

QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tlieta 3 ta' Ottubru 2017

Numru 2

Rikors Numru 203/17

Cherubino Limited (C-3677)

v.

- 1. Dipartiment tal-Kuntratti**
- 2. Central Procurement & Supplies Unit**

Il-Qorti:

Dan hu appell imressaq fil-15 ta' Mejju 2017, mis-soċjeta` rikorrenti Cherubino Ltd. Wara deċiżjoni datata 25 ta' April 2017, mogħtija mill-Bord ta' reviżjoni dwar il-Kuntratti Pubbliċi (min hawn 'l quddiem imsejjaħ "Il-Bord") fil-każ huwa marbut ma' sejħa għall-offerti li ħareġ is-Central Procurement & Supplies Unit sabiex tiġi fornuta medicina tat-tip "*Amifampridine (3,4-Diaminopyridine) 1-mg or 20 mg scored tablets*".

Għal dan il-kuntratt, l-offerta li tefgħet is-soċjeta` rikorrenti Cherubino Ltd. Kienet l-unika waħda, iżda d-Dipartiment tal-Kuntratti kkanċella t-

talba għall-offerti għax qies li din l-offerta li saret ma kentix “*qualitatively or financially worthwhile*”. Is-soċjeta` rikorrenti appella minn din id-deċiżjoni lill-Bord, li b'deċiżjoni tal-awtorita` kontraenti. Id-deċiżjoni tal-Bord hija s-segwent:

“Having noted this Objection filed by Cherubino Ltd (herein after referred to as the Appellant) on 27 March 2017, refers to the Contentions made by the latter with regards to the cancellation of Tender of Reference CT 2042/2016 listed as Case No 1040 in the records of the Public Contracts Review Board, issued by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

“Appearing for the Appellant: Dr Danica Caruana
Dr Adrian Delia

“Appearing for the Contracting Authority: Dr Christopher Mizzi
Dr Stefan Zrinzo Azzopardi

“Whereby, the Appellant contends that:

“a) The Central Procurement and Supplies Unit insists that, at Tendering Stage, at Evaluation Stage and even at Cancellation Stage, the Appellants did not possess the necessary requisites to market the medicinal product as requested in the Tender Document.

“In this regard, the Contracting Authority pointed out that since there was only one bid and that the Appellants were not in a position to supply the product required, they had no other option but to cancel the Tender.

“This same Board also noted the Testimonies of the witness namely:

“1. Mr Mark Zammit summoned by the Central Procurement and Supplies Unit;

“2. Mr Anthony Cachia summoned by Cherubino Ltd

“This Board has also taken note of the documents submitted by:

“1. The Central Procurement and Supplies Unit which consisted of correspondence between BioMarin and Cherubino Ltd and BioMarin and the Contracting Authority itself

“2. Cherubino Ltd which consisted of correspondence between themselves and the Central Procurement and Supplies Unit

“This Board, after considering the merits of this case, arrive at the following conclusions:

“1. This Board heard and noted the lengthy submissions made by all parties concerned and in particular, the testimony of the Technical witness. However, since the jurisdiction of this Board is to determine whether the adjudication process was carried in a proper, just and transparent manner, this same Board opines that the main issues in this particular case can be considered to be those mentioned in the Appellant’s *“Letter of Objection”* dated 12 April 2017. In this regard, this Board will consider the contentions made therein.

“2. With regards to Cherubino Ltd’s contentions, this Board, after having examined the relative documentation and taken note of the Technical Expert’s testimony opines that consideration thereof should be treated under two main issues, namely, *“Reasons for Cancellation of the Tender”* and *“The Procedure adopted by the Evaluation Board”*, as follows.

“a) *“Reasons for Cancellation of the Tender”*

“This Board refers to the *“Letter of Rejection”* dated 17 March 2017, wherein it was stated that the reasons why the Central Procurement and Supplies Unit had rejected Cherubino Ltd’s bid was that the latter was neither qualitatively nor financially worthwhile while quoting Article 18.3 of the *“General Rules Governing Tenders”* version 1.14 issued by the Department of Contractson 4 January 2016, with the latter dictating the circumstances and eventualities as and when a Tender can be cancelled by the Contracting Authority.

