QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF JOSEPH AZZOPARDI
ONOR. IMĦALLEF JOSEPH R. MICALLEF
ONOR. IMĦALLEF TONIO MALLIA

Seduta ta' nhar il-Ħamis 31 ta' Jannar 2019

Numru 31

Rikors numru 291/18

ProCare Ltd (C 71386)

v.

1. Central Procurement and Supplies Unit

2. A.M. Mangion Ltd. (C 4112)

Il-Qorti:

Dan hu appell imressaq fis-26 ta' Settembru, 2018, mis-soċjeta` rikorrenti ProCare Ltd., wara deċiżjoni datata 6 ta' Settembru, 2018, mogħtija mill-Bord ta' Reviżżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il quddiem

imsejjaħ “il-Bord”) fil-każ li għandu riferenza CFT 020-6655/2017 każ numru 1202).

Dan il-każ huwa marbut ma sejħa għall-offerti li ħarġet is-Central Procurement and Supplies Unit (CPSU) għal “the Supply of Monofilament Polypropylene Sutures”. Għal din is-sejħa ntefgħu diversi offerti fuq il-lottijiet separati, inter alia, mis-soċjeta` rikorrenti u mis-soċjeta` konvenuta A.M. Mangion Ltd. Il-kuntratt ġie rakkomandat li jingħata, in kwantu għall-lottijiet 1, 3, 4, 5, 6 u 7 lis-soċjeta` A.M. Mangion Ltd., u in kwantu għall-lott bin-numru 2, lis-soċjeta` rikorrenti.

Din l-aħħar soċjeta` resqet appell quddiem il-Bord peress illi ħasset ruhha aggravata bir-rakkomandazzjoni li saret, u l-Bord b’deċiżjoni tas-6 ta’ Settembru, 2018, laqa’ in parte l-ilment (li kien imressaq fil-kuntest tal-lottijiet 1, 5 u 7), billi aċċetta l-ilment fir-rigward tal-lott numru 1, iżda ċaħdu inkwantu jolqot il-lottijiet numri 5 u 7), u ordna li d-depożitu mħallas mis-soċjeta` rikorrenti ma jiġix rifuż lilha.

Id-deċiżjoni tal-Bord hija s-segwenti:

> “…having noted this Objection filed by ProCare Limited, (hereinafter referred to as the Appellants) on 7 August 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of reference CFT 020-655/2017, awarded by the Central Procurement and Supplies Unit and listed as Case 1202 in the records of the Public Contracts Review Board.
>
> “Appearing for the Appellants: Dr Robert Galea

"Appearing for the Contracting Authority: Dr Marco Woods

"Whereby the Appellants:

"a) refer to Lots 1, 5 and 7 of the tender dossier and insist that their product was technically compliant so that the Contracting Authority's decision to reject their offer was incorrect;

"b) raise their concern regarding the alleged claim that certain equipment being offered failed the tests. In this regard, the Appellants maintain that no proof of such occurrence was given by the Authority and no explanation, as to why their product failed the test, was provided.

"This Board has also noted the Contracting Authority's "*Reasoned letter of Reply*" dated 17 August 2018 and its verbal submissions during the Public Hearing held on 28 August 2018, in that:

"a) The Central Procurement and Supplies Unit contend that, as per its "*Letter of Rejection*" dated 27 July 2018, the Appellants were provided with the necessary explanations and reasons as to why their products for Lots 1, 5, and 7 were rejected. At the same instance, the Contracting Authority maintains that its assessments on all the offers was based on clinical advice given by experts and consultants, the latter being the users of the product.

"This same Board also noted the testimony of Ms Marie-Etoile Craus, Charge Hand Nurse at Mater Dei Hospital, duly summoned by the Public Contracts Review Board.

"This Board has also taken note of the documents submitted by ProCare Limited which consisted of an extensive HST of SMI Sutures.

