



QORTI TAL-APPELL

IMĦALLFIN

**S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF CHRISTIAN FALZON SCERRI
ONOR. IMĦALLEF JOSETTE DEMICOLI**

Seduta ta' nhar il-Ħamis, 11 ta' April, 2024.

Numru 12

Rikors numru 18/24/1

V.J Salomone Pharma Limited (C-10268)

v.

**Direttur Ġenerali Dipartiment tal-Kuntratti, Central Procurement
Supplies Unit (MFH) u Vivian Corporation Limited (C-68)**

Il-Qorti:

1. Din hija sentenza dwar appell imressaq minn V.J. Salomone Pharma Limited kontra deċiżjoni mogħtija mill-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi fit-3 ta' Jannar, 2024, li permezz tagħha l-Bord ma aċċettax it-talbiet tagħha sabiex l-offerta mixħuta minnha titqies bħala finanzjarjament konformi ma' dak mitlub fis-sejħa CT 2270/202 u sabiex

hija tingħata l-kuntratt pubbliku għaliex provdjet l-aktar offerta rħisa.

Daħla

2. Fil-21 ta' Awwissu, 2022, id-Dipartiment tal-Kuntratti ħabbar sejħa pubblika (CT22702022) bl-isem «*Tender For the Supply of Oral Cyclin-Dependent Kinase 4/6 (CDK 4/6) Inhibitor.*»

3. Dawn l-inibituri huma klassi ta' mediċina użata biex iddewwi ċertu tipi ta' kanċer tas-sider, billi tinterrompi l-proċess, li permezz tiegħu ċ-ċelloli tal-kanċer jinqasmu u jimmultiplikaw.

4. Kif miktub fi **klawsola 1.1** tal-Ewwel Taqsima dwar l-Istruzzjonijiet lill-Offerenti, f'paġna 3 tad-dokument tas-sejħa, l-awtorità kontraenti riedet kwantità ta' inibituri li hija biżżejjed biex tipprovdi kura lil 180 pazjent:

«The subject of this tender is the supply of Oral Cyclin-dependent kinase 4/6 (CDK 4/6) inhibitor for a period of 36 months with an option for a further extension of 6 months.»

Estimated Quantity: Based on annual patient treatment as per SPC¹ of product/s on offer to cater for a total of 180 patient treatments.»

¹ L-akronimu 'SPC' ifisser 'Summary of Product Characteristics' skont **klawsola 9.9** tat-Tieni Taqsima tad-dokument tas-sejħa pubblika.

5. Illi skont **klawsola 6.1** tal-Ewwel Taqsima tad-dokument tas-sejha:

«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.»

6. B'danakollu biex wiehed jstabbillixi l-orħos prezz fost l-oblaturi ekonomiċi, wiehed kellu jqis dak li hemm imniżżel fil-**klawsola 2.4** tat-Tielet Taqsima tad-dokument tas-sejha pubblika, li taqra hekk:

«For adjudication purposes, the cheapest acceptable offer will be established by comparing the annual cost based on the recommended daily dosage regimen as per respective SPC.»

7. Il-kumpanija appellanti V.J. Salomone Pharma Limited u l-kumpanija appellata Vivian Corporation Limited, kienu fost l-oblaturi ekonomiċi li ħadu sehem għal din is-sejha.

8. F'paragrafu 4.2 tal-SPC tagħha, bit-titlu «*Posology and method of administration*», V.J. Salomone Pharma Limited iddikjarat hekk:

«The recommended dose is 600mg (three 200mg film-coated tablets) of ribociclib once daily for 21 consecutive days followed by 7 days off treatment, resulting in a complete cycle of 28 days.»

