



QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF MARK CHETCUTI

ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO

ONOR. IMĦALLEF ANTHONY ELLUL

Seduta ta' nhar it-Tnejn, 18 ta' Marzu 2024

Numru 2

Appell numru 459/2023

V.J. Salomone Pharma Limited (C-10268)

v.

- 1. Dipartiment tal-Kuntratti;**
- 2. *Central Procurement and Supplies Unit (MFH) u***
- 3. *Drugsales Limited (C-1780)***

1. Dan huwa appell ta' *V.J. Salomone Pharma Limited* ["*Salomone*" jew "l-appellanti"] minn deċiżjoni tal-11 ta' Settembru 2023 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbliku ["L.S. 601.03"], li ċaħad oġġezzjoni mressqa minn *Salomone* kontra l-għażla ta' *Drugsales Limited* ["*Drugsales*"] bħala oblatur rakkomandat għall-għoti ta' kuntratt pubbliku wara

sejha għal offerti mis-*Central Procurement and Supplies Unit* [“*CPSU*” jew “l-awtorità kontraenti”].

2. L-awtorità kontraenti ħarget sejha għal offerti “*for the supply of Pazopanib tablets*”. Fost il-kondizzjonijiet tas-sejha kien hemm dawk illi jgħidu hekk:

»General Provisions

»... ..

»1.3 The estimated procurement value for this call for tenders has been based on comprehensive research including appropriate financial analysis. In the context of this procurement, the estimated procurement value, based on market research, is that of €1,204,128.00 excluding VAT.

»The purpose of this value shall be the guidance of prospective bidders when submitting their offer, and is not to be considered as a binding capping price.

»Therefore, the published estimated procurement value is not restrictive and final on the contracting authority. Economic operators are free to submit financial offers above or below the estimated procurement value. However, the contracting authority reserves the right to accept or reject financial offers exceeding the estimated procurement value.

»9. Criteria for Award

»The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.

»Technical Specifications

»... ..

»1.2.1 Medicinal products and food supplements

»In case of solid oral dosage forms (tablets/capsules), medicinal products and food supplements must be supplied in the following containers and these will be considered in the following sequence order as follows:

»a) Pack size of 120 units or less in blister packs;

»b) Pack size of 120 units or less in any other container type;

»... ..«

3. Tefgħu offerti, fost oħrajn, *Salomone* u *Drugsales*. L-offerti t-tnejn kienu orħos mill-*estimated procurement value* iżda l-offerta ta' *Salomone* kienet l-orħos waħda. Minkejja dan b'ittra tat-2 ta' Ġunju 2023 id-Dipartiment tal-

Kuntratti [“id-dipartiment”] għarraf lil *Salomone* illi l-offerta tagħha ma kinitx sejra tintlaqa’ u illi l-oblatur rakkomandat huwa *Drugsales*. Ir-raġunijiet għala l-offerta ta’ *Salomone* twarrbet ġew imfissra hekk:

» I regret to inform you that the offer submitted by your company was found to be technically non-compliant as follows:

- »• As per technical offer form and documentation submitted by the bidder at tendering stage, the product on offer (both 400 mg and 200 mg dose) is packed in HDPE¹ bottles containing 30 tablets.
- »• Not recommended in view of an alternative product with a ‘pack size of 120 units or less in blister packs’ in line with the sequence order to be considered as per Section 3 – Specifications, article 1.2.1 of the published tender document.«

4. B’ittra tad-9 ta’ Ġunju 2023 *Salomone* ressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta’ Reviżjoni. L-oġġezzjonijiet kienu tnejn:

- »1. The appellant’s bid ought not to have been declared as technically non-compliant, as the tender document itself recognises the possibility of supply of products in container types other than blister packs;
- »2. The sole criterion for the award of the tender was the price.«

5. Bid-deċiżjoni tal-11 ta’ Settembru 2023 il-Bord ta’ Reviżjoni ċaħad l-oġġezzjoni ta’ *Salomone* u ordna illi d-depożitu minnha mħallas biex setgħet tressaq l-oġġezzjoni ma jintraddx lilha.

