



QORTI TAL-APPELL

IMHALLFIN

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

Seduta ta' nhar I-Erbgħa, 23 ta' Frar, 2022.

Numru 2

Appell numru 361/2021/1

Associated Drug Company Limited (C-409)

v.

*Central Procurement and Supplies Unit u
A.M. Mangion Limited (C-4112)*

1. Dan huwa appell ta' *Associated Drug Company Limited* [“ADCL”] jew “l-appellanti”] minn deċiżjoni tal-5 ta’ Novembru 2021 tal-Bord ta’ Reviżjoni dwar Kuntratti Pubblici [“il-Bord ta’ Reviżjoni”], imwaqqaf taħt ir-Regolamenti dwar l-Akkwist Pubbiku [“L.S. 601.03”] jew “ir-Regolamenti”] li laqgħet eċċeazzjoni preliminari tas-Central Procurement and Supplies Unit [“CPSU”] jew “l-awtorità kontraenti”] illi ma jiswiex rikors tal-appellanti għal dikjarazzjoni ta’ ineffettivitā ta’ kuntratt pubbliku taħt ir-reg. 277 tal-L.S. 601.03. Il-fatti relevanti huma dawn:

2. FI-2018 kienet saret sejħa “*for participation (negotiated) for the supply of treatment service of PD1 inhibitors*”. Fid-9 ta’ Mejju 2019 il-kuntratt [“il-kuntratt originali”] kien ingħata lil A.M. Mangion Limited [“AMML”] bil-prodott *Nivolumab* għal sentejn bil-fakoltà għall-awtorità kontraenti li ġġedded il-kuntratt għal sentejn oħra. L-għoti ta’ dan il-kuntratt originali lil AMML ma huwiex qiegħed jiġi kontestat f’dawn il-proċeduri.
3. Il-ħarġa tal-Gazzetta tal-Gvern tal-20 t’Awissu 2021 ħabbret illi fl-24 ta’ Marzu 2021 kien reġa’ ngħata kuntratt [“il-ftehim kontestat”] b’“*negotiated procedure for the supply of Nivolumab 10mg/ml vials*” lil AMML bil-prezz ta’ miljun u tmien mitt elf euro (€1,800,000). Dan il-kuntratt ingħata għal żmien sena bil-proċedura negozjata mingħajr pubblikazzjoni (“*negotiated procedure 6033/21*”) u bla konkorrenza taħt ir-reg 153 tal-L.S. 601.003.
4. B’rikors tat-13 ta’ Settembru 2021 magħmul quddiem il-Bord ta’ Reviżjoni taħt ir-reg. 277 tal-L.S. 601.03 ADCL talbet dikjarazzjoni ta’ ineffettivitā tal-kuntratt, flimkien ma’ danni u penali. CPSU ressjet żewġ eċċeazzjoni-jiet preliminari, viz. i. illi r-rikors huwa inammissibbli għax il-proċedura negozjata saret kif trid il-liġi, u ii. huwa inammissibbli wkoll għax sar wara ż-żmien li tagħti l-liġi.
5. Il-Bord ta’ Reviżjoni iddeċċieda li jqis dawn l-eċċeazzjonijiet u jiddeċċiedi dwarhom qabel ma jisma’ dwar il-meritu. Imbagħad, wara li sema’ l-partijiet, fid-deċiżjoni tal-5 ta’ Novembru 2021 li minnha sar dan l-appell il-bord laqa’ l-ewwel eċċeazzjoni u ma qiesx it-tieni waħda għal raġunijiet li fissirhom hekk:

».... the contracting authority's preliminary pleas are based on the following:

»a) Situations in which the application of ineffectiveness may be filed

»CPSU preliminarily submits that this application is declared inadmissible, since an application of ineffectiveness may only be filed:

»i. Regulation 277(2), Public Procurement Regulations (PPR) – "if the authority responsible for the tendering process has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2014/23/EG, Directive 2014/24/E and Directive 2014/25/EC"; or

»ii. Regulation 277(3)(a) PPR "when, notwithstanding an appeal is lodged before the Public Contracts Review Board, the authority responsible for the tendering process concludes the contract before a final decision is given by the Public Contracts Review Board"; or

»iii. Regulation 277(3)(b) PPR "when the contract is concluded by a contracting authority or the authority responsible for the tendering process before the expiry of the period for the filing of an appeal as provided for in regulation 271".

»Thus, the Directive, and consequently the Public Procurement Regulations, limits the instances to where this exceptional remedy may be availed of. Thus, an application for ineffectiveness may only be filed in three main circumstances. Firstly, where the contracting authority has directly awarded a contract without placing an OJEU advertisement in circumstances where an OJEU advertisement is required by the legislation. Secondly, where there has been a breach of the rules relating to the standstill period and that breach has denied the supplier an opportunity to challenge the contract award in relation to a separate, earlier, breach. Thirdly, where a call-off contract under a framework agreement for goods or services with a value over the EC procurement threshold has been entered into without following the relevant call-off procedures under that framework. Neither of the above-quoted situations are applicable in this case.

»So much so, the request for participation for the 2018 procurement cycle was advertised in the OJEU, there were no pending procedures, and the contract was not signed during the period for appeal of the 2018 procurement cycle or in any other period of appeal prescribed by law. It is very important to emphasise that this a continuance of service regulated by an existing contract.

»Moreover, even if the contract merit of this procedure is disregarded, in that it is not deemed that this is a continuance of services regulated by an existing contract, this application would still be inadmissible because the award of this contract without publication was permissible in accordance with article 32 of the Directive 2014/24/EC, transposed in regulation 150 *et seqq.* of the Public Procurement Regulations, particularly regulation 153.

»b) Date when application for ineffectiveness was filed

»Regulation 282 of the PPR provides:

»“**282.** Applications for the ineffectiveness of a contract shall be deemed admissible if they are made:

»“(a) before the expiry of at least thirty calendar days with effect from the day following the date on which:

»“(i) the authority responsible for the tendering process or the contracting authority published a contract award notice, provided that this notice includes justification of the decision to award the contract without prior publication of a contract notice in the Official Journal of the European Union; or

»“(ii) the authority responsible for the tendering process or the contracting authority informed the tenderers and candidates concerned of the signing of the contract; and.

