

PUBLIC CONTRACTS REVIEW BOARD

Case 2097 – NP14/2023 – Negotiated Procedure for the Supply, Delivery and Distribution of Incontinence Products for Senior Citizens and Persons with Disabilities in Malta

3rd June 2025

The Board,

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Krypton Chemists Limited, (hereinafter referred to as the appellant) filed on the 13th November 2023;

Having also noted the letter of reply filed by Dr Noel Bezzina acting for Active Ageing and Community Care (hereinafter referred to as the Contracting Authority) filed on the 22nd November 2023;

Having also noted the letter of reply filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for Pharma-Cos Limited (hereinafter referred to as the Preferred Bidder) filed on the 23rd November 2023;

Having heard and evaluated the testimony of the witness Ms. Mary Grace Balzan (Procurement Manager, Active Ageing and Community Care) as summoned by Dr Clement Mifsud Bonnici acting for Krypton Chemists Limited during the first hearing held on the 4th of April 2025;

Having heard and evaluated the testimony of the witness Ms. Mary Grace Balzan (Procurement Manager, Active Ageing and Community Care) as summoned by Dr Clement Mifsud Bonnici acting for Krypton Chemists Limited during the second hearing held on the 29th of May 2025;

Having heard and evaluated the testimony of the witness Ms. Graziella Calleja (Assistant Director, Department of Contracts and Secretary of the General Contracts Committee (GCC)) as summoned by Dr Clement Mifsud Bonnici acting for Krypton Chemists Limited during the second hearing held on the 29th of May 2025;

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 sittings of the 4th of April 2025 (first hearing) and of the 29th of May 2025 (second hearing) hereunder reproduced.

Minutes

Case No.2097-AACC NP14/2023 Tender for a Negotiated Procedure for the Supply, Delivery and Distribution of Incontinence Products for Senior Citizens and Persons with Disabilities in Malta.

The Negotiated Procedure was issued on the October 12, 2023, and the closing date was October 19, 2023.

The estimated value of the Negotiated Procedure, excluding VAT, was €2,850,000.

On November 13, 2023, Krypton Chemists Ltd. (C8933) lodged an appeal against the Active Ageing and Community Care, the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations. The appellant objected to the decision by the Contracting Authority to resort to a negotiated procedure without prior publication.

A deposit of €14,250 was paid.

First Hearing - April 4, 2025

On April 4, 2025, the Public Contracts Review Board (PCRB) composed of Mr. Kenneth Swain as Chairman, Dr Ana Thomas, and Dr Ing. Damien Gatt as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant: Krypton Chemists Limited. (C8933)

Dr Clement Mifsud Bonnici – Legal Representative

Dr Calvin Calleja – Legal Representative

Mr. Matthew Arrigo – Company Representative

Contracting Authority: Active Ageing and Community Care

Dr Noel Bezzina – Legal Representative

Ms. Mary Grace Balzan – Procurement Manager

Mr. Marisa Cassar – Procurement Officer

Recommended Bidder: Pharma – Cos Ltd. (MT 11656022)

Dr Matthew Paris – Legal Representative

Dr Zack Esmail – Legal Representative

Interested Party: Drugsales Ltd.

Dr Douglas Aquilina – Legal Representative

Ms. Giulia Attard Montalto – Company Representative

Mr. James Borg – Company Representative

Department of Contracts

Dr Mark Anthony Debono – Legal Representative

Dr Audrey M. Buttigieg Vella – Legal Representative

Opening Statements

Mr. Kenneth Swain, Chairman of the Public Contracts Review Board, welcomed the parties and invited the appellant's legal representative, Dr Clement Mifsud Bonnici, to deliver his initial submissions.

Initial Submissions

Initial submissions by the Appellant

Dr. Mifsud Bonnici confirmed that the witness from the Department of Contracts was outside the courtroom. In his opening statement, Dr. Clement Mifsud Bonnici explained that this case differed from usual cases, describing it as an aggravated use of negotiated procedure without prior publication. He characterized this as complex terminology for a direct order, where the contract can be awarded to either one person or to limited operators. He noted that generally, one becomes aware of such contracts when they are 'fait accompli' and disclosed by chance in the Government Gazette, parliament, or newspaper articles.

He explained that a remedy exists under Regulation 277 (declaration of ineffectiveness). Recently, before contracts are awarded and signed, authorities publish notices on ePPS indicating they are negotiating with particular companies. When negotiated procedures of this type are issued through ePPS, only those present in the case would be aware of them—in this instance, Pharma-Cos.

