

QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF SILVIO CAMILLERI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF NOEL CUSCHIERI

Seduta ta' nhar it-Tnejn 18 ta' Lulju 2017

Numru

Appell numru 178/2017

AMAS Company Limited (C-18668)

v.

***The Central Procurement and
Supplies Unit; Ministeru tas-Saħħa; u
Cherubino Limited (C-3677)***

1. Dan huwa appell ta' *AMAS Company Limited* ["AMAS"] minn deċiżjoni tas-6 ta' April 2017 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [L.S. 174.04], dwar oġġezzjoni ta' *Cherubino Limited* [*Cherubino*] kontra deċiżjoni ta' *The Central Procurement and Supplies Unit* ["CPSU"] illi kuntratt għal "supply of foldable/injectable lenses" jingħata lil AMAS.

2. Il-fatti rilevanti seħnew hekk: kienet saret sejħa [“l-ewwel sejħa”] mis-
CPSU għal offerti għall-kuntratt għall-provvista ta’ “*foldable/injectable lenses hydrophobic implants with length 13.00 mm and a diameter of between 5.5 mm and 6.00 mm. Diopter range of -5.0 D to +40 D including half sizes*”. Din l-ewwel sejħa, li għaliha kienet għamlet offerta *Cherubino*, kienet tħassret għax “*the economic or technical parameters of the project have been fundamentally altered*”. *Cherubino* kienet oġġezzjonat għal din id-deċiżjoni li titħassar l-ewwel sejħa.
3. Sakemm kienet għadha qiegħda tinstema’ l-oġġezzjoni ta’ *Cherubino*, fid-19 ta’ Frar 2016 saret sejħa oħra [“it-tieni sejħa”] għal offerti għall-istess prodott, għalkemm f’ammont anqas, u kemm *Cherubino* u kemm *AMAS*, fost oħrajn, għamlu offerta.
4. Waqt li kienu qegħdin isiru l-valutazzjonijiet tal-offerti tat-tieni sejħa il-Bord ta’ Reviżjoni, fil-11 ta’ Ottubru 2016, iddeċieda hekk dwar l-oġġezzjoni ta’ *Cherubino* dwar it-tħassir tal-ewwel sejħa:

»Apart from the fact that this board regretfully notes that a fresh issue of tender for the same product was made while an appeal was still pending, this board justifiably established that the appellant’s offer was technically compliant both in this tender [*viz.* l-ewwel sejħa] and in the second tender. In this regard, the board does not find any credible reason or proof as to why the tender under appeal was cancelled. In this regard the cancellation of the tender is unfounded.
Cherubino Ltd’s offer is to be re-integrated in the evaluation process.«
5. Ma jidhirx li *AMAS* kienet parti fil-proċeduri li wasslu għal din id-deċiżjoni.
6. B’ittra tas-17 ta’ Frar 2017 *CPSU* għarrfet lil *Cherubino* illi l-offerta tagħha wara t-tieni sejħa twarrbet għax “*specifications stated that a*

dioptr range of minus 5.0 D to 40 D is required whilst this offer is for dioptr range from plus 5.0 D to plus 30.0 D; therefore offer is not according to specifications”, u illi l-kuntratt kellu jingħata lil AMAS. Cherubino ressqet oġġezzjoni għal din id-deċiżjoni b’ittra tat-23 ta’ Frar 2017 u talbet illi l-Bord ta’ Reviżjoni:

»1. for all intents and purposes, confirm that complainant is in fact technically compliant and the product offered is according to the specifications of the second tender; and

»2. declare and confirm that the second tender should in fact be cancelled; and

»3. as per the decision given and quoted above by the board [dwar l-ewwel offerta], re-declare and re-confirm that the first tender is to be re-evaluated and awarded;

»... ..«

7. *AMAS* din id-darba kienet parti fil-proċeduri relattivi għall-oġġezzjoni dwar it-tieni sejħa.

8. Imbagħad, bid-deċiżjoni tad-6 ta’ April 2017, li minnha sar dan l-appell, il-Bord ta’ Reviżjoni iddeċieda hekk dwar l-oġġezzjoni ta’ *Cherubino* għad-deċiżjoni dwar it-tieni sejħa:

»This Board,

»Having noted the objection filed by *Cherubino Ltd* (hereinafter referred to as the Appellant) on 24 February 2017, refers to the contentions made by the latter with regards to the award of tender [it-tieni sejħa] awarded by the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority).

»... ..

»Whereby the Appellant contends that:

»a) his offer was technically compliant and, since another decision relating to the same product was confirmed by this same board as differently composed, the Contracting Authority should consider *Cherubino Ltd’s* offer as technically compliant.

»In this regard, the Appellant maintains that his present offer is exactly the same as that of the previous tender. As such, his offer should not be discarded on grounds as alleged by the Contracting Authority. However, due to the

fact that the latter did not abide by the previous decision taken by this same board as differently composed on 11 October 2016, this present tender which represents exactly the same requirement of the previous tender should be cancelled.