“After having heard the Technical Evidence submitted by the witness brought under oath by the Central Procurement and Supplies Unit, this Board is not credibly convinced that the reasons given by the Contracting Authority for rejecting the Appellant’s product, as being either non qualitatively nor financially worthwhile, are justifiably applicable as it has been established all along that there was nothing wrong or non-compliant with the product being offered. At the same instance, there was no credible submission suggesting that the price of the Appellant’s product was beyond the expectations.

“In fact, this Board justifiably notes the testimony given by the Technical Expert whereby he confirmed that the product offered by Cherubino Ltd was compliant in both respects and that the reason why their offer was rejected was for other motives which will be considered later on.

“The “*Reasoned Letter of Reply*”, issued by the Contracting Authority and the submissions made during the Public Hearing, credibly establish that the actual reason why the Appellant’s offer was rejected was due to the fact that at time of submission of the Tender and also during the Evaluation Stage, Cherubino Ltd did not possess the necessary official requisites to market the product.

“In this regard, and as emphasised on numerous occasions, this Board opines that the Contracting Authority should have given the very specific reason for the rejection of the Appellant’s offer and consequently for the eventual cancellation of the Tender itself.

“In this regard, this Board upholds Cherubino Ltd’s grievance and confirms that the reasons given when rejecting the latter’s bid were incorrect. This Board also contends that in the “*Letter of Rejection*” there should also have been mentioned the real cause for cancelling the Tender.

“In this regard, this Board opines that in quoting Article 18.3 of the “*General Rules Governing Tenders*” version 1.14 issued by the Department of Contracts on 4 January 2016, the Central Procurement and Supplies Unit did not specify properly the circumstances which justified the Tender’s cancellation.

“b) “*The Procedure adopted by the Evaluation Board*”

“This Board, on many occasions opined that the Evaluation Board members should carry out their duties in a just and fair manner yet they should also apply their utmost due diligence in their adjudications.

“One of the prime factors in the due diligence process, is to ensure that the Recommended Bidder is competent in rendering his obligations in accordance with the dictated specifications at the quoted price.

“With regards to Cherubino Ltd’s contention that the Tender should not have been cancelled, this Board would like to primarily point out that the product consists of a medicinal which is centrally authorised and licensed by the European Medicines Agency so that in order for the product to be marketed, the Marketing Authorisation holder must have a local representative.

In this particular case, it has been justifiably established that the Marketing Authorisation Holder is BioMarin Ltd and that the latter had to have a representative in Malta. Through submissions and witnesses, it has also been affirmed that during the Evaluation Process, Cherubino Ltd did not have the representation of a “*Marketing Authorisation Holder*” and in this respect, the Appellant’s product could not be marketed by the latter.

“In this regard, this Board also took note of the correspondence which confirmed that the Appellant was not a representative of BioMarin Ltd, both at the time of submission of the Tender and at the time of Evaluation Stage.

“In fact, the Appellant was not representing the Marketing Authorisation Holder with effect from 8 March 2016 whilst the closing date of the Tender was 12 May 2016; hence the representation agreement had been terminated prior to the closing date of the Tender and the Evaluation Period.

“From the examination of the related documentation and testimony of the witnesses this Board is justifiably convinced that the Evaluation Board were faced with a situation where they could not award the Tender to the only Bidder who, in turn, was not authorised to market the Tendered product.

“In this respect, this Board noted that there was only one Bidder for this Tender and under the circumstance, quite correctly and diligently, the Evaluation Board had no other option but to cancel the Tender. In this regard, this Board upholds the latter decision taken by the Central Procurement and Supplies Unit.

“In view of the above, this Board finds that:

- “i. The Product offered by Cherubino Ltd was financially compliant;
- “ii. Cherubino Ltd’s product was also qualitatively compliant;
- “iii. The Reasons given by the Central Procurement and Supplies Unit for rejecting the Appellant’s Bid were unfounded.