The authority uploads the award notice and sometimes grants the right of appeal under Regulation 270 (normal appeal), not under Regulation 277. After ten days without appeals, the authority may publish a Voluntary Ex Ante Transparency Notice (VEAT) notice in the Government Gazette, and after another ten days, no remedies remain available. In Malta, appeals can be submitted during two periods; in this case, the appeal was submitted during the first period.

Initial submissions by the Contracting Authority

Dr. Noel Bezzina, legal representative for the Contracting Authority, responded to the appellant's grievances whereby appellant is stating that the Contracting Authority could not award the negotiated procedure to the incumbent contractor. All approvals were obtained for negotiating with Pharma-Cos. Dr. Bezzina emphasised that the board recognizes this service as essential, serving vulnerable people, which justifies the urgency to negotiate. The authority complied with all regulations and adhered to proper procedures. Regarding the VEAT Notice, witnesses from the contracting authority would explain the procedure.

Initial submissions by the Recommended Bidder

Dr. Matthew Paris sought clarification regarding which law governed this appeal. The response confirmed it was under Law 270.

Witness Testimony

Ms. Mary Grace Balzan (ID no.474775M)- Summoned by Dr Clement Mifsud Bonnici.

When questioned about her position and involvement in case 14/2023, Ms. Balzan stated she worked as Procurement Manager with Active Ageing and was responsible for the negotiations, publishing them on ePPS with DOC approvals.

Dr. Mifsud Bonnici referenced two important documents:

- Email sent on August 8 to the Department of Contracts
- Email from the Department of Contracts on August 10 to Ms. Balzan

When asked about the legal basis for issuing the negotiated procedure, Ms. Balzan explained that a contract had expired in July. They requested an extension, but as the tender was about to be awarded, the extension was refused by the contractor.

Regarding the extreme urgency in this case, Ms. Balzan stated the service was necessary, the Financial Manager declared it value for money, and budget approval existed. When questioned about dates of discussions with the contractor, Ms. Balzan could not provide answers, nor could her present colleagues assist.

Conclusion of First Hearing

Since this information was important for the case, the Chairman Mr. Kenneth Swain said that he had no alternative but to adjourn the meeting for another date.

End of Minutes of first hearing

Second Hearing – May 29, 2025

On May 29th, 2025, the Public Contracts Review Board (PCRB) composed of Mr. Kenneth Swain as Chairman, Dr Ana Thomas, and Dr Ing Damien Gatt as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant: Krypton Chemists Limited. (C8933)

Dr Clement Mifsud Bonnici – Legal Representative

Dr Calvin Calleja – Legal Representative

Mr. Matthew Arrigo – Company Representative

Contracting Authority: Active Ageing and Community Care.

Dr Noel Bezzina – Legal Representative

Ms. Mary Grace Balzan – Procurement Manager

Mr. Marisa Cassar – Procurement Officer

Recommended Bidder: Pharma – Cos Ltd. (MT 11656022)

Dr Matthew Paris – Legal Representative

Interested Party: Drugsales Ltd.

Dr Douglas Aquilina – Legal Representative

Dr Samira Briffa – Legal Representative

Mr. James Borg – Company Representative

Department of Contracts.

Dr Mark Anthony Debono – Legal Representative

Witnesses:

Ms. Mary Grace Balzan- Procurement Manager, Active Ageing and Community Care

Ms. Graziella Calleja – Assistant Director, Department of Contracts and Secretary of the General Contracts Committee (GCC)

Opening Statements

This case was a continuation of Case No. 2097 AACC NP14/2023. Tender for a Negotiated Procedure for the Supply, Delivery and Distribution of Incontinence Products for Senior Citizens and Persons with Disabilities in Malta, that was adjourned on the 4th of April 2025.

Mr. Kenneth Swain, Chairman of the Public Contracts Review Board, welcomed the parties and invited the appellant's legal representative, Dr Clement Mifsud Bonnici, to call his first witness.

Witness.

Ms. Mary Grace Balzan (ID 474775M)– Summoned by Dr Clement Mifsud Bonnici.

Ms. Mary Grace Balzan has worked as Procurement Manager with Active Ageing since 2017, responsible for proceeding with negotiations.