- »b) in view of the above, the Appellant insists that the previous decision taken by this same board as differently composed on 11 October 2016 is to be abided upon [*sic*] by the Contracting Authority.

»This Board also noted the Contracting Authority's letter of reply dated 21 March 2017 and its verbal submissions during the public hearing held on 28 March 2017, in that:

- »a) the Central Procurement and Supplies Unit contends that the technical submissions made by the Appellant did not conform with those dictated in the tender document; hence the Appellant's offer was technically non-compliant.

»The Contracting Authority is also maintaining that the technical literature submitted by *Cherubino Ltd* did, in fact, indicate different specifications from those requested in the tender document.

- »b) The Contracting Authority insists that the reference to a previous tender is irrelevant as the tender which is currently under appeal is a different one and considerations of the merits should only be carried out on this particular case.

»This board, after having considered the merits of this case, arrived at the following conclusions:

- »1. With regards to *Cherubino Ltd's* first grievance, this board, after having examined the relative documentation and heard lengthy submissions made by all the parties concerned, would like to first and foremost establish whether the tender under review is the same one as that on which a decision was issued by this same Board, as differently composed, on 11 October 2016.

»From an examination of both ... the first tender and ... the present tender, one cannot but notice that the product being requested in both tenders is the same.

»... ..

»It is evidently clear, from the technical data of both tenders, that the characteristic and technical features of the product represent the same tender requirement. In this regard, this board would like to refer to the decision taken by the same, as differently composed, on 11 October 2016 regarding the first tender, wherein it was decided that:

»“In view of the above, this board finds in favour of *Cherubino Ltd* and recommends that:

- »“i) *Cherubino Ltd's* offer is to be reintegrated in the evaluation process;

»“ii) the deposit paid by *Cherubino Ltd* is to be re-funded.”

»This board would also point out that, during the pleadings of the first tender, this same board had noted that,

»“Apart from the fact that this board regretfully noted that a fresh issue of the tender for the same product was made while an appeal was still pending, this board justifiably established that the appellant’s offer was technically compliant both in this tender and in the second tender.”

»The second tender being referred to here above refers to the present tender. In this regard, this board would like to respectfully point out that, at that stage, this same board had already established that *Cherubino Ltd’s* offer was technically compliant in both offers and, although it did not include the cancellation of the new tender in its decision, it did in its deliberation conclude that the appellant’s product was technically compliant and should be considered and reintegrated into the evaluation process. This latter action, however, for some unknown reason, was not carried out.

»This board placed great emphasis on the testimony given by the technical expert summoned in the hearing of the first tender, who confirmed that *Cherubino Ltd* did conform to the technical specifications as requested in the tender document.

»In this respect, since it has been established that the product in both tenders is the same, the Appellant’s product in the second tender is also technically compliant. At the same instance, this board had not been presented with a credible reason as to why its previous decision dated 11 October 2016 [dwar l-ewwel sejħa] was not implemented by the Central Procurement and Supplies Unit.

»From the submissions made, this board was not justifiably made aware as to why this new tender was issued for the same product as that of the previous tender that had been adjudicated by the Public Contracts Review Board as differently composed.

»This board also notes that, although the Central Procurement and Supplies Unit is claiming that this tender is different from the previous one, no credible evidence was produced to show that the product is different in kind.

»2. With regards to *Cherubino Ltd’s* second grievance, this board, as stated previously, was not given reasons as to why Tender CT 2033/2015 [l-ewwel sejħa] was not implemented and, although another tender is being considered, the latter is justifiably related to the first tender which was not contracted yet relating to the same type of procurement which has already been assessed and adjudicated upon.

»At the same instance, this board does not see any credible justification as to why a new tender is being

assessed whilst a previous one for the same product is still pending.

»In view of the above, this board upholds Appellant's grievances and recommends that:

- »a) the decision taken by the Public Contracts Review Board on tender [-ewwel sejha] on 11 October 2016 is to be implemented and acted upon;
- »b) the deposit paid by *Cherubino Ltd* is to be fully refunded;
- »c) the present tender under review is to be cancelled as its objectives are satisfied by Tender CT 2033/2015 [-ewwel sejha].«

9. AMAS rressqet appell minn din id-deciżjoni b'rikors tas-26 ta' April 2017 li għalih *Cherubino* wiegħbet fil-15 ta' Mejju 2017 u *CPSU* wiegħeb fid-19 ta' Mejju 2017.

