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. 426/2014/1

Cherubino Limited (C-3677)

v.

Id-Direttur (Ġenerali) tal-Kuntratti;

Central Procurement and Supplies Unit;
Europharma Limited (C-1822)

1. Dan huwa appell ta' *Cherubino Limited* ["*Cherubino*"] minn deċiżjoni tal-15 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' "*column agglutination system with equipment on loan*" tiġi mwarrba.

2. Il-fatti relevanti seħħew hekk: fid-9 ta' Diċembru 2013 saret sejħa mid-Dipartiment "*for the supply of column agglutination system with equipment on loan"*. Fost il-kondizzjonijiet tas-sejħa hemm dik taħt *Section 4 (technical specifications) 2. (equipment on loan)* li tgħid hekk:

> "2.1.2 The system should be able to give priority to urgent requests preferably without disturbing or halting an already on-going process. It should be flexible enough to run a variety of different test profiles and samples at the same time."

3. Saru żewġ offerti minn *EuroPharma Limited* ["*EuroPharma*"] u offerta minn *Cherubino.* B'ittra tat-22 ta' Lulju 2014 id-Dipartiment għarraf lil *Cherubino* illi l-offerta tagħha ma ntlaqgħetx għal raġunijiet li ġew imfissra hekk:

> "Section 2.1.2 - the system offered does not give priority to urgent requests;
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> "Item 1.4 not offered;
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> "Item 1.5 not offered;
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> "Item 3.2 not according to specifications requested QC kit is not available.

> "For your information, this tender was awarded to *Europharma Ltd* for €743,261.10."

4. *Item 1.4* huwa *antibody identification (enzyme)*; *Item 1.5* huwa *antibody identification (Coombs) + crossmatch*; *item 3.2* huwa *QC*[1] *kits for internal evaluation of kits and reagents*.

5. B'ittra tal-31 ta' Lulju 2014 *Cherubino* talbet illi titħassar id-deċiżjoni illi titwarrab l-offerta tagħha għax "*reason for exclusion are* (*sic*) *in fact incorrect as complainant did in fact offer a system that gives priority as well as offered all items requested*", u talbet ukoll illi l-kuntratt jingħata lilha flok lil *EuroPharma* bili hija kienet "*the technically fully compliant and cheapest bidder*". L-offerta ta' *Cherubino* kienet ta' seba' mija u ħamsa u għoxrin elf, sitt mija u wieħed u erbgħin euro u erba' ċenteżmi (€725,641.04) waqt li l-offerta ta' *EuroPharma* li ntgħażlet kienet ta' seba' mija u tlieta u erbgħin elf, mitejn u wieħed u sittin euro u għaxar ċenteżmi (€743,261.10).

6. Fil-15 ta' Ottubru 2014 il-Bord ta' Reviżjoni iddeċieda hekk:

> "The Board,
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> "Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 1st August 2014[2] and also through Appellant's verbal submissions during the hearing held on 11th September 2014, had objected [*sic*] to the decision taken by the pertinent Authority, in that:
>
> "a) Appellant Company claims that the reasons given by the Contracting Authority were unfounded as follows:

1 *Quality control*.

2 L-ittra ġġib id-data tal-31 ta' Lulju 2014 iżda kienet preżentata quddiem il-Bord fl-1 ta' Awissu 2014.

"i) The product offered by Appellant does in fact conform with the technical requirement as specified in Clause 2.1.2 of the tender document, as specified in the literature submitted by same;

"ii) Appellant was also in conformity with clause 1.4, as, in actual fact, he did submit the requested information as dictated in tender document;

"iii) Again, Appellant contends that he did submit the information as per item 1.5 of the tender document, so that he conformed with the requirements of this clause as well;

"iv) Appellant claims that he was technically compliant, in accordance with clause 3.2 of the tender document.

"b) Appellant claims that if the Contracting Authority is now insisting that Appellant's offer was not technically compliant, then it is clear that the reasons given by the Contracting Authority for refusal of Appellant's offer were unfounded and misleading.