»“(b) in any other case before the expiry of a period of at least six months with effect from the day following the date of the signing of the contract.

»Primarily with regard to this preliminary plea, CPSU submits that as indicated in the application the contract for the supply of *Nivolumab* was awarded to *A.M Mangion* ‘around September 2018’. As stated in the statement of facts of this reply, the 2018 procurement cycle and contract included a clause which stated that ‘interested economic operators must be willing to provide the service for a period of 2 years with an option to extend with a further 2 years’.

»If the applicant felt aggrieved that the CPSU would be entering or had the chance to enter into direct negotiations with *A.M. Mangion Ltd* to extend the term of this contract, it had to file for the ineffectiveness of the 2018 contract, within the timeframe specified in regulation 282 quoted above, given that this agreement is a continuance of the existing 2018 contract. Filing for ineffectiveness now puts the applicant *fuori termine* when it comes to the time frames established in the above-quoted regulation.

»The period specified by these regulations is a peremptory period and may not in any way or for any reason be extended.

»This board, after having examined the relevant documentation to this application and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider the preliminary pleas, as follows:

»a) Situations in which the application of ineffectiveness may be filed

»The board notes the following:

»i) that the Public Procurement Regulations (“PPR”) are very specific in regulations 277(2), 277(3)(a) and 277(3)(b) in listing the grounds permissible for an application of ineffectiveness;

»ii) that this board outright notes that regulations 277(3)(a) and 277(3)(b) have not been breached as there were no prior appeals lodged before the Public Contracts Review Board and the signing of the contract was not done before the expiry of the period

- for the filing of an appeal. These two facts are not being disputed;
- »iii) that the possible ground for application of ineffectiveness in relation to regulation 277(2) of the PPR needs, however, further delving into.
 - »iv) that the request for participation for the 2018 procurement cycle ("the original contract") was duly advertised in the Official Journal of the European Union;
 - »v) that the original contract's term was for a period of two years with an option for a further two-year extension;
 - »vi) that, after the expiration of the initial term (two years), the parties to the contract exercised the option for a one-year extension;
 - »vi) that the extension / option exercised was not for its full term of 'a further 2 years'. Hence the option was exercised for half of its possible total duration.
- »Therefore, the main issue is to consider whether this 'extension' / 'option' which was exercised to be deemed as a continuance of service regulated by the existing / 'original' contract or whether the contract has been widened enough to make it to be considered as a new and / or separate procurement cycle.
- »In relation to above, this board notes:
- »i) that the contracting authority did not show any 'intent' in distorting competition when it exercised its right for half of its possible duration;
 - »ii) the testimony under oath of Dr Alison Anastasi whereby she stated that the extended period of one year did not involve any changes to the financial offer;
 - »iii) the testimony under oath of Professor Nick Refalo whereby he stated that "he is keen to have all three available as they have different uses" (reference to *Dostarlimab*, *Nivolumab* and *Pembrolizumab*). Hence, the board opines that these medicines are not complete replicas of each other;
 - »iv) the testimony under oath of Ms Jacqueline Gili, representing the Department of Contracts, whereby she stated that "the department approved the negotiating procedure request from the beginning to the end";
 - »v) product *Nivolumab*'s use is in accordance with the licensed summary of product characteristics ("SPC"). Any changes in use from the original contract are in line with the updated SPC whenever this is approved by the respective authority.
 - »vi) no other terms of the original contract have been altered.

»The board finally notes that therefore, apart from point (v) above, no other terms of the original contract have been altered and all the PPR procedures in relation to negotiated procedures have been adequately followed by the contracting authority. When considering that this treatment is of a very sensitive nature and used in critical healthcare, the wellbeing of the patients receiving this type of treatment is to be considered of paramount importance and should always be the first priority in the decision taken. Therefore, point (v) above is not deemed to constitute a material change and, thus, this extension is not deemed to constitute a new and / or separate procurement cycle.

»The board hence upholds the preliminary plea as brought forward by the contracting authority.

»b) Date when application for ineffectiveness was filed

»The board opines that, due to its decision in point (a) above, it is deeming irrelevant to discuss the date when the application for ineffectiveness should have been filed.

»In conclusion this board, having evaluated all the above and based on the above considerations, concludes and decides:

»a) to accept the contracting authority's first preliminary plea and therefore declare the application for ineffectiveness as inadmissible.«

6. *ADCL* resqet appell quddiem din il-qorti minn din il-deċiżjoni tal-Bord ta' Reviżjoni b'rikors tas-16 ta' Novembru 2021. *AMML* wieğbet fid-9 ta' Diċembru 2021 u l-awtorità kontraenti wieğbet fl-14 ta' Diċembru 2021.
7. Qabel tqis il-meritu tal-appell il-qorti sejra tqis "punt preliminari" mqajjem mill-awtorità kontraenti fit-tweġiba tagħha. L-awtorità tgħid illi l-rikors tal-appell kelli jiġi notifikat lill-Avukat tal-Istat kif iġħid u jrid l-art. 181B(3) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili Iadarba I-kawži hija kontra dipartiment tal-gvern.
8. Min huma l-partijiet leġittimi fi proċeduri bħal dak tallum huwa regolat mhux bl-art. 181B tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili iżda bir-reg. 285 tal-L.S. 601.03:

»**285.** Ir-rikors tal-appell għandu jkun indirizzat kontra l-awtorità responsabbi għat-tmexxija tas-sejħa, l-awtorità kontraenti, l-offerent

rakkomandat, jekk ikun hemm, u kull parti oħra involuta fil-proċeduri quddiem il-Bord ta' Reviżjoni dwar Kuntratti Pubblici«

9. L-Avukat tal-Istat ma kienx parti fil-proċeduri quddiem il-Bord ta' Reviżjoni, u għalhekk ma għandux leġitimationsi biex ikun parti fil-proċeduri tallum quddiem din il-qorti.