Dr. Mifsud Bonnici referenced emails dated August 8 and 10, 2023, inquiring about the basis for the Negotiated Procedure. Ms. Balzan explained they had requested an extension from Pharma-Cos for the existing contract, but due to time passage and price changes, negotiations became necessary. Active Ageing Community Care sought permission from the Contracts division to negotiate.

Ms. Balzan detailed the timeline: they requested an extension from the contractor on June 9, 2023, and the contract expired on July 23, 2023. Tender document preparation began on June 10, 2022, after consulting continence nurses for specifications and 'Centru Servizzi Anzjani' for quantities. The drafted tender dossier was sent to contracts for vetting on June 9, 2023, and was approved and published by contracts on August 11, 2023.

Regarding negotiated procedures, Ms. Balzan explained the process: first agreeing on prices, then seeking Department of Contracts approval for negotiations, followed by receiving the financial bid on ePPS.

Dr. Mifsud Bonnici highlighted that the €2,850,000 figure represented the result price after negotiations with the contractor, which Ms. Balzan confirmed. AACC did not request technical specifications and literature because the contractor was already supplying the products. The financial bid was published on ePPS on October 12, 2023.

When questioned about the Terms of Reference line stating: "*The negotiated procedure will be retrospectively from July 17, 2023,*" Ms. Balzan explained that July 17 was the contract expiry date. Though the negotiated procedure was blocked, they had to purchase products from Pharma-Cos to continue assisting clients.

Dr. Mifsud Bonnici noted that the 2017 financial bid form (case KCL5) requested 45 products, while the later contract requested 57 items. Ms. Balzan explained this was due to an addendum for bariatric sizes, confirming different prices but unable to elaborate further.

Cross Examination by Dr Noel Bezzina

Dr Bezzina inquired Ms. Balzan to elaborate about the difference in the item numbers, between the tender of 2017 and the negotiated process. Ms. Balzan explained that the need for bariatric sizes arose.

Cross Examination by Dr Matthew Paris

Dr. Paris asked about product supply since July 17. Ms. Balzan stated she doesn't receive invoices and confirmed no contracts existed after the tender. They sought permission from the Department of Contracts for an urgent call for quotations for one year, unrelated to this tender. Three suppliers were considered with the final decision made by administrative heads. The contract duration was one year from July 1, 2024, to June 30, 2025.

When asked about the authority's intentions if the procurement procedure were cancelled or reconfirmed, the witness could not answer.

Cross Examination by Dr Mark Anthony Debono

Dr. Debono asked if Ms. Balzan agreed they resorted to the negotiated procedure after the recommended bidder submitted a restraining order in court. She disagreed, explaining negotiations started because Pharma-Cos did not accept the contract extension. The restraining order concerned the new tender.

Ms. Graziella Calleja (ID 246275M)– Summoned by Dr Clement Mifsud Bonnici

Ms. Calleja serves as Assistant Director for the Demand Management Unit since 2018, secretary of the General Contracts Committee, and presents requests for negotiated procedures. She participates in discussions but is not the decision-maker, being responsible for documents exchanged between the Contract Authority and General Contract Committee.

Dr. Mifsud Bonnici asked about procedures adopted by GCC regarding unpublished negotiations and their approval process. Dr. Mark Anthony Debono objected, stating Ms. Calleja was not the appropriate person to answer as she was not part of GCC. The Chairman noted Ms. Calleja's role as GCC secretary and Assistant Director in the Department of Contracts, inviting her to proceed.

Ms. Calleja explained the procedure: the Contracting Authority sends requests to the Director General to start negotiated procedures, documents are vetted by herself and presented to the committee, which either decides or requests clarification.

When asked if the Contracting Authority could start Negotiated Procedures after the process concludes with DG approval, Ms. Calleja answered negatively. Dr. Mifsud Bonnici inquired about GCC's investigation level and whether it relies on the authority's statements.

Dr. Debono objected that negotiated procedures could not be contested through these procedures but through Regulation 277. This objection was overruled.

Referencing emails dated August 8 and 10, 2023, Dr. Mifsud Bonnici asked if the Contracting Authority had explained they were purchasing from one supplier. Ms. Calleja could not remember since this occurred in 2023.

Dr. Mifsud Bonnici pressed for information about other emails received by contracts and forwarded to GCC beyond the August 8 email from Ms. Balzan. Ms. Calleja explained that when sums exceed €350,000, they refer to the budget office, obtain Permanent Secretary endorsement, and confirm appropriate regulations for the negotiation procedure, entity, and duration.

