

QORTI TAL-APPELL

IMĦALLFIN

**S.T.O. PRIM IMĦALLEF JOSEPH AZZOPARDI
ONOR. IMĦALLEF JOSEPH R. MICALLEF
ONOR. IMĦALLEF TONIO MALLIA**

Seduta ta' nhar il-Ġimgħa 12 ta' Lulju 2019

Numru 12

Rikors numru 93/19

Labo-Pharm Ltd (C-39816)

v.

Universita` ta' Malta u Technoline Ltd

Il-Qorti:

Dan hu appell imressaq fid-9 ta' April, 2019, mis-soċjeta rikorrenti Labo-Pharm Ltd. wara deċiżjoni datata 20 ta' Marzu, 2019, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'l quddiem imsejjaħ "il-Bord") fil-każ referenza MEDE/MPM/UOM/31-2018 (każ numru 1277).

Dan il-każ hu marbut ma' sejha għall-offerti li ħarġet l-Universita` ta' Malta għas-*"supply, delivery and installation and commissioning of an energy efficient UV-VIS-NIR Spectrophotometer system for the Faculty of Engineering"*. Għal dan il-kuntratt intefgħu diversi offerti, fosthom waħda mis-soċjeta` rikorrenti, u oħra mis-soċjeta` intimata Technoline Ltd. Il-kumitat ta' evalwazzjoni ddeċieda li jirrakkomanda li l-kuntratt jingħata lis-soċjeta` intimata Technoline Ltd. Is-soċjeta` rikorrenti Labo-Pharm Ltd. ressqet oġġezzjoni quddiem il-Bord, iżda dan ċaħad l-appell u kkonferma d-deċiżjoni tal-kumitat ta' evalwazzjoni.

Id-deċiżjoni tal-Bord hija s-segwenti:

"This Board,

"having noticed this Objection filed by Labo-Pharm Limited (herein after also referred to as the Appellants) on 6 February 2019, refers to the claims made by the same Appellants with regard to the Tender of Reference MEDE/MPM/UOM/31/2018 listed as Case No 1277 in the records of the Public Contracts Review Board, awarded by the University of Malta (herein after also referred to as the Contracting Authority).

"Appearing for the Appellants: Dr John L Gauci

"Appearing for the Contracting Authority: Dr Oriella de Giovanni

" Mr Tonio Mallia

"Whereby, the Appellants contend that:

"a) the Preferred Bidder's offer does not meet the technical specifications. In this respect, the Appellants are stating that this type of equipment has a very restrictive market and in fact, only the Appellant Company can supply the equipment with such specific requirements.

“This Board has also noted the Contracting Authority’s ‘Letter of Reply’ dated 4 February 2019 and its verbal submissions during the hearing held on 7 March 2019, in that:

“a) the University of Malta insists that the product being offered by the Preferred Bidder provides all the functions as requested in the Tender Document and is cheaper than that being offered by the Appellants. In this respect, the Contracting Authority confirms that the alleged shortcomings mentioned by Labo-Pharm Limited, have been thoroughly checked and also verified through the technical literature of the Preferred Bidders’ offer and that the latter’s offer conforms with the stipulated technical requirements.

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

“1. Mr Jan Wuelfken, who was duly summoned by Labo-Pharm Limited;

“2. Dr Eng Stephen Abela, who was duly summoned by the University of Malta.

“This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned, opines that what merits consideration are the claims made by Labo-Pharm Limited.

“1. The Appellants are claiming that the product which the Contracting Authority requested with the specific stipulated technical specifications can only be supplied from one Bidder and that is, Labo-Pharm Limited, so that any other offer should be deemed as technically non-compliant.

“At the same instance, the Appellants claim that the Preferred Bidder’s offer failed in the following technical requirement:

““Item 1 ii. h. - Photometric range: 10 Abs or better.

““Item iv. Operating Modes a. Must be capable of: ...ii. Measurement of absolute reflection and transmission, at user definable angles, for s-polarized and p-polarized light.