9. Imbagħad fl-offerta finanzjarja tagħha, V.J. Salomone Pharma Limited indikat dan il-prezz li ġej:

Description	Quantity (based on annual patient treatment i.e. for one patient for one (1) year) IN UNITS	Price per patient per annum	Total cost for 3 years (for 180 annual patient treatments) including Taxes/Charges, other Duties & Discounts but Exclusive of VAT (Delivered Duty Paid - DDP) €
Oral CDK 4/6 Inhibitor	12 packs (756 tablets)	16,078.68	2,894,162.40

10. B'ittra tal-15 ta' Novembru, 2022, il-kumitat tal-għażla ġibed għall-attenzjoni ta' V.J. Salomone Pharma Limited, li l-kwantità indikata minnha fl-offerta finanzjarja ma taqbilx mad-doża rakkomandata li hija ssemmi f'paragrafu 4.2 tal-SPC tagħha. Għalhekk il-kumitat tal-għażla ta' hamest ijiem tax-xogħol lil V.J. Salomone Pharma Limited sabiex tiċċara l-offerta tagħha.

11. V.J. Salomone Pharma Limited wiegħbet lura billi rreferiet li d-doża rakkomandata indikata f'paragrafu 4.2 tal-SPC trid tinqara fil-kuntest tal-paragrafu 4.8 tal-SPC tagħha, li jitkellem dwar it-tnaqqis tad-doża rakkomandata. Sa fejn rilevanti għal dan l-appell, V.J. Salomone Pharma Limited qalet hekk:

«Section 4.8 of SmPC page 12 states.

«Dose reduction due to adverse events, regardless of causality, occurred in 39.5% of patients receiving Kisqali® in the phase III clinical studies regardless of the combination and permanent discontinuation was reported in 8.7% of patients receiving Kisqali® and any combination in the phase III clinical.»

The above data mean that 71 patients out of 180 (39.35%) will need a

dose which is lower than 600 mg for at least 3 months. As per SmPC, in case of Kisqali®, this dose reduction is managed by reducing the number of tables/day from the same pack. This would mean that one pack would provide 31 days of treatment instead of 21 days to such patients.

In addition, as per Section 4.8 of the SmPC, 8.7% of patients will discontinue treatment due to side effects. This translates to a percentage discontinuation (8%) which means 12 pack/year instead of 13 packs per year in case all patients will be treated to 365 days. This is equivalent to 756 tablets per patient per year.

If we would incorporate dose reductions as per SPC occurring in 39.5% of patients, that means that 71 patients out of 180 would need 8 packs or 504 tablets/year while 109 patients would consume 819 tablets or 13 packs per year. This is equivalent to an average of 694 tablets per patient per year, corresponding to 11 packs per year.

Taking into consideration the full dose regime as per SmPC Section 4.2 (13 packs per year per patient) and the reduction of dose/discontinuation of treatment, as per SmPC section 4.8 as explained above, the average number of packs for 180 patients / year works out at 12 packs per patient per year, as per our financial bid submitted.

It is VERY important to note that any dose adjustment with Kisqali® does not involve any further purchases by CPSU, unlike does adjustments with other products in this Class. Patients treated with other products will require CPSU to purchase a different pack accordingly to the new dose prescribed. For Kisqali® a lower number of tablets will need to be administered to the patient.»

12. Imbagħad fis-17 ta' Marzu, 2023, id-Dipartiment tal-Kuntratti għarraf lil V.J. Salomone Pharma Limited li l-offerta tagħha ġiet meqjusa bħala mhux finanzjarjament konformi. Dan għaliex fl-SPC tagħha hija indikat doża ta' «600mg (three 200mg film-coated tablets) of ribociclib once daily for 21 consecutive days followed by 7 days off treatment, resulting in a complete cycle of 28 days», li jammontaw għal 819 pillola jew 13-il pakkett ta' 63 pillola f'kull wieħed (3 pilloli x 21 jum x 13-il ċiklu), filwaqt li fl-offerta finanzjarja hija indikat prezz għal 756 pillola jew 12-il

pakkett.

