QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF ANTHONY ELLUL

Seduta ta' nhar il-Ħamis, 25 ta' Frar, 2021.

Numru 13

Appell numru 281/2020/1

***Prohealth Limited* (C-18246)**

v.

***Central Procurement and Supplies Unit* tal-Ministeru tas-Saħħa; id-Direttur tal-Kuntratti; u *Medina Healthcare Limited* (C-44038)**

1. Dan huwa appell ta' *Prohealth Limited* [*Prohealth*] minn deċiżjoni tas-27 ta' Awissu 2020 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi [il-Bord ta' Reviżjoni], imwaqqaf taħt ir-Regolamenti dwar l-Akkwist Pubbiku [L.S. 601.03], li ċaħad oġġezzjoni tagħha kontra deċiżjoni tas-*Central Procurement and Supplies Unit* [l-awtorità kontraenti] li biha twarrbet offerta tagħha wara sejħa pubblika għal offerti għal kuntratt għal "*supply of cleaning sanitizing wipes*" u l-kuntratt ingħata lil *Medina Healthcare Limited* [*Medina*].

2. Il-fatti relevanti seħħew hekk: kienet saret sejħa mill-awtorità kontraenti għal offerti għall-provvisita ta' *wipes*. Fost il-kondizzjonijiet tas-sejħa hemm dik taħt *technical specifications* li tgħid hekk:

> »Cleaning and sanitising wipes, containing both appropriate disinfectants (not based on alcohol) as well as surfactants to be effective for both cleaning as well as disinfection of surfaces and equipment used within the health care settings.
>
> »1. … … …
>
> »2. Wipes must be able to be applied using unprotected hands (without gloves).
>
> »3. Demonstrates effectiveness against a wide range of micro-organisms that includes bacteria (including MRSA and Mycobacteria) as well as viruses (including Influenza, hepatitis B, hepatitis c and norovirus). Specifically, the product should provide at least a 99.99% reduction within a 30 second contact time, when tested using EN13727, for the following organisms:
>
> »… … …
>
> »All claims must be supported by reports of analyses, using EN methods, undertaken in independent ISO accredited laboratories.«

3. Għal dawn l-ispeċifikazzjonijiet tapplika *note 3* li tgħid "*no rectifications shall be allowed. Only clarifications on the submitted information may be requested*". Iżda dwar id-dokumenti li jagħmlu prova tal-ispeċifikazzjonijiet tal-prodott tapplika *note 2* li tgħid hekk:

> »2. A) Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.
>
> » B) Tenderers will be requested to rectify/submit only missing documents within five (5) working days from notification. No changes to the information provided in the Literature submitted will be allowed. Literature submitted shall be rectifiable only in respect of any missing information. … … …"

4. L-offerti kellhom isiru sal-10 ta' Jannar 2019.

5. Fit-3 ta' Jannar 2019 l-awtorità kontraenti bagħtet nota lill-oblaturi bi tweġibiet għal mistoqsijiet li kienu għamlu wħud minnhom. Waħda mill-mistoqsijiet kienet dwar il-kondizzjoni li l-prodott kellu jkun effikaċi

"*within a 30 second contact time*", u l-oblatur staqsa "*if these 30 seconds refer to dirty conditions*". It-tweġiba kienet illi:

> »Since the wipes are intended for use in clinical settings where soiling would be anticipated, compliance with the 30 second contact time … … … would obviously need to be demonstrated in dirty conditions.«

6. Saru offerti minn *Prohealth* u minn *Medina*. Fil-5 ta' April 2019, wara li għalaq iż-żmien għall-offerti, l-awtorità kontraenti stiednet lill-oblaturi jissottomettu ċertifikati ġodda li juri li l-prodott tagħhom seta' jintuża mingħajr ingwanti u li t-*test* għall-effett batteriċida tal-prodott ikun sar "*under dirty conditions*". *Medina* fiż-żmien mogħti għalhekk ippreżentat ċertifikati biex juru dan.

7. Intlaqgħet l-offerta ta' *Prohealth* u l-kuntratt kellu jingħata lilha, iżda saret oġġezzjoni minn *Medina* u l-Bord ta' Reviżjoni, b'deċiżjoni tal-25 ta' Ottubru 2019, ħassar l-għoti tal-kuntratt lil *Prohealth* u ordna li l-offerti jitqiesu mill-ġdid. Ma sar ebda appell minn din id-deċiżjoni tal-Bord ta' Reviżjoni.

8. Imbagħad b'ittra tat-12 ta' Ġunju 2020 *Prohealth* ġiet mgħarrfa illi, wara li l-offerti tqiesu mill-ġdid, instab li l-offerta tagħha ma kinitx l-orħos waħda u illi l-kuntratt kellu jingħata lil *Medina.*

9. Fit-22 ta' Ġunju 2020 *Prohealth* ressqet oġġezzjoni għal din id-deċiżjoni quddiem il-Bord ta' Reviżjoni, billi dehrilha illi l-offerta ta' *Medina* ma kinitx tilħaq numru ta' speċifikazzjoniiet tekniċi tas-sejħa għal offerti, iżda l-bord, bid-deċiżjoni tas-27 t'Awissu 2020 li minnha sar dan l-appell, ċaħad l-oġġezzjoni u ikkonferma d-deċiżjoni li l-kuntratt jingħata lil *Medina.*