"This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the technical witness opines that each grievance will be given its due consideration as follows:

"1. <u>Lot 1</u>

"With regards to ProCare Limited's grievance, this Board would refer to the reason given by the Central Procurement and Supplies Unit for rejecting the Appellants' product, in that, when tested, their offered needle became straight after first insertion. At this stage of consideration, this Board is taking into account that such a test is quite appropriate and understandable that the applicator of the sutures would determine that such a needle is not performing the task for which it is intended and thus not technically compliant, upon straightening of the needle on first insertion.

"Through the testimony of the technical witness, this Board was made aware that out of five samples supplied by the Appellants, only two were tested, one which was found to be faulty and at the same instance, this Board was not presented with the result of test carried on the second sample. In this respect, this Board cannot determine whether the second sample was ever tested and, if so the result thereof. At the same instance, this Board was made aware that no record of such a result is available by the Contracting Authority and the identity of clinician who applied such a test cannot be determined either. In this regard, this Board opines that two more samples are to be tested followed by a reasoned report of the findings. In arriving at this conclusion, this Board is firmly assuming that such tests will not cause harm or discomfort to the patient on which such trials of sutures are carried out.

"2. Lot 5

"With regard to Lot 5, ProCare Limited are maintaining that they offered the appropriate and technically compliant product. On the other hand, the Central Procurement and Supplies Unit is contending that the item offered by the Appellants represented a 3/8 circle and not one half circle needle, as duly dictated in the specifications. In this particular case, the product has to be assessed by the applicator of this specific needle and this Board had to reply on the clinician performing the application. At the same instance, through clarification requests, it was established that the samples submitted by the Appellants were for sutures bearing code number 5351540 and not for sutures bearing code number 5351440 and in this respect, such samples do not fall within the specification of $^{1}/_{2}$ circle reverse cutting. In fact, the sample submitted was for reverse cutting 3/8 circle.

"Although the Appellants are insisting that they had delivered samples bearing code number 5351440, it is actual practical testing of the product which rendered the results, as being technically non-compliant. This Board was also made aware, that upon delivery of samples, the latter were not checked as to contents and in this aspect, this Board would point out that it is the duty of the Contracting Authority to check that the correct samples have been delivered for testing, prior to issuing a receipt for the delivery, yet, at the same time, this does not exempt the Appellants from ensuring that they have sent the correct samples.

"With regards to the Appellants' claim that the Contracting Authority should have requested literature, this Board noted that, the Appellants, in their submissions had included enough information to identify the product which they were offering. At the same instance, the Witness confirmed that the samples provided and the code number in the catalogue, both indicated that they were 3/8 of a circle and not $^{1}/_{2}$ of a circle. In this regard, this Board does not uphold the Appellants' second contention.

"3. Lot No 7

"ProCare Limited are alleging that different technical specifications were requested after samples were submitted and the "*Slim Blade*" which the Central Procurement and Supplies Unit had requested, represented a trade mark of a particular product.

"This Board would respectfully refer to the specifications dictated in the Tender Dossier, as follows;

> ""*Monofilament polypropylene suture G3/0 on 20mm (+/- 1mm) curved cutting slim blade needle suture material blue of length 45mm (+/- 5cm) sterile and individually packed in double wrap.*""

"First and foremost, this Board notes that the tender dossier requested a "*curved cutting slim blade needle*" and not a "*reverse cutting needle*", the latter type fulfils a different purpose from that a "*reverse cutting needle*". In this regard, this Board opines that although the technical data did not indicate that a "*reverse cutting needle*" is not compliant, the requested product was a "*curved cutting needle*", which in the medical field has a different application from that offered by the appellants. In this regard, this Board opines that ProCare Limited's product for Lot 7 was not in accordance with the requirements as stipulated in the tender dossier.

"With regard to the Appellants' claim that the word "*slim blade*" represents a trade mark, this Board was not presented with any justifiable evidence to prove such a claim and a the same instance, this Board notes a difference in the description so indicated in the tender dossier, in that a "*curved cutting slim blade needle*" does not on any way refer to a trademark under the name of "*slim blade*". In this regard, this Board does not uphold the Appellants' contention.

