

## **QORTI TAL-APPELL**

### **IMĦALLFIN**

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

**Seduta ta' nhar it-Tlieta 18 ta' Lulju 2017**

**Numru 20**

**Rikors Numru 121/17**

**OK Ltd – C3506**

**v.**

- 1. Direttur tal-Kuntratti**
- 2. Central Procurement and Supplies Unit (CPSU) fi ħdan il-Ministeru tas-Saħħa**
- 3. Segretarju Permanenti fi ħdan il-Ministeru tas-Saħħa**

**Il-Qorti:**

Dan hu appell imressaq fl-24 ta' Marzu 2017, mis-soċjeta` rikorrenti OK Ltd wara deċiżjoni datata 7 ta' Marzu 2017, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ 'il-Bord') fil-każ referenza CT 2026/2015 (każ numru 1026).

Dan il-każ huwa marbut ma' sejha għall-offerti li ħareġ il-Ministeru intimat *"for the supply of bone conductive hearing device for children and adults with a mild to severe hearing loss or single sided deafness."*

Għal dan il-kuntratt intefgħu tliet offerti, fosthom waħda mis-soċjeta` rikorrenti u oħra mis-soċjeta` Med-EI Elektromedizinische Geraete GmbH Unita` Locale, bil-kuntratt jiġi rakkomandat li jingħata lill-aħħar imsemmija soċjeta`. Is-soċjeta` rikorrenti appellat minn din id-deċiżjoni lill-Bord, li b'deċiżjoni tas-7 ta' Marzu 2017, ċaħad l-appell u kkonferma d-deċiżjoni tal-awtorita` kontraenti. Id-deċiżjoni tal-Bord hija s-segwent:

"This Board,

"Having noted this Objection filed by OK Ltd (herein after referred to as the Appellant) on 27 January 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2026/2015 listed as Case No 1025 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

"Appearing for the Appellant: Dr. Michael Tanti Dougall.

"Appearing for the Contracting Authority: Dr. Christopher Mizzi.

"Whereby, the Appellant contends that:

"a) Med-EI Elektromedizinische Geraete GmbH Unita` Locale's offer was not technically compliant since the devices which they were offering did not cater for patients under the age of 5 years.

"Since the Tender Document requested that the device is for children and adults, the latter's offer should have been discarded on technical grounds as it did not comply with this basic requirement while on the other hand, OK Ltd's device catered for all ages;

"b) The Recommended Bidder's offer failed to address the Technical Requirements relating to choice of sound processors, wearing options and power range. Since these features were

mandatory and they were not adhered to Med-EI Elektromedizinische Geraete GmbH Unita` Locale's offer was technically non compliant;

"c) The Central Procurement and Supplies Unit should have compared both UK's and Med-EI Elektromedizinische Geraete GmbH Unita` Locale's offer in order for them to discover the supremacy of the Appellant's Bid over the awarded device in all Technical Aspects and application thereof.

"This Board also noted the Contracting Authority's *"Letter of Reply"* dated 6 February 2017 and its verbal submissions during the Public Hearing held on 23 February 2017 in that:

"a) The Central Procurement and Supplies Unit contends that OK Ltd was contesting the technical submissions made by Med-EI Elektromedizinische Geraete GmbH Unita` Locale whilst, at the same time, they were not aware of the technical details of the awarded device.

"In this regard, the Contracting Authority insist that the Evaluation Board compared the technical data of the Recommended Bidder's offer to the requested Technical Specifications in the Tender Document and did not compare an offer against an offer.

"b) The Contracting Authority also maintains that the Tender Document requested that the device is to be utilised on children and adults. In this regard, the Central Procurement and Supplies Unit, on advice from the medical field, established that the ages are as follows:

"i) From birth up to five years are to be considered as infants;

"ii) From five till eighteen years are to be considered as children;

"iii) From eighteen years upwards are to be considered as adults.

"The Central Procurement and Supplies Unit confirm that the recommended Bidder's offer did cater for children as it can be used on ages from five upwards;

"c) The Contracting Authority maintains that the Evaluation process was to be carried out in a proper and just manner in that, the awarded device was the second cheapest and fully compliant and this procedure was in accordance with the Public Procurement Regulations in all aspects.

"This same Board also noted the Testimonies of the witness namely, Ms Marika Cutajar duly summoned by the Chairman of the Public Contracts Review Board.

