

QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF SILVIO CAMILLERI
ONOR. IMHALLEF TONIO MALLIA
ONOR. IMHALLEF JOSEPH AZZOPARDI**

Seduta ta' nhar il-Gimgha 29 ta' April 2016

Numru 13

Rikors numru 8/16

Pharma-Cos Limited (C-2804)

v.

- 1. Central Procurement and Supplies Unit;**
- 2. Direttur (Generali) tal-Kuntratti;**
- 3. Associated Equipment Limited (C-9340) ghal kull interess li jista' jkollhom; u**
- 4. Technoline Limited (C-4250) ghal kull interess li jista' jkollhom**

Il-Qorti:

Dan hu appell imressaq fil-11 ta' Jannar, 2016, mis-socjeta` Pharma-Cos Ltd. wara decizjoni datata 22 ta' Dicembru, 2015, moghtija mill-

Bord ta' Revizjoni dwar Kuntratti Pubblici (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-kaz referenza CT/2249/2015 (kaz numru 879).

Dan il-kaz huwa marbut mas-sejha għall-offerti li harget is-Central Procurement and Supplies Unit "*for the supply of oxygenators and tubing packs – lot 1*". Għal dan it-tender applikaw diversi entitajiet, fosthom is-socjeta` Pharma-Cos Ltd. u z-zewg societajiet intimati; l-offerta tas-socjeta` Pharma-Cos Ltd. giet imwarrba għax ma tissodisfax il-kriterji teknici tas-sejha. Is-socjeta` Pharma-Cos Ltd. ma qablitx ma' din id-decizjoni u ressqet appell quddiem l-imsemmi Bord, li b'decizjoni tat-22 ta' Dicembru, 2015, caħad l-appell u ikkonferma d-decizjoni tal-awtorita` kontraenti. Id-decizjoni tal-Bord hija s-segwent:

"Having noted the Appellant's objection, in terms of the "*Reasoned Letter of Objection*" dated 30 November 2015 and also through their verbal submissions during the Public Hearing held on 10 December 2015, had objected to the decision taken by the Pertinent Authority in that:

"a) The Appellant Company contends that the Technical Reasons given by the Contracting Authority for discarding the Appellant's offer were incorrect. In this regard, the Appellant maintains that the request for the submission of samples was made by the Contracting Authority on the 11th June 2015 and not on the 8th June 2015.

"At the same instance, in the Letter of Rejection, the Contracting Authority stated that the Appellant did not submit the samples as requested on the 8th June 2015.

"The Appellant contends that the wrong reason was in fact stated by the Contracting Authority for discarding their offer.

"Having considered the Contracting Authority's "*Letter of Reply*" dated 7 December 2015 and also the verbal submissions submitted during the Public Hearing held on 10 December 2015, in that:

“a) Although the wrong date was mentioned in the “*Letter of Rejection*”, the Contracting Authority maintains that the request for samples of items B, C and D were communicated to the Appellant. The latter was also informed as to why these samples were mandatory requirements;

“b) The Contracting Authority maintains that although current suppliers are exempted to provide samples, if the product being offered dictates the same specifications as those being currently supplied, in this particular case, i.e. items B, C and D had modifications. In this regard, of the Appellant did not provide samples of these said items.

“Reached the following conclusions:

“1. This Board, after having heard the submissions during the Public Hearing and examined the relevant communications, justifiably notes that the Appellant was informed by the Contracting Authority on 5 June 2015 that he had to submit samples for items B, C, D, E and F.

Although the Appellant was the present supplier, there was a “variation” in the published drawings and specifications of these items, so that the Appellant was liable to present samples.

“Although the Contracting Authority, in its “*Letter of Rejection*” dated 20 November 2015, quoted an incorrect reference, to a date relating to a “*Request for Samples*”, this “*slipshod*”, does not, in any way, create a credible basis for not submitting the samples as mandatorily requested by the Authority.

“This Board opines that it has been credibly established that the Appellant was aware of his obligations, even though he was the current supplier, as per communication dated 5 June 2015.

“This Board also points out that “*substance over form*” should prevail in that the “*substance*” should be the “*submission of samples*” and form in this particular instance was an error in quoting an incorrect date of a particular request, i.e. the Contracting Authority, quoted a date of 8 June 2015 instead of 5 June 2015.

