

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 2130 – CfT020-3032/25 (CPSU 5007/25) – Tender for the Supply of 4% Chlorhexidine Scrub Solution 500ml Bottles with Pump**

**9<sup>th</sup> July 2025**

The Board,

Having noted the letter of objection filed Dr Clement Mifsud Bonnici, Dr Calvin Calleja and Dr Kelly Cini on behalf of Ganado Advocates acting for and on behalf of Krypton Chemists Limited, (hereinafter referred to as the appellant) filed on the 10<sup>th</sup> June 2025;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 20<sup>th</sup> June 2025;

Having also noted the letter of reply filed by Dr Matthew Paris and Dr Zack Esmail on behalf of DalliParis Advocates acting for Cherubino Limited (hereinafter referred to as the Contracting Authority) filed on the 16<sup>th</sup> June 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 sitting of the 3<sup>rd</sup> July 2025 hereunder-reproduced.

#### **Minutes**

##### **Case 2130**

##### **Cft020-3032/25 (CPSU5007/25) – Tender for the Supply of 4% Chlorhexidine Scrub Solution 500ML Bottles with Pump**

The tender was issued on the 9<sup>th</sup> January 2025, and the closing date was the 31<sup>st</sup> January 2025

The estimated value of the tender, excluding VAT, was €102,190.00

The recommended Contract Value (Excluding VAT) was €30,250.00

On 10<sup>th</sup> June 2025 Krypton Chemists Ltd (C 8933) lodged an appeal against the Central Procurement and Supplies Unit – the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations and in connection with the above-captioned Tender.

The appellant's bid was disqualified as its bid was non-compliant with the tender technical specifications.

A deposit of 400.00 euro was paid.

There were eight (8) bids.

On the 3<sup>rd</sup> July 2025, the Public Contracts Review Board (PCRB), composed of Mr Kenneth Swain as Chairperson, Dr Ana Thomas and Dr Vincent Micallef, as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

<b>Appellant:</b>	<b>Krypton Chemists Ltd</b>
Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Dr Kelly Cini	Legal Representative
Mr Mathew Arrigo	Company Representative
<b>Contracting authority</b>	<b>Central Procurement and Supplies Unit</b>
Dr Leon Camilleri	Legal Representative
Ms Bernice Gauci	Chairperson of the Evaluation Committee
Mr Juan Zarb-Cousin	Secretary of the Evaluation Committee
<b>Recommended Bidder</b>	<b>Cherubino Ltd</b>
Dr Mathew Paris	Legal Representative
Dr Kayleigh Borg	Legal Representative

The Chairperson welcomed the parties, declared the hearing open, and invited the representatives of Krypton Chemists Ltd to open the initial submissions.

Dr Mifsud Bonnici declared that as no witnesses were summoned by the appellant, his legal representatives were going to rely on the documented evidence found in the appeal and since the main issue is a legal one and this can be addressed in the final submission.

Dr Leon Camilleri confirmed that since the Contracting Authority was also not summing any witnesses it was agreeing to continue likewise.

#### **Submission by Dr Calvin Calleja**

Dr Calvin Calleja started by stating that he was convinced that the PCRB was cognizant of the details of the objection and moved on to the main objection.

He contended that the aim of the appellant is to convince this Board that this case should be re-evaluated since it is based on the application of the principle of proportionality since this was not adhered to by the tender evaluation committee. He insisted that a Tender Evaluation Committee has other ways than drastically refuting a bid due to any type of irregularity.

Dr Calleja said that the rejection letter stated that the reason of rejection was that a clear and legible copy was not submitted. This requirement is derived from Clause 2.2 under Terms of reference Section 3 of the tender document which required a clear and legible copy of the packaging including the labeling of the product offered.

Dr Calleja reiterated that the PCRB can confirm that a copy of the packaging including the labelling was submitted by the appellant since it has at its disposal the procurement process. This is found as technical literature on the first page of the bid so much so that the CPSU does not contest this fact.

Dr Calleja continued that at best the reason for rejection is ambiguous and wrong as there are no indications that the shortcoming indicated by the CPSU is not that the document was not submitted, or that the document was submitted but is not clear and legible.

Dr Calleja explained that he is insisting on this point to try to establish the parameters for the PCRB to decide if the appellant was to be given the opportunity of a clarification or a rectification.