10. Il-konsiderazzjonijiet li wasslu lill-bord għal din id-deċiżjoni ġew imfissra hekk:

> »This board, having noted this objection filed by *Prohealth Ltd* (hereinafter referred to as the Appellants) on 22nd June 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2300/2018 listed as case Nº 1467 in the records of the Public Contracts Review Board awarded by Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) … … … Whereby the Appellants contend that:
>
> »a. the preferred bidder's offer was not compliant in the first evaluation process, as the laboratory certificate stated that tests were carried out on the product under clean conditions, whilst the tender stipulated that such testing certification should be carried out under dirty conditions;
>
> »b. through a rectification which was not permissible as per Note 3 of the technical specifications the Evaluation Committee allowed the issue of another certificate for the preferred bidder's product.
>
> »This board also noted the Contracting Authority's "letter of reply" dated 1st July 2020 and its verbal submissions during the virtual hearing held on 31st July 2020, in that:
>
> »a. the Authority contends that, during the second evaluation process, the new evaluation committee ignored the rectifications which were effected during the first adjudication process. In this regard, the Authority insists that all the bidders were given the opportunity to rectify so that a level playing field was maintained and the second evaluation process was carried out on all the offers as duly rectified.
>
> »This same Board also noted the testimony of the witnesses … … …
>
> »This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned, during the virtual hearings held on 3rd July 2020 and 5th August 2020, opines that, the issues that merit due consideration relate to:
>
> »a) rectifications effected;
>
> »b) compliance with the non-usage of gloves;
>
> »c) tests carried out on wipes.
>
> »1. Rectifications
>
> »1.1 In this regard, Appellants are claiming that the evaluation committee requested fresh certification to establish whether it was necessary to use gloves with the preferred bidder's wipes and to carry out tests on the wipes under dirty conditions in regard to the preferred bidder's offer. Such a request constituted a rectification which, as per note 3, was not possible.
>
> »1.2 This board would point out that indeed such a request was made on the 5th April 2019 and the necessary appropriate

certification was subsequently submitted by the tenderer within the prescribed period.

»1.3 It would be pertinent and opportune to point out, at this particular stage of consideration, that, apart from the fact that such a rectification was requested on the 5th April 2019, other rectification requests were sent to all the other competing bidders in this tender so that each of the bidders had the same opportunity to rectify their offer and, by doing so, a level playing field was maintained.

»1.4 This board would also refer to this board's decision dated 25th October 2019 on the same tender wherein a newly composed evaluation committee was to be appointed to revaluate all the offers. It must also be pointed out that the new evaluation committee was presented with documentation after rectifications on all the offers were effected and the new committee started the whole adjudication process afresh. It is on such documentation that the new evaluation committee conducted their evaluation process and this board notes that the new evaluation committee did not effect any rectification to the offers.

»2. Compliance of non-use of gloves

»2.1 Article 1.1 (2) of the technical specifications states that:

> »"wipes must be able to be applied using unprotected hands (without gloves)"

»The above article stipulates that, the wipes must be able to be applied without the necessity for the user to wear gloves.

»2.2 This Board would point out that, the tender document stipulates that

> »"All claims must be supported by reports of analyses, using EN methods undertaken in ISO accredited laboratories"

»In this regard, the preferred bidder submitted the following report which confirmed that their product was not harmful to the skin and thus the preferred bidder's wipes can be applied without the necessity to wear gloves *viz.*:

> »"… … …
>
> »"23rd August 2017
>
> »"To Whom it May Concern:
>
> »"Re: Medipal 3 in 1 Disinfectant Wipes - Test Report on Skin Irritation
>
> »"A test is conducted to determine the human skin irritation potential of Medipal 3 in 1 Disinfectant Wipes by PCR Corp (Report Nº PALPATIM, dated 9th May 2017).
>
> »"Based on the test results, we are pleased to confirm that Medipal 3 in 1 Disinfectant Wipes is proven to be safe for use and dermatologically tested.
>
> »"Thank you for your attention.

»"Yours faithfully,

»"Dr Gracy Saito-Lebeau
»"Technical & Product Development Manager"

»In this respect, the evaluation committee had to abide by the principle of self-limitation and, in doing so, the preferred bidder's product was confirmed by the appropriately accredited laboratory that the application of the wipes without wearing gloves will not cause any damage to the skin.

»3. Tests carried out on wipes

»3.1 This Board would refer to clarification note dated 3rd January 2019 with special reference to question No. 8 and its relative reply, as follows:

»"Question Nº (8): Point three states that the contact time for EN 13727 should be of 30 seconds; please clarify if these 30 seconds refer to dirty conditions please.

»"Answer Nº (8): Since the wipes are intended for use in clinical settings where soiling would be anticipated, compliance with 30 second contact time, as determined by ENI 3727, listed in Section 4.1.1, would obviously need to be demonstrated in dirty conditions."

»The above clarification is misleading as there was no corresponding description of what is being implied by the word "dirty" and, in the opinion of this board, such a reply denoted the incorrect usage of the wipes being tendered for.

