

QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF JOSEPH AZZOPARDI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF NOEL CUSCHIERI

Seduta ta' nhar it-Tnejn 4 ta' Marzu 2019

Numru 1
Appell numru 336/2018

Krypton Chemists Limited (C-8933)

v.

1. **Direttur tal-Kuntratti;**
2. **Dipartiment għall-Anzjanità Attiva u Kura fil-Komunità;**
3. ***Pharma-Cos Limited (C-2804)* għal kull interess li jista' jkollha**

1. Dan huwa appell ta' *Krypton Chemists Limited* ["*Krypton*"] minn deċiżjoni tal-11 ta' Ottubru 2018 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [L.S. 174.04]. Il-każ quddiem il-Bord ta' Revizjoni kien dwar oġġezzjoni ta' *Krypton* kontra deċiżjoni tad-Dipartiment għall-Anzjanità Attiva u Kura fil-Komunità ["l-Awtorità Kontraenti"] illi irrakkomanda illi tintlaqa' offerta ta' *Pharma-Cos Limited* ["*Pharma-Cos*"] għal kuntratt għal "*diapers, pads, pull-ups and*

inco-sheets for senior citizens and persons with disability” wara li twarrbet offerta ta’ *Krypton* għax tqieset “*technically not compliant*”.

2. Il-fatti rilevanti seħhew hekk: kienet saret sejha mill-Awtorità Kontraenti għal offerti għall-provvista ta’ *diapers, etc.* Is-sejha kienet maqsuma f’żewġ partiti: *lot 1* u *lot 2*. Fost il-kondizzjonijiet tas-sejha kien hemm dik li tgħid hekk:

»Literature as per form marked ‘Literature List’ to be submitted with the technical offer at tendering stage. Literature submitted shall be rectifiable only in respect of missing information (Note 2B). The literature shall be full descriptive technical literature as originally printed by the manufacturer, and which technical literature must indicate absorption capacity of each product being offered.¹«

3. *Note 2B* kienet tgħid hekk:

»Tenderers will be requested to rectify/submit only missing documents within five (5) working days from notification. All rectifications are free of charge.«

4. Tefgħu offerti *Krypton, Pharma-Cos* u terzi. *Krypton* għamlet offerta ta’ miljun, tmien mija u wieħed u tletin elf, erba’ mija u tnejn u ħamsin euro u għaxar ċenteżmi (€1,831,452.10) għal *lot 1* u ta’ żewġ miljuni, erba’ mija u tnax-il elf, tmien mija u erbgħin eruo u disa’ ċenteżmi (€2,412,840.09) għal *lot 2*. Għalkemm l-offerta ta’ *Pharma-Cos* kienet ogħla – żewġ miljuni, tnejn u sittin elf, ħames mija u tletin euro (€2,062,530.00) għal *lot 1* u żewġ miljuni, erba’ mija u sebgħa u sittin elf, disa’ mija u żewġ euro u sitta u tletin ċenteżmu (€2,467,902.36) għal *lot 2* – l-Awtorità Kontraenti irrakkomandat illi l-kuntratt għaż-żewġ partiti jingħata lil *Pharma-Cos*

¹ Section 1, Clause 7 (C) (ii).

5. B'ittra tas-7 t'Awissu 2018 l-Awtorità Kontraenti għarrfet lil *Krypton* illi l-offerta tagħha kienet twarrbet għax:

»Literature uploaded by economic operator for the female disposable pads, male disposable pads, adult all in one diapers, pull up diapers and inco sheets are not considered to be original and printed by the manufacturer.«

6. B'ittra tas-17 t'Awissu 2017 *Krypton* ressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta' Reviżjoni b'talba li titfassar ir-rakkomandazzjoni li l-kuntratt jingħata lil *Pharma-Cos*, titfassir id-deċiżjoni li titwarrab l-offerta ta' *Krypton* u din l-offerta titqies mill-ġdid.

