

**Public Contracts Review Board**



In the records of cases numbered 114, 115, and 116 relating to CT2238/2023 in the names of:

**Pharma-Cos Limited**

*versus*

**Active Ageing and Community Care et**

**Next Sitting: 18 April 2024**

**REPLY of Krypton Chemists Limited (the “Interested Party”)**

**Humbly submits:**

1. *The end justifies the means.* Niccholò Machiavelli is credited with having coined this modern adage and it has been applied to perfection by the Applicant.
2. This is the Interested Party’s reply to the application filed by Pharma-Cos Limited (the “Applicant”) on 3 April 2024. The Applicant requested this Honourable Board to strike off the reply filed by the Interested Party to its application for a pre-contractual remedy (“PCR application”) and subsequently, to declare that the Interested Party has no legal standing in these proceedings.
3. Before rebutting on the merits of this application, the Interested Party humbly points out to this Board that it is here dealing with a unique set of circumstances. This is not a run of the mill PCR application where an applicant exercises its right at law in accordance with Regulation 262. It is not a run of the mill application where a PCR application is lodged within two-thirds of the time period allocated for the submission of offers.

**FIRST PRELIMINARY PLEA: no application could have been uploaded to the PCR website between 4 October 2023 and 31 October 2023.**

4. This Board is here dealing with a situation where the Applicant has concocted its own remedy which is not provided for at law by hijacking the legal system and reviving a remedy which was, for all intents and purposes, dead.
5. Since the timeframe for lodging a PCR application had lapsed, its obligation to monitor the PCR website for any such applications had also lapsed.
6. The Interested Party humbly submits that it would not be legal or just for this Board to strike off its reply for alleged late filing when the timeframe for lodging a PCR application had lapsed.

7. To explain better, the Interested Party refers this Board to the timeline of events marked as "**Exhibit KCL-12**" which is already part of the records of this case. The salient parts are being reproduced:
  - 11 August 2023: publication of this call for tenders ("**CFT**");
  - 28 September 2023: the original deadline for submissions;
  - 19 October 2023: the new deadline which was extended pursuant to Clarification Number 1 issued by the Contracting Authority;
  - 31 October 2023: the new deadline which was extended again pursuant to Clarification Number 5.
8. There are 81 days between the publication of the CFT (11 August 2023) and the final deadline for submission of tenders (31 October 2023). This translates into 54 days for the filing of a PCR application which lapsed on **4 October 2023**.
9. Neither the Applicant nor any other prospective bidder filed a PCR application within this peremptory time-period. Barring the Contracting Authority's ability to issue clarifications, the terms and conditions of the CFT crystallised as of 4 October 2023.
10. **Between 4 October 2023 and 31 October 2023, no application could have been uploaded to the PCR website.**
11. However, the Applicant filed an application to obtain a warrant of prohibitory injunction on 12 October 2023, **eight days after the lapse of its PCR remedy.**
12. It was the practice of the Department of Contracts to automatically extend the deadline for submissions whenever a PCR application was filed. This ensured that the opening session would not take place while the PCR application is pending before the Board, with the undesirable consequence of revealing tender details prematurely.
13. As is the duty of a reasonably well-informed and diligent tenderer, the Applicant was aware of this practice. However, it maliciously filed for a warrant of prohibitory injunction before the First Hall Civil Court in the knowledge that the deadline for submission of tenders would be extended as a result of its actions.
14. True enough, the Department of Contracts extended the deadline for submissions to 30 November 2023 resulting in a total of 111 days between the publication of the CFT and the deadline for submissions. Two-thirds of this timeframe translates into 74 days which means that suddenly, the deadline for filing a PCR application fell on 24 October 2023.

15. **The Applicant had succeeded in reviving a remedy which, for all intents and purposes, was extinct.**
16. Having achieved its Machiavellian plan, the Applicant withdrew its application for a prohibitory injunction on 18 October 2023. Two days later, it filed this PCR application before this Board.
17. On 2 November 2023, the Applicant as the incumbent operator was recommended for award of a negotiated procedure in the amount of €2,850,000.
18. This application is inadmissible. No applicant should be allowed to gain an advantage through its own abusive behaviour, and in any case, the right to apply for a PCR was extinguished. So too, then, was the Interested Party's obligation to monitor the PCR website for submissions.
19. The Interested Party cannot, and should not, be expected to monitor the PCR website for the exercise of an extinct remedy.
20. In view of the foregoing submissions, the Interested Party humbly demands that this Board reject this application *in toto*.

**SECOND PRELIMINARY PLEA: the Applicant's application for striking off should have been filed *in limine litis***

21. The Applicant filed its PCR application on 20 October 2023 and the Interested Party filed its reply on 29 October 2023.
22. Owing to the PCR's demanding schedule, the PCR application was only slated in for a hearing on 21 March 2024 where the parties were informed that the hearing would take place on 16 April 2024.
23. The Applicant filed its application on 3 April 2024, only two weeks prior to the actual hearing and more than five months after it had received the Interested Party's reply.
24. The Applicant cannot, at this late stage, submit an application which should have been submitted *in limine litis* when the Interested Party's reply was filed. The lapse of five months is neither excusable nor justifiable, especially given that the alleged late filing has existence as a state of fact since 29 October 2023.
25. In view of the foregoing submissions, the Interested Party humbly demands that this Board reject this application *in toto*.