»3.2 This board specifically refers to the testimony of Mr Paul Pace, a senior nurse in the Infection Control Unit at *Mater Dei*, who very vividly explained the intended use of such wipes, as follows:

»"Xhud: Il-fatt li l-prodott qed joqtol il-mikrobi *in 30 seconds*, sinjal li mhux *clean*. Jiġifieri dawn il-mikrobi jew qegħdin *in a state of a liquid*, jew qegħdin fuq it-trab. Jiġifieri dawn iridu jkunu forma ta' xi ħaġa. Per eżempju *sodiumoriginosa* [*recte, Pseudomonas æruginosa*] bilfors kien hemm *liquid* biex ittestjawh dan il-laboratorju privat. Jigifieri l-kelma *clean* qed tigi misinterpretata skorrettement. *Staphylococcus* jitrabba ħafna fit-trab. Kieku ma kinux jittestjaw ghalih. *Enterococcus is a bacteria* [*recte, bacterium*] *which lives in fluid form*. Mela meta saru dawn it-testijiet, il-kelma *clean* żgur ma kinitx għax kieku ma jeżistux dawn il-mikrobi u joħorġu rapport li jmutu fi żmien 30 sekonda. Dawn mikrobi qegħdin fuq mejda. Mela xi forma ta' *medium* dawn il-mikrobi bilfors kien hemm. Jiġifieri li ngħidu *clean*, qed nagħmlu *misinterpretation* tal-kelma *clean* mentri mhijiex *clean* ghax biex ikollok [*sc. Pseudomonas æruginosa*] jrid ikollok l-ilma. Ma tikbirx mix-xejn din. Biex ikolloxk *Staphylococcus* irid ikollok it-trab. Biex ikollok *Enterococcus* ukoll irid ikollok l-ilma. Dawn huma affarijiet u qed ngħidu għax użaw il-kelma *clean*, il-fatt li dawn gew ittestjati, *clean* ma kienx l-oġġett. Meta tgħid *clean*, ma jkun fih xejn. Mela la ġibt riżultat tal-mikrobi, xi *medium* użaw dan il-laboratorju. Mhumiex imġienen tal-laboratorju. Mela ma qagħdux jużaw il-kelma

> *clean*. La fih il-mikrobu huwa *dirty*. Inkella ma jkunx fih mikrobi. Għax qed nużaw kliem li nagħtu x'nifhem gambetti lil dan iċ-ċertifikat li joħroġ mil-laboratorji kollha, biex noqogħdu nfittxu l-kelma *clean* u *dirty* meta dan qed jurina biċ-ċar u tond li ttestjaw ruħhom ghall-*bacteria* u ghall-*viruses* li aħna tlabnieh fl-i*specifications*, Mela ma noqogħdux infittxu x'inhu *clean* u *dirty* għax dawn *clean*, kieku vera kollox *clean*, ma kienx hemm dawn il-mikrobi.
>
> »"*Chairman*: Għaliex fiċ-ċertifikat jikkwalifika *under clean conditions*?
>
> »"Xhud: Jiena min-naħa tiegħi l-kelma *clean* ma tridx tiġi interpretata li *clean* tfisser il-kelma *clean*. Fl-*infection control* tfisser mingħajr mikrobi. Dan żgur ma kienx il-każ għax l-ittestjar tal-mikrobi għall-kelma *clean* ma tfissirx il-*clean* kif nafuha aħna s-soltu li ma fih xejn u *clean*. Issa jekk l-avukati ser jidħlu fuq il-kelma *clean … … .*"

»3.3 From the credible and professional testimony of Mr Pace, this board is convinced that the tests to be carried out on the wipes which had to meet the specifications so dictated by the Authority were to be performed under dirty conditions.

»3.4 This board was also made aware that the intended use of the wipes was first to clean the particular surface and then apply the wipes, so that same wipes were not intended to clean but rather to sanitise from bacteria. In this regard, this board notes that the Authority should have specified more clearly what is denoted by the words "clean" and "dirty".

»In conclusion, this board opines that,

»a) the rectification note dated 3rd January 2019 was effected by the Authority prior to the closing date of the tender of 10th January 2019. Same rectification was not appealed. It must also be noted that rectifications request were sent to all competing bidders so that, a level playing field was maintained;

»b) the new evaluation board, as duly instructed by this board's decision dated 25th October 2019, proceeded with their evaluation process well after the rectifications on all the offers were effected. At the same instance, the evaluation committee had to abide by the principle of self-limitation. In this regard, this board, after considering the technical testmony of Mr Paul Pace and the documentaion presented to the evaluation board, confirms that the preferred bidder's offer was fully compliant and the cheapest;

»c) this board also confirms that the certificate supplied by *Pal*, a respectable laboratory, affirms the fact that the successful wipes can be used without gloves, as they do not cause any harm to the skin.

»In view of the above, this board:

»i. does not uphold Appellants' contentions;

»ii. upholds the Contracting Authority's decision in the award of the tender;

»iii. directs that the deposit paid by Appellants should not be refunded.«

11. *Prohealth* ressqet appell minn din id-deċiżjoni tal-Bord ta' Reviżjoni b'rikors tal-14 ta' Settembru 2020. Għal dan ir-rikors l-awtorità kontraenti u d-Direttur tal-Kuntratti wieġbu fit-8 ta' Ottubru 2020 u *Medina* wieġbet fit-28 ta' Diċembru 2020.