6. Il-Bord ta’ Reviżjoni ċaħad l-oġġezzjoni għal raġunijiet li fissirhom hekk:

»The board ... having noted the objection filed by *V.J. Salomone Pharma Limited* (hereinafter referred to as the appellant) filed on the 12th June 2023 refers to the claims made by the same Appellant with regard to the tender ... whereby, the appellant contends that:

- »a) 1st grievance - the appellantss bid ought not to have been declared as technically non-compliant, as the tender document itself recognises the possibility of supply of products in container types other than blister packs

»In terms of clause 1.2.1 of Section 3 of the tender document, entitled ‘Specifications’, it is stated that; “in case of solid oral dosage forms (tablets/capsules), medicinal products and food

¹ *High density polyethylene*

supplements must be supplied in the following containers and these will be considered in the following sequence order as follows:”.

»It clear, therefore, that the specifications do not automatically exclude the offer of a product in a container type which is not a blister pack. Rather, a sequential order is provided, as quoted hereabove, as to the manner in which different modes of packaging are to be considered, and there are no restrictions imposed for prospective bidders to participate with offers having a different mode of packaging other than that of a 'blister pack'.

»In view of the fact that the administrative and technical criteria as described within the specifications of the tender expressly recognise the possibility of products being offered in other container types, *i.e.* not necessarily supplied in blister packs, then it ought to follow that the fact that the appellant submitted a product which is packed in HDPE bottles, which certainly falls within the definition of “any other container type”, should not have resulted in the appellant’s bid being declared technically non-compliant.

»It is submitted that should the contracting authority [*sc.* have] wished to have the medicinal products forming the subject of the tender to be supplied only in blister packs, then the tender document ought to have simply excluded such other container types, and not have these included as a method in which the products may be supplied.

»In view of the fact that the tender specifications do not exclude container types that are not blister packs, then it cannot be argued that the bid submitted by the appellant was technically non-compliant, since other container types (including HDPE bottles) were expressly included in the sequence order described under clause 1.2.1 of the specifications.

»It is not appropriate for the contracting authority to argue that the appellant’s offer is not technically compliant because “an alternative product” in blister packs had been submitted, thereby giving the impression that it would have otherwise been declared technically compliant had there been no offer made with a blister pack. It is submitted that the determination of technical non-compliance should be fixed and determined on the basis of the technical and administrative specifications described within a tender document, and not on any other factors. Whether alternative options were submitted by other competitors ought not to have any bearing on the determination as to whether the appellant’s offer was technically compliant or otherwise. To permit the possibility of submitting other modes of packaging, only to then be declared as technically non-compliant on the basis that a competitor submitted a bid through an alternative mode of packaging effectively results in the hindrance of competition and the principles of transparency and openness, which are the cornerstones of public procurement law.

- »b) 2nd grievance - The sole criterion for the award of the tender was the price

»Given, therefore, that the appellant's offer should be deemed technically compliant in terms of clause 1.2.1 of the specifications, on the basis of the grievance as set out hereabove, the appellant humbly submits that the contracting authority should have based its award on the basis of clause 6.1 of Section 1 of the said tender document, which bases the award of technically and administratively compliant offers solely on the price. This clause 6.1 of Section 1 provides that "the sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria".

»Once the appellant's offer was technically and administratively compliant and the cheapest product offering, than the award should have been in its favour. The appellant contends that to argue that price is irrelevant simply because there was an offer of a product in blister packs does not make economic and financial sense, and goes against the very criterion established for the award of the tender.

»The only sensical interpretation of the tender document read as a whole is that should a submission have been made with a blister packaging, at the same price as the appellant's offer which was in another container type, the award should follow the sequence in clause 1.2.1 of the specifications and be made in favour of the blister packs. However, this is certainly not the case in the tender subject to this objection since the appellant's offer is clearly and substantially cheaper than that of the awarded tenderer.

»Moreover, it is also pertinent to stress. the fact that the product offered by the appellant, *Voltrient*, has been in supply since 2016 and is an originator product, whereas the product offered by the recommended bidder is a generic product. It is a well-known fact within the industry that generic products tend to be cheaper than originator products. In the case at hand, the appellant's bid was substantially cheaper than that of the recommended bidder, notwithstanding the fact that the appellant's product was an originator product, while the recommended bidder's was a generic product.