Dr Calleja insisted that the Evaluation Committee had three choices as regards the appellant's submission. In the first place the contract had to be given to the appellant because he submitted the cheapest offer. The second choice was to give the opportunity of a clarification or rectification so that the appellant could submit a clear and legible label. The third choice was to automatically reject the appeal without any opportunity for clarification or rectification.

Dr Calleja explained why the first and third choices were wrong for different reasons. He explained that the first choice was wrong because it would have gone against the principle of equal treatment. He admitted that the evaluating committee rightly so couldn't give the contract to the appellant due to the mentioned shortcoming as other bidders had abided by the requirements of the call of Tender.

However, Dr Calleja insisted that the evaluation committee made the wrong choice (i.e. the third one) when it went against the principle of proportionality because it was a disproportionate decision and which even went against the aim of the tender itself. Dr Calleja continued that the shortcoming was an obvious mistake and given the chance the appellant could have clarified as long as he did not include new information. Dr Calleja explained that Exhibit A was sent on Monday 30<sup>th</sup> June to confirm this to the evaluating committee.

Dr Calleja stated that he could anticipate that the contracting authority was to emphasize that what the appellant is asking for is not a clarification under Note 3 but a rectification which cannot be given, as the document is marked under Note 3.

Dr Calleja pointed out that in the literature list under Clause 1.2 there is a reference to a clear and legible copy of the packaging including the labelling of the product offered and this is identical to what is required in the Tender Specifications. Hence he emphasized that the literature list is a document marked as Note 2 so much so that and even the Contracting Authority accepts that the copy of the label is a rectifiable document.

In fact, Dr Calleja insisted, that the appellant is not asking for a rectification because the information already exists in the appellant's bid and he is only asking to be given the opportunity to make the information already given more clearly without adding new information.

Dr Calleja holds that this means that the principles of equal treatment and proportionality will be both safeguarded. In fact, Dr Calleja continued that the debate whether the document falls under Note 2 or Note 3 is superfluous. These, he contends, both depend on the principle of proportionality and in fact our courts do not apply a net distinction between them but apply the principle of proportionality as witnessed in the two following court cases:

1. Case 281/2015 – Firetech - paragraphs 19 & 20 where the court stated that not all shortcomings lead to disqualification but this depends on the gravity and consequences of that shortcoming.

Dr Calleja stated that applying this sentence to this appeal one can safely say that:

- a. The shortcoming did not give any advantage to the appellant.
  - b. It did not create any prejudice on the preferred bidder and other bidders.
  - c. There were no changes to the call for the tender.
  - d. There is no change in the offer of the appellant and there will not be any if the clarification is made.
2. Case 362/2014/1 – Cassar Petroleum where they had to provide a license marked under Note 3 and the court decided that more time was to be allowed for its submission. It also stated that the principle of proportionality would not apply if an advantageous offer is disregarded because a document which was not provided could be still handed in.

Dr Calleja concluded by emphasizing that in this case the appellant is not asking to provide a new document because it already submitted it at submission stage and all that the appellant is asking for is to make the required information clearer.

**Submission by Dr Leon Camilleri:**

Dr Camilleri stated that the position of the contracting authority can be followed in the written submissions in the letter of reply. He also addressed two issues namely:

1. He emphasized that new grievances couldn't be raised at this stage and referred to the fact that while referring to the literature list the appellant submitted that the specifications leading to the disqualification is not Note 3 but Note 2. This is nowhere found in the letter of objection and moreover there is no contestation that what was required is note 3 and not Note 2 in the letter of objection.

Dr Camilleri reiterated that the PCRB has the faculty to see that the presented document has nothing to do with the appellant's offered bid. The specification quoted was note 3 and was not contested in the appellant's letter of objection.

He continued that since it follows that it was not presented before the adjudicating committee the later was obliged to follow the relevant decisions to ensure equal treatment. He continued that had the adjudicating board accepted the document's submission this would have given space to a rectification and this was not permissible due to the rules of Note 3

**Final Submission by Dr Mathew Paris:**

Dr Paris stated that his submission is limited to the little information at his disposal and that which emanates from the tender document itself and which should be everybody's bible. He continued that how one solves issues which present ambiguity is debatable but one has to abide by article 62.1 where all bidders have to submit offers according to what the Tender Document requires. He continued that when one doesn't, one usually faces exclusion due to incompliance.

Dr Paris said that bidders cannot expect that their shortcomings can be solved by others and that this is what Krypton Chemists Ltd are trying to do when she expects both the adjudicating committee and the PCRB to solve a shortcoming which she herself created in order to be re-integrated in the tender process.