“In this regard, this Board does not uphold the Appellant’s contention that the Appellant was informed of his obligations on the 11 June 2015, but this Board opines that the Appellant, through communication dated 5 June 2015 was well informed as to what samples had to be submitted and the reasons for the latter’s submissions.

“2. This Board would justifiably point out that had a request for an extension for the submission of samples been granted to the

Appellant by the Contracting Authority, this action would have created unequal treatment among the suppliers.

“In this regard, this Board credibly opines that the Appellant was fully aware of his obligations from the very start of the Tendering Procedure and did not avail himself of the remedies available, in accordance with the Public Procurement Regulations.

“In this regard, this Board does not uphold the Appellant’s contentions and credibly confirms that the Evaluation Process was carried out in a just and transparent manner;

“3. With regards to the Appellant’s submission that this Appeal is at a Preliminary stage, this Board credibly opines that the merit of the case concerning the incorrect date in the “Letter of Rejection” has been exhausted.

“In view of the above, this Board finds against the Appellant Company and recommends that :

“i) The deposit paid by the Appellant should not be reimbursed;

“ii) The tendering process is to be continued.”

Is-socjeta` rikorrenti Pharma-Cos Ltd. appellat mid-decizjoni tal-Bord ghax issostni li kuntrarjament ghal dak allegat fl-ittra tac-cahda tal-applikazzjoni taghha, hi qatt ma giet mitluba b’ittra tat-8 ta’ Gunju, 2015, biex tipprezenta kampjuni tal-prodotti offerti, u ghax, f’kull kaz, hija kienet ezenti milli tissuplixxi kampjuni peress li kienet il-kuntrattur attwali tal-prodotti; tilmenta wkoll mill-fatt li gie deciz li hi ttitlef id-depozitu li ghamlet ghall-appell quddiem il-Bord.

Wara li semghet it-trattazzjoni tad-difensur tal-partijiet u rat l-atti kollha tal-kawza, din il-Qorti sejra tghaddi ghas-sentenza taghha.

Ikkonsidrat:

Trattat l-appell, din il-Qorti tibda biex tosserva illi skont it-termini tas-sejha, kull offerent kellu jissottometti tnejn jew erba' kampjuni, skont il-kaz, tal-prodotti offruti. Din il-kundizzjoni kienet wahda mandatorja tant li regolament specifiku jghid li offerent li ma jissottomettix il-kampjuni fi zmien hamest ijiem tax-xoghol minn meta jigi hekk mitlub, "*will be disqualified*".

B'ittra tal-5 ta' Gunju, 2015, l-awtorita` kontraenti kitbet lis-socjeta` appellanti u qaltilha li filwaqt it-tlett items kienu bhal ta' qabel, u ma kienx mehtieg kampjun, pero`, irsistiet ghall-kampjuni tat-tlett items l-ohra peress illi l-prodotti offruti kienu mibdula. Fit-8 ta' Gunju, 2015, is-socjeta` Pharma-Cos Ltd. kitbet lill-awtorita` kontraenti li hi kienet ezenti milli tissuplixxi kampjuni fuq l-items kollha. B'ittra tal-11 ta' Gunju, 2015, l-awtorita` kontraenti insistiet ghall-kampjuni, bid-ditta Pharma-Cos terga' twiegeb fit-12 ta' Gunju, 2015, li ma kienx hemm htiega li l-kampjuni jigu fornuti. Eventwalment, b'ittra tal-20 ta' Novembru, 2015, l-awtorita` kontraenti informat lis-socjeta` appellanti illi, "*On 08.06.15 samples were requested for items B, C and D. Samples were not submitted until deadline 12.06.15*", u li allura l-offerta giet imwarrba.

Is-socjeta` appellanti tghid li hi ma gietx mitluba tforni l-kampjuni bl-ittra tat-8 ta' Gunju. Dan hu minnu, pero`, l-argument hu sofizmu legali li ma

jwassal imkien. Il-fatt hu li b'ittra li waslet fid-destinazzjoni taghha, is-socjeta` Pharma-Cos Ltd. giet mitluba tipprezenta l-kampjuni, izda hi baqghet tipika u tinsisti li ma kellhiex tforni l-kampjuni mitluba. Sa hamest ijiem tax-xoghol mid-data tal-ittra, dawn il-kampjuni baqghu ma gewx suppliti u, ghalhekk, giet korrettement skwalifikata.