“This Board also recommends that:

- “i. The deposit paid by Cherubino Ltd should be fully refunded;
- “ii. The Tender is to be cancelled.”

Is-soċjeta` rikorrenti issa qed tappella mid-deċiżjoni li ħa l-Bord għall-quddiem din il-Qorti, u ressqet, tista' tgħid, żewġ aggravji: l-ewwel li d-deċiżjoni tal-Bord kienet ultra/extra petita, u t-tieni, li sar apprezzament ħażin tal-fatti u tal-liġi li tirregola l-materja.

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:

Fir-rigward tal-ewwel aggravju, hu ċar mill-atti li l-kumitat tal-kuntratti ma aċċettax l-offerta tas-soċjeta` rikorrenti peress li jgħid li ma kenitx kompatibbli mal-ħtiġijiet tas-sejha. Il-Bord, pero`, qal ċar u tond li din ir-raġuni hi bla bażi. Qal anzi, li “*there was nothing wrong or non-compliant with the product being offered*” u li ma kien hemm xejn x’jindika li l-prezz tal-prodott offrut “*was beyond expectations*”. Aktar tard l-istess Bord ikkonferma li l-prodott offrut mis-soċjeta` rikorrenti kien “*compliant in both respects*”, u li, fil-verita`, l-offerta ġiet miċħuda “*for other motives*”. Wara din il-konkluzjoni, il-Bord għadda biex jeżamina u jiddeċiedi fuq ir-raġunijiet l-oħra li tressqu waqt l-udjenza bħala ġustifikazzjoni għar-rifjut tal-offerta tas-soċjeta` rikorrenti.

Din il-Qorti tara li l-Bord aġixxa ħażin f’dan il-każ. Din il-Qorti tara li, jekk iċ-ċirkostanzi hekk jiddettaw, l-awtorita` kontraenti, waqt is-smiġħ tal-appell, tista’ tbiddel ir-raġuni għaċ-ċaħda tal-offerta lit kun qed tiġi diskussa mill-Bord, pero`, meta jiġri hekk, il-Bord għandu jordna li r-raġuni jew raġunijiet il-ġodda jiġu registrati bil-miktub, u l-Bord għandu

jissospendi s-smiġ, jagħti terminu lill-appellant biex jirregola ruħu billi, jekk hekk iħoss, jippreżenta ittra ta' oġġezzjoni ġdida, u jiddiferixxi s-smieġ tal-appell għal data oħra wara l-iskadenza tat-terminu. B'hekk, l-appellant ikun imqiegħed f'posizzjoni li jiddefendi ruħu kontra r-raġuni jew raġunijiet ġodda li tressqu fil-konfront tal-offerta tiegħu. Meta quddiem il-Bord jitressqu aggravji ġodda – cioè` aggravji mhux trattati fl-ittra tar-rifjut jew fl-ittra ta' oġġezzjoni – il-Bord ma għandux jibqa' għaddej bis-smiġ, sakemm ma jkollux il-fakolta` li hekk jagħmel mill-partijiet, liema permess irid ikun ingħata b'mod espress u ċar u reġistrat bil-miktub fl-atti tal-kawża mill-Bord.

F'dan il-każ kif indikat, il-Bord ma mexxiex b'dan il-mod, u s-soċjeta` rikorrenti għandha raġun tilmenta min-nuqqas ta' smiġ xieraq fil-konfront tagħha.

Il-Bord, eventwalment iddeċieda li l-awtorita` kontraenti kellha raġuni ma taċċettax l-offerta tas-soċjeta` rikorrenti peress li skont hi, din is-soċjeta` ma kellhiex l-awtorizzazzjoni illi timporta din il-mediċina f'pajjiżna. Hawnhekk, is-soċjeta` rikorrenti ressqet l-aggravju l-iehor relattiv u tissottometti li hi ressqet dokumentazzjoni li juru li s-soċjeta` estera li timmanifattura dik il-mediċina partikolari fil-fatt kienet lesta tforniha biha, u wkoll illi hija ottjeniet l-awtorizzazzjoni meħtieġa biex timporta dan il-prodott f'Malta.