Dr Paris explained that it is true that both Courts and the PCRB adopted the Department of Contracts' circulars (which are not in themselves governed by legal law) which indicate that in cases of ambiguities one shouldn't go to extreme decisions of exclusion, yet this is accepted in very strict circumstances and elements and also according to what the tender document itself dictates.

Dr Paris explained that the appellant didn't make a distinction between Note 2 and Note 3 in his objection letter and agrees with Dr Camilleri that one cannot present issues at this stage which were not presented in the objection letter.

Dr Paris stated that Article 270 states clearly that one's grievances have to be clearly presented and sustained especially what one is objecting about. At this stage Dr Paris emphasized that the appellant cannot change and expand upon that which he objected about.

Dr Paris continued that if the appellant wanted to present something new he had first to make a plea to the PCRB and say that he wanted to present a new grievance at this stage due to new circumstances which did not originally exist before. This he reiterated was not done and since there is no reference to the distinction regarding Note 2 and Note 3 in Krypton's letter of objection the PCRB should ignore this issue.

Turning to the issue of clarification and/or rectification Dr Paris stated that although there was no obligation, one could have asked about this discretion. However, Dr Paris asked that if this discretion was made use of, how would it have regularized Krypton's shortcoming under the title of clarification and not rectification?

Dr Paris emphasized that the distinction is important because in that case the issue is not about a rectification but about the not making use of a clarification whose shortcoming falls under Note 3. Therefore, he continued, the appellant could obtain that which he is asking for.

Dr Paris explained that a clarification means that one has to indicate from one's own submitted offer where there is or isn't that which one wants.

He continued that in this case there is a document in this tender which could be the required label but does not satisfy the requirement cited at 2.2. i.e. that which asks for a clear and legible label. He emphasized that it is clear that there is no contestation on this point and what he can gather from the limited information that is at his disposal and from what he heard here during this sitting he can deduct that there is nothing clear and legible. Likewise, he can deduct that while giving the impression that the document which was submitted with the offer is the same one as the one presented now, this is not the case and it is up to the PCRB to decide this, since the documents are at its disposal. He continued that if the document is illegible the discretion regarding the clarification could never be addressed.

Dr Paris ended by stating that the appeal addressed one particular grievance and not other matters heard during this hearing. He also stated that if the board accepts the second grievance we will go back to the adjudicating board so that the shortcoming would be corrected.

The truth is, he reiterated, that the document is illegible and even the appeal was wrongly formulated with the consequence that the PCRB has only one option but to ignore Krypton's appeal once it confirms that the document is illegible.

**Statement by Dr Calleja:**

Dr Calleja reiterated that the appellant is not making any new grievances but only sustained grievances put forward before this board during the 10-day period following the issuing of the rejection letter.

Referring to Dr Paris's reference to Regulation 62 which requires conformity *ab initio* Dr Calleja quoted from this regulation to explain why appellant submitted Exhibit A to confirm that the appellant's offer includes all documents and information required by the Contracting Authority in the Tender Document by the closing date.

### **Statement by Dr Camilleri**

Dr Camilleri stated that since the appellant is confirming that new grievances were not submitted we hold that the requirement which led to the rejection falls under Note 3.

At this stage the Chairman thanked the legal representatives and declared the hearing as closed.

End of Minutes

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### **Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 3<sup>rd</sup> July 2025.

Having noted the objection filed by Krypton Chemists Limited (hereinafter referred to as the Appellant) on 10<sup>th</sup> June 2025, refers to the claims made by the same Appellant with regard to the tender of reference CfT020-3032/25 (CPSU 5007/25) listed as case No. 2130 in the records of the Public Contracts Review Board.

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

Appearing for the Contracting Authority: Dr Leon Camilleri

Appearing for the Preferred Bidder: Dr Matthew Paris

Whereby, the Appellant contends that:

