



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar il-Ħamis, 12 ta' Lulju, 2023.

Numru 23

Rikors numru 139/23/1

Cherubino Limited

v.

- 1. Ministeru għall-Ambjent, l-Energija u l-Intrapriża;**
- 2. The Organic Kid; u**
- 3. Direttur Ġenerali tal-Kuntratti għan-nom u in rappreżentanza tad-Dipartiment tal-Kuntratti**

Il-Qorti:

- 1. Rat li dan hu appell imressaq fis-27 ta' Marzu, 2023 mis-soċjetà rikorrenti Cherubino Ltd. wara s-sentenza mogħtija fis-6 ta' Marzu, 2023, mill-Bord ta' Revizjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-każ riferenza SPD6/2022/095 (każ numru 1851).**

2. Dan il-każ jirreferi għal sejha li ħareġ il-Ministeru għall-Ambjent, l-Energija u l-Intrapriża “*for the supply and delivery of sustainable baby items and boxes with a reduced environmental impact*”. Għal din is-sejha tressqu żewġ offerti u l-kumitat evalwattiv iddeċieda li jirrakkomanda l-kuntratt a favur is-soċjetà intimata The Organic Kid. L-offerta tas-soċjetà rikorrenti ġiet imwarrba għax ma kinitx l-orħos waħda. Is-soċjetà Cherubino Ltd. ressqet l-aggravji tagħha għal quddiem il-Bord li b’deċiżjoni tas-6 ta’ Marzu, 2023, ma aċċettatx l-aggravji ta’ din is-soċjetà. Is-sentenza tal-Bord hija s-segwenti:

“Whereby, the Appellant contends that:

a) The Organic Kid does not meet the tender requirements –

Following the information received from the DOC in relation to the product on offer by The Organic Kid, it transpires that the following items are not in accordance with the tender specifications: ITEM 3.1, ITEM 3.5, ITEM 3.10, ITEM 3.11

b) Samples submitted not in accordance with the Tender specifications –

In addition and in accordance with the 'logsheet of samples received by bidders', it transpires that The Organic Kid submitted its samples on the 11th January 2023, thus in breach of the Technical Offer Sample List [Note 3], which stipulated that the samples are to be submitted within ten [10] working days from notification.

c) Doctrine of self-limitation –

The doctrine of self-limitation is an important public procurement principle which has been referred to by this honourable Board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document, this will ensure predictability and transparency.

The Appellant company feels aggrieved by the decision of the evaluation committee, in particular since it failed to adhere to the mandatory requirement of the tender document, and in the process breaching this fundamental principle.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 8th February 2023 and its verbal submission during the hearing held on 2nd March 2023, in that:

a) The Organic Kid does not meet the Tender Requirements

In its first grievance, Appellant is claiming that Items 3.1, 3.5, 3.10 and 3.11 of the offer by The Organic Kid are not in accordance with the tender specifications. The Appellant does not give any reasons for its grievance despite the formal requirements contained in Regulation 270 of the Public Procurement Regulations (S.L. 601.03) – *“may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints”*. The Ministry is thus reserving its right to present ulterior defence pleas once the Appellant clarifies the object of its grievance. In the failure of the Appellant to state in a clear manner the reasons for its first grievance, the grievance should be rejected for lack of observance of the aforementioned formal requirement. Without prejudice to the above, the Ministry stands by its evaluation and holds that it was correct when the procurement was recommended for award to The Organic Kid, this being the cheapest priced offer satisfying all the administrative and technical criteria stipulated in the Tender Document.

b) Samples Submitted not in Accordance with the Tender Specifications

In its second grievance, Appellant is also claiming that The Organic Kid submitted its samples on the 11th of January 2023 and therefore was in breach of the Technical Specification C (iii) requiring the submission of samples. Appellant argues that the requested samples had to be submitted within 10 working days from tenderers being notified and not by the 11th of January 2023 as requested by the Ministry. By virtue of a letter dated the 22nd of December 2022 the Ministry informed all bidders including Cherubino Ltd and The Organic Kid that samples in line with the Item Specifications found in Section 3 of the Tender Document had to be submitted by noon of Wednesday 11th of January 2023. Cherubino Ltd submitted its samples on the 5th of January 2023 and The Organic Kid submitted its samples on the 11th of January 2023 both within the time limit provided by the Ministry. The Ministry thus considers that the samples for both bids were submitted within the time-limit of the 11th of January 2023 which is the applicable time-limit imposed.

c) Doctrine of Self-Limitation

In its third grievance, the Appellant is arguing that the Evaluation Committee failed to adhere to the mandatory requirement of the Tender Document, and thus breached the doctrine of self-limitation.

