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22nd November 2023

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

Negotiated Procedure for the Supply, Delivery and Distribution of Incontinence Products for Senior Citizens and Persons with Disabilities in Malta - AACC- Ref. NP 14/2023.

Reply to Reasoned application filed by Krypton Chemists Limited ('the Objector') pursuant to regulation 270 of the PPR.

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 Negotiated Procedure, and particularly with reference to the application filed by Krypton Chemists Limited (hereinafter the 'Objector').

Objector has filed the application in accordance with Regulation 270 of the PPR, through which three grounds of objection were raised, namely:

- A) The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor;
- B) The Contracting Authority has not used the VEAT notice mandatorily required by law;
- C) The Contracting Authority has not disclosed the Requested Information.



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To this effect, the Contracting Authority is rebutting this objection and the grounds of appeal raised therein which grounds will be addressed in this reply.

1. Background

Preliminarily, in his objection, the Objector gives a detailed exposition of the sequence of events which led to the awarding of the present negotiated procedure, which facts, in so far as the chronology of events is concerned, are uncontested.

However, besides explaining the chronology, the Objector purports to show some form of wrongdoing on the part of the Contracting Authority through certain unwarranted comments, and this without explaining the context or the explanations provided by the Contracting Authority.

Indeed, the Objector had communicated his request to be provided with information related to the award of the negotiated procedure. What the Objector fails to state however is that the Contracting Authority had replied that it was still waiting for feedback from third parties, in order to obtain the necessary approvals to disclose the requested information. Therefore, it is certainly not the case that the Contracting Authority ignored or disregarded the Objector's requests, but, on the contrary, the Contracting Authority acted and sought to obtain the necessary feedback to allow it to reply accordingly.

2. The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor.

In essence, by virtue of this ground of appeal, the Objector argues that the Contracting Authority couldn't have awarded the negotiated procedure because, as it is being assumed by the Objector, the Contracting Authority did not have the requisite approvals by the Director General of the Department of Contracts. Additionally, the Objector also argues that if the Contracting Authority did indeed have the approval to award the negotiated procedure, it still couldn't have awarded the Negotiated Procedure since the grounds stipulated in regulation 153 of the PPR are in applicable.



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In this regard, the Contracting Authority submits that, contrary to what is being alleged by the Objector, the Contracting Authority had all the necessary approvals to proceed with the negotiated procedure and subsequently award the same, and this as will be proven in the course of these proceedings (Approval exhibited as DOK AACC 1).

Additionally, the Contracting Authority also submits that such approval by the Director General (Contracts) was granted in terms of Regulation 153(c) of the PPR subject to certain conditions.

According to Regulation 153(c) of the PPR, a negotiated procedure without prior publication may be used in cases of extreme urgency brought about by events unforeseeable by the contracting authority.

The facts leading to the awarding of the negotiated procedure fit exactly within the parameters of Regulation 153(c). It has to be borne in mind that the purpose of the negotiated procedure and even the tender referred to in the objector's application (*Tender for the supply, delivery and distribution of Incontinence Products for Senior Citizens and persons with Disabilities in Malta – CT2238/2023*), is to procure incontinence products the beneficiaries of which are senior citizens, who as one can appreciate, are vulnerable individuals.

This means that, the negotiated procedure was indeed necessitated owing to the fact that the Contracted Authority ended up in a situation where it did not have enough stock to meet the demand and distribute incontinence products to senior citizens who are under its care and this owing to the fact that the awarding of the tender issued by the Contracting Authority came to a halt in view of the pending proceedings before the PCRB and the injunction filed before that.

The Objector's argument in this regard is entirely fallacious especially when stating that *"the urgency caused by the contracting authority's negligence or delay to issue a new tender does not qualify as "extreme urgency"*. If anything, the Objector himself contradicts this very assertion when it is stated in the application that the Contracting Authority published a tender (referred to above) for the supply of Incontinence products, which tender is now sub judice before this honourable board and which, as rightly stated also by the Objector, was also subject to court proceedings via a warrant of prohibitory injunction!

Therefore, the Objector is entirely incorrect when stating that the ground in regulation 153(c) does not apply. This because, the Contracting Authority did indeed publish a new tender to plan ahead and avoid situations where it would be caught without supply of same incontinence products intended for vulnerable individuals. The circumstances which developed after the publication of the tender have in actual fact



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created the need for this present procedure under contestation, and this without any fault of the contracting authority.

