

PUBLIC CONTRACTS REVIEW BOARD

Case 1992 – SPD3/2022/045 – Supplies – Framework Agreement for the provision of Incontinence Diapers, Pull-Ups, Pads and Inco-Sheets for Senior Citizens and Persons with Special Needs for the Ministry for Gozo– Lot 1

22nd April 2024

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for and on behalf of Pharma-Cos Limited, (hereinafter referred to as the appellant) filed on the 15th June 2023;

Having also noted the letter of reply filed by Dr Tatiane Scicluna Cassar acting for Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 26th June 2023;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for Krypton Chemists Limited (hereinafter referred to as the Preferred Bidder) filed on the 23rd June 2023;

Having heard and evaluated the testimony of the witness Ms Christabelle Marie Grech (Chairperson of the Evaluation Committee) as summoned by the Public Contracts Review Board;

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 16th April 2024 hereunder-reproduced.

Minutes

Case 1992 – SPD3/2022/045 – Supplies – Framework Agreement for the provision of Incontinence Diapers, Pull-Ups, Pads and Inco-Sheet for Senior Citizens and Persons with Special Needs for the Ministry for Gozo. LOT 1

The tender was issued on the 7th July 2022 and the closing date was the 17th March 2023

The estimated value of this tender for Lot 1, excluding VAT, was € 525,750.

On the 15th June 2023 Pharma-Cos Ltd filed an appeal against the Ministry for Gozo objecting to their disqualification on the grounds that their offer on Lot 1 was not the cheapest priced offer.

A deposit of € 2,629 was paid on this lot.

There were four bids on this lot.

On the 16th April 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Pharma-Cos Ltd

Dr Matthew Paris	Legal Representative
Dr Zack Esmail	Legal Representative
Mr Gordon Zammit	Representative
Mr Marcel K Mifsud	Representative

Contracting Authority – Ministry for Gozo

Dr Tatiane Scicluna Cassar	Legal Representative (Online)
Ms Christabelle Marie Grech	Chairperson Evaluation Committee
Mr Paul Meilak	Evaluator
Ms Doreen Camilleri	Evaluator
Ms Christine Formosa	Evaluator
Mr Marnol Sultana	Representative

Preferred Bidder – Krypton Chemists Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Matthew Arrigo	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
Dr Audrey Marlene Buttigieg Vella	Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions, stated the following:

“I make reference to the e-mail sent to this Board yesterday stating that it gave an interlocutory decision on Case NP14/2023. It is important that one underlines that the procedure referred to is totally different to the one that the Board will be hearing this morning to the extent that even the Contracting Authority is different and therefore this Board is unable to comprehend how Pharma-Cos Ltd is alleging that, as a result, it is suffering serious prejudice.

As far as this Board is concerned it sets its own procedures and in every instance that preliminary pleas have been raised these were always heard first. This does not mean that if one party requests an interlocutory decision this request must necessarily be met. The Board has the total right to decide on such matter according to the urgency and the subject matter in question. Should the Board conclude that a decision is not urgent or immediately necessary it has the right to delay this decision until the first hearing involving the parties concerned.

Bearing this in mind this Board is none too pleased when certain unsubstantiated allegations are made which in some way are nothing more than an attempt to hijacking the normal process in an effort to try to control the way these procedures are run.”

Dr Clement Mifsud Bonnici Legal Representative for Krypton Chemists stated that his clients had not been sent the email of the 15th April from Dr Paris, to which reference had just been made.

Dr Paris Legal Representative for Pharma-Cos said what he would be saying refers to all three lots in the tender in question. All that Appellant requested is to be treated the same as all the other parties and he had no intention of hijacking procedures. All he requested was information in both his letter of the 5th June and the e-mail of the 8th June. He received a reply on one point but was totally ignored on the second point which was a request on the distribution centre. At that stage Appellant was left with no alternative except to submit an appeal on the 15th June. The information was required and hence the need for the interlocutory application.

Dr Mark Anthony Debono on behalf of the Department of Contracts said that the contracting authorities in these cases are not the same and should not be amalgamated.

Dr Paris said that he was prepared to strike out the first point of his appeal.

Dr Debono continued by saying that the DoC provided the brand and model but it was now up to the Board to decide on releasing information regarding the distribution centre. There was European Union case law regarding maintaining a balance between confidentiality and providing information. There was also Public Procurement Regulation 40 (3) regarding the confidentiality aspect.

Dr Tatiane Scicluna Cassar Legal Representative for the Ministry for Gozo said that the Contracting Authority held the view that the information could not be released at this stage.

Dr Mifsud Bonnici pointed out that the location of the distribution centre is not something private and will be public knowledge in the near future. However, bidders were not requested to indicate the location of the premises. The Contracting Authority has the right to impose its own criteria and special conditions each with its separate function. Bidders were not obliged to provide an eSPD if they were not relying on someone else. The technical offer only requested a self-declaration that the premises were compliant.

Dr Paris said that it was precisely what was requested by Appellant – confirmation that what was required in the technical offer was offered. If the premises were to be sub-contracted then it should have been declared with a submission of an eSPD. This information was required to enable him to discuss with his client. This information was requested in June, but the failure to provide it led to this situation.

Dr Mifsud Bonnici pointed out that the information requested was clearly shown in the tender and the preferred bidder would have no objection to the refund of the deposit if Appellant withdrew its appeal.

At this stage the Chairman said that there will be a short recess to enable the Board to consider the submissions made.