The principle of self-limitation is seen as a corollary to the principles of equal treatment and transparency and was given its due importance during the evaluation, such that the Evaluation Committee fully adhered to the terms of the Tender Document.

The case law of the General Court of the Court of Justice of the European Union (CJEU) defines clearly that the doctrine of self-limitation cannot be read without reference to the principle of equal treatment of economic operators: *“it must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations.”* - Case T-415/10, Nexans France v. European Joint Undertaking for ITER and the Development of Fusion Energy, judgment of the 20th of March 2013, paragraph 80.

Therefore, the objective of the doctrine of self-limitation is to enforce the principle of equal treatment, in accordance with Regulation 39(1) of the Public Procurement Regulations (S.L. 601.03) so that all tender conditions apply to all bidders equally. It is clear according to the above-cited case law that, even if for the sake of the argument it is to be accepted that the Ministry changed the time-limit specified in the Tender Specifications, this minor change does not alter the Tender Specifications. The bidders were still bound by the same Tender Specifications, i.e. to submit the same samples that were included in the tender document. The time-limit of the 11th of January 2023 applied to all bidders equally. Therefore, no bidder was disadvantaged and a level playing field was maintained. Moreover, the time-limit of the 11th of January 2023 was communicated to all tenderers on the same date using official channels using the ePPS portal. Therefore, given that there is no doubt that all bidders had been treated equally there could have been no breach of the principle of self-limitation.

It should also be noted that Regulation 38 of the Public Procurement Regulations (S.L. 601.03) expressly allows contracting authorities to clarify or even amend the tender document:

“(4) The contracting authority or the central government authority may issue clarification notes to explain certain matters, to give additional information, to remove or amend certain inconsistencies or errors and to fill in missing information contained in the procurement document.

(5) When issued in the clarification notes, the additional information and the supporting document shall form an integral part of the procurement document.”

If a contracting authority is allowed to amend the procurement document, then surely in this case, where the tender specifications were not changed but the Ministry merely extended the deadline for submission of the samples for all bidders equally, the Ministry acted in line with the Public Procurement Regulations.

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, will now consider Appellant's grievances.

a) ***The Organic Kid does not meet the tender requirements*** – ***1st grievance*** - the Appellant raised a number of different arguments. This Board will deal with the most relevant:

i. Model number – reference was made by the appellant to the Technical Offer Questionnaire whereby *“Bidders are to state the brand of the supplies being offered in response to the specification requested under Section 3 – Technical Specifications. Bidders are to also specify the items being offered and confirm compliance of offered items to GPP Criteria”* – This Board opines that this clause can be divided into three (3) separate requirements. The first requirement is self-explanatory. The ‘brand’ name had to be declared specifically, something which was done by both the recommended bidder and the appellant. The second requirement, i.e. *“Bidders are to also specify the items being offered”*, is in this Board's opinion, open for interpretation. The appellant is of the opinion that this required a specific ‘model number’ to be submitted and is therefore feeling aggrieved that the recommended bidder rather than supplying a ‘model number’ listed down specifications of the products being offered. The Board opines that since the model number was not asked for specifically, and the information as provided by the recommended bidder could easily be verified by the request of samples (which was actually done by the Contracting Authority), then the Evaluation Committee correctly interpreted such a requirement. The third requirement, i.e. *“confirm compliance of offered items to GPP Criteria”* was adhered to by both parties.