13. Ir-raġunijiet għat-twarrib tal-offerta ta' V.J. Salomone Pharma Limited ġew imfissra hekk:

«Offer is not acceptable for the following reason:

The Bidder stated that, “We have submitted our financial bid as per Section 1 – Article 1.1 of the tender specifications – “Estimated Quantity is based on annual patient treatment as per SPC of product/s on offer to cater for a total of 180 patient treatments.” In Section 3- Specifications Article 1.1.2.4 of the published Tender Document it is also stipulated that “For adjudication purposes, the cheapest acceptable offer will be established by comparing the annual cost based on the recommended daily dosage regimen as per respective SPC.”, without making any reference to the reduction of dose/discontinuation of treatment that was mentioned by the Bidder in the clarification response. Thus, since the Bidder’s offer was for 756 tablets (12 packs x 63tablets) per patient per year instead of “the full dose regime as per SmPC Section 4.2 (13 packs per year per patient)” (i.e. 13 packs x 63 tablets = 819 tablets per patient per year), the offer cannot be recommended in line with Section 1 – Article 3.1 of the Tender Document, which states that “This tender is not divided into lots, and tenders must be for the whole of quantities indicated. Tenders will not be accepted for incomplete quantities.”*

Dose adjustments: The Bidder stated that “any dose adjustment can be managed with the same pack as supplied – Kisqali® 200mg x 63 tablets.” And that “.....it will cost CPSU more when dose adjustments are done for products in this Class, except with Kisqali®.; however, these statements cannot be taken in consideration for evaluation purposed since the only requirement in the published specifications addressing dose adjustments is in Section 3 Article 1.1.2.3 which states that ‘The same active ingredient must be available in all marketed doses to treat all patients and allow for any required dose adjustment.’»

14. Fl-istess ittra, id-Dipartiment tal-Kuntratt għarraf lil V.J. Salomone Pharma Limited li l-kuntratt kien qiegħed jiġi rakkomandat li jingħata lil Vivian Corporation Ltd bil-prezz ta' €3,012,750 mingħajr VAT.

15. V.J. Salomone Pharma Limited ma qablitx ma' din id-deċiżjoni u ressqet ittra ta' oġġezzjoni quddiem il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi sabiex dan iħassar l-iskwalifika tal-offerta tagħha u minflok jordna li l-kuntratt jingħata lilha peress li hija offriet l-orħos prezz. Fil-qosor l-ilmenti tagħha kienu: (i) li l-offerta tagħha ma kinitx maqsuma f'lottijiet; (ii) li d-dokument tas-sejħha kien ambigwu; u (iii) li l-offerta tagħha kienet konformi mas-sejħha.

16. B'deċiżjoni mogħtija fit-3 ta' Jannar, 2024, il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi, iddeċieda l-każ hekk:

«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 consider now Appellant's grievances in their entirety:

*a) **On the issue of 'Lots'** - The Contracting Authority, in its rejection letter never attributed a reason for rejection on the grounds that the appellant's bid was divided into lots. The appellant's submission was not accepted due to 'incomplete quantities' offered. This is the main bone of contention and what will be duly analyzed and decided upon by this Board.*

*b) **On the issue of 'Ambiguity'** - A principle which is deemed crucial to this appeal is that of equal treatment (reference to regulation 39 of the Public Procurement Regulations "PPR"). It impinges on the Contracting Authority, that to fully observe such an important principle the evaluation and eventual award is done in accordance with the specifications as issued in the tender document. Once that no clarifications were sought on the technical and / or financial parameters by the appellant (reference to regulation 38 of the PPR) and the timeframes for the application of a call for remedies in accordance with regulation 262 of the Public Procurement Regulations have elapsed, it is to be deemed that economic operators participating in the tendering process have accepted to duly abide by such specifications included therein. The 'goal posts' / evaluation criteria are to be then considered shut.*

c) On compliance – The tender document was clear and unambiguous when it stated “For adjudication purposes, the cheapest acceptable offer will be established by comparing the annual cost based on the recommended daily dosage regimen as per respective SPC”. (bold emphasis added)

i. Therefore, in the opinion of this Board, what the tender document required was a supply, for 180 patients, in accordance with the recommended daily dosage of the respective SPC, and not a calculation based on averages.

ii. Ex admissis it is the same appellant that states that since the medicine is taken in cycles of 28 days each, on an annual basis there will be 13 distinct cycles. It was also the same witness called to testify by the appellant, Ms Loukia Samata that when asked to explain the basis of calculation in offering only 12 packs instead of 13, she stated that this is accounted for by the percentage of patients affected by reduction in their treatment.