Naturally, it is every person's right to appeal and dispute any decision given by a Contracting Authority; however one must examine the facts leading to the Authority's decision and not merely argue that such decision does not qualify under regulation 153(c) because there was no extreme urgency. On the contrary, the extreme urgency was well founded especially in view of the prolongation of the award of the main tender in view of the pending legal proceedings which were initiated.

Therefore, this ground of appeal should be rejected.

3. The Contracting Authority has not used the VEAT notice mandatorly required by law.

In this regard, the Contracting Authority humbly submits that although the Contracting Authority provided and uploaded information with respect to the economic operator in favour of whom the contract award decision has been taken, it did not upload the VEAT notice since, the signing of the award by the economic operator was not concluded yet. In fact, the Contracting Authority refrained from concluding the award procedure and subsequent contract in view of this present appeal filed by the Objector. In the absence of such appeal, the Contracting Authority would have published a VEAT notice also giving all interested parties 10 days for appeal.

4. The Contracting Authority has not disclosed the Requested Information

As already stated, the Contracting Authority had indeed communicated to the Objector that it was awaiting certain clearances from third parties before disclosing the information requested.

Additionally, up until the time of the filing of this present Appeal, the Contracting Authority hadn't received such clearances in order to enable it to disclose the requested information.

Also, it is to be noted that certain information requested by the Objector was indeed of a commercially sensitive nature and thus could not be disclosed.



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5. The Contracting Authority should procure from multiple suppliers

The Objector here argues that the PCRB should, by way of interim measure in terms of Regulation 90(4) of the PPR, order the Contracting Authority to purchase the products subject-matter of the 2023 tender following a competitive process.

With all due respect, the Contracting Authority had already published a call for tenders which, as stated above, is currently sub judice before this honourable board.

The very reason why the contracting authority resorted to a negotiated procedure is to try and ensure continuous supply of the product demanded (keeping in mind that the ultimate recipient of such products are vulnerable individuals) and this in a expedited manner while the final outcome of the 2023 tender is determined. In fact, this is also the reason why the approval for the negotiated procedure was granted on the basis of regulation 153(c) since this circumstances which led the Authority to resort to such procedure were indeed a matter of extreme urgency.

Resorting to another competitive process as is being suggested (or better demanded) by the Objector would defeat the whole purpose which would consequently result in further prolongation of the procurement of the supplies in question which in turn results in vulnerbale senior citizens being deprived of basic products.

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

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D Amato Ritianne at MFE

From: Calleja Graziella at Department of Contracts <graziella.calleja@gov.mt>
Sent: Thursday, 10 August 2023 09:45
To: Degabriele Renzo at AACC
Cc: Schembri Christine at MFAA; Spiteri Daniela at Department of Contracts; Balzan Mary Grace at AACC; Gili Jacqueline at Department of Contracts; Abela Mario at AACC
Subject: CT5000/2023 - Negotiated Procedure for the supply, delivery and distribution of Incontinence Products (Scheme A and Scheme B Beneficiaries)

CT 5000/2023

Dr Renzo Degabriele
Chief Executive Officer
Active Ageing and Community Care
Ministry for Senior Citizens & Active Ageing

Negotiated Procedure for the supply, delivery and distribution of Incontinence Products (Scheme A and Scheme B Beneficiaries)

Reference is made to your e-mail dated 8 August 2023 regarding the subject in caption.

The General Contracts Committee has discussed your request. Approval is hereby being given to enter into a negotiated procedure with Pharma-Cos Ltd Services Ltd for the supply, delivery and distribution of incontinence products at the estimated cost of €2,850,000 excl VAT, for a period of 1 year.

This approval has been granted in terms of Regulation 153 (c) of the Public Procurement Regulations LN352/2016 under the following conditions:

- a) these supplies are absolutely necessary;
- b) the most cost effective (value for money) basis was taken into consideration when submitting your request;
- c) funds are available;
- d) this negotiated procedure is to be published thru' the epps;
- e) the Economic Operator is to be informed about the VEAT notice during publication of this procedure;
- f) the Contracting Authority is to revert for definite approval once the actual costs are known and provide a screenshot from the epps showing the publication of this procedure;
- g) Recommendation for award is subject to the publication of a VEAT notice, observing a minimum 10 day standstill period before the contract is awarded.

Thanks and regards

Graziella Calleja
Assistant Director

f/Director General (Contracts)
Department of Contracts

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