Il-Qorti tosserva li, kuntrarjament ghal dak sottomess mis-socjeta` appellanti, l-izball fid-data ma jwassalx ghall-konsegwenza ta' nullita`. L-importanti hu li s-socjeta` giet mitluba kampjuni, u din ma ipprovdithomx. Biex wiehed jissellef argument minn dak li qalet il-Prim'Awla tal-Qorti Civili fil-kawza **Gatt Baldacchino v. Arcidiacono** deciza fl-20 ta' Jannar 1998:

“Jekk il-kawzi fil-fehma tal-konvenuti ghandhom jintrebhu u jintilfu ghax issir “akka” zejda mela hemm bahar jaqsam bejn il-ligi bhala strument tal-gustizzja kif tifhimha din il-Qorti u l-ligi bhala nassa u strument ghal min irid jahrab minn dmirijietu kif jifhmuha l-konvenuti. Il-ligi trid is-sewwa, mhux li twaqqa' lin-nies f'xi nassa.”

Fil-kuntest tal-aggravju marbut mal-allegazzjoni li s-socjeta` appellanti ma kellhiex opportunita`, quddiem il-Bord, li tiddiskuti l-meritu, peress li, skont hi, it-trattazzjoni kienet limitata fuq id-data tal-ittra, jigi rilevat li, mill-atti ma jirrizultax li t-trattazzjoni quddiem il-Bord giet limitata b'xi mod. Kien id-difensur tas-socjeta` appellanti li unilateralment stqarr li, fi stadju preliminarji, ried jenfasizza fuq in-nuqqas ta' ittra datata 8 ta' Gunju, 2015 mibghuta mill-awtorita` kontraenti. Ma jirrizultax, pero`, mill-atti, li t-trattazzjoni giet hekk limitata, tant li l-Bord ma iddefirixxiex

is-smigh ghall-data ohra ghall-kontinwazzjoni. Lanqas ma jirrizulta li inghata xi digriet mill-Bord li kellu jaghti decizjoni preliminari, u lanqas xi verbal fejn il-partijiet qablu li kellha tinghata biss decizjoni dwar l-izball fid-data. Fil-fatt, da parti tal-awtorita` kontraenti saret sottomissjoni fil-meritu (marbuta man-nuqqas ta' konsenja tal-kampjuni kif mitlub), u wara dan il-Bord qies is-smigh maghluq, u ma giet registrata ebda opposizzjoni ghall-fatt li l-kaz thalla ghas-sentenza.

Fid-dawl tat-tieni aggravju s-socjeta`, appellanti lanqas setghet tassumi li hi kienet ezenti milli tforni kampjuni, ghax il-kundizzjoni relattiva tghid li l-offerent "*may be exempted*" milli jforni kampjuni, u, ghalhekk, kienet fid-diskrezzjoni tal-awtorita` kontraenti titlobx jew le kampjuni. Anke meta, fil-*pre-bidding stage*, talbet kjarifika fuq kellhiex tforni kampjuni jew le, ir-risposta kienet li l-awtorita` kontraenti setghet tezenta mill-prezentazzjoni ta' kampjuni, u ma tghidx, kif targumenta s-socjeta` appellanti, li ma kellhiex ghalfejn tissupplixxi kampjuni. Inoltre, f'dan il-kaz, l-awtoritajiet kompetenti kellhom raguni tajba ghaliex talbu l-kampjuni minghand il-kumpanija appellanti. Jinsab ammess anke mis-socjeta` appellanti li xi *items* ta' Lot 1 kien fihom dizinnji u specifikkazzjonijiet differenti minn dawk li kienu qeghdin jigu moghtija fil-prezent u ghalhekk qamet il-htiega li l-kampjuni jigu ezaminati. Hawnhekk il-kumpanija appellanti tipprova tghid li dawn id-diskrepanzi huma minimi u negligibbli izda prova dwar dan qatt ma ngiebet.