When asked about justification for purchasing from one supplier, Ms. Calleja explained the Contracting Authority had a tender being vetted by DOC with a published open call, and as a stopgap measure, continued purchasing diapers from the existing service provider.

Dr. Mifsud Bonnici stated the Contracting Authority wished to purchase incontinence products for €2,850,000, inquiring about the breakdown. Ms. Calleja could not answer and did not remember other questions about the procedure addressed to the Contracting Authority.

Cross Examination by Dr Noel Bezzina.

Dr. Bezzina asked if the documents attached to the email were the only ones or if others existed. Ms. Calleja answered that other documents could exist.

Cross Examination by Dr Mark Anthony Debono.

Dr. Debono asked if Ms. Calleja knew who objected or submitted the application for the open call case at PCRB regarding a call issued on behalf of the Contracting Authority. Ms. Calleja replied negatively.

Dr. Clement Mifsud Bonnici intervened, insisting that when he called the witness, she should have produced all relevant correspondence seeking approval for the negotiated procedure. He could not accept the witness's uncertainty about additional documents.

The Chairman intervened, insisting the witness clarify whether she had more documents that were not presented. Ms. Calleja answered negatively.

Re Examination by Dr Clement Mifsud Bonnici.

Dr. Mifsud Bonnici recalled Ms. Balzan, asking if the Authority (AACC) received written requests for clarification from contracts between August 8 and 10. Ms. Balzan answered negatively but noted that on July 30, they sent for budget office clearance, received on August 31.

Dr. Matthew Paris intervened, asking Ms. Balzan about the July email she mentioned. On July 25, Ms. Balzan sent an email to Senior Finance Manager Mr. Mario Abela, requiring CEO approval from Mr. Reno Degabriele. The email was released by Permanent Secretary Ms. Christine Schembri on July 28.

Dr. Clement Mifsud Bonnici asked again about other emails to the authority. Ms. Balzan answered negatively.

Final Submissions

Final Submission by Dr Clement Mifsud Bonnici.

Dr Mifsud Bonnici, started by saying that this was a hybrid case where, negotiated procedures, were usually challenged after the facts. These last three years contracts were recommending that the Contracting Authority, before they proceed with the signature of the contract, they upload a proposed recommendation on the ePPs. The Contracting Authority gives the right of appeal for ten days to any

interested party, who happens to know about it. Another process that one can do, is to publish the VEAT (Voluntary Ex-Ante Transparency Notice).

The general principles require negotiated procedures for exceptional cases only, with legal grounds interpreted restrictively. European Law principles mandate tender issuance for intra-EU competition, as manifested in Directive 2014 recital 50: "*In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be accepted in very exceptional circumstances.*"

C318/94 Commission v Germany, paragraph 13, establishes this principle. In negotiated procedures, the burden of proof is on the government, because it is exceptional. These principles were embraced by the Court of Appeal in Managing Consulting Service Industry (MCSI) reference 23/22/1 paragraph 6.

In this case the government chose the grounds of extreme urgency.

Maltese law faithfully transposes the directive with two differences: distinction between works and services of supply, and Article 32 creating approval procedures. Courts of justice and the Court of Appeal, referencing MCSI paragraph 5, state six elements for these legal grounds including:

- That the event must be unforeseeable by the Contracting Authority.
- That there is extreme urgency.
- That the unforeseeable events are not attributed to the Contracting Authority.
- That the procedure is strictly necessary.
- That the time limits cannot be complied with.

These elements are cumulative. If one of these elements, is not carried out, the whole procedure is ungrounded. Each one of these elements should be interpreted in the most restrictive way.

The case supporting these elements is C24/91 Commission v Spain, paragraph 13.

Dr. Mifsud Bonnici argued none of these elements were satisfied. Regarding the first three elements, despite law requiring contracts approval, negotiations clearly occurred before approaching contracts. Price, quantity, and products were already known. The negotiated procedure was whitewashing completed actions. The document was retroactively approved for a period almost predating initial contract discussions.

He emphasized that public contracts should be written; purchasing without procedures means no contract exists. Eventually, CT2023 was blocked due to a restraining order. When the Contracting Authority approached contracts, CT was not yet issued. Approval was sought based on urgency, requiring all elements to be satisfactory then. Krypton could not challenge the tender reference as it was still being vetted by contracts.

The contract was foreseeable—they began working on the tender in June 2022 but took until August 2023 to finalize. The July 2023 tender expiration and the contractor's lack of obligation to accept extensions were foreseeable events. Remarkably, despite such urgency, publication took two months from August 8 to October.