7. Bid-deċiżjoni tal-4 ta' Lulju 2017, li minnha sar dan l-appell, il-Bord ta' Reviżjoni iddeċieda hekk dwar l-oġġezzjoni ta' *Krypton*:

»This board,

»Having noted the objection filed by *Krypton Chemists Limited* (hereinafter referred to as the Appellant) on 3 [recte, 17] August 2018, refers to the contentions made by the same Appellants with regards to the award of tender of reference CT 2118//2017 awarded by the Active Agent [recte, Ageing] & Community Care (hereinafter referred to as the Contracting Authority).

»... ..

»Whereby:

- »a) the Appellants' first contention refers to the reason given by the Contracting Authority wherein it was alleged that they did not submit the technical literature as "originally printed by the manufacturer". In this regard, the Appellants maintain that they had submitted the technical literature as duly transmitted to them, by the manufacturer, so that the information represented what the original literature dictated;
- »b) the Appellants' second contention refers to the fact that, in their opinion, there existed a lack of clarity with regards to the requirements of the technical literature in the tender document;
- »c) the Appellants also maintain that, with regards to any doubts or suspicion regarding the submitted technical literature, the Contracting Authority had the obligation to seek clarifications on the documentation so submitted;
- »d) the Appellants contend that the evaluation committee should have applied the principle of proportionality

regarding the technical literature so that the appellants' advantageous offer would not be discarded for such a minor error, if any;

- »e) the Appellants' fifth contention is that the Contracting Authority did not give the reasons for the disqualification of their offer and in this regard the same Appellants are unaware of such reasons.

»This board has also noted the Contracting Authority's letter of reply dated 20 August 2018 and its verbal submissions during the public hearing held on 25 September 2018, in that:

- »a) the Active Ageing and Community Care maintains that the technical details submitted by the Appellants with regards to the technical literature were not in accordance with the "Instructions to Tenderers", Section 1, Clause 7 (c) (ii) of the Tender Document;
- »b) the Contracting Authority also insists that the tender document specified in a very clear manner what was requested in so far as the technical literature is concerned. In this regard, the authority maintains that the Appellants did not submit the manufacturer's originally printed document, showing all the technical specifications by [*recte*, of] the products being requested in the tender document;
- »c) with regards to the Appellants' contention that the Contracting Authority, in case of doubt, should have asked for a clarification, the Active Ageing and Community Care contends that, since documentation pertaining to the technical literature was not missing, the evaluation committee could not ask for rectification, as per note 2B of the tender document;
- »d) the Contracting Authority also insists that the evaluation committee could not apply the principle of proportionality, as the nature of the product, if not as specifically dictated in the tender dossier, could be deterrent [*recte*, detrimental] to the well being of the patients;
- »e) the authority also maintains that the letter of rejection did give the reasons for the disqualification of the Appellants' offer and enough details were included to enable *Krypton Chemists Limited* to file this appeal.

»This same board also noted the testimony of the witness, namely Ms Antoinette Zahra, duly summoned by Active Ageing and Community Care.

»This board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned, will consider the Appellants' contentions as follows:

»1. Printed Material of Technical Literature Submitted

»This board would respectfully refer to clause 7 (c) article (ii) wherein it is stipulated that:

»“The literature shall be full descriptive technical literature as originally printed by the manufacturer and which technical literature must indicate absorption capacity of each product being offered.”

»Through the above mentioned clause this board opines that the Contracting Authority requested the official technical literature issued by the manufacturer, showing their products (sometimes with pictures) and the respective technical detail of each product which the Contracting Authority requested. In this regard, this board acknowledges that the authority expected a brochure with all the technical details to substantiate the products being offered by *Krypton Chemists Limited*. From submissions made in this regard the evaluation committee noted that *Krypton Chemists Limited's* submissions consisted of various extracts, probably from various documentations, without denoting the source of such texts apart from the fact that there were missing specifications for some of the products.