ii. GPP Criteria & Scope of Tender – this Board agrees with the argument as brought forward by the appellant that the scope of the tender is to shift to a more sustainable and eco-friendly upbringing of children. However, the Evaluation Committee, due to the principle of self-limitation, is to follow what is ‘sustainable and eco-friendly’ as listed in the tender dossier. Page 17 of the tender dossier clearly states which items fall under the GPP

(Green Public Procurement) criteria and what thresholds they are to meet. The products offered by the recommended bidder were confirmed to be compliant with such criteria (this as requested in the Technical Offer Questionnaire). Moreover, it is also clearly listed that the verification stage will be done 'upon deliver', i.e post award.

iii. Item 3.5 – this item could be offered either in a 'one size fits all' form or in an 'adjustable' form. This Board finds no non-compliance with what the recommended bidder offered. The fact that this item could be used for 'up to 15 kgs' when the tender required 'up to 13 kgs' is certainly not an issue of non-compliance.

iv. Note 3 – the Board opines that following the above analysis, no changes were required in the Technical Offer Questionnaire of the recommended bidder, hence this point and argument, becomes now irrelevant.

This Board therefore does not uphold Appellant's first grievance.

b) ***Samples Submitted not in Accordance with the Tender Specifications – 2nd grievance*** – This Board makes reference to the General Rules Governing Tenders section 10 which states "*The Central Government Authority/Sectoral Procurement Directorate/Contracting Authority may, at its own discretion, extend the deadline for submission of tenders to give Economic Operators sufficient time to take clarification notes into account when preparing their tenders. Economic Operators will be notified with any such extension through the issuing of a clarification note. In such cases, all rights and obligations of the Central Government Authority/Sectoral Procurement Directorate/Contracting Authority and the tenderer regarding the original date specified in the contract notice will be subject to the new date.*" Therefore, it is clear that the Contracting Authority has options as to how and why it can extend the deadline for submission of tenders, or, as in this case, the samples requested. While doing so it must however abide by the requirements as set out in this same section, being referred to, as well as the major principles guiding the public procurement process. This Board opines, that with the way that the Evaluation Committee proceeded, all the requirements were met. A letter was issued to all the parties participating in this tender procedure instructing them about the date by when samples needed to be submitted. The decision as taken by the Evaluation Committee does not in any way, form or matter go against the principle of Self-Limitation, as most importantly, the principle of equal treatment was well adhered to. A case could have been made, if the timeframes were shortened. However, in this very case, the timeframes were extended only due to the Christmas holiday recess. Since all the parties were informed in due time, this Board will not uphold this grievance of the Appellant.

c) **Doctrine of Self-Limitation – 3rd grievance** – as already discussed above, the principle of self-limitation has not be infringed by the Evaluation Committee. Hence, this Board does not uphold the Appellant’s third grievance.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed”.

3. Is-soċjetà Cherubino Ltd. issa ressqet appell għal quddiem din il-Qorti u tinsisti li l-offerta tas-soċjetà rakkomandata kellha tiġi skartata. Hi tissottometti li joħroġ ċar mis-sejħa li l-prodotti offruti kellhom ikunu magħmula minn “*eco-friendly and / or sustainably sourced material*”, iżda l-prodotti tas-soċjetà The Organic Kid kellhom materjal għoli ta’ *polyester* u *polyimide* li ma humiex *eco-friendly jew sustainably sourced*.

4. Wara li rat l-atti kollha tal-kawża u d-dokumenti esebiti, tinsab f’pożizzjoni li tgħaddi għas-sentenza tagħha.

Ikkonsidrat:

5. Illi f’dan il-każ l-ilment tas-soċjetà issa appellanti hu bbażat fuq il-fatt li l-prodotti li offriet is-soċjetà preferuta ma humiex *eco-friendly* u ma kellhomx jiġu aċċettati. Il-Bord fid-deċiżjoni tiegħu jirrikonoxxi l-użu tal-fuq imsemmija materjal fil-prodotti offruti u aċċettati, iżda jgħid li skont id-

dokumenti tas-sejha x'inhu "*sustainable and eco-friendly*" joħroġ mill-*Green Public Procurement criteria* li tniżżlu fl-istess dokumenti. Jgħid li għalhekk, biex jiġi deċiż jekk il-prodotti humiex *eco-friendly* jew le jiddependi minn dawk il-kriterji li stabbiliet is-sejha.