10. Ngħaddu mela biex inqisu l-appell ta' ADCL.

11. Għalkemm ma tressaq ebda aggravju formali dwar hekk, l-appellant fir-rikors tal-appell għamlet din l-osservazzjoni:

»Fis-seduta quddiem il-bord, minkejja li kien hemm qbil bejn id-difensuri tal-partijiet li dawn l-eċċeżzjonijiet jiġu trattati u deċiżi flimkien mal-mertu (*salv it-talba għad-danni*), il-bord *ex officio*, u bi ksur tal-prinċipju ta' proċeduri avversarji u l-prinċipju li r-rimedji fl-akkwist pubbliku għandhom ikunu “*rapid*” u “*effective*”, iddeċieda li jitratta dawn l-eċċeżzjonijiet l-ewwel u qabel il-mertu.

»...

»Sfortunatament il-bord daħħal għal din il-kawża bi preġudizzju ġà ffurmat dwar kif ser jiddisponi mill-appell tas-soċjetà appellanti«

12. Fl-aħħar mill-aħħar, minkejja dak li jidhrihom il-partijiet, hija r-responsabilità tat-tribunal li, dejjem fil-limiti ta' dak li trid il-liġi tal-proċedura, jimxi kif jidhirlu li huwa l-aħjar biex jaqta' l-każ quddiemu b'heffa, effičjenza u, fuq kollo, ġustizzja, u għalhekk huwa fid-diskrezzjoni tat-tribunal li jiddeċiedi għandux iqis eċċeżzjonijiet preliminari għalihom qabel ma jisma' dwar il-meritu jew għandux jagħti deċiżjoni finali waħda kemm fuq l-eċċeżzjonijiet u kemm fuq il-meritu. Il-fatt li lill-bord deherlu li jkun aħjar li qabel xejn jagħti deċiżjoni fuq l-eċċeżzjonijiet la jmur kontra l-“prinċipju ta' proċeduri avversarji” u lanqas kontra dak tal-effikaċċja tar-rimedji. Kummenti bħal dak li għamlet l-appellant, li “hija sempliċement inkredula għal mod ta' kif mexa u ddeċieda l-bord” u li, għax għażżej li jisma' u jqis l-

eċċeżzjonijiet preliminari, il-bord “daħal għal din il-kawża bi preġudizzju ġja ffurmat dwar kif ser jiddisponi mill-appell tas-soċjetà appellanti”, huma biss kliem žejjed li ma jimpresjonax lill-qorti.

13. Eliminat kull ekwivoku li seta' nħoloq bil-kummenti tal-appellanti, il-qorti sejra issa tgħaddi biex tqis l-aggravji mressqa mill-appellanti.
14. Peress illi, fil-fehma tal-qorti, għas-soluzzjoni ta' din il-kawża huwa meħtieg qabel xejn li jiġi determinat jekk il-kuntratt impunjat huwiex kuntratt ġdid, awtonomu, jew huwiex estensjoni tal-kuntratt tad-9 ta' Mejju 2019 wara li l-awtorità kontraenti nqdiet bil-fakoltà mogħtija lilha f'dak il-kuntratt biex iġġeddu, il-qorti sejra tibda billi tqis it-tieni aggravju tal-appellanti li huwa appuntu dwar din il-kwistjoni. L-aggravju ġie mfisser hekk:

»In-negotiated procedure 6033/21 mhux estensjoni tat-2018 tender
 »Il-bord identifika bil-preċiż x'inhu l-pern tad-difiża tal-awtorità appellata f'dan il-każ u cioè li n-negotiated procedure 6033/21 huwa estensjoni tal-kuntratt iffirmat mas-soċjetà appellata riżultanti mit-2018 tender.
 »Il-bord wasal għall-konklużjoni li n-negotiated procedure 6033/21 huwa estensjoni tat-2018 tender u dan stante li dan kien permissibili skont klawżola 19.1 fil-kuntratt u anke għaliex ma kien hemm l-ebda “substantial modification” skont il-liġi li titlob il-ħruġ ta’ sejħa għal offerti ġidha.
 »Din il-konklużjoni hija wkoll ħażina u kontradetta mill-provi.
 »Is-soċjetà appellanti tissottometti li n-negotiated procedure 6033/21 qatt u qatt ma tista' titqies bħala estensjoni tat-2018 tender. Fil-verità l-argument li n-negotiated procedure 6033/21 hija estensjoni tat-2018 tender huwa wieħed li ġie kkreat ex post facto mill-awtorità appellata biss biex jilqa' għar-rikors tal-appellanti ai termini tar-regolament 277(2) tar-Regolamenti.
 »Dan huwa l-każ għas-segwenti fatti li huma irrifjuttabbli u li jikxfu l-mens reali tal-awtorità appellata fl-ġħoti tan-negotiated procedure 6033/21:
 »a. L-awtorità appellata, volontarjament, għaddiet mill-process burokratiku u oneruż li tikseb l-approvazzjoni ta' għotja ta' negotiated procedure without prior publication mingħand id-Direttur tal-

Kuntratti *ai termini* tar-regolamenti 150 tar-Regolamenti meta, li kieku vera n-negotiated procedure 6033/21 kien estensjoni pura skont il-kondizzjonijiet originali tat-2018 tender, kien hemm process ferm aktar semplici *ai termini* tar-regolament 246(1)(a) tar-Regolamenti. Dan tal-aħħar jaqra hekk:

»“For tenders with an estimated value which falls within regulation 9(1)(b) and upon the prior approval of the Director a contracting authority can order modifications to the contract or framework agreement without a new procurement procedure, in any of the following cases: [...] where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement.”

»It-2018 Tender kien jiprovd i kif ġej fuq il-kwistjoni tal-estensjoni:

»“Article 19: Period of Execution of Tasks

»“This contract shall run for a period of 24 months from commencement date, with a possibility to extend for a further 24 months at the same prices and conditions of this RFP.”

»Il-linja addottata mill-awtorità appellata mhux verosimili. L-użu tan-negotiated procedure without prior publication għandu jkun eċċeżzjonali għaliex wieħed ikun qed joħnoq il-kompetizzjoni u l-għotxi ta’ Kuntratt direttament lil operatur wieħed tmur kontra l-ġħanijiet principali tad-Direttivi Komunitarji.