“This Board, after having treated the merits of this case, arrived at the following conclusions:

“1. With regards to OK Ltd’s First Grievance, this Board, after having examined the relevant documentation and heard submissions made by all parties concerned, would like to first and foremost refer to Note 1, Section 4 of the Technical Specifications wherein it was clearly denoted that the device is to be applicable for children and adults.

“In this regard, this Board justifiably notes that the interpretation of the word “*Children*” has been taken to mean children of all ages, whilst, in actual fact the medical classification of children is regarded as to a different scale of ages as follows:

“1a) From birth till five years are classified as infants;

“1b) From five till eighteen years are classified as children;

“1c) Over 18 years are classified as adults.

“This statistical information has been extracted from the “*Convention on the Rights of the Child*” published by the United Nations General Assembly dated 12 December 1989 and also from medical papers, one of which is specifically dealing with Paediatric Age Categories to be used in differentiating between listing on a Model Essential Medicines List for Children.

“In this regard, this Board opines that there are clear medical yardsticks regarding the classification of ages and the age when a person can be considered as a child.

“The Tender Document requested this device for children and adults. This Board justifiably notes that Med-EI Elektromedizinische Geraete GmbH Unita` Locale’s offer did cater for children aged five years upwards so that from this Technical Aspect, his Bid was compliant and this Board is credibly satisfied that the product offered by the latter is suitable for its utilisation, the latter of which is specifically requested by the Tender Document.

“2. With regards to the Appellant’s Second Contention, this Board would like to respectfully point out that the latter is stressing the issue of comparing his offer with that of the Recommended Bidder. In this regard, this Board also noted that OK Ltd contend that prior to the award, the Evaluation Board should have carried out this comparison.

“This Board would like to justifiably state that the evaluation of Tenders are not carried out by comparing one offer to another but each offer is evaluated in its own rights by assessing its compliance with special reference to the conditions as dictated in the Tender

Document. This Board could not find any evidence that this procedure was not applied by the Evaluation Board besides the fact that the Appellant's technical assessment was not even carried out.

"At the same instance, the Central Procurement and Supplies Unit gave credible justification on why the Appellant's offer was not technically evaluated. This Board would also like to point out that it is not its jurisdiction to assume doubt on the decision taken by the Evaluation Board but rather to verify that the correct and proper procedures were adopted in awarding the Tender.

"In this regard, this Board, after hearing credible submissions, is justifiably convinced that in their deliberation, the Evaluation Board have adjudicated the offers in a fair and just manner. This Board also took into consideration the fact that during the drafting of the Tender Document, medical advice was sought in order to acquire the best possible device for the benefit of the patient.

"In this respect, this Board opines that the offer of Med-El Elektromedizinische Geraete GmbH Unita` Locale was adjudicated in a just and proper manner and that the Technical Specifications of the same fell within the parameters of the conditions as dictated in the Tender Document. In this regard, this Board does not uphold the Appellant's Second Contention.

"3. This Board would like to also point out that although OK Ltd raised the "*Psycho-Social*" aspect issue, it is convinced that the Central Procurement and Supplies Unit in choosing Med-El Elektromedizinische Geraete GmbH Unita` Locale's offer, is not, in any way, limiting the application of this device to a particular age group capriciously.

"This Board is also convinced that, since the Contracting Authority took medical advice, the latter field has other more suitable devices and care to cater for the age group up to five years of age. In this regard, this Board does not uphold OK Ltd's Third Contention.

"In view of the above, this Board finds against OK Ltd and recommends that the deposit paid by the latter should not be refunded."

L-imsemmija soċjeta` rikorrenti issa qed tappella mid-deċiżjoni li ħa l-Bord għal quddiem din il-Qorti u ressqet prinċipalment żewġ aggravji: l-ewwel, li l-Bord naqas illi jqis li d-*device* mitluba kellha tapplika għall-

etajiet kollha inkluż tfal, u t-tieni li l-prodott offert mill-kumpanija preferuta ma kinitx *technically compliant*.