Regarding impossibility of complying with other procedures' time limits, he stressed that if urgency existed, they could have used accelerated procedures (15 days instead of 30). Referencing C352/13 paragraphs 50-52:

'Un Amministrazzjoni adjudicatrice, non puo avvellarsi della deroga previsto nel artico 31 quando le sarebbe stato materialmente possibile utilizzare la procedura accelerata'.

"An adjudicating administration cannot avail itself of the derogation provided in Article 31 when it would have been materially possible to use the accelerated procedure."

For the final element requiring negotiated procedures to be strictly necessary, as in MCSI page 10, they used a stopgap measure as they could not remain without products. Dr. Mifsud Bonnici noted Pharma-Cos prices were more expensive, and the agreement was granted for an extended period. Finally, he stated the negotiated procedure was finalised before approaching contracts, with one element being sufficient for the board to cancel.

Final submissions by Dr Noel Bezzina.

Dr. Bezzina emphasized considering the essential product and its necessity for stock availability. Although the Contracting Authority commenced tender work previously, due to circumstances, they had to use alternative procedures to ensure adequate supply. Referencing Article 153C as the basic element justifying this procedure type, the Contracting Authority risked being without the product. All elements, approvals, and chain of command were followed with nothing irregular in the procedure; the appeal should be denied.

Final submissions by Dr Matthew Paris

Dr Paris stated, that after researching through the Public Procurement Regulations, mainly 262, 270 and 277, he finalised that a hybrid appeal does not exist in the law. Regulation 87, A, B and C explains the function of this Board.

He quoted from article 87 A:

'Concerns or complains raised before the closure of a submission of a tender by candidates of persons having an interest in obtaining a particular public contract'.

In case, there is someone who has a complain about anything written in the tender, he, can apply for regulation 262.

He Quoted article 87 B:

'Complains raised by tenderers or candidates related, exclusions, non-complain offers, contract award decisions or cancellations of a procurement procedure after the closing date and time set and time set for the submission of the said call'.

Dr Paris explained that these articles give way for a remedy if one goes to the Contracting Authority,

He quoted article 87 C:

'Request for the in effectiveness of a public contract as established in these regulations'.

The invitation of the appellant is for the Board to do something that is not in their competence, because there was no complain whatsoever of how the evaluation was carried out. The complain was only about the way the procedure was chosen. This was not only an academic issue but showed the Board's limited review scope. This was not a hybrid case or Regulation 277, as the appellant would not have paid the deposit.

Dr Paris explained that one of the pledges, was for a broad interim measure where the Board was asked, and he quotes:

'Order that the Contracting Authority take all steps to purchase the product subject matter of the negotiation procedure following a competitive process'.

He quotes again:

'Declare that the contracting Authority has breached the duties at law, towards the claimant to disclose the requested information'.

Dr Paris stressed that all information was always given. He quotes from the third request:

'Order the Contracting Authority to disclose the requested information mention to the claimant'.

Since there was no proof and the request was not retrieved, then the Board should deny this request. Regarding article 153C, the most crucial thing is that nothing must be attributed to the Contracting Authority. The Contracting Authority was not negligent, as they had started working on the document one year before and handed it to the contracts. The Contracting Authority, went to extend, the already existing contract, which contract, was issued before COVID. Due to the pre-covid and the pre-Ukraine war, the prices varied, and that was the reason, why the existing contract could not be extended.

Dr. Paris stressed this exceptional product's importance for children and older persons, with Article 153C requisites being met. They are not obliged to scrutinize GCC authorization as other remedies exist. Once GCC decision was issued and approved, the Board has no right to scrutinize.

Final submissions by Dr Mark Anthony Debono

Dr. Debono mentioned legal principles that legal actions cannot be changed during procedures. The board should implement Regulation 270 and should not determine the Contracting Authority's negotiated procedure choice. The appellant could have used Regulation 277. EU Treaty Regulation 36 states derogation applications are possible when cases concern life and health. The Department of Contracts, according to request 153, was satisfied due to urgency. These products serve vulnerable people, which the Board cannot ignore.

The fact that the tender took from June 2022 to August 2023 did not indicate Contracting Authority fault; clarifications could have been made during vetting. During Negotiated Procedures, no vetting should occur since the Contracting Authority handles procedures alone without Director of Contracts involvement.

Final Intervention by Dr Clement Mifsud Bonnici.