»Għalhekk, jekk vera kien hemm il-prospett ta’ estensjoni ta’ Kuntratt minħabba “a clear, precise and unequivocal review clause [...] provided for in the initial procurement documents” huwa assolutament illogiku li tieħu t-triq tan-negotiated procedure without prior publication.

»L-awtorità appellata, però, ma setgħetx taqbad din ir-rotta minħabba li n-negotiated procedure 6033/21 ma kienx estensjoni pura tat-2018 tender, imma anzi kienet tikkontjeni “substantial modification” kif ser jiġi spjegat.

»b. In-negotiated procedure 6033/21 fil-verità tikkontjeni “substantial modification” li ma kinetx permessa mill-kondizzjonijiet originali tat-2018 tender u għalhekk kien hemm bżonn ta’ new procurement procedure – senjalament in-negotiated procedure 6033/21.

»Din il-modifika tikkonsisti fl-estensjoni tat-therapeutic indications li għalihom ġie mixtri l-prodott Nivolumab fit-2018 tender. Il-bord għarraf fid-deċiżjoni appellata li n-negotiated procedure 6033/21 xtara Nivolumab għall-imqar therapeutic indication waħda li ma kinetx parti mit-2018 tender, imma saħaq, b'mod żbaljat għall-aħħar, li “point (v) above is not deemed to constitute a material change and thus, this extension is not deemed to constitute a new and/or separate procurement cycle”.

»Għall-benefiċċju ta’ din l-onorabbli qorti t-2018 tender ġie emendat varji drabi u dan fis-sens li:

- »● Fl-ewwel iterazzjoni tat-2018 tender ma kien hemm l-ebda indikazzjoni tat-*therapeutic indications* li għalihom kien ser jinxтарa l-prodott fil-klassi ta' *PD-1 Inhibitors* u kien hemm miktub sempliċement:
 - »“For the purpose of evaluation capping price is based on annual treatment service on the below regimen as per SPC:
 - »“[...]
 - »“Any indication that is approved and that will be approved, will be treated at same treatment service price awarded within this RFP.”
 - ».... . . .
- »● Wara li saret *pre-contractual remedy* quddiem il-bord rigward it-2018 tender fil-każ 1177, dan il-kliem tneħħha u minflok it-2018 tender kien jaqra biss hekk:
 - »“For the purpose of evaluation capping price is based on annual treatment service on the below regimen as per SPC for NCLS (non-small cell lung cancer) and skin melanoma.”
 - ».... . . .
- »● Fiż-żmien ta' meta *Nivolumab* inxtara permezz tat-2018 tender, *Nivolumab* kien biss approvat mill-*European Medicines Agency* bħala *second-line treatment* u mhux bħala *first-line treatment* li ġie approvat sussegwentement.
 - »Għalhekk, *Nivolumab*, permezz tat-2018 tender, inxtara biss għall-second-line treatment ta' NSCLC (non-small cell lung cancer) u mhux għall-first-line treatment tal-istess.
 - »Il-fatt li *Nivolumab* qed jinxтарa permezz tan-negotiated procedure 6033/21 għall-first-line treatment NSCLC ukoll jikkostitwixxi *substantial modification* u fil-verità kien għal-hekk li l-awtorità appellata kellha tixtri bi proċedura ġidha – u hija għażlet in-negotiated procedure 6033/21 u mhux estensjoni ai termini tal-klawżola 19.1 tat-2018 Tender.
 - »Biss però l-awtorità appellata ma tistax issa tgħid li n-negotiated procedure 6033/21 huwa estensjoni tat-2018 tender, speċjalment meta t-2018 tender espressament neħħha l-kliem “Any indication that is approved and that will be approved, will be treated at same treatment service price awarded within this RFP” u fis-seduta quddiem il-bord fil-każ precedingi 1177 l-avukat tal-awtorità appellanti stqarr hekk:
 - »“Dr Zrinzo Azzopardi stated that the tender refers only to the two indications approved by the Medical Authorities [li dak iż-żmien kienu second-line treatment NSCLC u melanoma] – if the Government takes over those funded by the MCCF [Malta Community Chest Fund] then a new tender would be necessary.
 - »Din id-dikjarazzjoni verbalizzata mill-awtorità appellata hija l-prova regina li turi li x-xiri ta' *Nivolumab* għall-first line treatment NSCLC riedet sejħa għal offerti ġidha u dan għaliex tikkostitwixxi *substantial modification*.

»c. L-awtorità appellata meta talbet l-approvazzjoni tad-Direttur tal-Kuntratti għall-għotja ta' *negotiated procedure without prior publication* (u mhux ta' estensjoni ta' kuntratt) ma qalet xejn fuq it-2018 tender u l-klawżola 19.1 li tippermetti estensjoni.

»d. In-natura vera tan-*negotiated procedure 6033/21* inkixxet mill-awtorità appellata stess meta din ippubblikat id-dettalji tan-*negotiated procedure 6033/21* fil-Gazzetta tal-Gvern dan sar taħt il-“Lista ta’ proċeduri negozjati mogħtija mis-Central Procurement and Supplies Unit bejn l-1 ta’ Jannar 2021 u t-30 ta’ Ĝunju 2021, skont l-artikolu 111(2) tar-Regolamenti tal-2016 dwar l-Akkwist Pubbliku (AL 356/2016)” u mhux taħt il-“Lista ta’ varjazzjonijiet mogħtija mis-Central Procurement and Supplies Unit bejn l-1 ta’ Jannar 2021 u t-30 ta’ Ĝunju 2021, skont l-artikolu 111(2) tar-Regolamenti tal-2016 dwar l-Akkwist Pubbliku (SL 601/03)”.

»Dawn iż-żewġ listi ġew pubblikati fl-edizzjoni tal-Gazzetta tal-Gvern tal-20 ta’ Awissu 2021 imma l-awtorità appellata għażżelet li tippubblika n-*negotiated procedure 6033/21* fil-lista tal-proċeduri negozjati u mhux f’dik tal-varjazzjonijiet.