12. Fir-rikors tal-appell *Prohealth* talbet illi l-qorti, wara li tħassar id-deċiżjoni tal-Bord ta' Reviżjoni, tgħid illi l-offerta ta' *Medina* ma hijiex konformi mal-kriterji stabiliti fis-sejħa għal offerti u tordna li l-kuntratt jingħata lilha. L-aggravji tal-appell huma erbgħa:

> »A. Il-bord żbalja meta ma kkunsidrax li, b'riżultat tar-*rectification* mitluba mill-awtorità kontraenti u li saret mill-appellata *Medina Healthcare Limited* dwar rekwiżit tekniku u indikat bhala *Note 3,* l-istess *Medina Healthcare Limited* kellha tigi skwalifikata;
>
> »B. F'kull każ, anke jekk it-talba għal rettifika tal-5 ta' April 2019 u kull ma sar b'riżultat tagħha għandu jiġi injorat, il-bord kellu jagħraf li l-offerta ta' *Medina Healthcare Limited* kienet xorta wahda *technically non-compliant*;
>
> »Ċ. Il-bord żbalia wkoll meta qies li l-kjarifika hija waħda *misleading*, li ma kienx hemm spiega ta' x'kienet ttisser il-kelma "*dirty*" u li l-istess kjarifika tindika użu inkorrett tal-prodott li dwaru saret is-sejħa; u
>
> »D. Fl-aħħar nett, u b'żieda mal-aggravii l-oħra, il-bord żbalia wkoll meta qies illi l-prodott offert minn *Medina Healthcare Limited* kien jissoddisfa l-kriterji tekniċi tas-sejħa in kwantu l-istess prodott jista' jintuża mingħajr l-użu ta' ingwanti.«

13. L-ewwel aggravju kompla tfisser hekk:

> »Mill-provi miġjuba quddiem il-bord, irriżulta li fil-5 ta' April 2019 (wara l-għeluq tas-sejħa), l-awtorità kontraenti bagħtet talba lill-offerenti kollha sabiex jirrettifikaw numru ta' *items* fl-offerti tagħhom. Fost dawn il-kwistjonijiet, il-bord talab lill-offerenti sabiex jaderixxu mal-kjarifika li kienet saret fit-3 ta' Jannar 2019 u jissottomettu r-riżultati tat-testijiet tal-laboratorju magħmula in *"dirty conditions".*
>
> »*F'Section 4 – Technical Specifications* tat-*tender document* (li tinsab indikata bħala '*Note 3*' u għalhekk mhux rettifikabbli) jingħad li għandhom isiru numru ta' dimostrazzjonijiet tal-prodott offert biex juru l-effikaċja tal-istess kontra numru ta' batteri, liema dimostrazzjonijiet għandhom ikunu *"supported by reports of analyses using EN methods, undertaken in independent ISO accredited laboratories".*
>
> »B'kjarifika maħruġa fit-3 ta' Jannar 2019, l-awtorità kontraenti ċċarat li t-testijiet tal-laboratorju għandhom isiru f'*dirty conditions.*

»Mid-dokumenti eżebiti mill-awtorità kontraenti stess, irriżulta li l-appellata *Medina Healthcare Limited* kienet, sad-data tal-għeluq tas-sejħa, issottomettiet riżultati tal-laboratorju dikjaratament eżegwiti fi *clean conditions* u għalhekk bi ksur tal-kjarifika li kienet saret mill-awtorità kontraenti stess fit-3 ta' Jannar 2019. Dan it-*test*, eżebit bħala "Doc. A" mar-risposta tal-awtorità kontraenti għall-oġġezzjoni tal-appellanti quddiem il-bord, huwa datat 28 ta' Settembru 2018.

»Irriżulta wkoll li *Medina Healthcare Limited*, in segwitu għat-talba ta' rettifika li saret mill-awtorità kontraenti, issottomettiet riżultati tal-laboratorju godda (datati 15 ta' April 2019), din id-darba espressament magħmula f'*dirty conditions* u li jikkontjenu konklużjonijiet differenti minn dawk ta' Settembru 2018.

»Effettivament, il-bord kien korrett meta f'paragrafu 1.2 tad-deċiżjoni appellata, jikkonferma li *Medina Healthcare Limited* issottomettiet iċ-ċertifikazzjoni neċessarja biss wara r-rikjesta magħmula mill-awtorità kontraenti:

> »"1.2. This board would point out that, indeed such a request was made on the 5th April 2019 and the necessary appropriate certification was subsequently submitted by the tenderer within the prescribed period.

»Il-bord però jiżbalja meta jgħid li, għalkemm huwa minnu li *Medina* ssottomettiet iċ-ċertifikazzjoni l-korretta f'April 2019 (minkejja li din l-ispeċifikazzjoni kienet *Note 3*, u għalhekk, mhux rettifikabbli) madankollu l-istess talba għal rettifika ntbagħtet lil kulħadd, u għalhekk *"a level playing field was maintained*".

»… … …

»B'kull dovut rispett, din l-osservazzjoni u konklużjoni li jagħmel il-bord hija żbaljata. Qabel xejn, l-appellanti ma tifhimx x'ried ifisser il-bord meta kkonkluda li r-rettifika 'ma ġietx appellata' peress li ma hemm ebda proċedura ta' appell minn talba għal rettifika li tagħmel l-awtorità kontraenti f'proċess ta' sejħa għall-offerti.

»*Inoltre*, l-appellanti *Prohealth Limited* ma ssottomettiet ebda dokumentazzjoni ġdida in segwitu għat-talba ta' rettifika magħmula mill-awtorità kontraenti. Li kieku għamlet hekk, l-appellanti kienet tkun tantieħor skwalifikabbli. Il-fatt li t-talba ta' rettifika saret lil kulħadd, ma jfissirx li tali talba kienet waħda valida u korretta. Għall-kuntrarju, it-talba tal-awtorità kontraenti tal-5 ta' April 2019 hija invalida u irregolari in kwantu tirrigwardja elementi tas-sejħa li, skond it-*tender document*, mhumiex rettifikabbli.