Dr. Mifsud Bonnici clarified that Regulation 270 is clear about remedies, but he could not submit Regulation 277 without a signed contract, nor Regulation 262 without invitation. Regulation 270 can challenge every Contracting Authority decision and alleged infringement. He referenced the Credorex case, where Regulation 270 can be used even without procedure participation. This differed because Credorex was invited for negotiated procedures and could have used Regulation 262, whereas Krypton was never invited.

Dr. Debono intervened that reference was made to the Contracting Authority for double appeals of ten days each. The appellant submitted remedy during the ten days, satisfying the directive.

The Chairman stated this was irrelevant.

Conclusion of the Hearing

With no further arguments presented, Chairman Mr. Kenneth Swain thanked the parties and formally concluded the session.

End of Minutes of second hearing

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 4th of April 2025 (first hearing) and of the 29th of May 2025 (second hearing).

Having noted the objection filed by Krypton Chemists Limited (hereinafter referred to as the Appellant) on 13th November 2023, refers to the claims made by the same Appellant with regard to the tender of reference NP 14/2023 listed as case No. 2097 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Noel Bezzina

Appearing for the Preferred Bidder: Dr Matthew Paris

Whereby, the Appellant contends that:

a) ***First Ground of Appeal: The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor -***

The Claimant submits that the Contracting Authority is recommending the award of this Negotiated Procedure to the Incumbent Contractor without this being permissible at law.. That the Negotiated Procedure could have been awarded without prior publication in terms of Regulations 150 et seq. of the PPR which require: i). The Director General (Contracts)'s prior approval to use the negotiated procedure without prior publication. This approval must be requested and provided in writing in advance. The Contracting Authority must have sent a duly substantiated request to substantiate the need to use this procedure. and ii) That one of the grounds provided for in Regulation 153 of the PPR for the use of the negotiated procedure without prior publication subsists. The Claimant submits that according to Regulation 150(1) of PPR, the prior

approval of the Director General (Contracts) must have been obtained for the use of a negotiated procedure without prior publication, and, that it is practice, that the Director General's prior approval is also obtained prior to the award of any public contract pursuant to negotiated procedure. This is not just a formalistic tick-the-box exercise. It is an approval which is required as a matter of law; *ad validitatem*. The Claimant submits that it has no evidence in hand, at the date of filing of this application, that this prior approval was duly obtained. On this basis, the Claimant is assuming that such a prior approval was not obtained since, as shall be explained in the subsequent paragraph, any such request (if made at all) could not have substantiated the use of the negotiated procedure without prior publication.

The Claimant has gone through each ground exhaustively listed in Regulation 153 of the PPR (in the case of public supply contracts) and none of those grounds exist in the case of the Negotiated Procedure: i) Regulation 153(a) is inapplicable because the 2018 Tender was awarded according to law and no other open or restricted procedure was issued since then. ii) Regulation 153(b) is inapplicable since competition in the market for the supply of the subject-matter of the Negotiated Procedure is plenty and immediately available. iii) Regulation 153(c) is inapplicable since there is evidently no case of extreme urgency as contemplated in the law-which as this Honourable Board is aware, has been interpreted restrictively by jurisprudence of the Courts of Justice of the European Union. It is opportune to raise, at this early stage, that urgency caused by the contracting authority's negligence or delay to issue a new tender does not qualify as "extreme urgency". Further, this "extreme urgency" cannot be caused by the very same Incumbent Contractor, and conversely, the Incumbent Contractor cannot benefit from its deliberate actions to stall the 2023 Tender-*ex turpi causa non oritur* and, or *fraus omnia corrumpit*. iv) Regulation 153(d) is inapplicable since the products subject-matter of the Negotiated Procedure are off-the-shelf products and definitely not "manufactured purely for the purpose of research, experimentation, study or development". v) Regulation 153(e) is inapplicable because there is no existing contract, the 2018 Tender has lapsed, and in any case, there is no case of "*incompatibility or disproportionate technical difficulties in operation and maintenance*". vi) Regulation 153(f) is inapplicable because the products subject-matter of the Negotiated Procedure are not quoted or purchased on a "commodity market". vii) Regulation 154(g) is inapplicable since the Incumbent Contractor is not, according to the Claimant's knowledge, in winding-up or similar procedure. Further, the "voluntary ex-ante transparency notice" purportedly uploaded on ePPS by the Contracting Authority is not valid given that it does not comply with the standard form and does not provide the minimum information a VEAT notice should disclose. The notice should also have been published on the Official Journal of the European Union.