»Għal dawn ir-raġunijiet dan l-aggravju għandu jintlaqa’ u għalhekk ir-rikors odjern huwa ammissibl *ai termini tar-regolament 277(2)* tar-Regolamenti stante li n-*negotiated procedure 6033/21* ma kienx estensjoni tat-2018 tender imma anzi *substantial modification* tat-2018 Tender.«

15. AMML wieġbet hekk għal dan l-aggravju:

»It-tieni aggravju tal-appellanti huwa illi l-Bord ta’ Reviżjoni skorrettament ikkonkluda li n-*negotiated procedure 6033* hija estensjoni tat-2018 tender.

»L-appellanti targuenta wkoll li l-argument li n-*negotiated procedure 6033* huwa estensjoni tat-2018 tender huwa wieħed li ġie kkreat *ex post facto* mis-CPSU biex tilqa’ għar-rikors tal-appellanti.

»... ... is-CPSU dejjem qalet li x-xiri permezz ta’ *negotiated procedure 6033* kien ser isir biex tkun f’posizzjoni li tkompli bit-trattament ta’ pazjenti eżistenti.

»Ms Gili kkonfermat dan fix-xieħda tagħha meta xehdet li, fit-talba li saret mis-CPSU lid-Dipartiment tal-Kuntratti, kien hemm hekk:

»“Branded product is patent and can only be supplied by one economic operator. Item is presently supplied to CPSU via negotiated agreement. This request is therefore to cater for 12 months worth of stock to secure continuation of treatment for current patients.”

»Huwa minnu li ma hemmx, fit-talba, referenza espliċita għat-2018 tender. Iżda huwa wkoll minnu lit-talba tagħmel referenza espliċita għal kontinwazzjoni tat-trattament ta’ pazjenti eżistenti.

»Issa, huwa fatt (li mhux kontestat) li AM Mangion kienet iffirmat il-kuntratt oriġinali fid-9 ta’ Mejju 2019, kif ikkonfermat mix-xieħda ta’ Dr Alison Anastasi, u dan wara li rebħet il-kompetizzjoni li nbdiet permezz tat-2018 tender.

»Huwa fatt ukoll li l-kuntratt oriġinali kella durata fissa ta' sentejn, b'possibilità ta' estensjoni għal sentejn oħra. Jigifieri, durata massima sa Mejju tal-2023.

»Nonostante, l-appellant kemm fl-appell kif ukoll fir-rikors u s-sotto-missjonijiet tagħha quddiem il-bord tagħmel numru ta' allegazzjonijiet għal kollox infondati. L-appellant tiprova tikkonvinċi lil din l-onorabbi qorti li kien hemm xi *mala fede mis-CPSU*.

»Il-fatti juru li din l-allegazzjoni ma tistax tkun iktar 'il bogħod mil-verità.

»Il-fatt huwa – u dan mhux kontestat – li s-CPSU setgħet tixtri l-prodott *Nivolumab* f'kwalunkwe kwantità neċċessarja (għaliex it-2018 tender kella biss stima tan-numru ta' pazjenti), u għal perjodu ta' erba' snin shah.

»Is-CPSU setgħet, legalment u kuntrattwalment, tagħlaq is-suq għal erba' snin shah (għallinqas fir-rigward ta' *NCLS (non-small cell lung cancer) and skin melanoma* li huma it-therapeutic indications li l-appellant tallega li jistaw jiġu trattati b'*Pembrolizumab*) u l-appellant ma setgħet tagħmel xejn.

»L-appellant issa qed tattakka lis-CPSU minħabba durata ta' estensjoni ta' 12-il xahar – cioè, nofs id-durata li kellha dritt tagħti taħt il-kuntratt oriġinali.

».... l-appellant tagħamel referenza għall-fatt li CPSU talbet l-approvazzjoni ta' għotja ta' *negotiated procedure without prior publication* mingħand id-Direttur tal-Kuntratti *ai termini* tar-regolament 150 tar-Regolamenti u targumenta li, li kieku vera n-negotiated procedure 6033 kienet estensjoni pura skont il-kondizzjonijiet oriġinali tat-2018 tender, kien hemm proċess ferm aktar sempliċi *ai termini* tar-regolament 246(1)(a) tar-Regolamenti.

»Il-verità hija li, kemm taħt ir-regolament 150 kif ukoll taħt ir-regolament 246, is-CPSU kellha titlob l-approvazzjoni tad-Dipartiment tal-Kuntratti. Regolament 246(1) infatti jiprovd hekk:

»“Għal offerti b'valur stmat li jaqa' fi ħdan ir-regolament 9(1)(b) u bl-approvazzjoni minn qabel tad-Direttur, awtorità kontraenti tista' li l-kuntratt jew il-ftehim qafas jiġu mmodifikati mingħajr proċedura gdida tal-akkwist fi kwalunkwe wieħed minn dawn il-każijiet li ġejjin: ...”

»Kif spjegat hawn fuq, is-CPSU setgħet tagħlaq is-suq għall-erba' snin kif espressament provdut fil-kuntratt oriġinali. Għażlet iżda li tintrabat biex tixtri *Nivolumab* għal 12-il xahar ieħor biss.

»Fis-sustanza, anki li kieku n-negotiated procedure 6033 ma setax isir, is-CPSU setgħet testendi l-kuntratt għal 12-il xahar, bla problemi ta' xejn, għaliex dan kien provdut b'mod espress fil-kuntratt oriġinali.