iii. Even though, such reasoning seems to be based and follows proper economic logic, especially due to the fact that most probably it will mean less wastage more so in the context that Kisqali is dispensed by 1 tablet of 200mg which is different to the other offers made by other economic operators, the tender document was specific in what it required.

iv. It is certainly not up to individual economic operators to change the specifications imposed on them as drafted in the tender document. Other tools, as already mentioned in the section “On the issue of ‘Ambiguity’”, were duly available to the appellant but they were not utilized by them. Once the tender specifications as drafted and accepted by the economic bidders by the submission of their bid, it is the Contracting Authority’s duty and responsibility to manage the evaluation process on the remit provided to it. It is only by following those specifications as drafted that the evaluation committee can fully adhere to the principles of self-limitation and to obtain an equal level playing field between all economic operators participating in the tendering process.

v. Finally, it is the opinion of this Board that the rejection letter dated 17th March 2023 was correctly drafted to state “.... was found to be financially non-compliant.....”. This since the issue identified related to the incomplete quantities as listed in the Financial Bid Form. Reference is made to the testimony under oath of Ms Edith Sciberras who when questioned on the submission of the appellant stated “In reply to Specification 2.4 in the tender which was mandatory Appellant had stated ‘yes’ and referred to Item 4.2 Table 1 of the SPC which states that the requirement is for 13 cycles. However the Financial Bid Form indicated 12 packs with footnotes indicating dose modification.”

Therefore, this Board cannot but reject and does not uphold the Appellant's grievances.

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.»*

17. V.J. Salomone Pharma Limited appellat minn din is-sentenza fit-22 ta' Jannar, 2024 u talbet biex din il-Qorti tħassar id-deċiżjoni tal-Bord u minflok issib li l-offerta tagħha hija finanzjarjament konformi mal-ħtiġijiet tas-sejħa u b'hekk tiddikjara l-offerta tagħha bħal dik li għandha tirbaħ is-sejħa.

18. Fil-qosor ħafna, l-aggravji tagħha huma dawn: (i) li l-Bord ma daħalx fuq il-kwistjoni li l-offerta tagħha ma setgħetx tiġi dikjarata bħala mhux finanzjarjament konformi, ladarba l-istess offerta nstabet bħala teknikament konformi; (ii) li l-Bord ma daħalx fuq il-kwistjoni li l-offerta tagħha kienet l-orħos waħda; (iii) li l-Bord kien skorrett meta qal li l-offerta tagħha kienet imsejsa fuq kwantitajiet inkompleti; u (iv) li l-Bord ma qalx sew li hija messha użat rimedji oħrajn biex tikkontesta l-ambigwià tat-termini tas-sejħa għaliex issostni li l-ambigwià ma teżistix fit-test tas-sejħa iżda fil-mod ta' kif il-kumitat tal-għażla u l-Bord interpretaw is-sejħa.

19. Id-Direttur tal-Kuntratti wieġeb għal dan l-appell fil-5 ta' Frar, 2024, filwaqt li Central Procurement and Supplies Unit u Vivian Corporation Limited wieġbu għal dan l-appell b'żewġ risposti separati, li t-tnejn daħlu fid-19 ta' Frar, 2024. Fit-tweġibiet rispettivi tagħhom huma qalu li d-deċiżjoni tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi għandha tiġi kkonfermata.

20. Inżamm smiġh fl-14 ta' Marzu, 2024 u minn hemmhekk il-kawża tħalliet biex tingħata s-sentenza llum.

Konsiderazzjonijiet:

21. Fl-**ewwel aggravju** tagħha, il-kumpanija appellanti tilmenta mill-fatt li l-Bord ma daħalx fuq il-kwistjoni li ladarba l-offerta tagħha, kif imfissra fl-SPC tagħha, instabet li kienet teknikament konformi ma' dak mitlub fis-sejha, allura din ma setgħetx tiġi kkastigata bħala finanzjarjament mhux konformi talli segwiet l-SPC tagħha stess. Minbarra dan, hija tgħid li l-Bord ma għamilx sew meta qies li l-offerta tagħha ma kinitx waħda kompleta iżda waħda msejsa fuq medja (*average*).

