QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tlieta 14 ta' Frar 2017

Numru:

Rikors Numru: 378/16

Associated Equipment Limited (C-9340)

v.

Direttur Ġenerali tad-Dipartiment tal-Kuntratti u Central Procurement Supplies Unit u A.M. Mangion Ltd (C-4112) għal kull interess li jista' jkollhom

Dan hu appell imressaq fis-7 ta' Ottubru, 2016, mis-soċjeta` Associated Equipment Ltd. wara deċiżjoni datata 22 ta' Settembru, 2016, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-każ referenza CT2231/2014 (każ nru 976).

Dan il-każ huwa marbut ma' sejħa għall-offerti li ħareġ l-intimat "*for the*

supply of thirty two (32) operational brand new Haemodialysis machines on a pay per use basis to Mater Dei Hospital". Għal dan il-kuntratt intefgħu sebgħa offerti, fosthom waħda mis-soċjeta` rikorrenti Associated Equipment Ltd. u oħra mis-soċjeta` A.M. Mangion Ltd., bil-kuntratt jiġi rakkomandat li jingħata lill-aħħar imsemmija soċjeta` li offriet l-orħos prodott. Is-soċjeta` rikorrenti appellat minn din id-deċiżjoni lill-Bord, li b'deċiżjoni tat-22 ta' Settembru, 2016, ċaħad l-appell u kkonferma d-deċiżjoni tal-awtorita` kontraenti. Id-deċiżjoni tal-Bord hi s-segwenti:

> "Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection* dated 8 August 2016 and also through their verbal submissions during the Public Hearing held on 13 September 2016 had objected to the decision takebn by the Pertinent Authority, in that:
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> > "Associated Equipment Ltd maintains that the Evaluation of the machines was not carried out in accordance with the requested specifications as dictated in the Tender Document.
> >
> > The specifications refer to "*The blood volume control*" and the "*Automatic sodium and ultra filtration profiling mode.*" In this regard, Associated Equipment Ltd contends that their machine did include these two features whilst the Recommended Bidder's equipment being offered did not; hence the latter's cheaper rates.
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> "Having considered the Contracting Authority's "*Letter of Reply*" dated 9 September 2016 and also their verbal submissions during the Public Hearing held on 13 September 2016, in that:
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> > "Central Procurement and Supplies Unit contend that the Technical Specifications as dictated in the Tender Document, gave a holistic requirement to enable the prospective bidders to submit their best offer.
> >
> > "At the same instance, through clarifications, the Contracting Authority confirmed, again through clarifications, that the equivalent machines rendering the desired output will be

accepted. In this regard, AM Mangion Ltd's machinery, in accordance with its Technical Specifications does give the desired end result.

"Reached the following conclusions:

"This Board, after having examined the relative documentation and heard submissions from all the interested parties, opines that the issue at stake, is not whether the machines offered by both the Appellant and the Recommended Bidder, were up to the required standard, but rather whether the Evaluation Board arrived at their conclusion by taking into account the Tender Document.

"At the same instance, this Board would like to credibly opine that clarifications do form part of the Tender Document and tht all clarifications made are to be regarded as forming part of the Tender Document.

"With regards to the Appellant's Grievance, this Board notes that the two main issues being contested by Associated Equipment Ltd is the absence of the "*Blood Volume Control*" and "*Automatic Sodium and Ultra Filtration Profiling Mode*" from the machinery being offered by AM Mangion Ltd, thus a cheaper rate being quoted by the latter.

- "Blood Volume Control

"The purpose of these machines was credibly explained and elaborated by the Technical Member of Evaluation Board. This Board notes that both the machines of the Appellant and the Recommended Bidder were tested "*hands on*" for the same duration and on the same number of patients so that there prevailed a Level Playing Field.

"Both machines tested were in accordance to specifications and gave the desired output. This Board would like to refer to Reply 28 in Clarification 4 wehrein it was cle3arly stated and confirmed that "*The Contracting Authhority clarifies that as long as the machine offered gives kt/V readings, as requested, in published Technical Specifications, whether read in real time or calculated, this will be considered acceptable*".

"It has been credibly established that, equivalent equipment with different technology, will be accepted by Central Procurement and Supplies Unit, as long as the desired output results have been achieved, so that, in this particular case, both machines were fully compliant.

"The Evaluation Board through its numerous clarifications

expanded extensively on what is being required from the bidders. At the same time, again, through clarifications, the Evaluation Board dictated what will be considered as "*acceptable*".

"To be more certain of the Technical Compliancy of the machines, the latter were tested on a number of patients and the results derived proved that both the machines offered by Associated Equipment Ltd and AM Mangion Ltd gave the desired results.