»L-appellant ma tikkontestax il-fatt li (a) il-kuntratt oriġinali kien jiprovd għal estensjoni ta' sentejn, u (b) li dik l-estensjoni kienet tkun perfettament konformi mal-liġi. Regolament 246(1)(a) tar-Regolamenti jiprovd hekk:

»“**246.** (1) Għal offerti b'valur stmat li jaqa' fi ħdan ir-regolament 9(1)(b) u bl-approvazzjoni minn qabel tad-Direttur, awtorità kontraenti tista' li l-kuntratt jew il-ftehim qafas jiġu mmodifikati

mingħajr proċedura ġdida tal-akkwist fi kwalunkwe wieħed minn dawn il-każijiet li ġejjin:

»“(a) fejn il-modifikasi, irrispettivament mill-valur monetarju tagħhom, ikunu ġew previsti fid-dokumenti inizjali tal-akkwist fi klawżoli ta’ reviżjoni čari, preċiżi u inekwivokabbli, li jistgħu jinkludi klawżoli ta’ reviżjoni ta’ prezzi, jew għażliet. Dawn il-klawżoli għand-hom jiddikjaraw il-kamp ta’ applikazzjoni u n-natura ta’ modifikasi jew għażliet possibbli kif ukoll il-kondizzjonijiet li taħthom dawn jistgħu jintużaw. Ma għand-homx jipprovdu għal modifikasi jew għażliet li jibdlu n-natura ġenerali tal-kuntratt jew tal-ftehim qafas; ...”

»L-appellanti targuenta li s-CPSU ma setgħetx timmodifika l-kuntratt originali mhux għax il-kuntratt originali ma kienx jikkontempla estensjoni ta’ sentejn (*multo magis ta’ sena*), iżda minħabba li fil-fehma tal-appellanti n-negotiated procedure 6033 ma kienx estensjoni pura tat-2018 tender, imma anzi kienet tikkontjeni “*substantial modification*”.

»L-appellanti targuenta li l-modifikasi tikkonsisti fl-estensjoni tat-therapeutic indications li għalihom ġie mixtri l-prodott *Nivolumab fit-2018 tender*.

».... . . . L-appellanti tallega li t-2018 tender oriġinarjament (qabel ma ġie emendat) kien jippermetti lis-CPSU li tuża l-prodotti għal kwalunkwe therapeutic indication li hemm fl-SPC, iżda dan ġie emendat biex jillimita l-użu għal “*regimen as per SPC for NCLS (non-small cell lung cancer) and skin melanoma*”.

»Mhux kontestat li kien hemm tibdil fit-terminoligja tat-2018 tender

»Iżda l-interpretazzjoni tal-appellanti tat-2018 tender hija kkontestata bis-saħħa.

»L-ewwel nett, is-sejħha originali kienet tipprovd hekk:

»“Any indication that is approved and that will be approved, will be treated at same treatment service price awarded within this RFP.”

»Huwa evidenti li l-iskop tagħha kien li tiffissa l-prezz għal kull “*indication that is approved and that will be approved*”.

»It-tieni nett, it-2018 tender (kif emendat) jeskludi dak il-paragrafu u jirreferi għal żewġ therapeutic indications – NCLS (non-small cell lung cancer) and skin melanoma – biss fir-rigward tal-evalwazzjoni tal-prezzijiet. Naturalment, biex evalwazzjoni ssir b'mod li tirrispetta l-principji tat-trasparenza u l-ugwaljanza, evalwazzjoni trid issir like with like. It-2018 tender, b'mod espress, ipprovda hekk għal finijiet ta’ evalwazzjoni:

»“For the purpose of evaluation capping price is based on annual treatment service on the below regimen as per SPC for NCLS (non-small cell lung cancer) and skin melanoma.”

»It-tielet nett, l-appellanti targuenta li s-CPSU setgħet tixtri *Nivolumab* biss għal second-line treatment u mhux first-line treatment NSCLC u dan għaliex dak iż-żmien l-SPC kien limitat b'dak il-mod.

»L-appellant includiet dan bħala fatt fejn tgħid li *AM Mangion* rebħet it-2018 tender bil-prodott *Nivolumab* “strettament għas-segwenti *therapeutic indications* approvati mill-European Medicines Agency dak iż-żmien: (1) *second-line treatment NSCLC*; u (2) *melanoma*.”

»Kif spjegat hawn fuq, it-2018 tender jiprovd hekk:

»“For the purpose of evaluation capping price is based on annual treatment service on the below regimen as per SPC for NCLS (non-small cell lung cancer) and skin melanoma.”

»Għalhekk, anki li kieku wieħed kelliu jinterpretar s-suespost bħala restrizzjoni fuq is-CPSU li tuża *Nivolumab* għal NCLS u *skin melanoma* biss (u mhux biss “*for the purpose of evaluation*”), fl-ebda parti tat-2018 tender ma hemm referenza għal *first* jew *second line*.

»Mhux biss ma hemmx limitazzjoni għal *second line treatment*, kif qed tallega l-appellant, iż-żda t-2018 tender jgħid “*as per SPC*” u jiprovd wkoll fis-special conditions:

“When the SPC is updated or revised during the period of validity of the contract, the contractor must provide CPSU with a copy of the updated or revised SPC.”

»Jekk *Nivolumab* jista’ jintuża għal *first* u *second line treatment* skont l-SPC, fi kwalunkwe perjodu waqt il-kuntratt originali, onkologu ser juža *Nivolumab* fl-aħjar interess tal-pazjent. Dr Refalo infatti xehed li:

»“Usually you use the most effective treatment first. The same can be applied in many things. Like in football, if you have a team of players, ideally you start the game with your best players. You do not start with the more inferior or less effective team. So the first treatment tends to be the treatment that is more likely to work. If you have a treatment which is 80% successful and a treatment which is 20% successful, you would use the first line treatment that is 80% successful”

»L-allegazzjoni li, għaliex *Nivolumab* qed jintuża wkoll għal *first line treatment*, dan jikkostitwixxi *substantial modification* u għalhekk is-CPSU kellha tixtrih bi proċedura ġidida — *negotiated procedure 6033* – u mhux estensijni *ai termini* tal-klawżola 19.1 tat-2018 tender hija infondata u bla ebda baži.

»L-ewwel nett, għaliex it-2018 tender ma jillimitax luu ta’ *Nivolumab* għal *second line treatment* kif qed tallega l-appellant. L-anqas mat-2018 tender jirreferi għal *first line* fir-rigward ta’ *Pembrolizumab*.