- a) Firstly, as this Board will be able to confirm from the procurement file, the Appellant's bid contained all the requirements stipulated in the Tender, including in terms of Clause 2.2 of Section 3 - Specifications of the Tender, 'detailed product technical documentation, a clear and legible copy of the packaging including labelling. Therefore, as a starting point, the Contracting Authority's allegation that the Appellant did not submit a copy of the label is unfounded in fact and at law. Secondly, if the Tender Evaluation Committee's ground for rejection is that the label could have been clearer and more legible, it had other tools at its disposal which were more proportionate and which it was duty bound to exercise before disqualifying the Appellant's bid. The principle of proportionality requires that measures adopted by contracting authorities, including those adopted during the evaluation process, do not exceed the limits of what is appropriate and necessary to achieve the objectives pursued and that when there exists a choice between several appropriate

measures, recourse must be had to the least onerous one. The Tender Evaluation Committee had at least two choices when assessing the Appellant's bid. The first and more proportionate choice would have been to request the Appellant to clarify the text imprinted on the label or supplement the same. The second and most onerous choice was the disqualification of the Appellant's bid on the basis of alleged non-compliance. The Appellant had already submitted a copy of the packaging including the labelling. Therefore, asking for the text imprinted on the label to be clarified would not have changed the bid in any way. Therefore, this could never have resulted in a rectification prohibited by Note 3. Nor would it have bestowed an undue advantage on the Appellant over the other bidders because the clarification would be based on information which has already been submitted and forms part of the Appellant's initial submission. Furthermore, the objective pursued by the Tender was the procurement of supplies against the cheapest price. In rejecting the Appellant's bid, the Contracting Authority bound itself to choose a more expensive bid. The Contracting Authority's decision exceeds what is appropriate or necessary for the evaluation procedure to achieve the objective of the Tender. The Tender Evaluation Committee opted for the most onerous route of excluding the Appellant's bid rather than pursue less onerous routes.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20<sup>th</sup> July 2025 and its verbal submission during the hearing held on 3<sup>rd</sup> July 2025, in that:

- a) Section 3 clause 2.2 of the tender dossier states that 'Detailed technical documentation, a clear and legible copy of the packaging including labelling, of product being offered.' As part of the technical offer this is note 3 and this is not contested by the objector.
- b) What the Objector is stating is that, faced with the non-compliance of not submitting legible labels of the products offered, the contracting authority should have given the objector the chance to clarify its position. What the objector is actually requesting is the change to rectify its position.
- c) The objector submitted literature containing photos of the products, naturally with a label on the product, but not the label per-se. The label on the product was not legible even if zoomed in. What the objector would have submitted if given the opportunity, would have most probably been an actual copy of the label, which was not submitted with the initial submission. This would have been a breach of note 3 conditions since the label should have been submitted with the initial offer.
- d) The evaluation committee conducted the evaluation process in accordance to law and with full respect to the general principles of public procurement legislation including the principle of proportionality, but also the fundamental principles of equal treatment and self-limitation.

This Board also noted the Recommended Bidder's Reasoned Letter of Reply filed on 16<sup>th</sup> June 2025 and its verbal submission during the hearing held on 3<sup>rd</sup> July 2025, in that:

- a) Whilst it is acknowledged that the clarification process exists to resolve uncertainties or confirm aspects of a submission, it must also be stressed that it remains the sole and exclusive responsibility of the economic operator to ensure full and unambiguous compliance with the tender requirements from the outset. This principle of 'ab initio' compliance is embedded within the procurement framework to safeguard fair competition and ensure that all bidders are treated equally.
- b) Permitting clarifications to cure material deficiencies or omissions would constitute an excessive and unjustified use of discretion by the Evaluation Committee. Such a course of action would not only undermine the integrity of the procurement process but would also unfairly prejudice other compliant bidders, including Cherubino Limited, who abided by the strict conditions imposed by the tender document.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

- a) In the view of this Board, the requirement outlined in Section 3, Clause 2.2 of the tender dossier is clear and unambiguous. It is also evident that this requirement falls under the provisions of Note 3, which explicitly states that no rectifications are permissible.
- b) During the hearing, it became apparent to this Board that the Appellant was not attempting to introduce any new grievances. The grievance as presented in the letter of appeal is specific and limited in scope. No request for the possibility of rectification was made, and accordingly, no ruling from this Board is necessary on that point.
- c) While the Appellant's original submission appears to include an image of a label, it is undisputed that the content of this label was neither clear nor legible.
- d) In the opinion of this Board, a rectification of the type permitted under Note 2 would have been necessary to remedy the situation. However, as the requirement in question falls under Note 3, such rectification is not allowed.
- e) This Board is of the considered opinion that the Evaluation Committee acted correctly in rejecting the Appellant's bid. To have accepted the bid would have contravened the principles of self-limitation and equal treatment, which must be upheld and applied equally to all economic operators participating in the same procurement procedure.

For the above reasons, this Board does not uphold the Appellant's grievance.

**The Board,**

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender to Cherubino Limited,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Dr Vincent Micallef**  
Member

**Dr Ana Thomas**  
Member