MALTA

# QORTI TA' L-APPELL

**S.T.O. PRIM IMHALLEF**

**SILVIO CAMILLERI**

**ONOR. IMHALLEF**

**GIANNINO CARUANA DEMAJO**

**ONOR. IMHALLEF**

**NOEL CUSCHIERI**

Seduta tas-6 ta' Frar, 2015

Appell Civili Numru. 400/2014/1

**Cherubino Limited (C-3677)**

**v.**

**Dipartiment tal-Kuntratti**

1. Dan huwa appell ta' *Cherubino Limited* ["*Cherubino*"] minn deċiżjoni tas-6 ta' Ottubru 2014 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2010 dwar il-Kuntratti Pubbliċi [L.S. 174.04], illi ċaħdet appell tal-istess *Cherubino* minn deċiżjoni tad-Dipartiment tal-Kuntratti ["id-Dipartiment"] illi offerta tagħha għall-provvista ta' "*coagulant reagents with equipment on loan*" tiġi mwarrba.

2. Il-fatti relevanti seħħew hekk: fl-10 ta' Diċembru 2013 saret sejħa mid-Dipartiment "*for the supply of coagulant reagents with equipment on loan"*. Fost il-kondizzjonijiet tas-sejħa hemm dik taħt *Section 4 – technical specifications, 1 – reagents/consumables* li tgħid hekk:

> "1.2 The reagents and other consumables which are offered must be of proven accuracy and precision. A detailed protocol for each kit or each type of reagent must be submitted with offer. All reagents and kits must be CE approved and Material Safety Data Sheets are to be submitted for each reagent/kit."

3. Taħt *2 – other technical specifications, 2.1 – standards* hemm kondizzjoni oħra li tgħid hekk:

> "2.1.1 Medicinal Products
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> "All medicinal products should meet those standards laid down in the latest edition of European Pharmacopoeia (Ph.Eur.) or, in the absence of which, other pharmacopoeia acceptable to the Superintendent of Public Health. In the event that neither of the above is available, an in-house company monograph may be considered."

4. Saru tliet offerti u l-orħos waħda kienet ta' *Cherubino*, bil-prezz ta' sitt mija u sebgħa u tletin elf, erba' mija u ħamsa u tmenin euro (€637,485). Minkejja dan, b'ittra tal-24 ta' Ġunju 2014 id-Dipartiment

għarraf lil *Cherubino* illi l-offerta tagħha ma ntlaqgħetx għal raġuni li ġiet imfissra hekk:

> "The provided literature for the Von Willebrand RiCoF[1] Factor shows that it is not CE marked.
>
> "For your information, the Evaluation Committee recommended that this tender is [*sic*] awarded to *Technoline Ltd* at €689,804.82 inc. VAT for a period of 36 months."

5. B'ittra tat-2 ta' Lulju 2014 *Cherubino* talbet illi titħassar id-deċiżjoni illi titwarrab l-offerta tagħha għal raġunijiet li fissrithom hekk:

> "Such statement [*i.e.* "The provided literature for the Von Willebrand RiCoF[2] Factor shows that it is not CE marked"] is at best incorrect, at worst misleading, since nowhere within the tender submission by the complainant is such a claim made;
>
> "It is thereby important to point out that [that] statement by the department of contracts, in that the literature provided states that item offered is not marked, is actually an incorrect statement by the department;
>
> "The statement by the department of contracts is not only incorrect, but also contrary to that declared and stated by the bidder in its offer, since the complainant *inter alia* in provision 1 confirms and attests the following:
>
> > ""1.1 *Cherubino Ltd* will supply reagents … … … and any other specific disposable items required for the running of the specific disposable items required for the running of the whole system.
> >
> > ""1.2 The reagents and other consumables offered are of proven accuracy and precision. A detailed protocol for each type of reagent is submitted with the offer. All reagents and kits offered are CE approved ...
> >
> > "…
>
> "Thus the above clearly underlines that complainant did not only confirm that the supply of the reagent and kit *etc*. will actually be supplied, but also did state very clearly, and in the most unequivocal of terms, that all reagents and kits offered are in actual fact CE approved."