"Having Considered the Contracting Authority's verbal submissions during the hearing held on 11th September 2014, in that:

"a) The Contracting Authority claimed that the Appellant's equipment being offered by same did not allow for the facility to give priority to urgent cases without stopping the process of analysis of the other tests in line. This was a requirement as dictated in the tender document;

"b) The system offered by Appellant applied a different methodology from that requested in the technical specifications of the tender document. The tender called for a 'Column Agglutination System' whilst the Appellant's offer provided an 'Immunofixation' system;

"c) The Contracting Authority requested a 'Kit' to control tests of each batch of reagents, to compare same with known results. Appellant's offer differed from this requirement.

"Reached the following conclusions:

"1. With regards to Appellant's contention that his offer was in full conformity with clause 2.1.2, *i.e.* that his offer was technically compliant, this Board, after having heard the expertise submissions, it was credible [*sic*] established that clause 2.1.2 requested a system whereby it would be possible to give priority to urgent requests without disturbing or halting the already ongoing process of the other tests. From the experts' submission it was justified [*sic*] that Appellant's offered equipment could not meet this requirement. In this regard, this Board upholds the Evaluation Board's contention that Appellant's bid was technically non-compliant.

> "2. With regards to item 1.4 and 1.5, after having heard the experts' submissions this Board is convinced that, since the tender called for a 'Column Agglutination System' and Appellant's bid offered a different system defined as 'Immunofixation', Appellant offered a system which was not asked for and, in this respect, this Board contends that the Evaluation Board's decision in this respect is correct.
>
> "3. This Board firmly affirms that 'medical technical specifications' must be strictly adhered to, especially in the medical field where specifications are of the utmost importance. It has been clearly established, from medical submissions, that Appellant's offer failed to abide by the mandatory technical specifications stipulated in the tender document.
>
> "In view of the above, this Board finds against the Appellant Company; however, due to the Contracting Authority's misleading reasons in the 'Letter of Refusal' sent to Appellant, this same Board recommends that the deposit paid by Appellant should be fully reimbursed.«

7. Il-"*misleading reasons in the letter of refusal*" li jissemmew fid-deċiżjoni tal-Bord ta' Reviżjoni kienu mfissra hekk mill-membri tal-bord tal-għażla (*evaluation board*) maħtur mid-Dipartiment:

> "Mr Jesmond Debono, a member on the evaluation board, under oath said that there were two systems for testing: one is the column agglutination, and this was requested in the tender, and the column affinity system using a gel … [*sc.* which] does not use agglutination. The agglutination system uses anti human globulin reagent while the affinity system does not use the anti human globulin reagent; it uses other reagents. The two technologies are different. … … …The evaluation board wanted to ensure that the anti human globulin reagent was included in the tests and therefore items 1.4 and 1.5 were not covered by appellant's offer. All the items in section 1 were not acceptable on the basis of the required methodology. … … … Ms Connie Miceli (*chairperson evaluation board*) explained that the different methodology was mentioned in the evaluation report but this was not included by the Department of Contracts in the letter of rejection through an oversight.«

8. *Cherubino* ressqet appell mid-deċiżjoni tal-Bord ta' Reviżjoni b'rikors tal-4 ta' Novembru 2014 quddiem din il-qorti. Id-Direttur (Ġenerali) tal-Kuntratti wieġeb fil-21 ta' Novembru u *EuroPharma* wieġbet fis-26 ta' Novembru 2014.

