

# QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF SILVIO CAMILLERI  
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO  
ONOR. IMĦALLEF NOEL CUSCHIERI

Seduta ta' nhar il-Ġimgħa 27 ta' Ottubru 2017

Numru 12  
Appell numru 329/2017

**Krypton Chemists Limited (C-8933)**

v.

**Dipartiment tal-Kuntratti;  
Central Procurement and Supplies Unit;**

1. Dan huwa appell ta' *Krypton Chemists Limited* ["*Krypton*"] minn deċiżjoni tal-4 ta' Lulju 2017 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [L.S. 174.04]. Il-każ quddiem il-Bord ta' Reviżjoni kien dwar oġġezzjoni ta' *Krypton* kontra deċiżjoni tad-Dipartiment tal-Kuntratti ["id-Dipartiment"] illi offerta ta' *Krypton* għal kuntratt għal "*supply of environmentally friendly incontinence items*" kienet "*technically non-compliant*".

2. Il-fatti rilevanti seħnew hekk: kienet saret sejha mid-Dipartiment għal offerti għall-provvista ta' "*environmentally friendly incontinence items*". *Krypton* għamlet offerta għal ħrieqi ["*lot 3*"].
3. L-ispeċifikazzjonijiet tekniċi għal *lot 3* kif imfissra fis-sejha għal offerti kienu jridu li dawn ikollhom *double core*. B'ittra tat-18 ta' Mejju 2017 id-Dipartiment għarraf lil *Krypton* illi l-offerta tagħha għal *lot 3* ma kinitx teknikament konformi għal raġuni li giet imfissra hekk:

»when samples were tested it was concluded that they did not include the double core as requested in the technical specifications Lot 3 - absorption level.«
4. Id-Dipartiment iddeċieda wkoll illi jħassar is-sejha għal *lot 3* (fost oħrajn) billi deherlu li ma kienet saret ebda offerta li jixirqilha li tintlaqa'.
5. B'ittra tal-24 ta' Mejju 2017 *Krypton* ressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta' Revizjoni b'talba li jithassar it-tħassir tas-sejha, li tintlaqa' l-offerta tagħha u li jintraddilha d-depożitu li għamlet biex setgħet tressaq l-oġġezzjoni.
6. Bid-deċiżjoni tal-4 ta' Lulju 2017, li minnha sar dan l-appell, il-Bord ta' Revizjoni iddeċieda hekk dwar l-oġġezzjoni ta' *Krypton*:

»This board,

»Having noted the objection filed by *Krypton Chemists* (hereinafter referred to as the Appellant) on 26 May 2017, refers to the contentions made by the latter with regards to the award of Lot 3 in tender of reference CT 2005/2016 ... .. awarded by the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority).

»... ..

»Whereby the Appellant contends that:

- »a) He feels aggrieved by the decision of the Contracting Authority in rejecting his offer due to the alleged reason that his product did not include the double core which is in fact a standard integral part of these incontinence items.

»In this regard, *Krypton Chemists Ltd* maintains that the Central Procurement and Supplies Unit's decision is incorrect as their product does in fact include the double core element.

»This board also noted the Contracting Authority's letter of reply dated 20 June 2017 and its verbal submissions during the public hearing held on 22 June 2017, in that:

- »a) the Central Procurement and Supplies Unit maintains that on testing the samples given by the Appellants, it was found out that these did not meet the requested Technical Specifications, hence being technically non compliant.

»... ..

»This board, after having considered the merits of this case, arrived at the following conclusions:

- »1. This board considers this appeal to be of a technical medical nature and therefore great emphasis is being placed on the testimonies of the technical witnesses duly summoned by both the Appellant and the Contracting Authority.

»In this respect, this board, after having heard lengthy submissions, opines that this case is to be considered under two main headings, namely, *Krypton Chemists Ltd's* product compliancy [*sic*] and the validity of reasons given by the Contracting Authority for rejection of the Appellant's offer.

»a) The compliancy of *Krypton Chemists Ltd's offer*

»This board, after having examined the relative documentation and heard submissions, would like to respectfully refer to the technical specifications of the tender document wherein the Central Procurement and Supplies Unit requested the product to include the double core.