6. Fis-6 ta' Ottubru 2014 il-Bord ta' Reviżjoni iddeċieda hekk:

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1 *Ristocetin co-factor*.

2 *Ristocetin co-factor*.

"This Board,

"Having noted appellant's objection, in terms of the "Reasoned Letter of Objection" dated 2nd July 2014 and also through appellant's verbal submissions during the hearing held on 2nd September 2014, had objected [*sic*] to the decision taken by the pertinent Authority, in that:

"a) Appellant Company contends that its offer was unfairly discarded on the alleged reason given by the Contracting Authority that appellant's products were not CE approved. In this regard, appellant contends that the declaration given by same assured in itself the fact that the latter would supply the products CE approved as requested in the Tender Document, in accordance with Provision 1.2;

"b) Appellant claims that, if the Contracting Authority had any doubts about the CE approval, the latter should have requested clarifications;

"Having Considered the Contracting Authority's verbal submissions during the hearing held on 2nd September 2014, in that:

"a) The Technical Expert on the Evaluation Board explained very vividly, under oath, the procedure in applying this product on patients. The prime decisive factor on which the Evaluation Board's decision rested was "to choose the most reliable and safe product for the benefit of the patients' safety". The product had to be CE approved. However from the Literature submitted by the appellant company, it was not possible for the Evaluation Board to determine whether the product offered by appellant was CE approved;

"b) One of the main concerns of the Evaluation Board was the Disclaimer made by the Supplier of the Appellant's product. The Contracting Authority chose the safest product which was CE approved.

"Reached the following conclusions:

"1. With regards to the first contention of the appellant company, in that its product was CE approved, and following the Technical Expert's submission (under oath), this Board acknowledges the importance of choosing the safest product to be administered on patients. One of the assurances which the Tender Document stipulated was that all reagents and Kits had to be CE approved and material safety Data sheets were to be submitted for each Reagent/Kit. From the Technical Literature submitted by the appellant, the Evaluation Board could not determine whether appellant's products were CE approved;

"The fact that the Appellant Company submitted the declaration that all products being offered by appellant were CE approved does not show evidence (from literature

submitted by the same) that the products were in actual fact CE approved.

"This Board also noted the fact that the appellant's product supplier submitted a disclaimer:

> ""Users assume total responsibility for validation of test results obtained with this protocol so as to be in full compliance with current local regulations applicable to in vitro reagents. Under no circumstances shall the supplier be held liable for any consequential damages resulting from the use of this protocol."

"This same Board opines that this disclaimer submitted by the supplier of the appellant's product does not augur favourably when one considers and establishes the fact that the Patient's Health and Safety is of the utmost and determing importance in the Evaluation Process. In this regard, this Board upholds the Contracting Authority's decision to select the safest product for the benefit of the Patient's safety.

"2. With regards to the Second Contention of the Appellant Company, in that the Evaluation Board could have asked for clarifications, this Board opines that the tender in fact, did not allow any clarifications regarding the Technical Specifications. This Board upholds this mandatory condition laid out in the Tender Document.

"In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by appellant should not be re-imbursed."

7. Id-*disclaimer* sħiħ fuq il-prodott offert minn *Cherubino* li jissemma' fid-deċiżjoni tal-Bord ta' Reviżjoni jgħid hekk:

> "This protocol is suggested by Dragnostica Stogo to assist users who choose to utilize the above mentioned reagents and instrument. Users assume total responsibility for validation of test results obtained with this protocol so as to be in full compliance with current local regulations applicable to *in vitro* reagents. Under no circumstances, shall Diagnostica Stago be held liable for any consequential damages resulting from the use of this protocol."

8. *Cherubino* ressqet appell mid-deċiżjoni tal-Bord ta' Reviżjoni b'rikors tal-24 ta' Ottubru 2014 quddiem din il-qorti, u d-Dipartiment tal-Kuntratti wieġeb fit-12 ta' Novembru 2014.

