

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1958 – CfT020-4480/23 (CPSU7573/2023) – Supplies – Tender for the Supply of Disposable Sharp Container – 7 Ltr**

**9<sup>th</sup> February 2024**

The Board,

Having noted the call for remedies filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for and on behalf of Medina Healthcare Limited, (hereinafter referred to as the appellant) filed on the 22<sup>nd</sup> December 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 27<sup>th</sup> December 2023;

Having heard and evaluated the testimony of the witness Mr Stephen Attard (Representative of Medina Healthcare Limited) as summoned by Dr Matthew Paris acting for Medina Healthcare Limited;

Having heard and evaluated the testimony of the witness Ing Noel Psaila (Engineer at Mater Dei Hospital) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Professor Michael Borg (Head of Inspection Control at Mater Dei Hospital) as summoned by Dr Leon Camilleri acting for 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 30<sup>th</sup> January 2024 hereunder-reproduced.

#### **Minutes**

#### **Case 1958 – CfT 020-4480/23 – Supplies – Tender for the Supply of Disposable Sharp Container – 7Ltr**

The tender was issued on the 5<sup>th</sup> December 2023 and the closing date was the 4<sup>th</sup> January 2024.

The estimated value of this tender, excluding VAT, was € 90,000.

On the 22<sup>nd</sup> December 2023 Medina Healthcare Ltd filed an appeal against the Central Procurement and Supplies Units) in accordance with Article 262.

A deposit of € 450 was paid.

On the 31<sup>st</sup> January 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Medina Healthcare Ltd**

Dr Matthew Paris	Legal Representative
Mr Stephen Attard	Representative

**Contracting Authority – Central Procurement and Supplies Unit**

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Mr Juan Zarb Cousin	Representative
Ms Krystle Refalo	Representative

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

Dr Matthew Paris Legal Representative for Medina Healthcare Ltd said that this appeal under Regulation 262 was filed since the tender, as worded, was limiting competition even after clarifications were sought. Competition is thereby being limited without being proportional and justified. The only justification offered in clarification note 3 is that in the past the bins were always yellow.

Dr Leon Camilleri Legal Representative for the Contracting Authority said there are issues of safety involved where people work in very busy conditions and difficult situations. This is a matter of practicality and there are legitimate reasons for the tender specifications. There are ample suppliers of the type of bins requested, so it is not a matter of restricting competition.

Mr Stephen Attard (48964M) called as a witness by Appellant testified on oath that he is a Product Specialist at Medina Healthcare. He explained the use of the sharp boxes and the function they served in clinical areas. Appellant is presently supplying the CPSU with 7 and 11 litre boxes made from recycled material including green bins with yellow lids. Witness was referred to filed exhibits indicating different deliveries of different bins to the Authority and past tenders where no colour was specified for the bins. There has been exchange of correspondence, and submission of samples of the new bins with the CPSU and these were accepted and the product was confirmed as compliant. A Medical Waste Memorandum indicated that colour coding is used depending on purpose.

In reply to question by Dr Camilleri witness said that Medina have been supplying the Health Authorities with bins for some 20 years. Till 2022 only yellow bins were supplied – in the current generation of bins only the lids are yellow. Witness accepted that apart from clinicians, waste management personnel also handled clinical and hazardous waste.

Engineer Noel Psaila called to testify by the Authority stated on oath that he is an Engineering Director at Mater Dei Hospital. He was not involved in the past tenders. He discovered that some of the bins in use were not completely yellow. Up to then tenders did not specify colour of bins but he insisted that future tenders will specify that. Wasteserv Malta had complained that there were instance were yellow bags with clinical waste had ended up in landfills. It is important that the function of hazardous waste bins is clear and the colour clearly defined to avoid risks and aid waste management. Any change of colour could create problems. There are several suppliers of yellow bins.

Questioned by Dr Paris, witness said that he is not aware if delivery of bins to the Authority were simply a single delivery or on contract basis as he was not involved with procurement. As soon as he became aware of the problem he contacted CPSU.

Prof Michael Borg (292163M) called to testify by the Authority stated on oath that he is the Head of Inspection Control at Mater Dei Hospital and advises on safe practices and waste management. Colour coding was used to help make correct decisions on handling and waste management, using recommendations from the WHO (Doc WHO - UMEP/SBC 2005) which recommends yellow bins for hazardous waste. Witness said he was sceptical about the use of multi-coloured bins in the UK as mixing of colours leads to a downhill trend in compliance.

In reply to a question from Dr Paris witness said that he is not aware of what is being delivered to the Hospital but the policy is to use yellow bins and yellow bags.

That concluded the testimonies.

Dr Paris said that the principle was lack of competition against which were the safety reasons. Reference was made to Prof Graells work stating that there should be no hindrance to competition and about the artificial narrowing of competition. Procurement must be as open as possible and there should be no restrictions (Regulation 39). The Authority has the right to decide what clauses it wants in a tender but these must ensure that competition is not narrowed. If there are difficulties in waste management the solution is not to restrict competition. Discretion can only be used if it is objective and proportionate. It is not a fact that only yellow bins are in use; according to the testimony heard, since 2022 there have been deliveries of 7, 11 and 21 litre bins supplied to Mater Dei. This defeats the argument that different colours cause confusion. The Board should see if there is objective justification for this restriction.

Dr Camilleri said that when dealing with hospital requirements it would be irresponsible if one were to wait for consequences before taking action. The matter turns on whether the requirement is justified. The tender clearly states yellow not colour and yellow. Witness stated that these are safer for handlers of waste. Court of Appeal Case 223/2022/1 *Vivian Corporation vs CPSU* was cited in the context that the process should be cancelled if it intentionally favours one operator over another. The CPSU has no intention of blocking any supplier – it simply is entitled to request what is required.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 30<sup>th</sup> January 2024.