"In view of the above, this Board,

"i) Upholds ProCare Limited's first contention relating to Lot 1, in that, a test on two samples of the Appellants' product is to be carried out and such tests are to be properly documented and if found to be compliant, re-integrated in the evaluation process;

"ii) Does not uphold the Appellants' second contention regarding Lot 5;

"iii) Does not uphold the Appellants' contentions relating to Lot 7;

"iv) Upholds the Central Procurement and Supplies Unit's Decision in the award of Lot 5 and Lot 7;

> "v) Recommends that the deposit paid by the Appellants should not be refunded."

Is-soċjeta` rikorrenti issa qed tappella mid-deċiżjoni li ħa l-Bord u resqet aggravju li jorbot maċ-ċaħda tagħha li hi tiġi rakkomandata wkoll għal-lottijiet 5 u 7. Hi ressqet diversi aggravji li lkoll kemm huma jolqtu l-provi mismugħa mill-Bord.

Wara li semgħet it-trattazjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti, din il-Qorti sejra tgħaddi għas-sentenza tagħha.

Ikkonsidrat:

Fil-kuntest ta' lott 5, mill-provi ħareġ li meta l-Awtorita` kontraenti eżaminat is-*samples* li kkonsenjathilha is-soċjeta` issa appellanti, irriżultalhom li dawn kienu $^{3}/_{8}$ *of a circle*, fil-waqt li huma talbu *sutures* li kienu $^{1}/_{2}$ *of a circle*. Is-soċjeta` appellanti ma taqbilx u tgħid li meta għamlet il-konsenja, fuq id-*delivery note* kien hemm ndikat id-daqs it-tajjeb, u din ġiet aċċettata u ffirmata minn rappreżentant tal-Awtorita` kontraenti; kwindi tissottemetti li hemm prova ċara li hi kkonsenjat samples b'*sutures* li kienu $^{1}/_{2}$ *of a circle*.

Din il-Qorti ma taqbilx ma dan l-argument. Il-fatt li l-iskrivan iffirma d-*delivery note* mingħajr ma ċċekkja s-samples, ma jfissrix neċċessarjament li hu aċċetta dak li kien hemm miktub fin-nota. Il-fatt li dak li jkun jaċċetta konteġġi jew *delivery note*, ma jfissirx li ma jistax, meta jeżamina bir-reqqa l-kontenut, ma jikkontestax il-veraċita` tal-istess dokument.

Dan mhux xi prinċipju aljen għall-ordinamanet ġuridiku Malti. Fil-kuntest ta' appalt per eżempju huwa paċifiku illi l-ħlas tal-prezz tal-appalt jew il-ħlas akkont ma jfissirx neċċessarjament approvazzjoni tax-xogħol jekk dan fil-fatt jirriżulta difettuż (ara "**Darmanin v. Agius**", deċiża minn din il-Qort, Sede Inferjuri, fis-6 ta' Ottubru, 2004). Hekk ukoll l-istess Qorti fil-kawża fl-ismijiet "**Tal-Francis Construction Ltd. v. Zarb**", deċiża fid-9 ta' Lulju, 2008, intqal li "*verifika u l-approvazzjoni tax-xogħol issir għal finijiet tal-ħlas lill-appaltatur, iżda b'daqshekk mhux eżonerat jekk 'il quddiem jiġu riskontrati difetti u mankanzi dovuti għal xogħol ħażin*".

Hekk ukoll, aċċettazzjoni ta' konteġġi, ma jfissirx li l-istess kontijiet ma jistgħux jiġu kkontestati 'l quddiem.

Ikun aħjar li, meta dak li jkun jirċievi konsenja ta' xi oġġetti li jkunu destinati għal għandu, jiverifika l-kontenut qabel ma jaċċetta l-istess, pero`, f'kull każ, l-aċċettazzjoni tal-oġġetti jew tas-servizz ma jimpedix lill-

dak li jkun li f'ċirkostanzi kongruwi jikkontesta l-kwalita` jew deskrizzjoni tal-oġġett jew tas-servizz fi stadju ulterjuri. F'każ ta' bejgħ ta' oġġett mhux tal-kwalita` patwita, it-tħassir tal-kuntratt jista' jintalab anke jekk tkun saret il-konsenja tal-ħaġa, diment li x-xerrej ma jkunx tilef tali dritt bil-fatt tiegħu stess (ara per eżempju, "**Vitafoam Ltd v. Kosmipharma Imports Ltd.**" deċiża mill-Prim' Awla tal-Qorti Ċivili fis-26 ta' Ġunju, 2003).