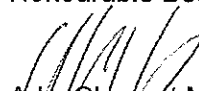
**PLEA ON THE MERITS: the Department of Contracts has *ex post facto* introduced a new mechanism to eliminate the possibility of abusive and unlawful practices like the Applicant's PCR application.**

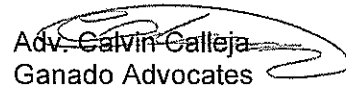
26. The Applicant revived an extinct right of remedy by circumventing the purpose and the wording of the law and the Department of Contractor's operating procedures.
27. To counter the risk of such an abusive and unlawful practice occurring again, the Department of Contracts has recently introduced a new technical feature where economic operators registered for a call for tenders will automatically be alerted that the procurement process is "under review".
28. This new technical feature formed the subject-matter of "Guidelines to Economic Operators" published by the Department of Contracts on 5 February 2024. These are attached to this reply and marked "**Exhibit KCL-13**".
29. The purpose of this new technical feature, explained in the guidelines, is twofold. Firstly, to eliminate the need to extend the deadline for submissions once a PCR application is filed. Secondly, to put prospective bidders on notice that the call is suspended as a result of which the time-limit for receipt of tenders and the tender opening date are extended indefinitely.
30. This tool was not in place at the time the Applicant lodged its PCR application before the PCRB on 20 October 2023. The Interested Party was not notified of the application by the PCRB. Nor was it automatically alerted that the procurement process was "under review" by ePPS.
31. Had it been alerted that the CFT was under review, then the peremptory time-period of five days for the filing of its reply would have started to lapse.
32. It would not be just or fair for this Board to punish the Interested Party for the Applicant's abusive and unlawful tactics—particularly when the Department of Contracts has taken steps to ensure that: (a) such Machiavellian conduct does not happen again and (b) to alert prospective bidders of the fact that a call for tenders for which they are registered is under review.
33. In view of the foregoing submissions, the Interested Party humbly demands that this Board reject this application *in toto*.

**WITHOUT PREJUDICE:** even if this Board accedes to the Applicant's application for striking off, the Interested Party is still entitled to participate fully in the proceedings, including by the submission of evidence and by making verbal submissions.

34. The Interested Party humbly reiterates that the time-limit for the filing of its reply in terms of Regulation 264 is inapplicable given the unique circumstances of this case, which were brought about solely as a result of the Applicant's abusive and unlawful conduct.
35. However, if this Board were to accede to this application and strike off the Applicant's written submissions, the Interested Party humbly submits that it remains an interested party with a right to participate fully in the proceedings, including by the submission of evidence and by making verbal submissions.
36. Regulation 264 is strict in its wording, in that the time-limit of five days is typically only applicable to the submission of a written reply.
37. In arguendo, even if this Board were to accede to this application, the Interested Party humbly submits that peremptory limitation periods, *fraus omnia corrumpit* and *ex turpi causa non oritur actio* are matters of public policy.
38. These are all matters which afflict the PCR application filed by the Applicant as raised in the preliminary plea of the Interested Party's reply thereto. As this Board will know, matters of public policy can be raised at any stage of the proceedings, even by the Board itself *ex officio*.
39. Matters impinging on public policy can even be raised at appeal stage before the Court of Appeal. In *V.J. Salomone Pharma vs Direttur Ġenerali tal-Kuntratti et*, the Court of Appeal pointed out that: "*sakemm ma jkunx hemm punti ta' ordni pubbliku, din il-Qorti ma tistax tqis materji ġodda li ma jkunux ġew imqanqla quddiem il-Bord*".<sup>1</sup>

So much does the Interested Party have to submit for consideration by this Honourable Board.

  
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TODAY, 12 April 2024  
VALLETTA MALTA

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<sup>1</sup> Rikors Nru. 18/24/1, Court of Appeal, *V.J. Salomone Pharma vs Direttur Ġenerali tal-Kuntratti et* delivered on 11 April 2024, p. 19 para. 51.

# Guidelines to Economic Operators Procurement Call Under Review



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## Introduction

Regulation 262(1) of the Public Procurement Regulations (2016) S.L. 601.03 relates to the Remedies before Closing Date of a Call for Competition, also known as a Pre-contractual Remedy. The Regulation states that *'Prospective candidates and tenderers may, within the first two-thirds of the time period allocated in the call for competition for the submission of offers, file a reasoned application before the Public Contracts Review Board'*.

In addition, Regulation 266 of S.L. 601.03 states that *'Pending the decision of the Public Contracts Review Board the process of the call for tenders shall be suspended'*. Accordingly, on the Electronic Public Procurement System (e-PPS), the Tender Coordinator will set the call's status to **Suspend**.