»This board also noted the contracting authority's reasoned letter of reply filed on 19th June 2023 and its verbal submission during the hearing held on 18th July 2023, in that:

- »a) 1st grievance - The General Rules Governing Tenders in clause 16 provide the 4 steps of an evaluation process. Part 1 and 2 are commonly known as the administrative criteria evaluation, whilst Part 3 is the technical vvaluation and Part 4 is the financial evaluation. These steps of the evaluation process are done sequentially, one after the other. Clause 1.2 of Section 3 – specifications – is clearly entitled '1.2 Other technical specifications' and the first sub-clause provides a hierarchy / order of preference for containers / packaging / pack sizes in which the tablets are supplied, as quoted.

»The fact that the quoted clause creates an order of preference (a, b, c, d) at technical evaluation stage is clear, unambiguous and a well-established fact since such clause is a standard clause in the procurement of all medicines (and food supplements).

»This clause has been used for numerous years and has multiple purposes for the general good and the public interest, namely that:

- »i. the clause gives unconditional preference to blister packs which as will be proven during this hearing, and, as was proven to the satisfaction of this board in case 1228 of this board, is the best way in which medicines are distributed to patients.
- »ii. secondly, if blister packs are not available, other containers will be considered in order to ensure that medicines are available for the patients' need. This avoids the cancellation of the tender due to having no submissions with blister packs, thus lengthening the procurement process and risking shortage of medication.

»As stated, this clause was clear and unambiguous and was part of the technical criteria section in the tender. Thus, since the objector's offer was not rejected at an administrative stage (and he had also accepted the content of the tender document and the General Rules Governing Tenders in their entirety, without reservation or restriction), and neither at a financial stage (since financial evaluation on the objector's offer did not even take place), and was only excluded on the basis of a clear clause in the technical specifications, then the evaluation committee was justified to state that the objector's offer was not recommended for technical reasons. Due to the fact that there were blister packs on offer from a different supplier, and the offer met all the other tender criteria, the offer of the objector and all other similar offers were thus to be excluded. The offer of the objector was thus not automatically non-compliant on a technical ground upon submission and would have reached financial evaluation stage if there were no blister packs offered, but this was not the case since another economic operator, particularly, the recommended bidder, offered blister packs. This possibility should have been known *a priori* from the above cited tender clause, and submitting an offer with a container other than a blister pack was a risk which an economic operator could take.

»If the objector had any difficulties with clause 1.2.1 of section 3 – specifications, it had the remedy under regulation 262 of the Public Procurement Regulations at its disposal which it could use as it did unsuccessfully in case 1228, on the same exact tender clause. The clause was clear and it was evident that preference at technical evaluation stage would be given to blister packs. Any action relating to the consequences of the clause in question cannot be taken at a post-evaluation stage but should have been taken within the rules established in regulation 262. Appellant's reference to any other tender in the objection letter is inadmissible and should not be considered by

this board since it would be delving into the merits of another evaluation. The objection should revolve only on the evaluation to the tender number CT 2116/2022. If the objector had any difficulty with the outcome of any other evaluation, it should have sought recourse to this board in a separate case. The outcome of an evaluation, not even if confirmed by this board or any other competent court should never set any precedent, let alone an evaluation process which was not challenged.

- »b) 2nd grievance - In its second grievance the objector argues that the sole award criterion was the price. Clause 6.1 of the tender states that “The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria”.

»The fact remains that the offer of the objector failed in the technical evaluation stage on the basis of a clear clause in the technical specifications section, irrespectively of whether the objector agrees with the clause in question, which was accepted as published once unchallenged. The fact also remains that, in line with the normal and established sequence of the evaluation process, once an offer fails in the technical part of the evaluation, the offer does not move to the financial evaluation, and thus any comments on the economic and financial sense are irrelevant.

»The evaluation committee is bound by the principle of self-limitation in evaluating the tenders, meaning that the only conditions upon which a tender can be adjudicated are the conditions stipulated in the tender document. The tender document, particularly clause 1.2.1 of the technical specifications, does not state that the established order of preference should only be resorted to in case of equally priced offers.

»The interpretation of the objector, as referred to above, is an extended interpretation of the objector, naturally to its advantage and could never be the interpretation of an evaluation committee for 2 main reasons, the first being that this would be a blatant breach of the fundamental principle of self-limitation, and the second reason being that, if this was the case, the clause would not be in the technical section but in the financial section.