““iii. Absolute reflection and transmission measurements, for s-polarized and p-polarized light must use a single baseline for any angle at a given polarization.

““v. Angular control of sample rotation (0-360 deg) and detector position (10 deg – 350 deg)

“vi. Angular control provide capability for absolute specular reflectance measurement at positive angles of incidence and negative angle of incidence.

“vii. Control over incoming and detected beam geometry. Incoming beam controllable in vertical and horizontal angles.”

“This Board refers to extracts of the testimony of the technical witness duly summoned by Labo-Pharm Limited and which testimony had the sole objective to identify the technical deficiencies of the Preferred Bidder’s offer, as follows:

“Lawyer: With regards to item 1 (II), photometric range, 10 absorbance or better, why are we saying that the recommended bidder does not meet that specification?

“Witness: For that I truly would need to know what is the instrument there aiming to be compliant.

“Chairman: How do you know exactly what the preferred bidder offered?

“Witness I do not know that

“Chairman: So how can you say that it is not compliant?

“Witness: Because I know that the 10 absorbance is the value, it is a specific value, no other supplier has this value in their specification sheets. I know because I am doing this for 18 years and I know the possible competition in this market. So there are 3 or 4 or 5 and none of them has 10 absorbance value in their specifications.

“Chairman: But you have not seen the specifications of the preferred bidder’s offer.

“Witness: No of course not.”

“With regards to the second alleged deficiency of the successful offer, an extract on this regard from the same technical witness would perhaps illustrate the basis on which the alleged claim was based upon, as follows:

“Lawyer: Second one is operating modes must be capable of measurement of absolute reflection and transmission at user definable angles for S-polarized and P-polarized light.

“Lawyer: Your offer offers free choice. What about the competition? What does it offer in relation to this?

“Witness: It would be very difficult and very technical to explain this point of measuring a base line only for a specific angle because this is only possible with a specific setup which we are using in this one where the detector is moving around. So very technical. I am fine to do that.”

“With regards to the third alleged deficiency, an extract from the testimony of the same witness, as follows:

““Lawyer: *The next one is angular control of sample rotation from 0 to 360 degrees and the detector position 10 degrees to 350 degrees.*

““Witness: *So this is for sure a unique possibility we have.*

““Chairman: *You are saying a unique possibility which you have. I want to know why the Appellant’s offer does not meet this requirement. That is my duty here.*

““Witness: *This is not existent or if somebody shows me in a brochure that it works but I know that this does not.*””

“With regards to the fourth alleged claim, the testimony of Mr Wuelfken continues as follows,

““Lawyer: *Number 4 is angular control provide capability of absolute specular reflectance measurement provided positive angles of incidence at negative angle of incidence.*

““Witness: *It is again something because we are moving around. We are cutting a circular, one is plus and one is minus and this is only possible when you are doing these type of setups. So it is question of how you set up the optics because you are setting it like this and we can define plus and minus angle, gives a higher accuracy for the measurement.*””

“With regard to the last alleged claim, an extract from the same testimony is as follows,

““Lawyer: *And the last one is control over incoming and detecting beam geometry, incoming beam controlling vertical and horizontal angles.*

““Lawyer: *Can you just briefly explain the importance of having free choice of angle like your system as compared to fixed angles which is provided by the competitor.*

““Witness: *The main point is to give you flexibility and not be thinking that only one angle of incidence is the right one and this typical example is for example if you think about the solar cell and the solar cell is measured at 0 degrees angle so the light is at 12 o’clock in Valletta hitting the surface. But what about 7 o’clock in the evening, the light is coming in a complete different angle. Maybe 80 degrees and a lot of people were interested in measuring solar cells are....*””

“2. This Board opines that, from the above quoted extracts from the testimony of Mr Jan Wuelfken, the latter explained what Labo-Pharm Limited’s product can achieve, yet he did not present proof or any evidence to justify any one of the alleged claims made by the

Appellants. In this regard, this Board would respectfully point out that the claims made in the Appellants' "*Letter of Objection*" were not justifiably substantiated by evidence of any shortcomings of the Preferred Bidder's offer.