»Credible technical testimony of one of the witnesses confirmed that, in actual fact, *Krypton Chemists Ltd's* product included the double core, and it was also credibly established that all samples presented to the evaluation board included double core. At the same instance, this board was given a "hands on" demonstration of *Krypton Chemists Ltd's* product, verifying the inclusion of a double core.

»This board also noted that the technical witness duly summoned by the Contracting Authority confirmed that she did not consider this type of technology as having a double core. During the same testimony, the witness also confirmed that she was not involved in the drafting of the technical specifications of the product. From the sub-

missions and testimonies of technical witnesses, this board is justifiably convinced that the Appellant's product included the double core, so that the Appellant's product was in line with the technical specification as dictated in the tender document, hence *Krypton Chemists Ltd's* being technically compliant.

»The fact that the technical witness was not aware of such technology of double core as presented by the Appellant does not mean that the latter's product can be classified as technically non compliant.

»From the submissions it transpired also that what the technical evaluator was expecting was not in line with the dictated terminology of a double core and, in this regard, this board finds this situation as a subjective circumstance.

»One must appreciate that when a tender document is being drafted great attention and emphasis must be given to the technical specifications of the requested product. At the same instance, this board opines that ambiguous technical terms which could mean an alternative should be avoided, but the most fair and transparent procedure is to describe in detail what is being requested and for what application the product is going to be utilised for [*sic*].

»In this particular case, the double core element was not specifically and elaborately described in the technical specifications and in this regard enough credible evidence was presented to prove that *Krypton Chemists Ltd's* product was technically compliant.

»b) Validity of reasons for the rejection of *Krypton Chemists Ltd's* offer

»This board would like to first and foremost establish the real reason why the Appellant's offer was rejected, based on the submissions of the technical witness summoned by the Central Procurement and Supplies Unit, who was also a member of the evaluation board.

»The actual reason, as explicitly described, was that the double core of the nappy should be smooth all over so that no after effects on the skin of the patient would arise and cause discomfort thereafter. It also transpired that the technical witness confirmed that the double core of the Appellant's products was lumpy enough to cause damage to the patient's skin.

»In the letter of rejection dated 18 May 2017, the reason given for discarding the Appellant's Offer was:

»“When samples were tested, it was concluded that they did not include the double core as requested in the technical specifications.”

»This board has been given clear evidence and demonstrations to prove that *Krypton Chemists Ltd's* product was a double core product but the Central Procurement and Supplies Unit expected other features in the product

which could have been denoted in the technical specifications of the product.

»In this regard, this board upholds the fact that the incorrect justifications were stated by the Central Procurement and Supplies Unit for rejecting the Appellant's offer

»2. This Board, as it had done on many occasions when treating appeals on medical or health procurement, always takes the prime principle of patients' safety and comfort first and since, during the submissions, this Board was made aware that the Appellant's product might cause skin damage and discomfort to the patient, this same board recommends the following:

»1. The tender for Lot 3 is to be cancelled. In this regard, it is being recommended that ... more descriptive technical specifications are to be dictated to avoid misinterpretation and misunderstanding of what is being requested by the Contracting Authority;

»ii) This board upholds the fact that the offer submitted by *Krypton Chemists* was technically compliant. However, additional features, which should have been denoted in the original specification, were not present for the intended use of the product;

»iii) This board recommends that the deposit paid by *Krypton Chemists Ltd* is to be fully refunded.«

7. *Krypton* ressqet appell minn din id-deċiżjoni b'rikors tal-24 ta' Lulju 2017 li għalih id-Dipartiment u s-*Central Procurement and Supplies Unit* wieġbu fl-10 ta' Awissu 2017.

8. Fl-ewwel aggravju *Krypton* talbet "konferma illi l-prodott tal-appellant huwa *technically compliant*".

9. Din il-qorti taqbel ma' dak li ntqal fit-tweġiba illi dan l-aggravju huwa "superfluwu". Ma sar ebda appell minn dik il-parti tad-deċiżjoni tal-Bord ta' Reviżjoni illi l-prodott ta' *Krypton* huwa teknikament konformi fis-sens li għandu *double core* u għalhekk ma huwiex meħtieġ li jitressqu raġunijiet għala dik il-parti tad-deċiżjoni għandha tiġi konfermata. Il-qorti għalhekk ma hijiex sejra tqis aktar dan l-aggravju.