Irrispettivament jekk dawn kienux negligibbli jew le, l-awtoritajiet kompetenti kellhom id-dritt li jitolbu ghall-kampjuni skont it-termini tas-sejha u l-kumpannija appellanti kellha l-obbligu jekk riedet tikkonkorri fis-sejha li tipprovdihom meta mitluba ghalihom. Dan il-kumpannija appellanti m'ghamlitux u ghalhekk hija ghandha tbatl l-konsegwenzi tan-nuqqasijiet taghha.

F'dan il-kaz, it-*tender documents* talbu haga differenti mis-soltu; mhux aktar *tubing set with sensor*, izda *tubing set* ghalih, fil-Lot 1, u *sensor* apparti, fil-Lot 2, u la hekk intalab, dak li kellu jigi offrut kien differenti minn ta' qabel. Kien ghalhekk li l-awtorita` kontraenti talbu kampjun tal-prodott offrut, u darba d-dokumenti kienu cari fejn jiddisponi li offerent ikun skwalifikat jekk ma jfornix kampjun kif mitlub, in-nuqqas ta' konsenja tal-kampjuni, f'dan il-kaz, seta' jkollha konsegwenza wahda biss.

Huwa principju li l-awtoritajiet kontraenti ghandhom jizguraw mhux biss li ma jkun hemm ebda diskriminazzjoni bejn operaturi ekonomici, izda wkoll u fuq kollox li t-termini tas-sejha jigu segwiti b'mod l-istess ghal kulhadd. F'sentenza moghtija mill-Qorti Generali (l-ewwel Awla) tal-Unjoni Ewropea fl-20 ta' Marzu, 2013, fil-kawza fl-ismijiet **Nexans France v. European Joint Undertaking for ITER and the Development of Fusion Energy (T-415/10)** intqal li:

“It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment that the Court must interpret the tender specifications.”

F’dan il-kaz, it-termini tas-sejha huma univoci dwar l-ghoti tal-kampjuni, u darba s-socjeta` appellanti giet mitluba tforni certi kampjuni, jekk riedet tibqa’ fil-girja ghall-kuntratt, kellha ssegwi l-kundizzjonijiet impost u tforni l-istess kampjuni. Mhux argument li l-prodott offrut kien ta’ kwalita` tajba u bhal ta’ qablu, (apparti li jirrizulta li kien hemm xi specifikkazzjonijiet differenti bejn il-prodotti); darba li ma qaghditx ghar-rikjesta tal-awtoritajiet kompetenti, ragjonevoli fic-cirkostanzi, biex tforni kampjuni, ma setghetx ma tigix skwalifikata.

Fir-rigward tal-aggravju marbut mat-telf ta’ depozitu, il-principju hu li min jitlef il-kawza ghandu igarrab l-ispejjez. L-izball li sar, f’dan il-kaz, fid-data tal-ittra, ma tistax isservi ta’ soljev ghas-socjeta` appellanti, ghax hi giet mitluba ghal darba darbtejn biex tforni kampjuni, u dan din is-socjeta` baqghet ma ghamlitux. Il-fatt li fl-ittra tac-cahda saret referenza ghal ittra zbaljata ma hiex ta’ rilevanza ghax teknikament lanqas kien mehtieg li tissemma d-data tat-talba; dak li johrog rilevanti mill-ittra tal-20 ta’ Novembru, 2015, tal-awtorita` kontraenti hi li s-socjeta` appellanti giet skwalifikata ghax ma ipprezentatx il-kampjuni fit-termini tas-sejha li

sarilha. Id-deskrizzjoni li uza l-Bord biex icahhadha milli tiehu lura d-depozitu, ma tistax, allura, titqies wahda mhux f'lokha.

Ghaldaqstant ghar-ragunijiet premissi, tidisponi mill-appell ta' Pharma-Cos Ltd. billi tichad l-istess u tikkonferma d-decizjoni li ta l-Bord ta' Revizjoni dwar il-kuntratti pubblici fit-22 ta' Dicembru 2015, bl-ispejjez jithallsu mis-socjeta` rikorrenti appellanti.

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