»This board also noted the preferred bidder’s reasoned letter of reply filed on 22nd June 2023 and its verbal submission during the hearing held on 18th July 2023, in that:

- »a) 1st grievance - That clause 1.2 of Section 3 of the tender entitled ‘Other technical specifications’ provides an order of preference for containers / packaging / pack sizes in which the tablets are supplied. The appellant submitted an offer of a product packaged in a bottle, which is therefore a container under (b), whilst *Drugsales Ltd* submitted an offer for a product in blister packs, which falls under (a). This clause makes it clear that the board was to give preference to blister packs over “any other container type”, and hence offers submitted under (b) were only to be considered if no offers under (a) had been submitted. Since the appellant’s offer was classified under section (b), it was not considered because there was a technically compliant offer

made under section (a), and the appellant was very well aware of this fact which was evident in the tender document. It is for this specific order of preference established at the technical evaluation stage that the offer made by the appellant was correctly declared technically non-compliant. The appellant is incorrect in arguing that this is wrong application of clause 1.2.1, or that this has rendered the price offer irrelevant, or that clause 1.2.1 is only triggered when two equal financial bids are submitted. That interpretation is nonsensical and goes contrary to the express wording of clause 1.2.1. Clause 1.2.1 evidently sets up a ranking whereby products under section (a) with blister packs are preferred to bids under section (b), and so on. The price offer is not rendered irrelevant – if there are several offers under section (a), it is then price that will determine the preferred bidder. The board should also bear in mind that blister packs are not some proprietary packaging, but are packaging which are freely available to all and do not in any manner limit competition. The appellant could have submitted a bid with a product in blister packaging, but chose not to. In this regard, it is also to be noted that it is more expensive to use blister packaging than to use a bottle. The imposition of this hierarchy under article 1.2.1 of section 3 of the tender document preferring blister packs is standard practice and is fully justified, also as explained in the reply by the CPSU. There are numerous objective advantages to blister packs over other containers (such as bottles), including that blister packaging helps in preventing child access to such medication. Furthermore, medication in blister packaging is easier to use and maintains proper dosage protocols for patients, unlike pills in a container or bottle. Pills in blister packaging also assures products quality as the pill remains protected and safeguarded with a seal until its administration at the very last moment. This is not the same situation regarding pills in a container or jar, whereby nurses, doctors and patients are touching the packaging and moisturizing the pills and causing chemical migration, thereby not assuring the same quality control to the product.

- »b) 2nd grievance - With regard to this second grievance raised by *VJ Salomone Limited*, the appellant company puts emphasis on the criteria of 'price' but ignores the equally important words included in the same sentence of Clause 6.1 of Section 1 of the tender document which state "... submitting the cheapest priced offer, satisfying the administrative and technical criteria".

»In this particular tender, the appellant company is trying to ignore the order of preference as laid out in article 1.2.1 of Section 3 of the tender document, whereby certain products are considered in preference to others, as already explained. The consideration and order of preference as established in the tender document, under 'technical specifications' is a relevant criterion that needs to be given its desired relevance in assessing the tender in question. The tender was clear in stating that it would consider the offers in the sequential order as stated in article 1.2.1 of Section 3 of the tender document. Therefore it would first verify whether any technically compliant bids were submitted in blister packs in terms of subclause (a). If so, it

would proceed to carry out the financial evaluation and award on the basis of price of those bids submitted in terms of subclause (a). If no bids were submitted in blister packs, then the financial evaluation would have been carried out on the bids submitted in terms of subclause (b), or further sub-clauses depending on the bids which were submitted.