- b) ***Second Ground of Appeal: The Contracting Authority has not used the VEAT notice mandatorily required by law -***

The Claimant submits that the Contracting Authority has failed to use the VEAT notice mandatorily required by law. The "voluntary ex-ante transparency notice" purportedly uploaded on ePPS by the Contracting Authority is not valid given that it does not comply with the standard form and does not provide the minimum information a VEAT notice should disclose. Further, the notice should also have been published on the Official Journal of the European Union. The Claimant has found no such notice published on the OJEU.

c) ***Third Ground of Appeal: The Contracting Authority has not disclosed the Requested Information -***

The Claimant submits that the Contracting Authority has breached its duty at law to disclose the Requested Information, and consequently, the Claimant's right to an effective judicial protection is breached. The requested disclosures are necessary to ensure the efficacy of the remedies framework provided in the PPR to which the Claimant is entitled. The Claimant must be aware of this documentation and/or information to be able to effectively scrutinise the Contracting Authority's decisions and conduct. The Requested Information simply do not (and cannot) constitute commercially sensitive information or a trade secret which may prejudice the legitimate commercial interests of the Incumbent Contractor, if disclosed. This Requested Information is essential for the Claimant to determine whether to lodge an appeal with this Honourable Board against the Contracting Authority's decision to issue the Negotiated Procedure and to award the same to the Incumbent Contractor and whether to raise additional grounds of appeal. The fact that the Claimant has absolutely no information about the Negotiated Procedure has the effect of impeding or even in this case, preventing, the effective use of its remedies. In the absence of sufficient information enabling it to ascertain whether the decisions and conduct of the Contracting Authority are vitiated by errors or unlawfulness, the Claimant cannot rely on its right in terms of law to an effective review. Without the Requested Information, the Claimant being effectively deprived of its right to lodge a substantive objection in terms of the PPR against the Contracting Authority's decisions and conduct.

d) ***Interim Measure: The Contracting Authority should procure from multiple suppliers -***

The Claimant understands that the Contracting Authority cannot end up without stock of the products subject-matter of the 2023 Tender. But the Claimant disagrees that the Contracting Authority should procure such products without a competitive process from the Incumbent Contractor who is stalling the 2023 Tender. To this end, the Claimant demands that this Honourable Board, by way of an interim measure in terms of Regulation 90(4) of the PPR, orders the Contracting Authority to purchase the products subject-matter of the 2023 Tender following a competitive process. The Incumbent Contractor cannot be allowed to remain the incumbent and exclusive supplier to the Contracting Authority; this would distort the market and give economic advantage, in the form of EU State aid, to the Incumbent Contractor on the eve of the 2023 Tender.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 22nd November 2023 and its verbal submission during the hearing held on the 4th of April 2025 (first hearing) and of the 29th of May 2025 (second hearing), in that:

a) ***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. 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. 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 *"exteme 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 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.

b) ***The Contracting Authority has not used the VEAT notice mandatorily 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.

c) ***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.

d) ***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 an 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 vulnerable senior citizens being deprived of basic products.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 23rd November 2024 and its verbal submission during the hearing held on the 4th of April 2025 (first hearing) and of the 29th of May 2025 (second hearing), in that:, in that:

a) ***The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor -***

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*'. This in fact is incorrect since the necessary approval by virtue of the requisites laid down in article 153 of the PPR. 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.' As such and in view of the above, the requisites of the use of Negotiated procedure without prior publication were fully adhered to. 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.

b) ***The Contracting Authority has not used the VEAT notice mandatorily required by law -***

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.

c) ***The DOC and the Contracting Authority have not disclosed the requested information***

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]. 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.

d) ***Interim Measure - The Contracting Authority should procure from multiple suppliers -***

Appellant contends and requests that an interim measure is granted by this honourable board in virtue of Article 90(4) of the PPR. 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.

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 now consider the Appellant's grievances and Interim Measure.