»Barra minn hekk, lanqas ma jfisser li nżamm *level playing field* sempliċement għax it-talba ta' rettifika ntbagħtet lill-offerenti kollha fis-sistema elettronika tal-*etenders*. Għall-kuntrarju, tali talba tiddisturba dak il-*level playing field* li kien inżamm sad-data tal-għeluq tas-sejħa għall-offerti, tagħti vantaġġ inġust lil min, bħal *Medina Healthcare Limited*, ma kienx konformi mar-rekwiżiti tekniċi tas-sejħa, u tippreġudika lil min, bħall-appellanti, segwa reliġjozament it-test tat-*tender document* u l-kjarifiki mibgħuta mill-awtorità.

»Effettivament, il-bord kellu jieħu qies ta' dak li jgħidu l-*General Instructions* tas-sejħa f'*Section 1.1* ossija li:

> »"No account can be taken of any reservation in the tender as regards the tender document; any disagreement, contradiction, alteration or deviation shall lead to the tender offer not being considered any further."
>
> »M'hemmx dubju li mhux biss l-intimata *Medina Healthcare Limited* kisret din il-kundizzjoni meta alterat u biddlet l-offerta tagħha wara d-data tal-għeluq tas-sejħa, iżda l-awtorità kontraenti intimata, bi ksur tal-prinċipju ta' trasparenza, marret konxjament kontra dak li tgħid *Note 3* ossija li *"No rectification shall be allowed. Only clarifications on the submitted information may be requested*". Ġjaladarba r-rekwiżiti tekniċi hawn fuq imsemmija kienu indikati bħala "*Note 3*", l-awtorità kontraenti ma setgħetx titlob ir-rettifika, u l-intimata *Medina* ma setgħetx teffettwaha.
>
> »Għal din ir-raġuni biss, din il-qorti għandha tirrevoka d-deċiżjoni appellata u tiskwalifika l-offerta tal-intimata *Medina Healthcare Limited*.«

14. Sabiex tħares il-kondizzjoni illi l-prodott tagħha "*should provide at least a 99.99% reduction within a 30 second contact time*" *Medina* ippreżentat ċertifikat bid-data tat-28 ta' Settembru 2018 li juri illi saret analiżi fuq il-prodott tagħha taħt "*experimental conditions: clean*". Peress illi dan ma kienx sodisfaċenti, kemm għax is-sejħa kienet għal *cleaning and sanitising wipes* – u *cleaning wipe* ma teħtiġhiex fuq xi ħaġa li hija ġà *clean* – u kemm għax l-ittra tal-awtorità kontraenti tat-3 ta' Jannar 2019 kompliet għamlitha ċara għal min kien għadu ma fehemx dak li kellu jkun ovvju illi l-analiżi "*would obviously need to be demonstrated in dirty conditions*", l-awtorità fil-5 ta' April 2019 ħarġet dik li sejħitilha "*rectification*" li *inter alia* tgħid hekk:

> »Reference is made to the tender in caption, and to your submission. The Evaluation Committee noted the following shortcomings with regard to your submission: … … … With reference to point 3 of the specifications, submit certificate that proofs [*recte*, proves] that the wipes offered have been tested in the laboratory for 30 seconds under dirty conditions. In terms of Article 7.1 of the Instructions to Tenderers, you are hereby being given the opportunity to rectify these short-comings by not later than 12 April.«

15. *Medina* mbagħad fiż-żmien mogħti lilha ippreżentat ċertifikat ta' analiżi magħmula taħt *dirty conditions* biex issodisfat din il-kondizzjoni partikolari tas-sejħa.

16. *Prohealth* issa qiegħda tgħid illi din kienet *rectification* projbita taħt *note 3* u għalhekk ma setgħetx saret.

17. Jingħad qabel xejn illi qal ħażin iċ-*chairman* tal-Bord ta' Reviżjoni meta, kif jingħad fil-minuta ta' seduta quddiem il-bord, "*the chairman … … pointed out the inconsistency between the clarification note* [tat-3 ta' Jannar 2019] *which requested testing under dirty conditions and the tender which specifies clean conditions*". Għalkemm id-dokument tas-sejħa ma jispeċifikax espressament *dirty conditions* huwa ovvju li biex tara jekk *wipe* hijiex tajba għal *cleaning* ma tagħmilx prova tagħha fuq ħaġa ġà *clean*.

18. Il-kwistjoni issa hija jekk b'dak li talbet l-awtorità kontraenti fil-5 ta' April 2019, meta stiednet lill-oblaturi jissottomettu ċertifikati ġodda, ippermettietx "rettifika" projbita taħt *note 3* jew għamlitx biss sejħa għal "*missing documents*" permessa taħt *note 2*. Tassew illi fid-dokument innifsu tissejjaħ "*rectification*" iżda l-kwistjoni hi jekk hijiex mitluba rettifika tal-offerta nifsha, li hija projbita, jew rettifika ta' dokument li mhuwiex biżżejjed għall-għanijiet tas-sejħa u għalhekk għandu jinbidel, li huwa permess.