22. Fil-fehma tal-Qorti dan l-aggravju huwa kuncettwalment ħażin. Imbilli offerent ikun ippreżenta dokument tekniku li jkun jaqbel mal-ħtiġijiet

u mal-ispeċifikazzjonijiet tekniċi indikati fis-sejha, dan ma jfissirx b'daqshekk li allura dik l-offerta ma tistax tiġi skwalifikata minhabba raġunijiet li jkollhom x'jaqsmu mal-prezz.

23. Fil-fatt skont il-ġabra ta' tifsiriet li nsibu fir-**regola 2 tar-Regolamenti Dwar l-Akkwist Pubbliku (Legislazzjoni Sussidjarja 601.03)**, offerta hija meqjusa bħala inaċċettabbli jekk il-prezz tagħha jkun jaqbeż il-baġit tal-awtorità kontraenti (ara ***Schembri Barbros Limited et v. Il-Korporazzjoni għas-Servizzi tal-Ilma et*** deċiża mill-Qorti tal-Appell fil-31 ta' Jannar, 2019) u offerta hija meqjusa bħala mhux konformi jekk din tkun baxxa żżejjed b'mod mhux normali (ara ***X Clean Limited v. Dipartiment għall-Anzjanità Attiva u Kura fil-Komunità et*** deċiża mill-Qorti tal-Appell fil-31 ta' Awwissu, 2021).

24. Għalhekk, kontra dak li tgħid il-kumpanija appellanti, offerta li tkun toqgħod eżatt mal-ispeċifikazzjonijiet tekniċi, tista' xorta waħda tiġi mwarrba minhabba raġunijiet li jkollhom x'jaqsmu mal-prezz tagħha.

25. Sewwasew fil-każ tal-lum, l-offerta tal-kumpanija appellanti ġiet imwarrba mid-Dipartiment tal-Kuntratti għaliex fl-SPC tagħha hija indikat li d-doża rakkomandata hija ta' 819 pillola fis-sena, filwaqt li fl-offerta finanzjarja tagħha hija semmiet prezz għal 756 pillola fis-sena għal kull pazjent. Jiġifieri 63 pillola inqas fis-sena mid-doża rakkomandata fl-SPC

tagħha stess.

26. Rilevanti li din l-iskwalifika ġiet imwettqa wara li l-kumitat tal-għażla kien talab kjarifika mingħand il-kumpanija appellanti, biex tispjega għaliex il-prezz finanzjarju tagħha ma jkoprix 819 pillola iżda 756 pillola fis-sena. Il-kumpanija appellanti wieġbet li l-prezz ħadmitu fuq 756 pillola għaliex mhux il-pazjenti kollha jispiċċaw jieħdu d-doża kollha ta' 819 pillola. Dan għaliex minn studji li qagħdet fuqhom, irriżultatliha li minn tal-inqas għal tliet xhur fis-sena, ħafna mill-pazjenti jkollhom bżonn jieħdu doża li tkun inqas minn dik rakkomandata ta' 600mg kuljum u li pazjenti jkollhom bżonn iwaqqfu t-trattament. Minħabba f'hekk, il-prezz tagħha ma nħadimx fuq id-doża sħiħa iżda fuq doża mnaqqsa minħabba li hi rraġunat li mhux il-pazjenti kollha kienu ħa jieħdu d-doża sħiħa.

27. Minn kif taraha l-Qorti, il-kumpanija appellanti mxiet ħażin meta ħadmet il-prezz tagħha fuq dawn l-assunzjonijiet tagħha li mhux id-doża kollha kienet sejra tintuża mill-180 pazjent. Tassew dak li jħoll u jorbot mhumiex l-assunzjonijiet ta' xi parti dwar x'inhu l-aħjar għall-awtorità kontraenti iżda l-ispeċifikazzjonijiet li effettivament ikun hemm imniżżla fid-dokument tas-sejħa (ara ***SR Environmental Solutions Limited v. Dipatiment tal-Kuntratti et*** deċiża mill-Qorti tal-Appell fis-6 ta' Frar, 2015).