First Ground of Appeal: The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor

- The Board notes that this grievance falls within its jurisdiction as established under Regulation 87 of the PPR. Sub-regulations (b) and (d) grant the Board the authority to review and decide on such an appeal.
- The Board observes that the Appellant contends that the Contracting Authority improperly resorted to a negotiated procedure without prior publication, as the legal grounds under Regulation 153 of the PPR were not satisfied.
- The Board notes that Regulation 153 of the PPR establishes seven specific instances where a negotiated procedure without prior publication may be used for public supply contracts. In this case, the Contracting Authority relied upon Regulation 153(c) concerning extreme urgency.
- With reference to Managing Consulting Service Industry (MCSI) case 23/22/1, the Board notes that the Court of Appeal has stated that the use of the negotiated procedure on the basis of extreme urgency is subject to three conditions: (1) an unforeseeable event; (2) extreme urgency rendering impossible the observance of time-limits laid down for calls of tenders; and (3) a causal link between the unforeseeable event and the extreme urgency.
- The Board finds that the Contracting Authority was aware, three years in advance, of the expiration date of the 2018 tender, as well as the Department of Contracts' vetting requirements and the necessary tender publication periods. It was the Contracting Authority's responsibility to issue the tender within the required timeframes to ensure that an open call contract could be awarded on time.
- The Board notes with concern that despite the Contracting Authority preparing for the tender a year before (commencing tender preparation in June 2022), it failed to meet the required timeframes, and published the open call (CT 2238/2023) only after the 2018 contract had expired. This demonstrates a clear failure in procurement planning and cannot constitute an unforeseeable event in line with Regulation 153(c), and EU Case law.

- The Board notes that jurisprudence in C318/94 Commission v Germany, paragraph 13, “*that the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.*”
- The Board opines that the Contracting Authority's has failed to establish the required elements for extreme urgency under Regulation 153(c) and EU case law.

Therefore, the Board upholds the Appellant's grievance on this point.

Second Ground of Appeal: The Contracting Authority has not used the VEAT notice mandatorily required by law

- The Board notes that as the name implies, a Voluntary Ex Ante Transparency Notice (VEAT) is voluntary and not mandatory.
- However, the Board observes that if a Contracting Authority chooses to publish a VEAT notice, there are standard requirements it must meet, including publication in the Official Journal of the European Union (OJEU) in accordance with established procedures under Council Directive 89/665/EEC Article 3a.
- The Board also concurs with arguments presented by the Contracting Authority in its reasoned letter of reply, stating that the VEAT notice was not uploaded because the award had not yet been signed by the economic operator, due to the ongoing appeal related to the matter.
- The Board observes that during the hearing proceedings, the Appellant failed to substantiate the specific claims made in the letter of appeal regarding the deficiencies in the VEAT notice process.

Therefore, the Board does not uphold the Appellant's grievance on this point.

Third Ground of Appeal: The Contracting Authority has not disclosed the Requested Information

- The Board notes that the Appellant requested specific information necessary to scrutinize the Contracting Authority's decisions and conduct in accordance with transparency principles enshrined in public procurement law.
- The Board finds that the documentation requested by the Appellant pertaining to the Negotiated Procedure approval by the Director of Contracts, the grounds relied upon under Regulation 153 of the PPR, and the procurement documentation of the negotiated procedure clearly do not require clearances from third parties and could have been provided to the Appellant.

- The Board further observes that despite the grievance put forward by the appellant, the Contracting Authority still failed to be prepared with the required documentation at hand during the first hearing, requiring the Board to adjourn the hearing to another date.
- The Board emphasizes that access to relevant documentation is fundamental to ensuring effective judicial protection and the proper functioning of the appeals process.

Therefore, the Board upholds the Appellant's grievance on this point.

Interim Measure: The Contracting Authority should procure from multiple suppliers

- The Board notes the Appellant's request for an interim measure under Regulation 90(4) of the PPR, ordering the Contracting Authority to purchase products following a competitive process.
- The Board understands that the Contracting Authority cannot end up without stock of such essential products, particularly given that the ultimate beneficiaries are vulnerable senior citizens and persons with disabilities.
- However, the Board finds that it does not have the authority to decide on the specific procurement process to be applied by the Contracting Authority as an interim measure, as this would effectively substitute the Board's judgment for that of the Contracting Authority in operational procurement decisions.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Upholds the Appellant's First Ground of Appeal and directs the Contracting Authority to cancel the Negotiated Procedure as per PPR regulation 276 (h)
- b) Does not uphold the Appellant's Second Ground of Appeal
- c) Upholds the Appellant's third Ground of Appeal
- d) Declares that it does not have the Authority to decide on the Interim Measure,
- e) Directs that the deposit paid by Appellant to be reimbursed in full.

Mr Kenneth Swain
Chairman

Dr Ing. Damien Gatt
Member

Dr Ana Thomas
Member