9. L-ewwel aggravju ta' *Cherubino* huwa illi d-deċiżjoni tal-Bord ta' Reviżjoni tmur *ultra* jew *extra petita*. Fissret dan l-aggravju hekk:

> "... ... ... hemm distakk bejn il-punti msemmija fil-*Letter of Refusal* u d-deċiżjoni meħuda mill-Bord tal-Appell [*recte*, Bord ta' Reviżjoni], tant hu hekk illi fid-deċiżjoni tieghu l-bord tal-kuntratti ... ... rrikonoxxa dan … … … Irid għalhekk jingħad illi l-Bord ma kellu l-ebda dritt illi jiddeċiedi fuq punti *ultra* minn dawk elenkati fil-*Letter of Refusal*. Dan joħroġ ċar mill-kumment illi ġie mqajjem waqt is-smigħ tal-appell fejn ic-*chairperson* tal-*Evaluation Board*, is-Sinjura Connie Miceli, saħqet illi kien hemm ċertu punti illi ġew imqajjma waqt l-evalwazzjoni tat-*tender* tal-appellanti liema punti però ma ġewx imniżżla fil-*Letter of Refusal* u għalhekk is-soċjetà appellanti tinsisti illi dawn il-punti ma jistgħux jiġu mqajjma waqt l-appell u dan għaliex ġew ommissi mill-istess ittra li suppost turi biċ-ċar għal liema raġuni is-sejħa ma ntrebaħx [*recte*, l-offerta ma ntlaqgħetx."

10. 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, u l-Bord ta' Reviżjoni iddeċieda li jiċħad dik it-talba, ħlief illi laqa' talba oħra li jintradd lil *Cherubino* d-depożitu li ħallset biex ressqet l-oġġezzjoni. Il-Bord ta' Reviżjoni għalhekk iddeċieda dwar dak li kellu jiddieċiedi, u ma mar la *ultra* u lanqas *extra*.

11. U lanqas ma hu minnu illi l-*letter of rejection* ma tatx ir-raġunijiet għala l-offerta ta' *Cherubino* ma ntlaqgħetx jew tat raġunijiet ħżiena jew *misleading*. Fil-fatt (kif sejrin naraw aktar 'il quddiem) huwa minnu illi *Cherubino* ma għamlitx offerta għal xi *items* li riedet is-sejħa għal offerti. Offriet sistema ieħor li jaħdem b'metodi differenti, li jfisser illi s-sistema li riedet is-sejħa ma offritux. L-iżjed li jista' jingħad hu illi l-*letter of rejection* tat ir-raġuni fil-qosor

bla ma fissret illi jekk toffri *item A* ma tistax titqies li qiegħed toffri *item B* meta s-sejħa riedet offerta għal *item B*. Il-Bord ta' Reviżjoni għalhekk għamel sew li qies jekk dak li offriet *Cherubino* kinitx tassew dak li riedet is-sejħa għal offerti, u b'ebda mod ma tista' titqies li marret *ultra* jew *extra petita*, la fid-deċiżjoni u lanqas fl-istħarriġ li għamlet.

12. Dan l-ewwel aggravju huwa għalhekk miċħud.

13. It-tieni aggravju ta' *Cherubino* huwa illi ma huwiex minnu illi s-sistema li offriet hi ma jagħmilx *priority testing*. Fissret illi l-"espert barrani" Ferry Sprengers (li fil-fatt huwa funzjonarju tas-soċjetà li tipproduċi s-sistema li offriet *Cherubino* u illi quddiem il-Bord ta' Reviżjoni deher bħala *representative* tagħha) xehed illi "*the system offered by appellant gives priority to urgent tests. In the event of an urgent sample to be tested this would be inserted with the other ongoing tests without disturbance*".

14. Qabel xejn għandu jingħad illi din hija materja ta' kriterji tekniċi li dwarhom bħala regola din il-qorti ma tiddisturbax l-apprezzament magħmul minn bord tekniku. Madankollu għandu jingħad illi s-sottomissjoni ta' *Cherubino* ma hijiex korretta, għax Sprengers kien kompla jgħid illi "*the ongoing tests would be paused, the priority test carried out and then the other tests would continue. The urgent test jumped the queue and is given priority*". Is-sejħa għal offerti riedet illi "*the system should be able to give priority to urgent requests preferably without disturbing or halting an already on-going*

process" waqt illi Sprengers stqarr illi bis-sistema ta' *Cherubino* "*the ongoing tests would be paused*". Tassew illi l-użu tal-kelma "*preferably*" jfisser illi dan in-nuqqas ma kienx bilfors wieħed fatali iżda jekk offerti oħra jagħtu dik il-faċilità dawn iridu jiġu preferuti. Barra minn hekk, is-sejħa għal offerti trid ukoll illi s-sistema "*should be flexible enough to run a variety of different test profiles and samples at the same time*"; evidentement, sistema illi jrid illi *ongoing tests* jitwaqqfu biex issir analiżi oħra aktar urġenti ma huwiex sistema illi jippermetti li jsiru analiżijiet differenti fl-istess ħin.