10. Fit-tieni aggravju *Krypton* tgħid illi l-Bord ta' Revizjoni għamel "apprezzament ħazin tal-fatti". Komplet tfisser l-aggravju hekk:

»Illi fit-tieni parti tad-deċiżjoni tiegħu, u allura l-parti fejn ingustament u mingħajr ebda bażi ġie deċiż illi l-prodott tas-soċjetà appellanti ma kellux jerga' jiġi re-integrat fil-proċess, il-bord straħ fuq ix-xieħda tal-infermiera Maria Aquilina illi kienet ukoll membru tal-bord tal-evalwazzjoni għal din l-offerta;

»... .. huwa ovvju anke mid-deċiżjoni tal-Bord tar-Revizjoni illi l-hekk imsejħa xieħda teknika tad-Dipartiment tal-Kuntratti, *ex parte*, lanqas biss kienet dedotta [*sic*] ma x'inhu eżatt dan id-*double core*. Dan huwa evidenti mix-xieħda tagħha stess fejn fil-fatt hija sostniet illi, għaliha, *double core* ifisser ili l-wiċċ tal-prodott ma jkunx "*clumpy*".

»Illi mingħajr ma nidħlu fit-tifsira ta' *double core*, għaliex din ġiet ampjament imfissra u mifhuma fil-proċeduri quddiem il-bord, hija tal-għageb kif membru tal-bord tal-evalwazzjoni ma jafx it-tifsira ta' *double core*, terminu rikonoxxut bħala wieħed standard ta' kif wieħed jirreferi għal kif ħrieqi huma magħmula minn ġewwa! B'kull rispett dovut, anke jekk ma tkunx espert imma tieħu d-definizzjoni tat-terminu *double core* mis-sens tagħha, tista' tasal għat-tifsira illi din qiegħed [*recte*, din qiegħda] tirreferi għal kif il-prodott, f'dan il-każ, ħrieqi, huma magħmulin minn ġewwa u mhux għal mod ta' kif allegatament u skond din l-hekk imsejħa xieħda esperta, jidher il-wiċċ tal-prodott.

»... ..

»Illi għalkemm hija [*recte*, huwa] evidenti l-fatt illi t-testimonjanza ta' Maria Aquilina ma kienet esperta xejn anzi pjuttost waħda suġġettiva, il-Bord tar-Revizjoni ingustament għamel apprezzament skorrett ta' dak illi komplet tgħid Aquilina fix-xieħda tagħha meta sostniet illi, għaliha, *double core* ifisser illi l-prodott ma jkunx "*clumpy*" u li waslet għal din il-konkluzjoni billi, matul is-smiġħ tal-oġġezzjoni, għamlet *test* illi l-Bord tal-Evalwazzjoni jagħmel biex jara jekk prodott għandux *double core*, liema test kien billi sempliciment tpoġġa *sample* ta' dan il-prodott mad-dawl tat-tieqa biex ikun jista' jidher minn xiex jikkonsisti ġewwa tal-prodott.

»Illi huwa fl-umli fehma tal-appellanti illi dan m'huwiex mod ta' kif isir *test* fuq prodott. ... ..

»Illi huwa proprju f'ċirkostanzi bħal dawn illi l-Qorti tal-Appell tista' tiddeċiedi illi tiddisturba deċiżjoni jew sentenza mogħtija fl-ewwel istanza. ... ..«

11. Dan l-aggravju huwa misinterpretazzjoni tad-deċiżjoni tal-Bord ta' Revizjoni. Il-bord ma qagħadx fuq dak li fehmet ix-xhud Aquilina b'*double core*, tant illi fil-fatt, kontra dak li fehmet ix-xhud, il-bord sab illi l-prodott ta' *Krypton* tassew kellu *double core*. Il-Bord ta' Revizjoni warrab l-offerta ta' *Krypton* mhux għax deherlu li dak il-prodott ma

kellux *double core* iżda għax deherlu li, għalkemm kellu *double core*, kellu nuqqasijiet gravi oħra li ma jagħmlux tajjeb biex jintuza.