"The remaining award issue was then the price. In this regard, this Board opines that the machine offered by AM Mangion Ltd was fully compliant and compiled with the clarifications made by the Contracting Authority.

"This Board credibly notes that the issue of the "*Blood Volume Control*" was also satisfied as the Recommended Bidder's system fulfilled exactly the required functionability of the product.

"In order words, the machine of AM Mangion Ltd, equipped with software & hardware would anticipate "*A drop in blood pressure*", which the "*Blood Volume Control*" will actually do. In this regard, this Board opines that the Evaluation Board acted in a transparent and fair manner in accepting an alternative machine, which when tested gave the required output results.

"This Board would also add that the clarifications made amplified the original Technical Specifications in the Tender Document and the Recommended Bidder's equipment was fully compliant to anticipate "*A drop in Blood Pressure*".

"This Board would also refer to the reply for Clarification 7 Question 3 wherein in it was emphasised that "*The Contracting Authority clarifies that as long as the <u>functional requirements</u> are ascertained, then the proposed system will be considered acceptable by the Contracting Authority*". Such were the sequence of events which this Board justifiably upholds.

- "<u>Automatic Sodium and Ultra-Filtration Profiling Mode</u>

"Again, on this issue, this Board would point out that the principle of "*Equivalency*" should apply. Another feature of the machine was that it had "*Automatic Sodium and Ultra-Filtration profiling modes*".

"The function of this feature is that when removing the water retained and toxins in kidney patients, from the Technical Evaluation, the machine offered by AM Mangion

> Ltd included automatic profiling mode for "*Ultra-Filtration Profile*" and it also included mode for "*Conductivity/Sodium Profile*" so that the features for the application of the "*Functionability*" of the machine were contained therein.
>
> "Yet again, this Board opines that the machine satisfied the inclusion of this feature and in this regard, the Evaluation Board acted in a diligent, fair and transparent manner.
>
> "At the same instance, this Board justifiably opines that the Evaluation Board did In fact assess the offers on the functionability feature of each machine which was offered and tested on the same Level Playing Field.
>
> "In view of the above, this Board finds against Associated Equipment Ltd and recommends that the deposit paid by the latter should not be refunded."

L-imsemmija soċjeta` rikorrenti issa qed tappella mid-deċiżjoni li ha l-Bord għal quddiem din il-Qorti għax issostni illi l-offerta tas-soċjeta` intimata ma kenitx *technically compliant* u kellha tiġi skartata.

Wara li semgħet it-trattazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti, din il-Qorti sejra tgħaddi għas-sentenza tagħha.

Ikkonsidrat:

Għandu jingħad, qabel xejn, li għalkemm tressqu seba' offerti, tlieta minnhom gew *short-listed* ghal testijiet ulterjuri, fosthom tal-kompetituri f'din il-kawża. It-tlett magni għaddew minn dawn it-testijiet b'suċċess, u l-għażla waqgħet fuq l-orħos offerta, dik tas-soċjeta` intimata. Is-

soċjeta` rikorrenti tilmenta li l-magni tal-offerent magħżul kien fihom nieqes żewġ speċifikazzjonijiet tekniċi mitluba fid-dokument tas-sejħa cioe`, ma kellhomx (i) *blood volume control (BVC) monitor* u (ii) *an automatic sodium and ultra-filtration profiling mode.* Il-Bord sab, min naħa l-oħra, li l-magni offruti kienu kapaċi jilħqu r-riżultat skont id-dokument tas-sejħa.

Dwar il-każ tal-*BVC monitor*, huwa fatt li l-magni tad-ditta intimata ma humiex mgħammra bl-apparat imsemmi. Dan l-apparat hu meħtieġ biex titkejjel il-pressjoni ta' pazjent waqt proċess ta' dijalisi. Il-magni offruti minn din is-soċjeta`, pero`, għandhom sistema mibnija go fihom li ma jħallux li jinħolqu każijiet ta' pressjoni baxxa. Fi kliem ieħor, il-magni huma kapaċi li jkejlu l-pressjoni tal-pazjent waħedhom u li jirreaġixxu awtomatikament jekk f'xi mument ikun hemm inżul fil-pressjoni. Dan ifisser li l-magni tas-soċjeta` intimata huma idoneji għall-iskop mitlub. Is-soċjeta` rikorrenti tgħid pero`, li darba l-offerta riedet magna b'*BVC Monitor*, magna mingħajr dak l-apparat kellha tkun inaċċettabbli.