28. Tajjeb jew ħażin, l-awtorità kontraenti talbet ammont ta' mediċina biżżejjed biex tikkura 180 pazjent. Sinjifikanti li l-awtorità kontraenti ma indikatx fi **klawsola 1.1** tal-Ewwel Taqsima dwar l-Istruzzjonijiet lill-Offerenti, li hija kienet ħa tuża din il-mediċina fuq 180 pazjent partikolari iżda talbet li hija riedet ammont ta' mediċina biżżejjed li tikkura 180 pazjent. Kif sewwa jgħid id-Direttur tal-Kuntratti fir-risposta tal-appell tiegħu, l-enfasi kienet fuq l-ammont ta' kwantità ta' mediċina u mhux fuq l-ammont ta' pazjenti.

29. Il-kumpanija appellanti għalhekk ma kellha l-ebda jedd tnaqqas id-doża rakkomandata tal-prodott tagħha stess minħabba li dehrilha li mhux il-180 pazjent kollha kienu ħa jspiċċaw jieħdu d-doża kollha li hija rakkomandata. Tassew, la l-awtorità kontraenti talbet ammont speċifiku ta' mediċina, il-kumpanija kellha tindika prezz għad-doża kollha b'mod sħiħ u mhux tindika prezz għal doża li ma tkoprix b'mod sħiħ il-180 pazjent.

30. Huwa veru dak li tgħid il-kumpanija appellanti fl-appell tagħha, li l-**klawsola 2.3** tat-Tielet Taqsima tad-dokument tas-sejħha pubblika tgħid li, «*The same active ingredient must be available in all marketed doses to treat all patients and allow for any required dose adjustments.*» Madankollu, għalkemm is-sejħha kienet težiġi lill-oblatur ekonomiku li joffri mediċina li setgħet tiġi aġġustata fid-doża tagħha għaliex xi pazjenti jaf

ikollhom bżonn dożi differenti, dan però ma kellux jiġi interpretat mill-kumpanija appellanti li allura hija setgħet taħdem il-prezz tagħha fuq kemm hija kienet qiegħda taħseb li kienu ħa jkunu dawn l-aġġustamenti fid-dożi.

31. Wara kolloxx skont il-**klawsola 2.4** tat-Tielet Taqsima tad-dokument tas-sejħa pubblika, kien hemm miktub ċar u tond li, «*For adjudication purposes, the cheapest acceptable offer will be established by comparing the annual cost based on the recommended daily dosage regimen as per respective SPC.*»

32. Ifisser dan, li ladarba skont l-SPC tagħha, ir-*recommended daily dosage regimen* kien iwassal għal 819 pillola fis-sena, il-kumpanija appellanti kellha taħdem il-prezz tagħha fuq din id-doża rakkomandata ta' 819 pillola fis-sena u mhux fuq id-doża mnaqqsa ta' 756 pillola fis-sena.

33. Kif jingħad f'paġna 714 tal-ktieb, ***European Public Procurement Commentary on Directive 2014/24/EU*** ta' **Roberto Caranta** u **Albert Sanchez-Graells**, «*If bidders put forward their own terms of pricing structures, these should be rejected as conditional bids, unless such an approach has been specifically authorised.*»

34. Din il-Qorti għalhekk ma ssib xejn x'tiċċensura la fid-deċiżjoni tad-

Dipartiment tal-Kuntratti li skwalifika l-offerta tal-kumpanija appellanti minhabba li hi naqset milli tipprovdi prezz konformi mad-doża rakkomandata fl-SPC tagħha u lanqas fid-deċiżjoni tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi li kkonferma dik l-iskwalifika.

35. L-ewwel aggravju tal-kumpanija appellanti għalhekk qiegħed jiġi miċħud.

36. Fit-**tieni aggravju** tagħha, il-kumpanija appellanti tishaq li fl-aħħar mill-aħħar l-offerta tagħha kienet l-irħas waħda u għalhekk il-Bord kellu jidhol fuq din il-kwistjoni.