9. L-ewwel aggravju ta' *Cherubino* huwa illi l-Bord ta' Reviżjoni għamel "apprezzament ħażin tal-fatti". Dan l-aggravju huwa pratikament identiku għal dak li tressaq quddiem il-bord u ġie mfisser hekk:

> "L-unika raġuni miġjuba mill-awtorità kontraenti sabiex tiġġustifika l-esklużjoni tas-soċjetà appellanti *Cherubino Limited* kienet li,
>
> ""The provided literature for the Von Villebrand RiCoF Factor assay shows that it is not CE marked."
>
> "Illi mhux talli li l-asserzjoni hija inveritjera, illi fl-offerta ta' *Cherubino* ġie effetivament iddikjarat djametrikament l-oppost, u *cioè* li l-prodotti u kull ħaġa li qed tiġi offruta mill-istess soċjetà kienet approvata *ai termini* tal-marka CE, u dana billi *inter alia* ġew użati s-segwenti kliem,
>
> ""All reagents and kits offered are CE approved."

10. Dan fil-fehma tal-qorti huwa biss logħob bil-kliem. Is-sejħa għal offerti riedet illi l-prodotti jkunu *CE approved*. Il-prova ta' dan tista' ssir billi l-prodott ikollu l-marka *CE* fuqu jew jista' jsir b'xi mod ieħor, ukoll permezz ta' "*an in-house company monograph*" ta' min jipproduċi l-prodott. Iżda l-prova trid issir u, fil-każ tal-prodott offert ma' *Cherubino*, ma saritx. Il-punt ma huwiex illi d-dokumenti juru illi l-prodott ma huwiex *CE approved* iżda li ma jurux illi hu. Li taqbad mal-fatt illi l-kumitat tal-għażla uża l-kliem "*The provided literature … shows that it is not CE marked*" flok, kif kellu jkun, "*The provided literature … does not show that it is CE approved*" huwa appuntu logħob bil-kliem.

11. Il-fatt jibqa' illi l-prova li l-prodott huwa *CE approved* ma saritx, kif kellha ssir, bid-dokumenti mehmuża mal-offerta. Il-qorti taqbel mal-Bord ta' Reviżjoni meta dan qal illi:

> "The fact that the Appellant Company submitted the declaration that all products being offered by appellant were CE approved does not show evidence (from literature submitted by the same) that the products were in actual fact CE approved."

12. Li kieku l-istqarrija ta' min jagħmel l-offerta kienet biżżejjed, kieku s-sejħa għal offerti ma kinitx titlob id-dokumentazzjoni li fil-fatt intalbet.

13. Tassew illi l-prova setgħet issir permezz ta' "*an in-house company monograph*" iżda dan jirreferi għal dokument maħruġ minn min jipproduċi l-prodott, għax huwa dan, u mhux *Cherubino* li hija biss importatur, li jista' jiċċertifika l-prodott tiegħu. Dan l-argument huwa msaħħah minn dak illi issottomettiet *Cherubino* stess waqt it-trattazzjoni bil-fomm, meta qalet illi d-dokumenti relativi għal *Von Villebrand RiCoF* ma fihomx il-marka ta' *CE approval* għax dawk id-dokumenti ħariġhom min ipproduċa l-makna dijanjostika u mhux min ipproduċa l-*Von Villebrand RiCoF* (li huwa re-aġent li bih il-makna dijanjostika tagħmel l-analisi), u min ipproduċa l-makna ma jistax jiċċertifika prodott ta' ħaddieħor. Fil-fatt fejn il-makna dijanjostika u r-ri-aġent huma prodotti tal-istess dar, dak iċ-ċertifikat ingħata.

