

20th November 2023

Public Contracts Review Board
Notre Dame Ravelin,
Floriana,
Malta

Krypton Chemists Limited [C-8933]

Vs

- [1] Department of Contracts;
- [2] Central Procurement & Supplies Unit;
- [3] Active Ageing and Community Care
- [4] Pharma-Cos Limited [C-2804]



NP14/2023

Tender Name: Negotiated Procedure for the Supply, Delivery and Distribution of Incontinence Products for Senior Citizens and Persons with Disabilities in Malta -AACC-

REASONED LETTER OF REPLY

Whereas, the Department of Contracts (hereinafter “**DOC**”) issued a call for ‘**Negotiated Procedure for the Supply, Delivery and Distribution of Incontinence Products for Senior Citizens and Persons with Disabilities in Malta -AACC**’

Whereas, Messrs. Pharma-Cos Limited (hereinafter “**Pharma-Cos**” and/or “**the recommended bidder**”) participated and *inter alia* submitted a bid for this procedure;

Whereas Pharma-Cos were confirmed as the recommended bidders by virtue of a Notification of Award dated 2nd November 2023.

Whereas, by means of an application dated 13th November 2023, Krypton Chemists Limited filed an appeal in accordance with *inter alia* article 270 of S.L. 601.03, hereinafter [“**the Regulations**”] or the [“**PPR**”];

Whereas, Pharma-Cos contends that the decision of the DOC should be confirmed by the PCRB, and this is based on the following grounds:

1. **General Observations and Remarks**

- 1.1 In its appeal Kypton has made substantial claims and allegations, some of which are frivolous, unsubstantiated and mostly erroneous –as such it has no right to make baseless claims, which in turn impinge on the rights of others. In this regard, all rights are being reserved for Pharma-Cos to take the necessary and appropriate actions against Kypton;
- 1.2 Whereas the appellants filed this appeal in accordance with article 270 of the PPR, hereinafter the Regulations.
- 1.3 In any case and in view of the aforesaid, the appellant could have resorted to other remedies at their disposal.

2. **FIRST GROUND: The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor**

- 2.1 The appellant contends that the Negotiated Procedure could not have been awarded to the Incumbent Contractor since it assumes that it did not have the requisite approvals from the Director General of Contracts by virtue of article 153 of the PPR, ‘*ad validatem*’.

- 2.2 This in fact is incorrect since the necessary approval by virtue of the requisites laid down in article 153 of the PPR.
- 2.3 The procedure was conducted by virtue of article 153 (c) of the PPR, whereby a negotiated procedure without prior publication is permissible in issues of ‘*extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.*’
- 2.4 As such and in view of the above, the requisites of the use of Negotiated procedure without prior publication were fully adhered to.
- 2.5 In view of the above, one must also bear in mind and understand that this procedure concerns the supply of incontinence products for senior citizens and persons with disabilities as such, the urgency is necessitated as per article 153 by the Contracting Authority was fully justified.
3. **SECOND GROUND: The Contracting Authority has not used the VEAT notice mandatorily required by law**
- 3.1 The Preferred Bidder was not involved and as such is not privy to the VEAT notice requirement by the Contracting Authority, as such , the preferred bidder is hereby resting on the Contracting Authorities’ submissions on this grievance.
4. **THIRD GROUND: The DOC and the Contracting Authority have not disclosed the requested information**
- 4.1 Whilst indeed, economic operators should be given limited information, and this in line with local and ECJ judgements, the information should be relevant to the requests made, proportionate [especially when compared to the grievances and requests made], and not anti-competitive [with a view of abusing one’s right for information];
- 4.2 In the context under review, there is a major difference between a limited right conferred by law for information in accordance with *inter alia* article 21 of S.L. 601.12 and the unreasonable request for information by Krypton and which is solely intended to distort competition.

- 4.3 Specific reference is hereby being made to a most recent decision by the ECJ, which specially deals with this point, in the names of **Antea Polska S.A., v Państwowe Gospodarstwo Wodne Wody Polskie [C-54/21]**, wherein it was held that:

In that regard, the Court has repeatedly held that the principal objective of the EU rules on public procurement is to ensure undistorted competition, and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in such a procedure, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators¹

- 4.4 It is imperative that the request for information by this Honourable Board is analysed in accordance with the relevance of the requests made by Krypton, and no information which is not relevant to such requests is released;

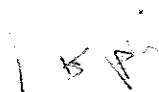
5. Interim Measure – The Contracting Authority should procure from multiple suppliers

- 5.1 Appellant contends and requests that an interim measure is granted by this honourable board in virtue of Article 90(4) of the PPR.
- 5.2 It should be hereby noted that a public call was already published and is currently *sub judice* in front of this honourable board and as such an interim measure for another procurement procedure is unnecessary.

NOWTHEREFORE, Pharma-Cos hereby requests the Board to:

- a. to reject the pleas and the requests made by Krypton in their entirety;
- b. to reject the request for an interim measure made by the appellant
- c. to confirm the notice dated 2nd November 2023 wherein Pharma-Cos were recommended for award;
- d. To do anything which is ancillary and conducive to the above requests;

Pharma-Cos Limited is hereby reserving the right to present further evidence, both orally or in writing, during the hearing.



Avv. Matthew Paris
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Required for testimony;	[1]	Representatives of the Evaluation Committee;
	[2]	Representatives of the Contracting Authority;
	[3]	Representatives of the Department of Contracts;
	[4]	Other witnesses which might be required