19. Fil-fehma ta' din il-qorti kienet tkun saret rettifika tal-offerta li kieku oriġinalment *Medina* offriet prodott li ma kienx tajjeb meta użat taħt *dirty conditions* u mbagħad wara l-5 ta' April 2019 offriet prodott li kien

tajjeb taħt dawk il-kondizzjonijiet. Il-fatt li biċ-ċertifikat oriġinali ntwera li l-analiżi saret taħt *clean conditions* ma jfissirx illi r-riżultat kien ikun ħażin li kieku saret taħt *dirty conditions*, għalkemm frankament il-qorti ma tistax tifhem x'inhu l-iskop li analiżi ta' prodott maħsub biex inaddaf tagħmilha fuq ħaġa ġà nadifa; min-naħa l-oħra ma tistax tassumi *mala fede*, bħal meta ngħid li jien tajjeb fil-aritmetika biex nevita li nagħti tweġiba onesta għall-mistoqsija jekk inix tajjeb fl-alġebra. Għandu jingħad ukoll illi ċ-ċertifikat ippreżentat minn *Medina* wara l-5 ta' April 2019 jgħid illi l-analiżi kienet saret ferm qabel, bejn is-26 ta' Jannar 2016 u s-26 ta' Frar 2016, li juri li l-prodott ġà kien jilħaq l-ispeċifikazzjonijiet meta saret l-offerta, għalkemm terġa' tqum il-mistoqsija, jekk *Medina* ġà kellha dan iċ-ċertifikat, għalfejn mal-offerta ippreżentat ċertifikat ieħor b'analiżi manifestament insuffiċjenti għall-għanijiet tas-sejħa għal offerti.

20. F'kull każ, la ma saritx rettifika iżda biss inġieb dokument nieqes, kif tippermetti li jsir *note 2*, l-ewwel aggravju huwa miċħud.

21. It-tieni aggravju hu marbut mal-ewwel wieħed u ġie mfisser hekk:

> »Fil-kunsiderazzjonijiet tiegħu, il-bord jgħid li, wara d-deċiżjoni tal-25 ta' Ottubru 2019 in konnessjoni mal-istess sejħa, ġie kompost kumitat evalwattiv ġdid, u għalhekk il-proċess tal-aġġudikazzjoni nbeda mill-ġdid.
>
> »Konsegwentement, fil-fehema tal-bord, it-talba għal rettifika li saret fil-5 ta' April 2019, ġjaladarba saret mill-kumitat evalwattiv ta' qabel id-deċiżjoni ta' Ottubru 2019, ma setgħetx tiġi konsidrata aktar.
>
> »Qabel xejn, l-appellanti tissottometti illi minn imkien ma jirriżulta li din it-talba saret mill-ewwel kumitat evalwattiv, iżda jekk xejn saret biss mill-awtorità kontraenti. Anke kieku stess saret mill-ewwel kumitat evalwattiv, dan mhuwiex organu jew entità indipendenti u separat mill-awtorità kontraenti in kwantu ma għandux personalità ġuridika separata. Lanqas ma jirriżulta li l-bord, fid-deċiżjoni tal-25 ta' Ottubru 2019, irrevoka xi atti li kienu saru qabel dakinhar, u konsegwentement

> l-istess talba ta' rettifika u r-risposti relattivi mogħtija mill-offerenti għandhom jibqgħu jgħoddu.
>
> »F'kull każ, però, u mingħajr preġudizzju għas-suespost, anke jekk it-talba għal rettifika tal-5 ta' April 2019 għandha tiġi injorata jew skartata, u konsegwentement, anke r-risposti jew rettifiki li saru mill-offerenti, il-bord kellu, xorta waħda, iqis l-offerta ta' *Medina Healthcare Limited* bħala waħda *non compliant*.
>
> »Fil-fatt, *Medina Healthcare* tant għarfet li l-offerta tagħha kienet ser tkun irregolari u mhux konformi, li kkummissjonat u ottjeniet 1ertifikat ġdid rilaxxat mil-laboratorju ingliż, din id-darba b'testijiet magħmula f'*dirty conditions,* u li jikkontjeni, fil-fatt, konklużjonijiet differenti minn dawk tal-ewwel testijiet. Il-laboratorju akkreditat kummissjonat minn *Medina* ċertament li kien jaf jagħraf id-differenza bejn *clean* u *dirty conditions,* tant li, fil-formula tar-riżultati nfisha, għandu *entry* speċifika dedikata proprju għal hekk u li, fl-ewwel rapport rilaxxjat minnu (dak datat 28 ta' Settembru 2018) jindika kjarament li t-testijiet saru taħt *clean conditions* u, għaihekk, bi ksur ta' dak li kien jitlob l-istess *tender document* fit-*technical specifications* kif iċċarati bil-kjarifika tat-3 ta' Jannar 2019.«

22. Ġà rajna li dak li ġara fil-5 ta' April 2019 ma kinitx sejħa għal rettifika tal-prodott iżda biss stedina biex jinġiebu dokumenti nieqsa, *viz.* ċertifikat ta' analiżi taħt *dirty conditions*, kif tippermetti *note 2*. Hu irrelevanti jekk din l-istedina saritx mill-awtorità kontraenti jew mill-kumitat tal-għażla, li wara kollox, kif tgħid *Prohealth* stess, hu biss organu tal-awtorità u dak li għamel għamlu f'isimha. L-importanti hu li ma nbidel xejn la mill-kondizzjonijiet tas-sejħa għal offerti u lanqas mill-ispeċifikazzjonijiet tal-prodott offert minn *Medina*. Kull ma ġara wara l-5 ta' April 2021 hu li nġieb dokument nieqes. Iż-żewġ ċertifikati – dak oriġinali u dak prodott wara l-5 ta' April 2019 – saru fuq l-istess prodott u jagħtu riżultati differenti biss għax saru taħt kondizzjonijiet differenti, mhux għax saru fuq prodott differenti. L-importanti hu li r-riżultat tal-analiżi tqies teknikament sodisfaċenti mill-kumitat tal-għażla.