"3. At the same instance, this Board noted that all the deficiencies alleged by the Appellants were thoroughly checked and also confirmed in the technical literature of the manufacturer of the equipment, and that all the functions which were stipulated in the Tender, were present.

"4. This Board would also refer to the testimony of Dr Eng Stephen Abela, confirming that Technoline Limited's offer was capable of performing all the functions, as stipulated in the Tender,

"Chairman: Control over incoming beam geometry. Dik għidtieli. Jigifieri minn dawn il-punti kollha, skont intom bħala evaluators, rajtu li l-offerta tal-preferred bidder it meets such conditions?"

"Xhud: Yes."

"From the above submissions and testimony of the technical witnesses, this Board does not find any justifiable need to appoint an expert. What Dr Eng Stephen Abela submitted under oath was credible enough to prove that, the University of Malta was not requesting the best equipment on the market but rather equipment which would conform with the technical requirements of the Tender. Also, the Appellant and the witness which the latter produced at no point pointed out specific issues in the Preferred Bidder's offer which they alleged were technically non-compliant. In this respect, the successful offer was compliant and the cheapest.

"In conclusion, this Board,

"a) after having heard submissions from the technical witnesses, does not find any justifiable reason to uphold the Appellants' contentions;

"b) is comfortably convinced that the Contracting Authority, in its own interest, has selected a compliant equipment;

"c) confirms that when making their technical submissions, the Appellants did not present any credible technical evidence to justify their alleged claims.

"In view of the above, this Board,

"i) does not uphold the contentions made by Labo-Pharm Limited;

"ii) upholds the University of Malta's decision in the award

of the Tender;

“iii) directs that the deposit paid by the Appellants should not be refunded.”

Is-soċjeta` Labo-Pharm Ltd. issa qed tappella mid-deċiżjoni li ħa l-Bord għal quddiem din il-Qorti u ressqet aggravju prinċipali fis-sens li l-offerta tas-soċjeta` Technoline Ltd. ma kinitx konformi ma' dak rikjest fis-sejħa u wħud mir-rekwiżiti elenkati fl-istess sejħa ma jistgħux jintlaqgħu mill-prodott offrut mill-imsemmija soċjeta` intimata.

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:

Illi f'dan il-każ is-soċjeta` rikorrenti qed tilmenta mill-fatt li l-offerta tas-soċjeta` Technoline Ltd. mhijiex konformi ma' wħud mir-rekwiżiti tekniċi elenkati *f' section 4 - Technical Specifications* tal-offerta. Tajjeb li jingħad illi l-Bord eżamina dawn il-lanjanzi u osserva illi *“all the deficiencies alleged by the appellants were thoroughly checked and also confirmed in the technical literature of the manufacturer of the equipment, and that all the functions which were stipulated in the tender were present”*.

Is-soċjeta` appellanti qed tinsisti li dan ma hux il-każ. Il-materja hija waħda pjuttost teknika u f'każijiet bħal dawn l-awtorita` kontraenti għandha diskrezzjoni wiesgħa biex tiddetermina liema hi l-aħjar offerta konformi mat-termini tas-sejħa. Din il-Qorti lanqas ma hi kompetenti biex tinvestiga kwistjoni purament teknika u trid bilfors tagħti ċerta affidament lill-persuni tekniċi li eżaminaw il-każ. Kif osservat din il-Qorti fil-kawża "**Steelshape Ltd v. Direttur tal-kuntratti et**" deċiża fis-7 ta' Awwissu, 2013.

