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12th August 2026

The Secretary
Public Contracts Review Board
Notre Dame Revlin
Floriana VLT 2000

RE: Framework Contract for the Provision of Incontinence Diapers, Pull-Ups, Pads and Inco-Sheets for Saint Vincent De Paul - Ref CT 2159/2026.

Reply to Reasoned application filed by Krypton Chemists Limited ('the Objector') pursuant to regulation 262 of the PPR.

I write to you for and on behalf of Saint Vincent De Paul (hereinafter the 'Contracting Authority') in connection with the above captioned Tender, and particularly with reference to the application filed by Krypton Chemists Limited (hereinafter the 'Objector').

Objector has filed the application in accordance with Regulation 262 of the PPR, through which, the objector is essentially raising one ground of objection, namely that the decision not to split the tender into lots by the contracting authority is discriminatory and unlawful.



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To this effect, the Contracting Authority is rebutting this objection and the grounds of appeal raised therein which grounds will be addressed in this reply.

1. The Decision not to split the tender into lots is discriminatory and unlawful.

In its objection, the objector essentially argues that the decision not to split the tender in question into lots is discriminatory and unlawful.

As a point of departure, it is pertinent to point out that, contrary to what the objector is alleging in its objection, the decision not to split the tender in question into lots is not in itself discriminatory nor illegal or unlawful.

Infact, Contracting Authorities are afforded a degree of discretion by the Public Procurement Regulations in deciding whether to award a contract in the form of separate lots or not. Regulation 33 of the PPR stipulates that:

33. Contracting Authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

The use of the word may was purposely included by the legislator to afford contracting authorities a margin of discretion when deciding whether to publish a tender in the form of separate lots or not. The only requirement which is mandated by the regulations is that contained in regulation 34 which requires that, whenever a contracting authority chooses not to subdivide a tender into lots, it has to provide the main reasons for its decision in the procurement documents.

This therefore means that, contracting authorities are allowed to opt not to divide a tender into different lots, provided that they provide justifications for such decision.

Contrary to what the objector alleges in its objection, the Contracting Authority humbly submits that it has sufficient reasons and justifications which serve the basis of its decision not to publish the present tender in lots.

In its objection, the Objector procees from an erroneous factual premise and, in particular, seeks to portray the present tender as being materially identical to the previous procurement exercise while alleging that the Contracting Authority subsequently devised a new justification for maintaining a singl contractual framework. The Contracting Authority submits that this is factually incorrect.

The Contracting Authority's decision is based upon objective and legitimate operational requirements arising from the manner in which the supplies forming the subject matter of the present tender are now required to be delivered and distributed throughout Saint Vincent De

Paul.

Moreover, and as already stated, the Public Procurement Regulations do not establish an absolute obligation upon a contracting authority to divide a public contract into lots. On the contrary, the PPRs expressly recognise the discretion of contracting authorities to determine whether a procurement is to be subdivided into lots, subject to the requirement that the reasons for a decision not to subdivide the procurement are indicated where applicable.

The Contracting Authority considers it necessary to correct a fundamental factual assertion underlying the Objector's application concerning the previous procurement exercise bearing reference number CT2104/2026 (the First Tender).

The Objector repeatedly seeks to draw an inference from the cancellation of the First Tender to the effect that the cancellation was somehow connected with the Objector's request that the procurement is to be divided into lots – this is factually incorrect.

The First Tender was cancelled on account of matters and issues of a technical nature in the tender document which were entirely unrelated to the question of whether the procurement ought to be divided into lots.

At no stage did the Contracting Authority cancel the First Tender because it had accepted, whether expressly or implicitly, the Claimant's contention that the procurement ought to have been divided into lots. Neither can any inference to such effect be drawn from the cancellation thereof.

In addressing the main bone of contention raised by the Objector, the Contracting Authority submits that the underlying basis upon which it decided not to divide the tender into lots was the mode of delivery of the supplies.

Under previous arrangement, the products forming the subject matter of the procurement were delivered principally to a central storage facility within Saint Vincent De Paul, whereupon such products were stored and thereafter distributed internally as required.

Under the present Tender (CT 2159/2026), the successful contractor is required to deliver the supplies directly to the respective wards and stores within Saint Vincent De Paul, at locations indicated, rather than merely delivering the supplies to one central storage facility.

This distinction is particularly significant having regard to the nature and scale of Saint Vincent De Paul. SVP caters for elderly and highly dependent residents across approximately 35 wards, accomodating approximately one thousand residents.