12. Effettivament li qal il-Bord ta' Revizjoni hu illi, fejn jidhlu prodotti mediċi, hemm kondizzjoni fundamentali, u daqshekk fundamentali li hija impliċita, li dawk il-prodotti ma jagħmlux ħsara lill-pazjent. Hija din il-kondizzjoni li l-bord sab li ma tħarsitx fil-prodott ta' *Krypton*, u mhux il-kondizzjoni tad-*double core*.

13. Dan l-aggravju huwa għalhekk miċħud.

14. Fit-tielet aggravju *Krypton* tgħid illi ma ngħatatx smiġħ xieraq:

»... ..is-soċjetà appellanti ma kellhiex opportunità illi tirribatti allegazzjonijiet magħmula mill-Infermiera Aquilina meta qalet illi l-prodott tas-soċjetà appellanti huwa "*clumpy*" u li jista' joħloq xi irritabilità lill-pazjent.

»Illi fuq dan l-argument, illi jrid jingħad ma kienx raġuni għall-iskwalifika tal-offerta tal-esponenti, il-Bord tar-Revizjoni stess isottometta illi l-argument dwar jekk il-prodott huwiex *clumpy* jew le huwa wieħed soġġettiv:

»"From the submissions it transpired also that what the technical evaluator was expecting was not in line with the dictated terminology of a double core and, in this regard, this board finds this situation as a subjective circumstance"

»Illi, minkejja l-fatt illi dan l-argument hekk kif imqajjem biss tul is-smiġħ tal-proċeduri huwa wieħed soġġettiv u mingħajr ebda sustanza ta' evidenza, huwa għall-aħħar ingust il-fatt illi s-soċjetà appellanti ma kellhiex l-opportunità xierqa illi tirribatti dawn l-allegazzjonijiet infondati magħmula minn xiehda *ex parte* illi fiha nnifisha ma tikkostitwix mezz ta' prova iżda sempliciment allegazzjoni difensiva. Bħala stat ta' fatt, dan il-prodott qiegħed jiġi fornut mis-soċjetà appellanti f'diversi djar tax-xjuħ pubbliċi u sptarijiet privati u qatt ma sar kumment simili bħal dak allegat mis-Sinjura Aquilina.

»*Oltre* dan ukoll, però, hija aktar ingusta l-fatt [*recte*, huwa aktar ingust il-fatt] illi l-motivazzjoni tad-deċiżjoni meħuda mill-bord kienet l-allegazzjoni *ex parte* u dan mingħajr ma ngħatat opporunità lis-soċjetà esponenti sabiex tirribatti tali allegazzjonijiet konkreti. «

15. Għal darba oħra *Krypton* qiegħda tinterpreta ħażin id-deċiżjoni tal-Bord ta' Revizjoni. Dak li l-bord qies bħala "soġġettiv" ma kienx l-

aċċertament tal-fatt illi l-materjal huwa “*clumpy*” iżda l-fehma tax-xhud illi materjal b’hal dak ma jitqiesx *double core*. Jerga’ jingħad illi l-Bord ta’ Revizjoni warrab l-offerta ta’ *Krypton* mhux għax qabel max-xhud li l-prodott ma kellux *double core* iżda għax sab li jista’ jkun ta’ ħsara għall-pazjent.

16. Huwa minnu illi waqt is-smiġġ quddiem il-Bord ta’ Revizjoni effettivament inbidlet il-kontestazzjoni, li ma baqgħetx dwar jekk il-prodott kellux *double core* u saret dwar jekk huwiex ta’ ħsara għall-pazjent. Effettivament gara b’hallikieku tressqet eċċezzjoni ulterjuri msejsa fuq konsiderazzjonijiet ta’ interess pubbliku, viz. is-saħħa pubblika. Dan jista’ jolqot id-deċiżjoni dwar l-ispejjeż – fil-fatt il-Bord ta’ Revizjoni ordna li d-depożitu biex saret l-oġġezzjoni jintradd lil *Krypton* – iżda ma jwassalx għan-nullità tad-deċiżjoni tal-bord għax, kontra dak li jingħad fir-rikors tal-appell, *Krypton* kellha fakoltà tirribatti x-xieħda tal-Infermiera Aquilina. Barra minn hekk, ma hemm xejn li jżomm lill-bord milli joqgħod fuq xieħda *ex parte* jekk jidhirlu li dik ix-xieħda hija ta’ min joqgħod fuqha. Ladarba mbagħad irriżulta b’ħala fatt lill-Bord ta’ Revizjoni li l-prodott huwa ta’ ħsara għall-pazjent, il-bord għamel sew li, min-naħa l-waħda ħares l-interess pubbliku billi warrab il-prodott u, min-naħa l-oħra, ħares ukoll l-interess ta’ *Krypton* billi ħassar is-sejħa sabiex hekk din issir mill-ġdid u *Krypton* ikollha opportunità terġa’ tagħmel offerta bi prodott aħjar.

