest li, dan il-mandat jilhaq ir-rekwiżiti neċessarji b'mod kumuluttiv, in kwantu *Pharma-Cos Limited* għandha jedd *prima facie*, kif ukoll il-preġudizzju li qiegħed jinholoq huwa wieħed irrimedjabbli, bil-konsegwenza li minghajr il-hruġ ta' dan il-mandat, il-jedd tar-rikorrenti ser jitneħħa darba għal dejjem u b'mod irrimedjabbli;

Illi s-socjeta' esponenti se tiġi ppreġudikata jekk l-intimat ma' jiġix inibit kif inghad hawn fuq;

Illi ai termini tal-artikolu 875(2) tal-kap 12 tal-ligġijiet ta' Malta in vista tal-fatt li hemm perikolu serju u imminenti u irrimedjabbli, din l-Onorabbli Qorti qiegħda tiġi mitluba sabiex tilqa dan il-mandat provvizorjament u dana taht dawk il-provvedimenti li hekk jidrinha xierqa u opportuni.

Av. Matthew Paris
matthew@dalliparis.com
189, Marina Suites, Marina Street, Pieta'

Prokuratur Legali

Illum

Ikkonfermat quddiem bil-gurament wara li qrajtlu l-kontenut, u fil-prezenza ta'

Bhala xhud ta' l-identita, u pprezentat minn

Doc DC2



Qorti Ċivili – Prim Awla
Onor. Imhalled Dr Joanne Vella Cuschieri
B.A., Mag. Jur. (EUR.LAW), LL.D.

Fl-Atti tal-Mandat ta' Inibizzjoni Nru:
1960/23JVC

Pharma-Cos Limited (C-2804)

vs

Direttur Ġenerali tal-Kuntratti bhala rappreżentant
tad-Dipartiment tal-Kuntratti et

Ilum 12 ta' Ottubru 2023;

Il-Qorti,

Rat it-talba għall-ħrug ta' mandat ta' inibizzjoni;

Tilqa' t-talba provizorjament;

Tordna notifika tiegħu lill-kontro-parti bi zmien hamest (5) ijiem għar-risposta
jew sad-data tas-seduta skont liema tiġi l-ewwel.

Tappunta r-rikors għas-smiġ għal nhar il-Ħamis 19 ta' Ottubru 2023 fil-
10:40pm.

F17 Onor. Imhalled Dr Joanne Vella Cuschieri
Imhalled

Cora Catania
Deputat Registratur

A TRUE PHOTO COPY
OF THE ORIGINAL

Deputat Registratur
Graciella Aguru Cassar

12/10/23

Doc DC3

DIPARTIMENT TAL-KUNTRATTI
Notre Dame Ravelin
Floriana FRN1600 – MALTA



DEPARTMENT OF CONTRACTS
Notre Dame Ravelin
Floriana FRN 1600 – MALTA

Telephone: (0356) 23781001
e-Mail: info.contracts@gov.mt
website: www.contracts.gov.mt

CT2238/2023

17th October 2023

Clarification Note No. 6

To all prospective bidders

CT2238/2023 – SUPPLY, DELIVERY AND DISTRIBUTION OF INCONTINENCE PRODUCTS FOR SENIOR CITIZENS AND PERSONS WITH DISABILITIES IN MALTA – ACTIVE AGEING AND COMMUNITY CARE

Reference is made to the above-captioned tender for which the deadline for submission of offers is 31/10/2023 at 9.30am.

The Contracting Authority would like to inform prospective bidders that the cFT 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.

All other tender documents, conditions and requirements, which are not superseded by this clarification remain in place.

Jacqueline Gili (signed)
f/Director General (Contracts)



Doc DC4

Qorti: CIVILI, PRIM AWLA - QORTI CIVILI, PRIM' AWLA
Gudikant/i: ONOR. IMHALLEF JOANNE VELLA CUSCHIERI

Mandat numru: 1960 / 2023

Numru fil-lista: 33

Partijiet: PHARMA-COS LIMITED vs DIRETTUR GENERALI TAL-KUNTRATTI ET NOE

Data: 19/10/2023

Meta ssejjah il-mandat,

Deher Dr Daniel Inguanez ghad-Direttur intimat.

Il-Qorti rat in-nota ta' cessjoni tas-socjeta' rikorrenti.

Il-Qorti tastjeni milli tiehu konjizzjoni ulterjuri tal-mandat.

Mandat cedut.

Cora Catania

Dep. Reg.