The change from centralised delivery and storage to direct delivery to the individual ward necessarily changes the logistical and operational considerations relevant to the manner in which the procurement is structured.

It was precisely in the context of this revised delivery model that the Contracting Authority determined that the procurement should be undertaken through one contractual framework and one contractor rather than divided amongst a number of separate suppliers.

In the event that the Tender is divided into separate lots and awarded to different economic operators, SVP could potentially be faced with several independent suppliers attending at the facility, specifically the wards, on different days and at different times throughout any given week for the purpose of supplying different categories of incontinence products directly to its wards.

SVP is a residential healthcare institution accomodating a substantial population of elderly and highly dependent residents. The organisation of repeated deliveries to wards in which such residents are accomodated necessarily raises legitimate considerations related inter alia, to the continuity and coordination of supply; the proper and timely delivery of the required products to the appropriate wards; the avoidance of delivery erroes and unnecessary disruption within the wards; the coordination of delivery schedules; the number of occurrences of external suppliers and their personnel entering and circulating the facility; infection control considerations and ultimately the safety and welfare of vulnerably residents.

The Contracting Authority was therefore reasonably entitled to conclude that the award to a single contractor responsible for the entire range of supplies and for their direct delivery to the respective wards would provide a substantially more coordinate and controlled delivery mechanism.

The decision therefore not to divide the Tender into lots was neither arbitrary nor intended to favour any particular economic operator. It arose from the Contracting Authority's legitimate assessment of its operational requirements and the particular manner in which the contract is performed.

In its objection, the Objector seems to place considerable emphasis upon what it describes as a change in the justification advanced by the Contracting Authority between the First Tender and the present Tender. The Objector even goes as far as to

allege that the Contracting Authority has 'reverse-engineered' its present justification in anticipation of a challenge from the Objector.

Such allegation is entirely speculative and unsupported by evidence. The fact that the Contracting Authority's present justifications places greater emphasis upon logistical coordination, continuity of care, delivery errors, infection control and patient safety is neither suspicious nor contradictory. It actually reflects the manner in which the contract under the present Tender is intended to operate.

According to the regulations cited above, a contracting authority must be entitled to formulate the terms of a procurement document by reference to its actual and current operational requirements, provided always that those requirements are objective, proportionate, justifiable and applied without discrimination.

Moreover, it appears that, in its application, the Objector seems to be relying heavily upon the decision Case No. 1731 of 2022. In this regard, the contracting authority humbly submits that notwithstanding the findings reached by the board in that decision, does not mean that the present tender is unlawful.

The fact that another contracting authority or indeed the same contracting authority operating under different factual or logistical circumstances, may have previously structured a procurement document into separate lots, does not impose an obligation upon SVP to adopt the same procurement structure indefinitely.

The issue to be determined by this honourable board isn't whether the present procurement could theoretically have been divided into lots, but whether the Contracting Authority acted unlawfully or unreasonably.

With regards to the allegations of discrimination, while such allegation is naturally unfounded, the Contracting Authority submits that public procurement rules cannot reasonably be interpreted as requiring a contracting authority to restructure its genuine operational requirements merely so as to accommodate the individual commercial portfolio of each prospective economic operator.

The promotion of competition is undoubtedly an important principle of public procurement law. It does not however, require a contracting authority to disregard legitimate considerations relating to the efficient and safe performance of the contract, particularly within a residential healthcare environment accommodating vulnerable persons.

With respect to subcontracting, insofar as the Objector argues that the possibility of subcontracting does not constitute a substitute for division of the tender into lots, the Contracting Authority submits that this contention does not address the substance of its decision.



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The Contracting Authority does not rely upon subcontracting as a substitute for dividing the tender into lots. On the contrary, the material consideration is that SVP requires one contractor to assume contractual responsibility towards it for the proper coordination and performance of the entire supply and delivery obligation.

How the economic operator internally organises its supply chain, insofar as permitted by the Tender and applicable procurement rules, is a separate matter from SVP's legitimate requirement to maintain one contractual point of responsibility.

THEREFORE, in view of the above and for other reasons that may be adduced at law at the sitting to be set by this Board, the Respondent Contracting Authority humbly requests that this Board, save for any other declaration, order or decree it may deem fit:

- a. Declare the applicant's objection and consequent claims as unfounded both at law and in fact and consequently rejects the objection and consequent claims;
- b. Rejects the applicant's request to be refunded in full the deposit paid upon filing of the application.



Av. Noel Bezzina