37. Kif rajna iżda fl-aggravju ta' qabel dan, il-prezz tal-kumpanija appellanti mhuwix wieħed tajjeb għaliex dan ma nħadimx fuq id-doża rakkomandata iżda fuq doża mnaqqsa. Għalhekk għall-għanijiet tal-**klawsola 2.4** tat-Tielet Taqsima tad-dokument tas-sejha pubblika, il-prezz annwali indikat mill-kumpanija appellanti ma setax jiġi mqabbel mal-prezz annwali tal-oblaturi ekonomiċi l-oħra biex jiġi stabbilit min minnhom kellu l-orħos prezz.

38. F'dan il-kuntest, huwa prinċipju magħruf fil-qasam tal-akkwist pubbliku li l-awtoritajiet kontraenti għandhom jiżguraw li ma jkun hemm ebda diskriminazzjoni bejn operaturi ekonomiċi, u li l-operaturi ekonomiċi

kollha jiġu trattati b'mod indaqs u trasparenti kull meta ssir sejha għall-offerti, ikun x'ikun il-valur stmat tagħhom (ara r-regola 39 tar-Regolamenti dwar Akkwist Pubbliku (Legislazzjoni Sussidjarja 601.03).

39. Fil-Każ-336/12 *Ministeriet for Forskning, Innovation og Videregående Uddannelser v. Manova A/S* deċiż mill-Qorti tal-Ġustizzja tal-Unjoni Ewropea fl-10 ta' Ottubru, 2013 ingħad li l-prinċipju ta' nondiskriminazzjoni jeħtieġ li sitwazzjonijiet paragonabbli ma jiġux ittrattati b'mod differenti u li sitwazzjonijiet differenti ma jiġux ittrattati b'mod ugwali, sakemm tali trattament ma jkunx oġġettivament iġġustifikat.

40. Fil-każ tagħna l-aċċertament tal-orħos prezz bejn l-oblaturi ekonomiċi kellu jiġi mkejjeġ bir-riga tal-«*annual cost based on the recommended daily dosage regimen as per respective SPC.*» Għalhekk, biex jiġihares il-prinċipju tat-trattament indaqs bejn l-offerenti kollha, il-prezzijiet tal-offerenti kellhom jiġu mkejja b'din ir-riga.

41. Billi l-prezz tal-kumpanija appellanti ma setax jiġi mkejjeġ b'din ir-riga, hija ma tistax tgħid li l-prezz tagħha huwa orħos minn dak ta' ħaddieħor. Wara kollox, mhux sew li l-prezz tagħha jiġi mkejjeġ fuq kwantità ta' medicina mnaqsa filwaqt li l-prezz tal-offerenti l-oħrajn jiġi

mkejjel fuq kwantità ta' medicina sfiha.

42. Anke dan it-tieni aggravju għalhekk qiegħed jiġi mwarrab.

43. Fit-**tielet aggravju** tagħha l-kumpanija appellanti tgħid li l-Bord qal li l-offerta tagħha kienet għal *incomplete quantities* għaliex targumenta li *r-recommended daily dosage regimen* mhuwiex wieħed assolut iżda wieħed li jirrifletti r-realtajiet tal-bżonnijiet differenti tal-pazjenti.

44. Il-Qorti tqis li dan l-aggravju huwa biss titnija tal-ewwel aggravju. Għalhekk dan l-aggravju qiegħed jiġu miċhud għall-istess raġunijiet mogħtija waqt l-istħarriġ tal-ewwel aggravju, viz. li skont il-**klawsola 2.4** tat-Tielet Taqsima tad-dokument tas-sejha pubblika, il-prezz kellu jinħadem fuq id-doża rakkomandata u mhux fuq kif din id-doża kellha tiġi aġġustata skont l-assunzjonijiet magħmula mill-kumpanija appellanti.

45. Jiġi b'hekk li l-Bord kien għalkollox korrett meta qal li l-offerta tal-kumpanija appellanti kienet għal *incomplete quantities*. Mod ieħor hija l-kumpanija appellanti li hija żbaljata f'dan l-aggravju tagħha.