23. Dan l-aggravju wkoll għalhekk huwa miċħud.

24. It-tielet aggravju wkoll huwa marbut mal-ewwel wieħed, u ġie mfisser hekk:

> »Mingħajr preġudizzju għas-suespost, il-bord żbaija meta qies li l-kjarifika kienet waħda *misleading* u li ma tispjegax sew xi tfisser il-kelma *"dirty".*
>
> »Ma hemmx dubju li l-kelma "*dirty*" hija attribwibbli għall-kundizzjonijiet tat-testijiet fir-rigward ta' *section* 4, 1.1, paragrafu 3. Ma hemmx dubju wkoll li "*dirty*", ma tfissirx "*clean*".
>
> »Finalment, huwa għal kollox inkonċepibbli li il-kelma "*dirty*" tirreferi għall-batteri mertu tal-istess testijiet, dan aktar u aktar meta r-risposta mogħtija mill-awtorità kontraenti tirreferi proprju għal "*clinical settings where soiling would be anticipated*".
>
> »F'kull każ, ma hemmx dubju li l-laboratorju akkreditat tal-appellata *Medina Healthcare Limited* fehem perfettament x'inhi d-differenza bejn waħda u oħra, u saħansitra jikkontempla *entry* speċifika u dedikata sabiex jiġi indikat proprju u biss jekk il-kundizzjonijiet tat-test kinux *clean* jew *dirty*. Għalhekk, għall-kuntrarju ta' dak li jgħid il-bord, ma kien hemm assolutament xejn li kien *misleading* jew ma jiftehemx bil-kelma "*dirty*".
>
> »*Inoltre*, jidher li l-bord wasal għall-konkluzjoni li l-kelma "*dirty*" kienet *misleading* anke peress li, skond il-bord, il-prodott in kwistjoni kellu jintuża għal *santizing* biss, wara li s-superfiċi li fuqu jkunu ser jintużaw ikunu ġew imnaddfa b'xi prodott ieħor. F'dan ir-rigward, f'paragrafu 3.4 tad-deċiżjoni appellata, il-bord jgħid hekk.
>
> > »"3.4. This board was also made aware that the intended use of the wipes was, first to clean the particular surface and then apply the wipes, so that same wipes were not intended to clean but rather to sanitise from bacteria. In this regard, this board notes that the Authority should have specified more clearly what is denoted by the words '*clean'* and '*dirty'*."
>
> »*Inoltre*, f'*section* 4, 1.1 (*Technical Specifications*) jingħad illi "*cleaning and sanitising wipes, containing both appropriate disinfectants (not based on alcohol) as well as surfactants to be effective for both cleaning as well as disinfection of surfaces and equipment used within the Health care settings*".
>
> »Għalhekk, il-konklużjoni raġġunta mill-bord tmur proprju *kontra* dak li jingħad fit-*tender document* innifsu u, konsegwentement, il-konklużjoni tal-bord li l-kjarifika kienet b'xi mod ma tiftehemx, *misleading*, jew li tagħti indikazzjoni ta' użu skorrett tal-prodott tas-sejħa, hija żbaljata.«

25. Ma hemmx dubju li kien żbaljat il-bord meta qies li l-kondizzjonijiet tas-sejħa ma kinux ċari u li kienu jeħtieġu xi kjarifika. Kien ċar mill-bidu-nett li l-*wipes* kellhom ikunu "*effective for both cleaning as well as*

disinfection of surfaces", u kien daqstant ovvju li l-analiżi kellha ssir taħt *dirty conditions* jekk kellha turi l-*wipes* kinux tajbin għal *cleaning*.

26. Dan iżda ma jibdel xejn mill-fatt li kull ma ġara hu li kien hemm dokument nieqes li l-awtorità, kif kellha setgħa li tagħmel, talbet li jinġieb, u li nġieb fiż-żmien mogħti. Kif ġà għidna[1], ma nbidel xejn mill-kondizzjonijiet tas-sejħa u mill-karatteristiċi tal-prodott.

27. Għalhekk l-iżball li għamel il-bord fl-interpretazzjoni tal-kondizzjonijiet tas-sejħa kien għalkollox irrelevanti u ma jolqotx il-validità tal-konklużjoni tiegħu.