»The appellant is incorrect in arguing that this is the wrong application of clause 1.2.1, or that this has rendered the price offer irrelevant, or that clause 1.2.1 is only triggered when two equal financial bids are submitted. That interpretation is nonsensical and goes contrary to the express wording of clause 1.2.1. Clause 1.2.1 evidently sets up a ranking whereby products under section (a) with blister packs are preferred to bids under section (b), and so on. The price offer is not rendered irrelevant – if there are several offers under section (a), it is then the price that will determine the preferred bidder. Furthermore, as already explained above, clause 1.2.1 also has a proviso whereby the said ranking only applies if the offer is in line with or within the last purchased price, which is a financial safeguard for the contracting authority in cases when a bid exceeds the last purchased price. *Drugsales Limited* submitted an offer which complied in full with the requirements of the contracting authority, which was within the parameters of section (a) of clause 1.2.1 and therefore was given precedence over other packaging, which was the best financial offer within that section (a), and which offer was also in line with or within the last purchased price. Therefore *Drugsales Limited* gave the most financially advantageous offer within the required parameters, and was rightly awarded this tender.

»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 in their entirety.

»a) Reference is made to tender document Section 3 – specifications, paragraph 1.2.1 Medicinal products and food supplements which states:

»"i) in case of solid oral dosage forms (tablets/capsules), medicinal products and food supplements must be supplied in the following containers and these will be considered in the following sequence order as follows: a) Pack size of 120 units or less in blister packs; b) Pack size of 120 units or less in any other container ..." (underline emphasis added)

»b) It is therefore clear and unambiguous that the preferred method of 'container' / packaging for the product being acquired was the 'blister pack'. Any other form of container type whilst still deemed desirable is not the preferred option of the contracting authority.

»c) As stated in PCR case 1228, the contracting authority has every right to dictate technical specifications which are attainable and have measurable objectives when it was stated:

»“The above mentioned clause (same as clause 1.2.1 of tender dossier) does indicate the preferred mode of packaging; however, at the same time, it is also allowing the contracting authority to consider other packaging methods, so that there are no restrictions for prospective bidders to participate with offers having a different packaging mode other than that of ‘blister packs’. At this stage of consideration, this board would respectfully point out that, the contracting authority has every right to dictate technical specifications which are attainable and have measurable objectives and yet, at the same instance, affording equivalent features; in this particular case being the mode of packaging of the medicines.” (underline emphasis added)

- »d) PCRB case 1228 also analysed whether the ‘blister pack’ preferred mode of packaging is in fact superior, thereby strengthening the case the contracting authority is in fact sanctioned to prefer such mode of packaging. It was ascertained that “In this regard, this board would respectfully point out that through the documentation and literature presented by the witness, it is evidently clear that there are credible medical reasons as to why ‘blister packing’ mode is preferred ...”.
- »e) Once it has been established that the contracting authority is well within its powers to request such a technical specification, the main bone of contention revolves around the interpretation of clause 1.2.1 of the tender dossier. This especially when correlated to the criteria for award as specified in the tender dossier which states that “the sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria”.
- »f) Facts of the case are the following
 - »i. Appellant submitted a financial bid of €1,009,183.51 with a product satisfying specification ‘1.2.1 i) b)’ with the use of a HDPE bottle;
 - »ii. Preferred bidder submitted a financial bid of €1,056,091.00 with a product satisfying specification ‘1.2.1 i) a)’ with the use of a blister packaging.
- »g) Two schools of thought / lines of argumentation were presented during the hearing:
 - » i. Appellant’s interpretation is that once it has been determined that the HDPE bottle, even though not the preferred mode of packaging, is still acceptable and its offer is cheaper than the other economic operator’s bid, its own bid should have been awarded the tender as per the criteria of award of Section 1 of the tender dossier.
 - »ii. Preferred bidder’s and contracting authority’s interpretation is that once a compliant bid has been submitted with the preferred mode of packaging (*i.e.* blister pack) and the bid does not exceed the estimated procurement value of €1,204,128.00, then this bid should be awarded the procurement process. If more than 1 bid were to be

received for the 'blister pack' then the criteria of award (*i.e.* cheapest administrative and technical compliant offer) would be awarded the tender.