10. Fost l-aggravji tal-appell ta' AMAS hemm dak li ġie mfişser hekk:

»12. Illi l-bord fid-deciżjoni tiegħu meritu ta' dan l-appell għażel li jagħmel riferenza għal provi li ġew prodotti fil-proċeduri li kienu relattivi għall-ewwel sejha għal offerti tal-2015 u għall-atti tal-appell relattivi għal tali sejha tal-2015 deciż fil-11 ta' Ottubru 2016. Dan ma setax isir. Fl-ewwel lok il-meritu tal-ewwel proċeduri kien il-kancellament tal-ewwel sejha għal offerti maħruġa fl-2015. Il-meritu tal-proċeduri odjerni kien illi l-offerta ta' *Cherubino Limited* kienet teknikament mhux *compliant*. Fil-proċeduri odjerni s-soċjetà *Cherubino Limited* ma għebet ebda prova biex tissostanza t-teżi tagħha. Għalhekk bir-riferenza għall-proċeduri differenti li l-meritu tagħhom kien dwar kancellament ta' sejha għal offerti, is-soċjetà esponenti għet miċhuda mill-fakultà li tikkontesta u tagħmel kontro-eżami lix-xhieda li għalihom issir riferenza. L-istess jingħad għal-atti ta' tali appell quddiem il-bord li fih l-esponenti ma kinux parteċipi. Dan iġib preġudizzju irreparabbli lis-soċjetà esponenti.

»13. Il-Bord għalhekk ma setax, biex jissostanza d-deciżjoni tiegħu, jagħmel riferenza għal provi u atti li ma kinux meritu tal-appell odjern, anzi separati u distinti. Lanqas ma seta' jagħmel riferenza għal deciżjoni tiegħu stess f'proċeduri separati li fiha iddikjara ruħu wkoll fuq is-sejha għal offerti odjerna meta din ma kinux meritu ta' dawk il-proċeduri, u għalhekk dikjarazzjoni *ossia* pronunċjament kompletament *ultra petita*.

»... ..

»16. Il-bord seta' biss jidhol fil-kwistjoni dwar jekk jekk id-deciżjoni lamentata, u *cioè* dik fil-kuntest tat-*tender* attwali li kienet fis-sens illi l-offerta ta' *Cherubino Limited*. kienet teknikament mhux *compliant*, kienet korretta jew le. Dan kellu jġi kkunsidrat indipendentement minn proċeduri oħra f'sejhiet għal offerti oħra, sejhiet li huma separati u distinti.«

11. *CPSU* ma ħaditx posizzjoni fuq l-appell iżda qalet biss illi toqgħod għal kull deċiżjoni tal-qorti b'dan li ma għandhiex teħel spejjeż.
12. *Cherubino* wiegħbet għal dan l-aggravju billi qalet biss:

»illi fid-deċiżjoni għal din it-tieni sejħa, u allura d-deċiżjoni mertu tal-appell odjern, il-bord ġustament għamel referenza għas-smiġħ tal-oġġezzjoni tal-ewwel sejħa kif ukoll għad-deċiżjoni tiegħu.«
13. Fil-fatt iżda d-deċiżjoni tal-Bord ta' reviżjoni hija milquta b'difett radikali għax il-bord ma setax joqgħod fuq xiehda li ma kinitx fil-proċess tal-każ li kellu quddiemu, *viz.* dak tal-oġġezzjoni dwar it-tieni sejħa, u joqgħod minflok fuq xiehda fi proċess ieħor – dak dwar l-ewwel sejħa – illi fih *AMAS* ma kinitx parti. Lanqas ma seta' l-bord jimxi bħallikieku d-deċiżjoni fil-proċeduri dwar l-ewwel sejħa torbot ukoll lil *AMAS* li ma kinitx parti f'dawk il-proċeduri u għalhekk ma setgħetx tressaq ix-xiehda u l-argumenti tagħha.
14. Effettivament il-bord ċaħħad lil *AMAS* mill-jedd ta' smiġħ xieraq u naqas li jħares il-prinċipju ta' ġustizzja naturali *audi alteram partem*.
15. L-iżball li għamel il-bord huwa ovvj u huwa hekk radikali illi ma jistax jissewwa ħlief billi d-deċiżjoni tiegħu titħassar u l-każ jinstema' mill-ġdid quddiem il-bord, magħmul, naturalment, minn membri oħra.
16. Il-qorti għalhekk tipprovdi dwar l-appell ta' *AMAS* billi tħassar id-deċiżjoni tal-Bord ta' Reviżjoni tas-6 ta' April 2017 dwar it-tieni sejħa u tordna li l-atti jerġgħu jintbagħtu mill-ġdid quddiem il-bord – magħmul minn membri oħra – sabiex dan jisma' mill-ġdid l-oġġezzjoni ta' *Cherubino* dwar it-tieni sejħa.

17. L-ispejjeż kollha ta' dawn il-proċeduri tħallashom *Cherubino*.

Silvio Camilleri
President

Giannino Caruana Demajo
Imħallef

Noel Cuschieri
Imħallef

Deputat Reġistratur
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