14. Iżda dan huwa appuntu prova illi dar ma tistax tiċċertifika l-prodott ta' dar oħra, u illi ċ-ċertifikat mogħti minn *Cherubino* ma jiswiex. Mhux biss, iżda min ipproduċa l-makna mhux talli ma tax ċertifikat iżda talli għamel *disclaimer* espress, naturalment għax ma jistax jieħu responsabilità għall-prodott ta' ħaddieħor. F'dawn iċ-ċirkostanzi, hija inevitabbli l-konklużjoni illi ma saritx il-prova meħtieġa illi l-prodott offfert huwa tassew *CE approved*, u

għamel sew il-kumitat tal-għażla illi warrab l-offerta u għamel sew il-Bord ta' Reviżjoni illi ikkonferma dik id-deċiżjoni.

15. Dan l-aggravju, li l-qorti tqisu bħala wieħed fieragħ, huwa miċħud.

16. Aggravju ieħor huwa illi d-deċiżjoni tal-Bord ta' Reviżjoni tmur *ultra* jew *extra petita*. Fissret dan l-aggravju hekk:

> "... ... ... id-deċiżjoni għall-esklużjoni ta' *Cherubino* kienet ċara ħafna, u per konsegwenza l-istess *Cherubino* intavola appell sabiex jitlob lill-Bord jirrevoka jew jikkonferma d-deċiżjoni tal-awtorità kontraenti, fl-ispirtu esklussiv tar-raġuni miġjuba għal-esklużjoni;
>
> "Il-Bord kien obbligat li jħares lejn ir-raġuni, u *cioè* li skont l-awtorità kontraenti s-soċjetà *Cherubino* ipprovdiet dokumenti li juru li l-prodotti tagħha ma kinux konformi mal-marka CE, u jinvestiga jekk dan hux minnu jew le;
>
> "Finalment, il-Bord kellu jasal għal konklużjoni waħda minn dawn: l-ewwel, jekk huwa minnu li *Cherubino* ipprovdew dokumenti li juru dak allegat, allura d-deċiżjoni tal-awtorità kontraenti kellha tkun konfermata, jew it-tieni, jekk dak indikat mill-awtorità kontraenti mhux minnu, allura d-deċiżjoni kellha tiġi revokata - kull ħaġa oħra, u li ma hiex fl-ispirtu ta' dan, mhux permessa li ssir mill-Bord ta' Reviżjoni;"

17. Li tgħid sew din is-silta hu illi l-Bord ta' Reviżjoni kellu "jirrevoka jew jikkonferma d-deċiżjoni tal-awtorità kontraenti". It-talba li kellu quddiemu l-Bord ta' Reviżjoni – dik li dwarha kellu jiddeċiedi – kienet dik li *Cherubino* stess ressqet fl-ittra tagħha ta' oġġezzjoni mid-deċiżjoni tad-Dipartiment, *viz.* illi titħassar id-deċiżjoni tad-Dipartiment u illi l-kuntratt jingħata lilha. Il-Bord ta' Reviżjoni għalhekk iddeċieda dwar dak li kellu jiddieċiedi, u ma mar la *ultra* u lanqas *extra*, u, għandu jingħad, iddeċieda sew għax l-offerta ta' *Cherubino* ma ħarsitx il-kondizzjoni tas-sejħa għal offerti li riedet illi ssir prova li l-prodotti kollha jkunu *CE approved*.

18. Dan l-aggravju wkoll huwa fieragħ u huwa miċħud.

19. Għal dawn ir-raġunijiet il-qorti tiċħad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Reviżjoni. L-ispejjeż ta' dan l-appell tħallashom is-soċjeta` appellanti *Cherubino Limited*. Billi wkoll hija tal-fehma illi l-appell kien wieħed għal kollox fieragħ, u għalhekk ukoll irresponsabbli għax serva biss biex ikompli jdewwem il-proċess biex jinkisbu prodotti essenzjali għas-saħħa ta' pazjenti, il-qorti wara li rat il-para. 10(1) tat-Tariffa A mehmuża bħala Skeda A mal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, tikkundanna lill-istess soċjetà appellanti tħallas lir-Reġistratur tal-Qrati spejjeż addizzjonali ta' elf euro (€1,000).

## < Sentenza Finali >

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