- »h) This board finds itself in agreement with arguments brought forward by preferred bidder when it states that "The price offer is not rendered irrelevant - if there are several offers under Section (a), it is then price that will determine the preferred bidder". This especially when one considers that the blister packs are not some proprietary packaging but these are well used and available in the open market with no specific restrictions on competition.
- »i) The above point was also emphasized by witness Dr Alison Anastasi who stated that "If the price of a bid is exceeded (*i.e.* is above the estimated procurement value) then only competitive offers are evaluated". This means that if the contracting authority would have received offers satisfying clause '1.2.1 i) a)' but [sc. these] would have exceeded the estimated procurement value, these bids would not have been preferred over bids satisfying clause '1.2.1 i) b)' but falling within the parameters of the estimate procurement value.
- »j) As already stated, the clause (1.2.1), in the board's opinion is clear and unambiguous when it states "... and these will be considered in the following sequence order as follows: ...".
- »k) It is also this board's view that the 'technical non-compliance' in the letter of rejection dated 2nd June 2023, was clearly explained to the appellant when it stated "Not recommended in view of an alternative product with a 'pack size of 120 units or less in blister packs' in line with the sequence order to be considered as per Section 3 – dpecifications, article 1.2.1 of the published Ttender document."
- » Hence, this board does not uphold the appellant's grievances.
- »The board, having evaluated all the above and based on the above considerations:
 - »a) does not uphold appellant's letter of objection;
 - »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 be reimbursed. «

7. *Salomone* appellat b'rikors tad-29 ta' Settembru 2023. L-awtorità kontraenti wiegbet fl-24 ta' Ottubru 2023; id-dipartiment wiegeb fit-30 ta' Ottubru 2023; *Drugsales* ukoll wiegbet fit-30 ta' Ottubru 2023.

8. Fit-tweġiba tiegħu d-dipartiment ressaq żewġ eċċezzjonijiet preliminari ta' nullità tal-appell u jeħtieġ għalhekk illi nqisu dawn l-eċċezzjonijiet qabel ngħaddu biex inqisu l-appell innifsu.

9. L-ewwel eċċezzjoni giet imfissra hekk:

»... .. id-Dipartiment tal-Kuntratti qiegħed iressaq eċċezzjoni tal-irritwalità u nullità tal-appell *de quo* in kwantu l-artikolu 181B tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili jipprovdi illi f'azzjonijiet ta' appalti r-rappreżentanza tal-Gvem ta' Malta, in kwantu huwa korp ġuridiku, il-leġittimità passiva hija vestita fil-persuna tad-Direttur tal-Kuntratti u mhux hekk kif erronjament indikat mill-appellant, u cjoè d-Dipartiment tal-Kuntratti. Dan iwassal sabiex din il-qorti għandha tillibera mill-osservanza lill-istess dipartiment.«

10. Din l-eċċezzjoni hija fiergħa. Il-parti fl-appell huwa d-dipartiment mhux ir-rappreżentant tiegħu. Billi fl-*occhio* tal-proċess jissemma "id-Dipartiment tal-Kuntratti" flok "id-Direttur tal-Kuntratti f'isem id-Dipartiment tal-Kuntratti" ma jwassal għal ebda nullità.

11. It-tieni eċċezzjoni tgħid hekk:

»... .. din il-qorti ma għandiex il-ġurisdizzjoni illi tissindika l-għemil tal-kumitat ta' evalwazzjoni u l-Bord ta' Revizjoni tal-Kuntratti Pubbliċi in kwantu dawn għandhom fakultajiet diskrezzjonali fil-mod ta' kif jilħqu d-deċiżjonijiet tagħhom.«

12. Din l-eċċezzjoni wkoll hija fiergħa. Ir-reg. 284 tal-L.S. 601.03 espressa-ment jagħti dritt ta' appell quddiem din il-qorti minn deċiżjonijiet tal-Bord ta' Revizjoni:

»**284.** Kull parti li tħoss ruħha aggravata minn deċiżjoni meħuda mill-Bord ta' Revizjoni tista' tappella quddiem il-Qorti tal-Appell«

13. Ngħaddu mela għall-meritu tal-appell; l-aggravji huma erbgħa, li nistgħu nqisuhom ilkoll flimkien:

- »1. l-offerta tas-soċjetà appellanti ma setgħetx tiġi dikjarata bħala *technically non compliant stante* li kienet tissodisfa r-rekwiżiti u speċifikazzjonijiet indikati fid-dokument tat-tender;
- »2. ġiet adottata interpretazzjoni li tmur *oltre* minn dak kontenut fid-dokument tat-tender;
- »3. l-uniku kriterju għall-għoti tat-tender, skont id-dokument tat-tender innifsu, kien “l-irħas prezz”;
- »4. il-bord strieħ fuq provi miġjuba f’każ differenti, filwaqt li ma rrikonoxxiex dawk miġjuba quddiemu fil-proceduri odierni. «