»It-tieni nett anki li kieku kien il-każ, li tuża *Nivolumab* għal *first line treatment* ukoll qatt ma jista’ jitqies bħala *substantial modification* (jekk tieħu l-eżempju ta’ Dr Refalo, qis u reserve issa huwa tajjeb biżejjed biex jibda l-logħba). L-istess prodott ikun qed jintuża għall-istess *therapeutic indications* fuq l-istess pazjenti, biss tkun inbiddlet l-ordni (cioè, qed tintuża bħala *first line* flokk *second line*).

»L-appellant mhix korretta meta tgħid li fis-seduta quddiem il-bord fil-każ preċedenti 1177 l-avukat tas-CPSU kien stqarr kif indikat fl-appell tagħha. Dr Zrinzo Azzopardi f'dik il-kawża qal hekk:

»“Dr Zrinzo Azzopardi stated that the tender refers only to the two indications approved by the medical authorities – if the Govern-

ment takes over those funded by the MCCF then a new tender would be necessary.”

»Ir-referenza hija referenza għal “NCLS (*non-small cell lung cancer) and skin melanoma*” kif indikat fit-2018 tender. Dawn huma l-indications u mhux second-line treatment NSCLC u melanoma kif qed tallega l-appellanti.

»Il-“prova regina” kif qed tallega l-appellanti ma teżistix. Fl-ebda mod ma t-2018 tender tillimita ruħha għal first jew second line treatment ta’ NSCLC jew melanoma.

»Kif spjegat hawn fuq, anki li kieku kien hemm referenza għal second line treatment, l-użu għal first line treatment ma jikkwalifikax għal modifika sostanzjali għax l-ebda mill-kundizzjonijiet fir-regolament 246(5) tar-Regolamenti ma japplika f'dan il-każ u l-appellanti ma resqet ebda prova jew argument biex tispjega kif, fil-fehma tagħha, modifika bħal din tista’ titqies bħala modifika sostanzjali fl-ambitu tar-regolament 246(5). Modifika bħal din żgur li ma trendix kuntratt materjalment differenti fin-natura minn dak inizjalment konkluż, kif jitlob ir-regolament 246(5) – il-kuntratt jibqa kuntratt għal NCLS (*non-small cell lung cancer) and skin melanoma*.

»Ma hemmx dubbu li s-CPSU kellha s-setgħa li tagħti estensjoni ta’ sentejn, iżda illimitata għal nofs dak il-perjodu. Li kieku eżerċitat id-dritt li testendi b’sentejn, is-suq kien ikun magħluq sat-2023.«

16. Il-kwistjoni mela hi jekk il-ftehim kontestat tal-24 ta’ Marzu 2021 bejn l-awtorità kontraenti u AMML – il-ftehim li dwaru sar dan l-appell – huwiex ftiehim ġdid, li allura kelli jsir b’ħarsien tal-proċeduri li jridu r-Regolamenti – jew huwiex biss estensjoni tal-ftehim oriġinali li kien jaħseb għal estensjoni, u għalhekk il-ftehim kontestat jista’ titqies bħala kontinwazzjoni tal-kuntratt oriġinali.

17. L-argument ewljeni tal-appellanti huwa msejjes fuq bidla li seħħet fis-sejħa għal offerti li wasslet għall-kuntratt oriġinali. Meta saret is-sejħa l-para. 1.1 u 1.2 tad-dokument relativ kienu jgħidu hekk:

»1.1 Specifications:

»For the purpose of evaluation capping price is based on annual treatment service on the below regimen as per SPC:

Nivolumab vials	Pembrolizumab vials
3/mg/kg administered IV over 60 minutes every 2 weeks	2mg/kg by IV infusion every three weeks

- »1.2 Price and performance outcome service
 - »• Capping of treatment service per patient per year will be at 60,000.00 euros.
 - »• Any indication that is approved and that will be approved, will be treated at same treatment service price awarded within this RFP.
- ».... «

18. Kien hemm ukoll *risk sharing agreement* li bis-saħħha tiegħu għall-ewwel sena tal-kuntratt il-kuntrattur kellu jerfa' sehem – li jonqos kull tliet xhur – mill-prezz, soġġett dejjem għall-capping tal-prezz totali kull pazjent.

19. Intalab rimedju dwar dan ir-*risk sharing agreement* quddiem il-Bord ta' Reviżjoni qabel l-għeluq tas-sejħa, u wara d-deċiżjoni tal-bord tnaqqas is-sehem mill-prezz li jgħorr il-kuntrattur u nbidlu wkoll il-klawsoli 1.1 u 1.2 tad-dokument tas-sejħa hekk:

»1.1 Specifications:

»For the purpose of evaluation capping price is based on annual treatment service as per SPC for NCLS (non-small cell lung cancer) and skin melanoma:

Nivolumab vials	Pembrolizumab vials
3/mg/kg administered IV over 60 minutes every 2 weeks	2mg/kg by IV infusion every three weeks

»1.2 Price and performance outcome service

- »• Capping of treatment service per patient per year will be at 60,000.00 euros.

».... «

20. Sinjifikanti fil-fehma tal-appellant hija l-eliminazzjoni tal-klawsola li tgħid illi "Any indication that is approved and that will be approved, will be treated at same treatment service price awarded within this RFP". Dan, tgħid l-appellant, ifisser illi l-mediċini ma jistgħux jintużaw għal kondizzjonijiet jew metodi ta' trattament "that will be approved" fil-gejjieni iżda biss għal dawk approvati fil-mument tas-sejħa, u għalhekk ma tistax issir

estensjoni tal-kuntratt oriġinali biex l-istess medicina tintuża b'mod differenti; għal dak l-użu huwa meħtieg kuntratt ġidid.

21. Din il-qorti iżda taqbel ma' AMML illi l-ħsieb wara l-klawsoli miġjuba fuq huwa li jirregolaw kif jiġi kalkolat il-prezz ghall-għanijiet tal-evalwazzjoni ta' liema offerta hija l-orħos – “*for the purpose of evaluation*” – u mhux li jillimitaw l-użu tal-mediċini fl-interess tal-pazjenti jekk jinsab illi kondizzjonijiet oħra jistgħu jiġu trattati bil-mediċini. Li ma kienx hekk fil-kondizzjonijiet emendati tas-sejħha ma kienx ikun hemm ħtiega għall-klawsola li tgħid hekk:

»9.9 Summary of Product Characteristics (Medicinal Products)

»The Contractor must ensure that a copy of the latest approved Summary of Product Characteristics (SPC) intended for the use of healthcare professionals is kept at all times by the contractor.