On resumption, the Chairman stated that the Board refers to the three preliminary pleas by the Appellant requesting answers to three distinct questions regarding the distribution centre. The first request was for 'confirmation that the recommended bidder submitted availability of a distribution centre'. The Board notes that this matter originated from the technical offer form which in substance requires a simple confirmation. This Board therefore accedes to the Appellant's request to be given this information which is not of a sensitive or commercial nature. Since all parties to this case are present this Board directs that this information is revealed through a representative of the evaluation committee testifying on oath if the preferred bidder has confirmed or otherwise this request.

The second plea asks for ‘the details of the proposed distribution centre by the recommended bidder’. In this respect the Board agrees with the submissions by Krypton Chemists Ltd that this information did not form part of the requirements of the tender document and therefore the economic operator was not obliged to provide this information in its bid. It therefore follows that the Board can certainly not accede to this request.

As regards the third request ‘the title under which the distribution centre is held by the recommended bidder’ the Board here gives the same direction as in the second plea – in other words that since this information was not requested at the bidding stage, this Board does not accede to the Appellant’s request.

Ms Christabelle Marie Grech (9785M) the Chairperson of the Evaluation Committee, called to testify by the Board stated under oath, [when shown the part of technical offer form of Krypton Chemists referring to the distribution centre] that the bidder had confirmed all answers in the affirmative and that there was no declaration regarding any subcontracting.

In reply to questions from Dr Mifsud Bonnici, witness stated that no supporting literature was requested and that no further details regarding the distribution centre were requested except those in the tender dossier.

Dr Paris requested that a short recess be taken to enable him to consult with his client.

After the recess Dr Paris advised the Board that after consulting with his client and in view of the information provided the appeal was being withdrawn on all three lots and consequently requests the Board to refund the deposits on all three lots.

The Chairman said that the Board took note of this and will give its decision in due course. He then 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 16th April 2024.

Having noted the objection filed by Pharma-Cos Limited (hereinafter referred to as the Appellant) on 15th June 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD3/2022/045 – Lot 1 listed as case No. 1992 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Matthew Paris & Dr Zack Esmail

Appearing for the Contracting Authority: Dr Tatiana Scicluna Cassar

Appearing for the Preferred Bidder: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Department of Contracts: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

a) ***Preliminary: Information re Distribution Centre not provided -***

By virtue of an email dated 8th June 2023, Pharma-Cos requested the following information:

"Whilst kindly asking you to send the information requested with urgency, Pharma-Cos Limited is in addition requesting the following information:

- *Confirmation that the recommended bidder submitted availability of a Distribution centre;*
- *The details of the proposed distribution centre by the recommended bidder;*
- *The title under which the distribution centre is held by the recommended bidder"*

In view of the fact that this information has not been supplied by the DOC until the date of submission of this appeal, Pharma-Cos is hereby reserving its rights to the fullest extent possible to produce additional submissions, documentation and evidence to the PCRB to safeguard its interests and ensure that the legal principle of *audi alteram partem* is upheld. In addition, the PCRB is being requested to render an interlocutory decree ordering DOC to furnish the relative and relevant information.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 26th June 2023 and its verbal submission during the hearing held on 16th April 2024, in that:

- a) The Contracting Authority cannot also understand how the Appellant is basing as its grievance the fact that it has allegedly sent an email dated 8h June 2023 to the DOC requesting information about details of the proposed distribution centre that could have been submitted by the recommended bidder of Lot 1 and was not supplied with such information until the date of submission of this appeal. In this respect, it is good to outline that the Contracting Authority, the Evaluation Committee and the DOC cannot divulge technical information pertaining to one's bid and therefore such information could never have been given to the Appellant notwithstanding he needed this information before the submission of his objection.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 23rd June 2023 and its verbal submission during the hearing held on 16th April 2024, in that:

a) ***The Distribution Centre -***

The Appellant claims that any bidder who participated in this Tender process should have owned a distribution centre at the time of the submission of the bid. This ground of appeal is unfounded

in fact and in law. The requirement under Clause 1 of Section 3 - Specifications/Terms of Reference reads: *The successful tenderer of Lot 1 must provide a Distribution Centre in Gozo, so that persons entitled to this service, can collect on a monthly basis, the specified items (listed under Lots 1, 2 and 3) from this centre.* The wording used in the Tender is deliberate and unequivocal: it is incumbent on the successful tenderer to provide a distribution centre in Gozo. Therefore, it is incorrect for the Appellant to state that the "tenderer" must have ab initio owned a distribution centre in Gozo at the time of the submission of its bid. This is corroborated by the use of the future tense in the Tender documents, including the Tenderer's Technical Offer Form which requires the tenderer to confirm by way of a self-declaration that: *"the distribution centre provided will be located in Gozo [...]"*. In any case, and in arguendo, it would have been disproportionate for the Contracting Authority to require tenderers to have in place a distribution centre at the time of the submission of their bids. For these reasons, and for others that may be brought in due course, these grounds ought to be dismissed. . Any condition or criterion imposed in the Tender must be proportionate to the value and objectives of the subject-matter of the contract. It would have been further contrary to the Contracting Authority's duty to promote genuine competition . For these reasons these grounds of appeal ought to be dismissed.

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 witness duly summoned, takes note of the withdrawal from the appeal proceedings by the appellant company. In consideration that the Board acceded to part of the plea, for the request for information made by the appellant, this Board will order the refund of the deposit to the appellant company.

The Board,

Having noted that the Appellant, Pharma-Cos Limited, has withdrawn its appeal during the hearing to the tender in caption (Lot 1), this Board resolves:

- a) That it will not consider their Objection any further ;
- b) Under these circumstances, this Board orders that the deposit paid by the Appellant when filing the Objection be reimbursed..

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Vincent Micallef
Member