14. Tgħid sew *Salomone* illi ma jistax jingħad illi l-offerta tagħha kienet bi ksur tal-kondizzjonijiet tas-sejħa, għax dawk il-kondizzjonijiet kienu jip-permettu *any other container type* u mhux biss *blister packs*; kienet għalhekk hażina r-raġuni mogħtija fl-ittra tad-dipartiment tat-2 ta’ Ġunju 2023 li tgħid illi l-offerta twarrbet għax “*the offer submitted by your company was found to be technically non-compliant*”. Ix-xhud Farmacista Edith Sciberras, membru tal-kumitat tal-għażla stess, ukoll stqarret quddiem il-Bord ta’ Reviżjoni illi “*there was no clause in the tender which excluded as non-compliant a bid that did not offer blister packs*”.

15. Għalkemm ukoll huwa minnu illi ma tistax tgħid, bħal ma tgħid *Drugsales*, illi hija “*nonsensical*” interpretazzjoni li tifhem il-kliem “*The sole award criterion will be the price*” bħallikieku jfisser illi kriterju wieħed hemm – dak wara kollox tfisser il-kelma “*sole*” – madankollu huwa minnu wkoll illi trid tqis il-kondizzjonijiet kollha tal-kuntratt, fosthom dik li tingħata preċedenza lil offerti ta’ prodott fi *blister packs*.

16. Dik il-kondizzjoni wkoll trid tingħata tifsira u ma hijiex realistika interpretazzjoni li dik il-kondizzjoni tidħol fis-seħħ biss fil-każ ferm eċċezzjonali

illi l-prezzijiet tal-offerti jkunu preċiżament indaqs, bħallikieku differenza ta' ffit euro fil-prezz tirrendiha superfluwa.

17. Huwa minnu wkoll illi, kif osserva l-Bord ta' Reviżjoni fid-deċiżjoni tiegħu, il-klawsola relativa għall-preċedenza illi tingħata lil *blister packs* kienet għa interpretata fil-każ 1228 tal-2018 li fih *Salomone* kienet parti u fittxet illi timpunja klawsola bħal dik. Għalhekk *Salomone* bħala oblatur ta' esperjenza messha kienet taf b'dik l-interpretazzjoni u ħasbet għaliha minn qabel.

18. Fil-fatt fil-każ 1228 ingħad hekk:

»... a clause in the tender regulated the supply of medicines to be in blister packs, and that pack formulation takes precedence *irrelevant of price.*«

19. Huwa minnu wkoll illi l-mod kif tfassal id-dokument tas-sejħa xejn ma hu felici, għax huwa kontradittorju li tgħid li l-prezz huwa "*sole criterion*" u mbagħad trid li la jkun kriterju waħdieni u lanqas kriterju ewlieni. Huwa xieraq għalhekk illi, għalkemm l-appell ma jistax jintlaqa' fuq il-meritu, lill-appellanti jintradd id-depożitu li kellha tħallas biex tressaq l-oġġezzjoni tagħha quddiem il-Bord ta' Reviżjoni u wkoll illi l-ispejjeż tal-appell tħallashom l-awtorità kontraenti li ma għarfitx tfassal dokument b'kondizzjonijiet mingħajr ambigwiżà.

20. Għal dawn ir-raġunijiet il-qorti tiddisponi mill-appell billi, wara li tiċċad l-eċċezzjonijiet preliminari ta' nullità tal-appell, tirriforma d-deċiżjoni appellata: tħassarha fejn ordnat illi d-depożitu mħallas mill-appellanti ma jintraddilhiex, u tordna, minflok, li jintraddilha kollu, u tikkonfermaha fil-

bqija, u għalhekk tikkonferma d-deċiżjoni dwar l-għażla tal-oblatur rakkomandat.

21. L-ispejjeż relattivi għall-eċċezzjonijiet preliminari tad-dipartiment iħallashom għal darbtajn id-dipartiment, billi l-eċċezzjonijiet kienu fiergħa; l-ispejjeż l-oħra tal-appell tħallashom l-awtorità kontraenti.

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