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:

Trattat l-aggravju dwar in-nullita` tal-appell, hu veru li skont il-liġi l-appell kellu jiġi notifikat ukoll lill-offerent rakkomandat, ħaġa li ma ġietx mitluba li ssir mal-preżentata tal-appell, pero`, fil-mori tal-appell intalbet li ssir tali notifika, li seħħet dakinhar stess tal-ewwel seduta quddiem din il-Qorti, bl-offerent rakkomandat jagħti ruġu notifikat bl-appell. Il-kwistjoni tan-nuqqas ta' notifika ġiet sanata fl-ewwel seduta tas-smiegħ ta' dan l-appell quddiem din il-Qorti u ma jidhirx li hemm bżonn ta' provediment ulterjuri fir-rigward.

Trattat l-ewwel aggravju fil-meritu, is-soċjeta` appellanti tgħid illi l-prodott tas-soċjeta` preferuta ma kienx applikabbli għal kull pazjent iżda biss għall-pazjenti mill-eta` ta' ħames snin 'il fuq. Ġie sottomess li mil-letteratura prodotta mis-soċjeta` preferuta kien jidher ċar li l-*hearing aid* li appunto kien offrut minn din is-soċjeta` teskludi l-użu tagħha għall-pazjenti taħt l-eta` ta' ħames snin.

Irriżulta li t-talba mill-Ministeru intimat riedet li 'l fuq imsemmi prodott kellu jkun għall-użu ta' *children and adults*. Il-Bord qal li filwaqt li l-kelma *children* għandha "*justifiably*" tifsira li tkopri tfal ta' kull eta`, skont klassifikazzjoni medika u l-Konvenzjoni tan-Nazjonijiet Uniti fuq id-Drittijiet tat-Tfal, (f'din l-aħħar Konvenzjoni din il-Qorti ma setgħetx issib id-differenzi minħabba l-eta` li qal il-Bord, u di fatti l-kelma "child" ġiet definita bħala "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"), tfal taħt il-ħames snin huma klassifikati bħala *infants*, u huma t-tfal bejn ħames snin u tmintax-il sena li huma klassifikati bħala *children*. Darba li s-sejha għall-offerti kienet għal *children*, ifisser li l-prodott offrut ma kellux ikopri t-tfal ta' taħt il-ħames snin.

Din il-Qorti ma tistax taċċetta din id-distinzjoni li għamel il-Bord. Għalkemm is-sejha għall-offerti saret bil-lingwa Ingliża, persuna Maltija li tkun interessata titfa offerti mill-ewwel tifhem li t-talba hija għall-prodott li setgħet tintuża fuq tfal u adulti, u tfal ta' bejn tliet snin u ħames snin huma żgur meqjusin bħala *tfal*. Ma ġiex spjegat lill-offerenti li l-kelma *children* ma kellhiex tittiehed fis-sens ġenerali tagħha, iżda fis-sens medico-legali tagħha, u jekk il-prodott li ried il-Ministeru intimat kien maħsub li jservi biss tfal 'il fuq minn ħames snin, dan kellu jingħad b'mod ċar.

Jista' jkun li tfal taħt il-ħames snin ikollhom bżonn prodott differenti minn tfal 'il fuq minn ħames snin, pero` dan kellu jiġi indikat b'mod ċar fid-dokumenti għall-ħruġ tas-sejħa. Fit-*technical specifications* annessi mas-sejħa, din id-differenza li għamel il-Bord ma tirriżultax, għalkemm hemm speċifikat ħafna dettalji dwar xi jrid ikollu l-prodott offrut.

Mhux mistenni li kumpanija li tiddeċiedi li toffri l-prodotti tagħha wara sejħa pubblika – u mhux limitata għal sezzjoni speċjalizzata ta' manifattura – li tapprezza li l-kelma *children* għandha tifsira differenti mill-kelma *tfal*, u f'għieħ it-trasparenza li wieħed għandu jesiġi f'dawn il-materji m'għandhiex fi stadju ta' evalwazzjoni issir differenza teknika li ma saritx fis-sejħa. Biex tkun ċara, l-awtorita` kontraenti setgħet faċilment titlob *hearing aid* għall-użu ta' *children (not infants) and adults*, u għal dan in-nuqqas ta' kjarizza, m'għandhomx ibatu l-offerenti.

Il-Bord iddeċieda li jelimina mis-sejħa tfal ta' taħt il-ħames snin, meta din ma saritx fis-sejħa. Jista' jkun li *babies* sa sentejn, jitqiesu trabi u mhux tfal, pero` tfal minn tliet snin 'il fuq jissejħu żgur tfal u ma tistax tgħidilhom trabi.