15. Dan it-tieni aggravju huwa għalhekk miċħud.

16. It-tielet aggravju huwa illi ma huwiex minnu li ma saritx offerta tal-*items 1.4* u *1.5*. Il-bord tal-għażla warrab l-offerta ta' *Cherubino* għax is-sistema li offriet din jaħdem b'metodu magħruf bħala *immunofixation* waqt illi s-sejħa riedet sistema li jaħdem b'metodu ieħor, magħruf bħala *agglutination*. *Cherubino* fissret dan l-aggravju hekk:

> "... ... ... mis-sena 2009 *Sanquin* [li tagħmel il-prodott offert minn *Cherubino*] bdiet tuża l-metodu ta' *agglutination* fi żvilupp avvanzat u avvanzatu ulterjorment fit-teknologija ta *immunofixation.*"

17. Għal darba oħra din il-qorti tosserva illi fuq materja ta' apprezzament tekniku bħala regola ġenerali u sakemm ma jintwerewx raġunijiet gravi u konvinċenti ma tiddisturbax apprezzament magħmul minn bord tekniku. Fil-każ tallum il-bord tal-għażla osserva illi *immunofixation* hija "*a different methodology from that requested*". *Cherubino* tgħid illi *immunofixation* huwa "żvilupp

avvanzat" tal-metodu ta' *agglutination*. Dan jista' jkun minnu; fil-fatt dokumenti prodott minn *Cherubino* jgħid illi *immunofixation* huwa "*an improved version of this principle*", *i.e.* ta' *the principle of agglutination of red cells*, li d-dokument isejjaħlu bħala użu ta' "*conventional techniques*". Jista' jkun minnu wkoll illi s-sistema ta' *immunofixation* huwa aħjar, għalkemm huwa naturali illi min jipproduċi u jbigħ din is-sistema jgħid illi huwa aħjar mill-*conventional techniques*. Jibqa' l-fatt iżda illi s-sejħa għall-offerti riedet sistema ta' *agglutination* u mhux verżjoni oħra, ukoll jekk aktar avvanzata, ta' din is-sistema. *Cherubino* offriet ħaġa oħra, li jfisser illi ma offrietx dak li s-sejħa riedet.

18. It-tielet aggravju wkoll huwa għalhekk miċħud.

19. L-aħħar aggravju jgħid illi ma huwiex minnu illi l-*quality control kits* ma humiex kif ridithom is-sejħa għall-offerti, u illi *Cherubino* "issottomettiet litteratura illi tikkonferma illi l-prodott offrut huwa fil-fatt dak mitlub fis-sejħa", iżda ma wrietx fejn il-"litteratura" tgħid dan. Fil-fatt iżda l-bord tal-għażla osserva illi:

> "… … … the contracting authority wanted a kit that would be used to make control tests of each batch of reagents to compare with known results. In this way each batch that passes control may be used for patients. The product offered by appellant, *Pelicase 1*, cannot be used in this way because its use is to assess staff proficiency. This is shown on the product packaging. This stated for example that … … … *Pelicase* is to be used for education purposes only. … … … [T]he QC kit offered by appellant … is used to assess the skills of the person using it while the authority wanted kits for testing other kits before these are used for patients."

20. Imkien ma ntwera illi dan ma huwiex minnu. Lanqas dan l-aħħar aggravju, għalhekk, ma jista' jintlaqa'.

21. 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*.

< Sentenza Finali >

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