Mhux każ allura li jingħad li l-aċċettazzjoni tad-*delivery note* twassal għal prova li dak offrut huwa skont dak mitlub.

Kif ingħad mil-provi prodotti f'dan il-każ, joħroġ ċar li s-samples ma kienux kompatibbli ma dak li ġie mitlub fis-sejħa. Il-Bord sema' l-provi li ressqu l-partijiet u għalkemm is-CPSU resqet xhud li kkonfermat din l-inkompatibilita`, is-soċjeta` appellanti għamlet biss riferenza għad-*delivery note* u ma resqet ebda xhud jew dokument ieħor biex tipprova ssostni l-każ tagħha. Fil-katalogu li s-soċjeta` appellanti tgħid li resqet mal-offerta tagħha, hemm indikazzjoni taż-żewġ tipi ta' *sutures*, iżda ma ġiex muri, in kontradizzjoni ta' dak li xehdet ix-xhud tas-CPSU, li bħala *sample* ġew ikkonsenjati t-tip mitlub espressament fis-sejħa.

Fil-kuntest tal-aggravji marbuta ma lott 7, hawn din il-Qorti taqbel mal-Bord, li dak offrut kien differenti minn dak mitlub fis-sejħa. Is-sejħa talbet speċifikament għal "*a curved cutting slim blade needle*", u mhux għal "*a*

reverse cutting needle". Ġie muri li t-tnejn mhux l-istess, u jekk wieħed jinjora r-riferenza għal *slim blade*, li tidher li hija *trade mark* li ma setgħetx tintalab, it-tip tal-labra kienet differenti. Il-fatt li l-Awtorita` kontraenti talbet "*a curved cutting needle*", ifisser li ma ridietx tip ieħor ta' labra. Id-differenza tista' tkun ta' frazzjonijiet ta' millimetri, pero`, kif kellha okkażżjoni tirrimarka din il-Qorti f'okkażżjonijiet oħra, meta s-sejħa titlob xi ħaġa speċifika, offerti differenti ma jistgħux jitqiesu aċċettabbli – anke jekk, forsi, l-oġġett offrut ikun, f'xi aspetti, aħjar minn dak mitlub.

Dwar l-ordni tal-Bord biex id-depożitu imħallas għall-appell quddiema ma jiġix rifuż, din il-Qorti tara li, fil-verita, wiehed mit-tlett ilmenti li resqet is-soċjeta` appellanti ġiet aċċettata u waħda mill-offerti tagħha ġiet re-integrata wara li kienet inġustament eskluża. Fil-fehma tal-Qorti, għalhekk, ikun ġust li terz ($^1/_3$) mid-depożitu mħallas jiġi rifuż lis-soċjeta` appellanti.

Għaldaqstant, għar-raġunijiet permessi, tiddisponi mill-appell tas-soċjeta` ProCare Ltd. billi tilqgħu biss in parte u tikkonferma d-deċiżjoni li ħa l-Bord fis-6 ta' Settembru, 2018, ħlief għad-deċide numru (v) billi tordna li, minflok dak deċiż, terz ($^1/_3$) mid-depożitu magħmul mis-soċjeta` appellanti jiġi lilha rifuż.

L-ispejjeż marbuta ma dan l-appell, peress illi fis-sustanza tiegħu, in kwantu jolqot il-mertu, ġie miċħud, għandhom jitħallsu kollha mis-soċjeta` appellanti ProCare Ltd.

Joseph Azzopardi Prim Imħallef	Joseph R. Micallef Imħallef	Tonio Mallia Imħallef

Deputat Reġistratur
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