Thus, when a call is suspended, and the status for Economic Operators indicates **Procurement Call Under Review**, the Time-Limit for Receipt of Tenders or Requests to Participate (Tender Submission Deadline) and Tender Opening Date are extended indefinitely. This means that on the e-PPS any deadlines are put on hold. When the Remedy's hearing is concluded, the Public Contracts Review Board determines the outcome, and the call is set to **Unsuspend** by the Tender Coordinator. The Time-Limit for Receipt of Tenders or Requests to Participate and Tender Opening Date will also be updated by the Tender Coordinator as necessary.

When a call is in the Procurement Call Under Review status, an Economic Operator can still submit their offer and any clarifications that may arise, even after the deadlines for both options have already passed. However, in the case of a clarification, submission may be possible only if the call was suspended prior to the clarification period deadline. Furthermore, even when the Time-Limit for Receipt of Tenders or Requests to Participate, the Tender Opening Date and the End of Clarification Period have elapsed, any offers submitted will remain unlocked. Correspondingly, the call will remain on hold, pending the Public Contracts Review Board's decision.

Figure 1 - Economic Operators can search for the CfT of Interest to confirm the status of that same call.

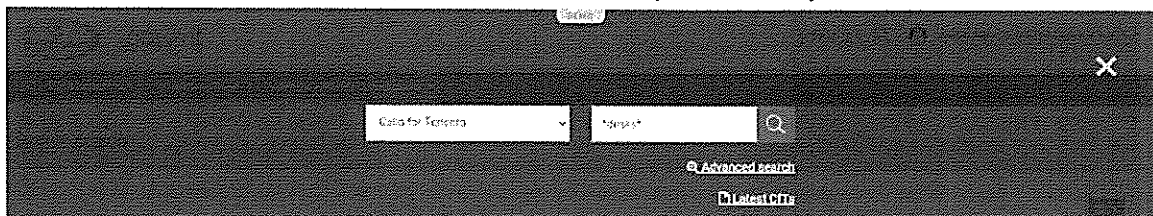


Figure 2 – From the Search Results page the status Procurement Call Under Review indicates that call is suspended.

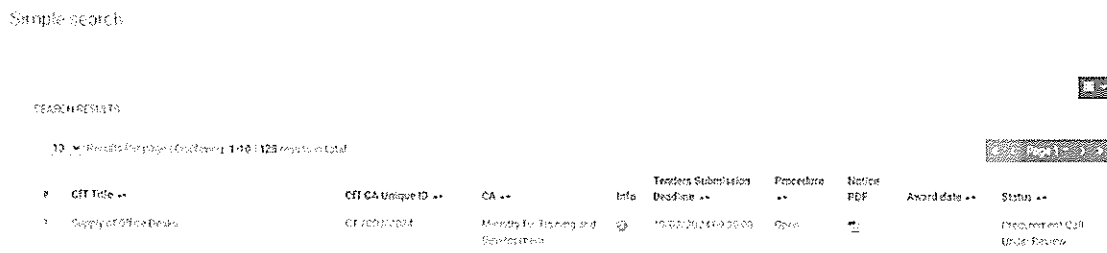


Figure 3 – The status Procurement Call Under Review is also indicated in the call's title when viewing the CFT Workspace.

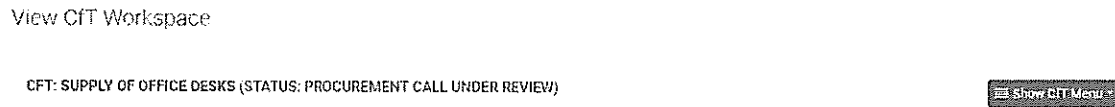


Figure 4 – Economic Operators can still submit a tender offer and/or clarification even if the specified deadlines have already passed. However, in reference to this example, clarifications can be submitted only if the call was suspended before 08/02/2024. Same deadlines indicated will be updated by the Tender Coordinator after the Remedy's outcome has been decided.

TIME LIMIT FOR RECEIPT OF TENDERS OR REQUESTS TO PARTICIPATE	19/02/2024 09:00
DEADLINE FOR DISPATCHING SUBMITTIONS	
END OF CLARIFICATION PERIOD	08/02/2024 12:00
OPENING OF PROPOSALS WITHIN THE CLARIFICATION	Yes
TENDERS OPENING DATE	19/02/2024 16:00

## Conclusion

Economic Operators are to note that when a call is in the Suspend status, submissions of tender offers and/or clarifications can still be made, even when submission deadline for both options may have already passed.

Furthermore, when the Time-Limit for Receipt of Tenders or Requests to Participate, the Tender Opening Date and the End of Clarification Period may have passed, offers submitted will not be opened. Respectively, the call will remain on hold, pending the Public Contracts Review Board's decision and henceforth the Tender Coordinator can proceed accordingly.