17. Dan l-aggravju huwa għalhekk miċħud.



18. Fl-aħħar aggravju *Krypton* tgħid illi d-deċiżjoni tal-Bord ta' Revizjoni

kienet *ultra vires*:

»... ..kienu ċari t-talbiet illi saru mill partijiet konċernati quddiem il-Bord tar-Revizjoni, dan billi s-soċjetà appellanti talbet ir-revoka għall-ikkancellament tad-deċiżjoni tal-bord tal-evalwazzjoni u sussegwentement l-għotja tal-kuntratt fil-waqt illi d-Dipartiment tal-Kuntratti talab illi l-oġġezzjoni tiġi skartata.

»Il-Bord tar-Revizjoni però mhux tali ... .. iddeċieda b'mod għall-aħħar erroneu iżda talli mar *oltre* minn hekk meta irrakkomanda illi s-sejha għandha terġa' tinħareġ b'tali mod illi jkun fiha, bħala parti mit-*technical specifications*, dak illi l-Infermiera Aquilina qalet illi ma jogħgobhiex fil-prodott tas-soċjetà appellanti.

»Illi l-funzjonijiet tal-Bord tar-Revizjoni huma ċari u limitati għal dawk illi huma mfissra f'artiklu 83 ta' L.S 174.04. Imkien fis-setgħat mogħtija lilu ma jgħid illi l-Bord tar-Revizjoni għandu l-jedd illi jordna kif u xiex ikunu t-*technical specifications* ta' offerta.

»Illi għalhekk, id-deċiżjoni infondata u ferm *oltre* l-poteri stabbiliti tal-Bord tar-Revizjoni in kwantu r-rakkomandazzjoni tiegħu illi għandhom jinkitbu *tender specifications* aktar dettaljati hija nulla u invalida u għanda tiġi revokata minnufih.«

19. Il-Bord ta' Revizjoni ma ordnax x'għandhom ikunu l-ispeċifikazzjonijiet

teknici tal-prodott li għalih issir sejha għal offerti; il-bord għamel biss rakkomandazzjoni. Effettivament qal illi għalkemm huwa ovvju li prodott mediku ma għandux jagħmel deni lill-pazjent, u li din hija kondizzjoni hekk fundamentali li hija implicita, tant illi prodott bħal dak għandu minnufih jitwarrab, madankollu, billi milli jidher dak li hu ovvju ma huwiex ovvju għal kulhadd, ikun aħjar illi l-fatturi li jagħmlu deni lill-pazjent jissemmew speċifikament biex jintehha kull dubju.

20. Id-deċiżjoni tal-Bord ta' Revizjoni, fil-fehma ta' din il-qorti, kienet ġusta

u għaqlija għax ħarset l-interess pubbliku bla ma ippreġudikat l-interessi ta' *Krypton* li għadha tista' tagħmel l-offerta tagħha meta terġa' ssir is-sejha.

21. Dan l-añhar aggravju wkoll huwa għalhekk miċhud.

22. Il-qorti għalhekk tiċhad l-appell u tikkonferma d-deċiżjoni appellata.

Fiċ-ċirkostanzi, u għar-raġunijiet mogħtija fuq, l-ispejjeż tal-appell jin-qasmu bin-nofs bejn il-partijiet.

Silvio Camilleri  
President

Giannino Caruana Demajo  
Imħallef

Noel Cuschieri  
Imħallef

Deputat Registratur  
Id