»The contractor must make the Summary of Product Characteristics (SPC) available without delay when requested by CPSU. When the SPC is updated or revised during the period of validity of the contract, the contractor must provide CPSU with a copy of the updated or revised SPC.«

22. Il-ġħan ta' din l-obbligazzjoni tal-kuntrattur huwa li min jiddeċiedi dwar l-użu tal-mediċini jkollu l-aktar tagħrif aġġornat dwar kif u meta jista' jinqeda bihom għall-aħjar riżultati u fl-aħjar interess tal-pazjenti. L-argument tal-appellanti, li trid, minflok, illi l-użu tal-mediċini jibqa' kristallizzat kif kien fl-imġħoddi, ma huwiex kompatibbli ma' dan l-interess.

23. Safejn imsejjes fuq il-bidliet fil-kondizzjoniet tas-sejħha li wasslu għall-kuntratt oriġinali, l-aggravju huwa għalhekk miċħud.

24. Argument sussidjarju tal-appellanti hu illi, li kieku l-ftehim kontestat kien biss estensjoni tal-kuntratt oriġinali, l-awtorità kontraenti ma kinitx tgħaddi mill-“process burokratiku u oneruż” li għażżelet biex tikseb il-kunsens tad-

Direttur tal-Kuntratti biex tagħmel il-ftehim kontestat; il-fatt li għażlet li timxi b'dik il-proċedura jfisser – tgħid l-appellant – illi l-awtorità stess tagħraf li dan kien kuntratt ġdid.

25. Il-fatt li ntalbet approvazzjoni fejn ma kinitx meħtieġa ma jinvalidax dak li sar. Barra minn hekk, kif tosserva *AMML* fit-tweġiba tagħha, l-approvazzjoni minn qabel tad-Direttur tal-Kuntratti xorta kienet meħtieġa jekk l-estensjoni tal-kuntratt originali titqies “modifika” tal-patt dwar id-durata tal-kuntratt, ukoll jekk dik il-modifika kienet kontemplata fil-kuntratt originali. Ir-reg. 246 tal-L.S. 601.03 fil-fatt igħid hekk:

»**246.** (1) Għal offerti b'valur stmat li jaqa' fi ħdan ir-regolament 9(1)(b) u bl-approvazzjoni minn qabel tad-Direttur, awtorità kontraenti tista' li l-kuntratt jew il-ftehim qafas jiġu mmodifikati mingħajr proċedura ġdida tal-akkwist fi kwalunkwe wieħed minn dawn il-każijiet li ġejjin:

»(a) fejn il-modifikasi, irrisspettivament mill-valur monetarju tagħ-hom, ikunu ġew previsti fid-dokumenti inizjali tal-akkwist fi klawżoli ta' reviżjoni čari, preciżi u inekwivokabbli,
...«

26. Ukoll jekk l-awtorità kontraenti għażlet li timxi bil-proċess aktar “onruž” maħsub għal kuntratt ġdid flok bil-proċess “anqas onruž” biex jinkiseb permess għall-estensjoni, dan ma jwassalx għall-invaliditā tal-ftehim kontestat ladarba dak il-ftehim, għar-raġunijiet mogħtija fil-konsiderazzjonijiet magħħmula aktar ’il fuq, seta’ jsir validament. Kien forsi jkun mod ieħor li kieku l-awtorità mxiet bi proċedura “leġġera” flok dik “onruža” meta kellha timxi bil-proċedura onruža, iżda l-fatt li għażlet il-proċedura aktar onruža jfisser se *mai* li nqđiet bi proċess b'aktar, mhux b'anqas, salvagwardji, u jkun kontro-sens tħassar ftehim għax sar wara għarbiel aktar metikoluż meta fis-sustanza l-ftehim huwa validu.

27. Argument ieħor tal-appellanti hu illi l-ftehim kontestat tħabbar fil-Gazzetta tal-Gvern taħt il-“Lista ta’ proċeduri negozjati mogħtija mis-Central Procurement and Supplies Unit bejn l-1 ta’ Jannar 2021 u t-30 ta’ Ġunju 2021” u mhux taħt il-“Lista ta’ varjazzjonijiet mogħtija mis-Central Procurement and Supplies Unit bejn l-1 ta’ Jannar 2021 u t-30 ta’ Ġunju 2021”.
28. Dan huwa minnu, iżda l-ftehim sar fl-24 ta’ Marzu 2021 u tħabbar fil-Gazzetta tal-Gvern fl-20 t’Awissu 2021, ġumes xhur wara. Dak li sar ġumes xhur wara ma jbiddilx in-natura ta’ dak li sar ġumes xhur qabel.
29. Barra minn hekk, ukoll jekk l-awtorità kontraenti fehmet illi kienet dieħla f’kuntratt ġdid, u mxiet bil-proċedura propria għal kuntratt ġdid u ġabbret il-ftehim bħala kuntratt ġdid, dan ma jibdilx il-fatt illi l-ftehim kontestat ma bidilx is-sostanza tal-kuntratt oriġinali, u l-estensjoni taż-żmien kienet kontemplata fil-kuntratt oriġinali. Il-ftehim oriġinali għalhekk ma sarx biksur tal-liġi, u ma għandux għax jitħassar.
30. Dan l-aggravju hu għalhekk miċħud. Dan hu biżżejjed biex jiġi miċħud l-appell, għax l-aggravji l-oħra fil-meritu huma msejsa fuq il-premessa illi l-ftehim kontestat kien kuntratt ġdid u mhux estensjoni tal-kuntratt oriġinali, u għalhekk huma msejsa fuq premessa ħażina. Il-qorti għalhekk tiċħad l-appell. L-ispejjeż relativa tħallashom l-appellant.

Mark Chetcuti
President

Giannino Caruana Demajo
Imħallef

Anthony Ellul
Imħallef

Deputat Registratur
gr