Din il-Qorti ma taqbilx. Fl-ewwel lok, is-sejħa talbet li l-magna jkollha "*the facility of a BVC Monitor*", li jfisser li l-magna kellu jkollha l-faċilita` ta' moniteraġġ tal-pressjoni u mhux bil-fors li jkollha apparat separat għal dan il-għan. Fit-tieni lok, ir-Regolament 46(3) tar-Regolamenti dwar il-Kuntratti Pubbliċi jippermetti li offerent juri li l-prodott tiegħu

jissodisfa "*b'mod ekwivalenti l-ħtiġijiet imfissra bl-speċifikazzjonijiet tekniċi*". Anke d-dokumenti tas-sejħa jgħidu b'mod ċar li l-awtorita` kontraenti "*will accept equivalent standards*". Apparti dan, l-awtorita` kontraenti kienet ħarġet nota ta' kjarifika li kienet tgħid, b'mod ċar, li "*systems that fulfil exactly the required functionality but work in a different way may be acceptable*". Hu magħruf li n-noti ta' kjarifiki jikkostitwixxu parti integrali tad-dokumenti tas-sejħa, kif del resto jgħid l-Artikolu 6(2) tal-istess dokument tas-sejħa. Din in-nota ta' kjarifika inġiebet a konjizzjoni ta' kull min ried jitfa' offerta, u għalhekk tissodisfa l-kriterji ta' trasparenza insitu f'dawn il-proċeduri (ara, bħala rifless fuq dan il-punt, il-każ **Capece Construction Ltd. v. Bord ta' Reviżjoni dwar il-Kuntratti Pubblici**, deċiż minn din il-Qorti fil-15 ta' Diċembru 2015).

Id-distinzjoni li ppruvat tagħmel is-soċjeta` appellanti bejn *blood volume control (BVC)* u *blood volume monitoring (BVM)* ma treġix. Il-magni li offriet is-soċjeta` A.M. Mangion Ltd huma bażati fuq sistema moderna li toffri b'mod integrali "*a direct automated blood pressure measurement and control module*". Fi kliem ieħor, il-magni għandhom il-faċilita` jindunaw bi process ta' *intradialytic hypotension* fil-pazjent u dan jagħmluh tramite sistema *in-built*, u mingħajr ħtieġa ta' appart separat. Il-magni tal-offerent preferut jaħdmu b'mod differenti u bl-użu ta' komponenti differenti, pero` jwasslu għall-istess riżultat. Il-magni

għandhom sistema ta' moniteraġġ li tantiċipa każijiet ta' nżul fil-pressjoni u dawn, allura, jissodisfaw b'mod ekwivalenti l-ħtiġijiet imfissra bl-ispeċifikazzjonijiet tekniċi, u ma jistgħux jiġu miċħuda. Darba dawn il-magni kapaċi jilħqu l-istess oġġettiv li jipprovdi *monitor* separat, jaqgħu f'dak li hu aċċettabbli skont id-dokumenti tas-sejħa.

Kwindi, dak offrut mis-soċjeta` intimata kien konformi ma' dak mitlub mill-awtorita` kontraenti u seta' jiġi aċċettat.

It-tieni ilment imiss mal-*automatic sodium profiling* li l-magni tas-soċjeta` intimata, skont is-soċjeta` rikorrenti, mhumiex kapaċi jagħmlu. Mill-atti, pero`, jirriżulta li l-magni offruti mis-soċjeta` intimata kapaċi jagħmlu din l-attivita`, u dan anke b'mod awtomatiku kif mitlub. Dan, mill-att tekniku, ġie konstatat mill-Bord, b'mod li din il-Qorti ma tarax li tista' tiddisturba din is-sejba li saret mill-Bord.

Dan l-aggravju hu wkoll miċħud.

Fil-kuntest tal-aħħar aggravju marbuta mas-somma li kellha titħallas bħala depożitu, din il-Qorti tosserva li r-regolamenti infushom, li jistabbilixxu kriterji ta' kif jiġi kkalkulat id-depożitu għall-appell quddiem il-Bord, mhux qed jiġu attakkati *per se*. Id-depożitu, f'dan il-każ, ġie imqiegħed bla riservi, u d-deċiżjoni tal-Bord li tordna li jintilef dan id-

depożitu a favur id-dipartiment intimat, tidħol fil-mansjonijiet tiegħu, u hi konformi mal-kunċett li, bħala regola ġenerali, it-tellief f'kawża jbati l-ispejjeż kollha tal-kawża. Ma intweriex li jeżistu xi ċirkostanzi speċjali jew pekuljari li jissuġġerixxu mod ieħor.

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell tas-soċjeta` rikorrenti Associated Equipment Limited billi tiċħad l-istess u tikkonferma d-deċiżjoni li ħa l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi fit-22 ta' Settembru, 2016, f'dan il-każ.

L-ispejjeż jitħallsu kollha mis-soċjeta` appellanti Associated Equipment Ltd.

Silvio Camilleri Prim Imħallef	Tonio Mallia Imħallef	Joseph Azzopardi Imħallef

Deputat Reġistratur
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