Having noted the call for remedies filed by Medina Healthcare Limited (hereinafter referred to as the Appellant) on 22<sup>nd</sup> December 2023, refers to the claims made by the same Appellant with regard to the tender of reference CfT020-4480/23 (CPSU 7573/2023) listed as case No. 1958 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Matthew Paris

Appearing for the Contracting Authority:

Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Whereby, the Appellant contends that:

a) **Clarification no 2 & 3 - In breach of 39(3) of S.L. 601.03 -**

In accordance with article 39 (3) of S.L. 601.03: "*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*". The above is transposed from article 18 of the European Directive 2014/24, which likewise stipulates that competition shall not be artificially narrowed. The appellant company submits that, clarifications 2 & 3 are in breach of article 39 of the PPR. The appellant company claims that there is no justified medical or clinical reason why the "whole item", including "the lid and the body" should be in yellow - on the contrary, medical international guidelines confirm that it is only the lid that must be "yellow" - hence imposing conditions which have no comfort within norms, nor do they form part of internationally accepted standards is acceptable, and have the affect to limit competition. The manner in which the requirement has been drafted, has no justification, legal or medical, and thus the appellant company feels aggrieved by the decision of the contracting authority.

b) **Creating unjustified obstacles -**

In addition to the above, the PPR through article 53 and where it specifically regulates technical specifications, it clearly states that: "*(6) Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition*" It is a given that, clarifications 2 & 3 do not allow equal access to economic operators - this inequality is not due to any medical or clinical reasons, as also confirmed by the contracting authority itself, through its reply to the clarification. On its part however, the contracting authority seeks to justify the unequal access by claiming that it is more convenient for the end-users. The justification produced is not proper to warrant deviation from the legal obligations enshrined within the PPR - the hypothetical claim of end-users making mistakes, is an (sic) nothing other than an assumption which is neither proven nor can be sustained in any way.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 27<sup>th</sup> December 2023 and its verbal submission during the hearing held on 30<sup>th</sup> January 2024, in that:

a) **On the First Grievance: Clarification 2 and 3 in breach of 39(3) of S.L. 601.03 –**

CPSU submits that the applicant's claim that the specifications are artificially narrowing competition is unfounded in fact and at law. Regulation 39(3) of the PPR states that: "*(3) 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.”* Since applicant is claiming breach of regulation 39(3) it is the applicant which must prove that the tender condition was made with an intention to unduly favour or disadvantage certain economic operators. CPSU rebuts to this allegation since the condition was stipulated in the tender document for safety reasons which render the condition a legitimate and responsible condition. Moreover, yellow is the most common colour for sharp containers and thus the applicant cannot claim that, requesting containers in the most common colour is narrowing of competition! In addition, CPSU submits that the local health authorities have every right to seek extra safety in addition to international minimum standards.

b) **On the Second Grievance: Creating Unjustified Obstacles -**

CPSU submits that the reasons for the imposition of the condition in question are indeed justified and have been imposed for very legitimate and important reasons - the safety of healthcare practitioners and of any person working in hospital environment, especially those handling waste, as will be further explained by the testimony of the witnesses during the hearing.

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 consider Appellant’s grievances as follows:

- a) Initially, this Board appreciates that whilst the wording of clarification number 3 may be somewhat misleading when it stated “..... *were in the past **and are at present always all yellow**.....*” (bold emphasis added), reference is made to the testimony under oath of Mr Stephen Attard who confirmed that till the year 2022 “*only yellow bins were supplied*”. As from the year 2022 to date, only the lids of the supplied containers are yellow in colour. The main body of the containers are now supplied in the colour grey.
- b) It is noted that ‘mid-way’ through the execution of the tender CFT020-0283/21 – CPSU 4174/20 for the supply of “Sharp Containers 7 Lts”, the supplier company announced a transition in their product line moving away from the ‘4<sup>th</sup> Generation 7 litre Sharpsafe ‘ to the ‘5<sup>th</sup> Generation 7 litre Sharpsafe’ containers. It is important to note that the 4<sup>th</sup> Generation containers were all yellow in colour, whilst the 5<sup>th</sup> Generation containers have yellow lids with the main body of the container being grey in colour. Whilst it is positive to note that approval had been sought by Pharma-Cos Ltd (a related party of the appellant company) on 2<sup>nd</sup> December 2022, which was duly accepted by CPSU on 11<sup>th</sup> January 2023, this should in no way or manner tie the hands of the Contracting Authority in relation to specifications in future tender procedures.

- c) As stated during the testimony under oath of Engineer Noel Psaila there has already been correspondence with Wasteserv who have complained to Mater Dei Hospital that there were instances where yellow bags with clinical waste had ended up in landfills. This corroborates the statement made by Prof Michael Borg who was sceptical about the use of multi-coloured bins in the UK as mixing of colours possibly leads to a downhill trend in compliance.
- d) Finally, reference is made to the Public Procurement Regulations (“PPRs”) regulation 39(3) 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 emphasis added) The Board opines that during these proceedings no material proof was brought forward to signal any ‘intention’ of unduly favouring or disadvantaging certain economic operators. In fact, the statement made by the Contracting Authority that there are ample suppliers of the type of bins requested was not rebutted by the appellant. Whilst Contracting Authorities have a right to request what they require (albeit always respecting the PPRs), it can also be argued that they are also to be proactive to ensure that drafted specifications are there to keep the safety of all workers as a paramount priority.

Once this Board opines that regulation 39(3) has not been breached by the Contracting Authority, this Board cannot but reject the Appellant’s grievances.

### **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;
- c) To order the Contracting Authority to amend the closing date of the call for tenders at its discretion whilst keeping in line with Public Procurement Regulations.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Dr Charles Cassar**  
Member