Fuq dan il-punt, din il-Qorti tirrileva li l-kwistjoni ta' liċenzji u ta' kif se jiġi impurtat il-prodott offrut ġewwa Malta ma hijiexmaterja li għandha tinteressa lill-awtorita` kontraenti jew lill-Bord. Kif jiġi esegwit il-kuntratt meta jingħata mhux kwistjoni li jrid jidħol fiha l-Bord.

Fin il-Qorti trattat punt simili fil-kawża **Joe Micallef & Son Express Skip Services Ltd v. Id-Direttur tal-Anzjani u Kura fil-Komunita`** u fis-sentenza tagħha tas-27 ta' Ġunju 2014, stabbiliet dan il-prinċipju.

Ġie osservat hekk fir-rigward:

“Inoltre, il-ligi trid li min ikun involut fi trasport ta' merkanzija perikoluza jkollu imqar persuna wahda li jkun konsulent bic-certifikat DGSA. Dan ifisser li biex l-appellat Saviour Mifsud ikun konformi mal-ligi jrid jizgura li jahtar konsulent tas-sigurta` għat-trasport li jkollu dan ic-certifikat. Mhux mehtieg li dan Saviour Mifsud personalment ikollu dan ic-certifikat, izda li jahtar konsulent b'din il-kwalifika. Din kwistjoni, pero`, li tolqot l-esekuzzjoni tal-kuntratt, u kif intqal mill-Qorti Suprema tal-Kanada fis-sentenza **Double N Earthmovers Ltd. v. Edmonton (City)**, deciza fil-25 ta' Jannar, 2007 (kaz 2007 SCC3), li kienet tikkoncerna wkoll garr ta' skart, *“to impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties. ... Whether or not the bidder is at the time of tender, capable of performing as promised is irrelevant in the light of the bidder's legal obligation to do so once its bid is accepted.”*

Mill-kumpless tač-čirkostanzi f'kaž ta' sejħa li ma tinsistix mod ieħor, mhux mehtieg li offerent ikun meta jitfa' l-offerta, f'pożizzjoni li jwettaq dak li l-obbliga ruħu li jwettaq, basta li dak li jkun jimpunja ruħu li jwettaq is-servizz skont id-dettami tal-ligijiet urgenti tal-pajjiž. L-offerent rebbieħ huwa dejjem marbut li fil-qadi ta' dmirijietu josserva l-ligijiet kollha tal-pajjiž.

Fid-dawl tal-premess, jirriżulta li kemm id-deċiżjoni tal-Bord tal-25 ta' April, 2017, kif ukoll id-deċiżjoni li ħareġ id-Dipartiment tal-Kuntratti b'ittra tas-17 ta' Marzu 2017, huma ħżiena u qed jiġu mħassra, u s-soċjeta` rikorrenti għandha titpoġġa fis-sitwazzjoni li kienet qabel il-ħruġ ta' dan ir-rifjut, biex l-offerta tagħha tiġi kkunsidrata mill-ġdid.

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell interpost mis-soċjeta` Cherubino Ltd billi tilqa' l-istess u tirriforma d-deċiżjoni li ta l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi fil-25 ta' April, 2017, billi tħassarha biss fejn irrikmandat li t-tender tiġi kanċellata u tikkonfermaha għall-bqija; tħassar ukoll, bħala konsegwenza, d-deċiżjoni li ħareġ id-Dipartiment tal-Kuntratti b'ittra tas-17 ta' Marzu 2017 u tibgħat l-atti lura lill-kumitat ta' evalwazzjoni sabiex jikkonsidra mill-ġdid l-offerta li saret mis-soċjeta` appellanti Cherubino Ltd fid-dawl tas-sejħa tal-offerti kif maħruġa.

L-ispejjeż ta' dawn il-proċeduri jiġihallu miż-żewġ intimati appellati in solidum.

Silvio Camilleri
Prim Imhallel

Tonio Mallia
Imhallel

Joseph Azzopardi
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Deputat Registratur
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