46. Jonqos biss li jiġi mistħarreġ l-**aħħar aggravju**. Fih il-kumpanija appellanti targumenta li l-Bord ta interpretazzjoni ambigwa tas-sejha

għaliex issostni li mkien ma hemm imsemmi fid-dokument tas-sejha li l-offerent m'għandux jaħseb għal aġġustamenti fid-doża. Fl-istess aggravju, il-kumpanija appellanti targumenta wkoll li hija l-offerta ta' Vivian Corporation Limited li kienet inkompleta.

47. Dwar l-ewwel parti tal-aggravju, din il-Qorti ttenni li l-Bord interpreta b'mod korrett it-termini tas-sejha u li bil-maqlub ta' dak li jingħad fl-aggravju, hija sewwasew il-kumpanija appellanti li qiegħda tagħti interpretazzjoni mgħawġa u ħażina tat-termini tas-sejha. It-termini tas-sejha kienu ċari ħafna, jiġifieri li l-orħos prezz kellu jiġi determinat fuq il-bażi *tar-recommended daily dosage regimen*. Li kieku l-awtorità kontraenti riedet li l-orħos prezz jinħadem fuq kif l-offerent kien qiegħed ibassar li d-doża kienet x'aktarx ħa tintuża fuq il-180 pazjent, kieku kien jaqbad u jgħidu fis-sejha. Però kif ingħad, fis-sejha ntabab biss li l-prezz jinħadem fuq *ir-recommended daily dosage regimen*. Għalhekk dan kellu jinftiehem li offerent ma kellu jqis ebda aġġustament fid-doża, meta jiġi biex jaħdem il-prezz finali tiegħu. Wara kollox l-awtorità kontraenti ma qalitx li hija riedet tixtri l-mediċina biex tipprovdiha għal 180 pazjent; qalet biss li hija riedet tixtri kwantità ta' mediċina li tkopri 180 pazjent.

48. Għamlet ħażin għalhekk il-kumpanija appellanti li ma offrietx prezz li jkopri kwantità ta' mediċina li tikkura 180 persuna iżda qagħdet toqgħod tidħol fuq assunzjonijiet ta' kemm x'aktarx ħa jkun id-dożaġġ li sejrin

jieħdu dawn il-180 pazjent, li kieku dan id-dożaġġ ħa jiġi provdut lil 180 persuna f'daqqa.

49. L-ewwel parti tal-aggravju għalhekk mhuwiex mistħoqq.

50. Dwar it-tieni parti tal-aggravju, din il-Qorti taqbel ma' dak argumentat minn Vivian Corporation Limited fir-risposta tal-appell tagħha, li l-kumpanija appellanti ma tistax tqajjem aggravji u sottomissjonijiet f'dan l-istadju tal-appell kontra s-siwi tal-offerta ta' Vivian Corporation Limited, ladarba hija qatt ma ilmentat dwar tali offerta quddiem il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi.

51. Hija ġurisprudenza miżmuma, anke f'din il-fergħa tal-liġi, li sakemm ma jkunx hemm punti ta' ordni pubbliku, din il-Qorti ma tistax tqis materji ġodda li ma jkunux ġew imqanqla quddiem il-Bord (ara **SaniClean Joint Venture v. St Vincent de Paul Long Term Care Facility et** deċiża mill-Qorti tal-Appell fl-20 ta' Lulju, 2020 u **Aurelia Enforcement Limited v. Kumitat Reġjonali Xlokk u Reġjun Xlokk** deċiża mill-Qorti tal-Appell fit-12 ta' Diċembru, 2013).

52. Dan il-parti tal-aggravju għalhekk ma jistax jiġi meqjus.

Deċiżjoni

Għaldaqstant għal dawn ir-raġunijiet, il-Qorti qiegħda **tichad** l-appell ta' V.J. Salomone Pharma Limited u b'hekk qiegħda tikkonferma s-sentenza appellata. L-ispejjeż kollha marbuta ma' dan l-appell għandhom jitħallsu minn V.J. Salomone Pharma Limited.

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