28. Dan l-aggravju wkoll huwa għalhekk miċħud.

29. L-aħħar aggravju huwa dwar il-kondizzjoni li l-prodott jista' jintuża mingħajr ingwanti – "w*ipes must be able to be applied using unprotected hands (without gloves)"* – u ġie mfisser hekk:

> »Fir-rigward ta' din il-parti tal-oġġezzjoni tal-appellanti, il-bord jaqbel li l-prodott mertu tas-sejħa *"must be able to be applied using unprotected hands (without gloves)"* (artikolu 1.1(2) ta' *section* 4 [*Technical Specifications*]). Il-bord jaqbel ukoll li dan ir-rekwiżit, skond l-istess *tender document*, għandu jkun konfermat u ċertifikat b'rapport minn laboratorju akkreditat.
>
> »Dwar dan, il-bord jikkonkludi li s-soċjetà appellata *Medina Healthcare Limited* issottomettiet rapport li, fil-fehma tal-bord, kien jissoddisfa l-kriterju hawn fuq imsemmi.
>
> »"In this regard, the preferred bidder submitted the following report which confirmed that their product was not harmful to the skin and thus the preferred bidders' wipes can be applied without the necessity to wear gloves *viz*:
>
> »"'23rd August 2017
>
> »"'To Whom it May Concern:
>
> »"'Re: *Medipal 3 in 1 Disinfectant Wipes* – Test Report on Skin Irritation

[1] Para. 22 *supra*.

> »"'A test is conducted to determine the human skin irritation potential of *Medipal 3 in 1 Disinfectant Wipes* by *PCR Corp* (report Nº PALPATJM, dated 9th May 2017).
>
> »"'Based on the test results, we are pleased to confirm that *Medipal 3 in 1 Disinfectant Wip*es is proven to be safe for use and dermatologically tested.
>
> »"'Thank you for your attention.
>
> »"'Yours faithfully,
>
> »"'Dr Gracy Sailo-Lebeau
> »"'Technical & Product Development Manager'"

»Evidentement, il-bord ma rrealizzax li dik id-dikjarazzjoni ma kinitx rilaxxjata minn laboratorju akkreditat iżda mill-manufattur tal-prodott tal-appellata *Medina Healthcare Limited*! Ċertament, għalhekk, ma jista' qatt japplika ebda principju ta' *self-limitation,* kif erronjament jgħid il-bord.

»Il-bord fil-fatt imur lil hinn minn hekk u saħansitra jikkummenta li "*PAL*" huwa *"a respectable laboratory"*.

»Għalhekk, jirriżulta li s-soċjetà appellata *Medina* ma pproduċiet ebda ċertifikazzjoni li l-prodott tagħha jista' jintuża mingħajr ingwanti. Għall-kuntrarju … il-prodott tal-appellata *Medina* jirrizulta li għandu standard "*EN H315*" li huwa konfermat li *"causes skin irritation".* Anke l-kaxxa u pakkett tal-prodott offert mill-*Medina* stess jindika**,** fuq l-istess konfezzjoni, li l-prodott irid jintuża bl-ingwanti. Prova ta' dan kollu ġie à eżebit fil-proċeduri quddiem il-bord, fejn jinsab mhux kontestat li, fuq il-pakkett estern tal-prodott offert mill-appellata *Medina Healthcare Limited*, jinsab espressament indikat li l-istess prodott *"causes skin irritation*".

»Għal din ir-raġuni wkoll, il-bord ma seta' qatt jikkonkludi li s-soċjetà *Medina Healthcare Limited* kienet konformi mar-rekwiżiti tas-sejħa għall-offerti, u kien fid-dover li jiskwalifikaha.«

30. Tassew illi l-bord iċċita minn dokument maħruġ mid-dar li tipproduċi l-prodott u mhux minn rapport maħruġ minn laboratorju indipendenti. Fil-fatt id-dokument ċitat mill-bord igħid illi l-konklużjoni illi l-prodott huwa "*safe for use and dermatologically tested*" hija msejsa fuq "*test …conducted … by PCR Corp*". *PCR Corp* huwa appuntu l-laboratorju li għamel l-analiżi tal-effett tal-prodott fuq il-ġilda, u r-rapport maħruġ minn *PCR Corp* kien fost id-dokumenti prodotti minn *Medina* mal-offerta tagħha. Dan ir-rapport igħid illi "*based on the data, the test article can be considered as safe for use and claims such as*

'dermatologically tested', 'clinically tested', 'clinically proven', 'kind to skin', 'mild for skin' and 'safe for skin' are all substantiated". Tassew illi, fid-dawl ta' dan, huwa x'aktarx stramb kif il-*product specification* maħruġ mid-dar stess li tipproduċi l-prodott iwissi, taħt "*hazard identification*", illi "*H315: causes skin irritation*"[2]; dan huwa fatt ieħor, flimkien ma' dak tal-analiżi taħt *clean conditions*, li joħloq xi ftit jew wisq perplessità.

31. Madankollu huwa minnu wkoll illi hemm ċertifikat ta' laboratorju, aċċettat mill-awtorità kontraenti, li l-prodott huwa "*safe for skin*", li huwa dak li riedu l-kondizzjonijiet tas-sejħa, u għalhekk ma hemmx raġuni għala l-prodott ta' *Medina* għandu jiġi mwarrab.

32. Dan l-aggravju wkoll għalhekk huwa miċħud.

33. Għal dawn ir-raġunijiet il-qorti tiċħad l-appell u tikkonforma l-konklużjoni tal-Bord ta' Reviżjoni fid-deċiżjoni appellata.

34. L-ispejjeż tal-appell tħallashom *Prohealth.*

Mark Chetcuti President	Giannino Caruana Demajo Imħallef	Anthony Ellul Imħallef

Deputat Reġistratur
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[2] Fl-atti ma hemmx kopja tal-kaxxi u pakketti tal-prodott, imsemmija fir-rikors tal-appell, li fuqhom allegatament hemm twissija li l-prodott irid jintuża bl-ingwanti.