*"Qabel ma jiġi ttrattat il-meritu tal-appell tajjeb illi din il-Qorti, qabel xejn, tirribadixxi li bħala Qorti tat-"tiolet istanza" f'dawn it-tip ta' każijiet, ma hux mistenni li din tidhol biex teżamina d-dettalji tekniċi ta' kull offerta biex tara jekk offerta partikolari tissodisfax jew le r-rekwiżiti tekniċi mitluba fis-sejħa għall-offerti. Din il-Qorti, kif kostitwita, la tista' u lanqas għandha x-xjenza teknika meħtieġa biex tevalwa materji li jmorru lil hinn mill-kompetenza tagħha. Kif qalet il-Qorti Ewropea ta' Ġustizzja (ECJ), f'każ numru T-300/07 fl-ismijiet **Evropaiki Dynamiki v. Commission**, deċiża fid-9 ta' Settembru, 2010:*

"As a preliminary point, it should be recalled that the Commission enjoys a broad margin of discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (see, to that effect, Case T-145/98 ADT Projekt v Commission [2000] ECR II-387, paragraph 147; Case T-148/04 TQ3 Travel Solutions Belgium v. Commission [2005] ECR II-2627, paragraph 47; and Case T-437/05 Brink's Security Luxembourg v. Commission [2009] ECR II-0000, paragraph 193."

"Dak il-każ, hu veru, kien jolqot każ mistfarreġ minn kummissjoni ewropeja, pero`, il-prinċipju jibqa' li, bħala qorti ta' revizjoni, il-kompetenza ta' din il-Qorti hija neċessarjament ċirkoskritta."

Hekk ukoll din l-istess Qorti fil-kawża "**Cherubino Ltd. v. Id-Direttur (Generali) tal-Kuntratti et**", deċiża fis-6 ta' Frar 2015, osservat illi:

“Qabel xejn għandu jingħad illi din hija, materja ta’ kriterji tekniċi li dwarhom bħala regola din il-Qorti ma tid-disturbax l-apprezzament magħmul minn bord tekniku.

“... ”

“Għal darba oħra din il-Qorti tosserva illi fuq materja ta’ apprezzament tekniku bħala regola ġenerali u sakemm ma jintwerewx raġunijiet gravi u konvinċenti ma tid-disturbax apprezzament magħmul minn bord tekniku.”

F’dan il-każ ma jirriżultawx ċirkustanzi li jitolbu tħassir tal-istħarriġ li għamlu kemm l-awtorita` kontraenti u kemm il-Bord. Hu ċar li l-Universita` ma talbitx li tingħata l-aqwa apparat li jeżisti fis-suq, imma talbet apparat li jaqdi l-ħtiġijiet tagħha u aċċettat offerta konformi mar-rekwiżiti tekniċi mitluba.

L-offerta tal-offerent magħżul hija madwar €55,000 orħos minn dik tas-soċjeta` appellanti. Huwa wkoll miċħud illi l-*attachments* offruti mis-soċjeta` preferuta huma kontra ħlas addizzjonali, u din l-istess soċjeta` stqarret b’mod ċar li dawn huma parti mill-prezz. Isegwi li ebda ħlas ulterjuri ma jista’ jiġi mitlub għall-dawn l-*attachments*. Jiġi rilevat li wieħed mill-persuni li ħareġ id-dokumenti tas-sejħa kien fuq il-bord tal-awtorita` kontraenti (l-ingineer Stephen Abela), u dan xehed li eżamina l-offerti a bażi tal-kriterji tekniċi indikati u li l-offerta tas-soċjeta` preferuta kienet l-orħos u fuq kollox kompatibbli ma’ dak li riedet l-Universita` ta’ Malta. Kwindi din il-Qorti, bħal Bord qabilha, ma’ tara xejn x’tiċċensura fid-deċiżjoni li ħadet l-awtorita` kontraenti.

Għaldaqstant, għar-raġunijiet premessi tidisponi mill-appell ta' Labo-Pharm Ltd. billi tiċċhad l-istess u tikkonferma d-deċiżjoni li ħa l-Bord fl-20 ta' Marzu, 2019, bl-ispejjeż relatati ma' dan l-appell jitħallsu mis-soċjeta` appellanti Labo-Pharm Ltd.

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