6. Jirriżulta, però, li l-istess speċifikazzjonijiet tas-sejha ma jindikawx li l-oġġetti kollha bħala li għandhom jiġu annaliżżati fuq is-saħħa tal-kriterji ndikati. Hemm oġġetti li kellhom jiġu offruti u li ma humiex soġġetti għal *Green Public Procurement criteria*. Fil-fatt kif inhu ndikat fl-istess sejha huma biss ċerti prodotti li għalihom huma applikabbli l-*Green Public Procurement criteria*, iżda l-prodotti kollha huma soġġetti għall-kundizzjoni ġenerali li jkunu sostenibbli u *eco-friendly*.

7. Issa l-prodotti li offriet is-soċjetà preferuta għandhom proporzjon ta' *polyester* u *polymide* li żgur ma humiex *eco-friendly* u għandhom effett kbir fuq l-ambjent. Hemm il-kutra ż-żgħira li għandha 40% *polyester*, il-ħarqa taċ-ċarruta għandha 20% *polyester*, filwaqt li l-kalzetti u ingwanti għat-tfal għandhom 18% *polymide*. Is-soċjetà preferuta tgħid li dawn huma persentaġġi żgħar, però, ebda persentaġġ ma huwa aċċettabbli u dawn il-prodotti, minħabba dawn il-persentaġġi, ma jistgħux jitqiesu sostenibbli u *eco-friendly*. Jista' jkun li l-*polyester* u l-*polymide* ma humiex espressament esklużi mid-dokumenti tas-sejha, però, meta l-istess sejha

tinsisti fuq prodotti sostenibbli u *eco-friendly*, ma jistax ikollok prodotti li ma humiex hekk.

8. Lanqas ma hu argument li l-verifikazzjoni tal-kwalità għandha ssir wara li jiġi ffirmat il-kuntratt. Is-sejha tgħid li l-informazzjoni fuq il-kwalità “*must be requested by the evaluation committee during the evaluation process*”. Fil-fatt f’dan il-każ, l-informazzjoni ngħatat u darba li rriżulta li ċerti prodotti offruti ma kinux sostenibbli u *eco-friendly*, dik l-offerta ma kellhiex tiġi aċċettata. Ovvjament, waqt l-eżekuzzjoni tal-kuntratt, il-prodott konsenjat jista’ jiġi eżaminat sabiex issir il-verifika tal-materjal tiegħu, però, mill-bidu nett, meta ssir dikjarazzjoni mill-oblaturi dwar il-materjal, dak dikjarat irid jiġi verifikat mas-sejha.

9. Peress li l-prodotti offruti mill-offerent preferut kellhom persentaġġ ta’ *polyester* u *polymide*, l-offerta tiegħu kienet orħos minn dik sottomessa mis-soċjetà appellanti. Dan m’għandux iwassal għaċ-ċirkostanzi li l-orħos offerta tiġi magħżula *senz’altru*. Mhux biss il-prodotti kellhom ikunu ta’ materjal li stabbiliet is-sejha, iżda meta hawn *si tratta* minn oġġetti għat-trabi u tfal żgħar, huwa aktar impellenti li l-materjal ma jkunx artifiċjali u jkun sostenibbli.

Għaldaqstant, għar-raġunijiet imsemmija, tilqa’ l-appell tas-soċjetà appellanti Cherubino Ltd. u tħassar u tikkancella d-deċiżjoni li ta l-Bord

ta' Revizjoni dwar il-Kuntratti Pubbliċi fis-6 ta' Marzu, 2023, u tal-kumitat evalwattiv relattiv, u tibgħat l-atti lura lid-Dipartiment tal-Kuntratti biex jerġa' jqis l-offerti li tressqu fid-dawl ta' dawn il-konsiderazzjonijiet. Id-depożitu li sar mis-soċjetà appellanti mal-appell tagħha quddiem il-Bord għandu jintradd lura lilha.

L-ispejjeż marbuta ma' dan l-appell għandhom jithallsu mill-intimat Dipartiment tal-Kuntratti.

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