Dwar it-tieni aggravju, din il-Qorti tara li, fil-verita` il-Bord abdika mid-doveri tiegħu meta ma eżaminax jekk il-prodott tas-soċjeta` preferuta



hux *technically compliant*. Il-Bord hu magħmul minn persuni tekniċi preċiżament sabiex hu jkun jista' jqis dan ir-rekwiżit b'mod dettaljat, u mhux jistrieħ fuq il-kumitat evalwattiv. Kien hażin il-Bord meta qal li:

“This Board would also like to point out that it is not its jurisdiction to assume doubt on the decision taken by the Evaluation Board but rather to verify that the correct and proper procedures were adopted in awarding the tender.”

Di fatti r-regolament 87(b) jipprovdi li l-Board għandu l-funzjoni li jindirizza “*non-compliant offers*” u r-regolamenti 90 u 91 jagħtu lill-Bord is-setgħa jappunta esperti, li l-aktar li huma meħtieġa hu proprju fejn si tratta ta' evalwazzjoni ta' materja teknika.

Il-Bord mhux Qorti ta' stħarriġ ġudizzjarju, iżda inħoloq għal tal-apposta biex jirrevedi l-konsiderazzjonijiet u l-analiżi li jkun għamel il-kumitat evalwattiv, u mhux biex jistrieħ fuq il-proċedura u jikkontenta ruħu billi jgħid li l-offerta ‘*was adjudicated in a just and proper manner*’. Darba li sar ilment li l-offerta tas-soċjeta` preferuta ma hijjex *technically compliant* il-Bord kellu jeżamina dan l-ilment mil-lat tekniku u jara jekk il-prodott offrut fil-fatt jissodisfax il-kriterji tekniċi indikati fis-sejħa.

Hu minnu li fl-añħar mill-añħar, il-kuntratt kellu jġi rakkomandat lil min joffri l-orħos prodott, iżda dan kellu jsir basta li dak il-prodott jissodisfa, fuq kollox, il-kriterji tekniċi mitluba u dan kellu jarah il-Bord darba li kellu ilment speċifiku fir-rigward.

Din il-Qorti tinnota li f'hadd, la l-kumitat ta' evalwazzjoni u lanqas il-Bord, ma eżamina l-offerta tas-soċjeta` appellanti, iżda li għara kien li wara li l-offerta tal-offerent rakkomandat għiet preżunta *technically compliant* u kellha l-orħos prezz, il-proċess waqaf hemm. Dan jidher li sar għaliex il-*"criteria for award"* espliċitament jipprovdu li *"The sole award criterion will be the price. The contract will be awarded to the cheapest priced tender satisfying the administrative and technical criteria."* (sottolinear tal-Qorti). Jista' jkun diskutibbli kemm hu għaqli li jkun hekk fejn hija involuta s-saħħa pubblika iżda dawk kienu t-termini tas-sejħa.

Jibqa' l-fatt li l-prodotti taż-żewġ kumpaniji involuti joperaw b'mod differenti, u dan kif spjega uffiċjal tas-soċjeta` appellanti quddiem il-Bord, u fid-dawl ta' dawk is-sottomissjonijiet, il-Bord kellu jeżamina jekk, bħala fatt, l-offerta tal-offerent preferut kinitx jew le *technically compliant*, u mhux jistrieħ fuq x'qallu l-kumitat evalwattiv.

Din il-Qorti, għalhekk tara li għandha tħassar id-deċiżjoni kollha tal-Bord, sabiex l-istess Bord jikkonsidra l-appell tas-soċjeta` appellanti mil-lat tekniku kollu tagħha u fid-dawl tal-konsiderazzjonijiet premessi.

Għaldaqstant, għar-raġunijiet premessi, tidisponi mill-appell tas-soċjeta` OK Ltd billi tilqa' l-istess, tħassar u tirrevoka *in toto* d-deċiżjoni li ha l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi fis-7 ta' Marzu 2017 u

App. Ċiv. 121/17

tibgħat l-atti lura lill-Bord biex dan jevalwa l-offerti kontestati jekk kienux jew le *technically compliant* fid-dawl ta' dak li intqal f'din id-deċiżjoni.

L-ispejjeż marbuta ma' din id-deċiżjoni ta' din il-Qorti jitħallsu mill-intimat Ministeru tas-Saħħa.

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