»An extract from the testimony of the witness, namely Ms Antoinette Zahra, would perhaps highlight the evaluation committee's findings:

»“Dan meta rajna d-dokument li ġie sottomess, l-ewwel nett aħna rajna li kif inhu miktub jidher li huwa xi ħaġa li hija *typed*, li meħuda forsi minn diversi dokumenti oħra, ma nafx, affarijiet flimkien. Anke *fonts* differenti li jidhru li ntużaw. Barra minn hekk huma ... qalu li kien hemm bħala *technical specs*, huma użaw per eżempju *page 1* u *page 8*. Issa, meta qed naraw *page 1*, huwa l-istess litteralment *copy and paste* għat-*technical specifications* li għamilna aħna.”

»In this regard, this board examined in detail the Appellants' submissions and can confirm that the compilation of various extracts from the documentation of an unknown source was indeed unprofessionally presented. At the same instance, this board takes into consideration the fact that such products are to be utilised by vulnerable people and patients.

»When the technical literature is requested in a tender document, such documentation is not capriciously stipulated. In fact, it is the only tool through which the evaluation committee can check and examine that what is being offered can be supplied and has the technical specifications as duly stipulated, so that the technical literature should show that it is what the manufacturer has available on the market for distribution and the technical specifications shown therein should be sufficient enough for the product to be identified and compared with what has been declared to be provided.

»In this particular case, the evaluation committee noted certain peculiarities in the Appellants' submissions which naturally created suspicions as to whether such information, in its form and presentation, really reflected what the Appellants had submitted in their technical offer. This board was made aware that the evaluation committee carried out some checks via the internet and the information obtained therefrom was by far

more descriptive and illustrated than the submissions done by *Krypton Chemists Limited*.

»In this respect, this board would again refer to an extract from the testimony of Ms Antoinette Zahra relating to the findings upon checking via the Internet, as follows:

»“Li rrizulta l-ewwel nett dan fejn qed juri l-prodott kif inhu hu iktar *descriptive* fejn aħna jista' jghinna biex inti tagħzel prodott li hu l-aħjar li jista' jkollu s-*service user*. Barra minn hekk ukoll sibna a *product list* fejn din il-*product list* hemm anke l-assorbenza li hija l-istess test: l-ewwel nett hemm l-istess *codes* tal-prodotti u barra l-istess *codes* ukoll hemm kif isiru *tests* li huwa l-ISO 11948 fejn hemm xi diskrepanzi minnhom fejn tidhol assorbenza.”

»In this regard, this board confirms that the Appellants' submissions with regards to the technical literature leaves much to be desired in the way it was presented, apart from the important fact that certain specifications were missing from the submissions, so that this board confirms that the Appellants' submissions were not complete and were presented in such a way that did not comply with clause 7 (c) (ii) of the tender document.

»2. Lack of Clarity in the Tender Document

»In this regard, *Krypton Chemists Limited* contends that clause 7 (c) (ii) regarding technical literature was not clearly defined in the tender document. In this respect, this board is somewhat surprised in that the Appellants, if in doubt about the interpretation of clause 7 (c) (ii), had all the remedies available prior to the submission of their offer. This board notes that the Appellants did not avail themselves of such remedial actions and, at the same instance, this same board notes that the fact that *Krypton Chemists Limited* submitted their offer without prior request for clarification or remedy confirms that they were comfortably aware of the requirements of clause 7 (c) (ii) of the tender document.

»This board also took into consideration the fact that the Appellants, being no newcomers in the field of tendering for medical products, are well aware of the expected contents and form of technical literature, when so requested. In this respect, this board does not uphold *Krypton Chemists Limited's* second contention.

»3. The Contracting Authority's Obligation to seek Clarification

»Regarding this issue, this board would refer to the principle of self limitation, in that the evaluation committee is bound, at law, to adhere strictly to the requirements as duly stipulated in the tender document. At the same instance, it is an established and accepted fact that the same committee can only adjudicate on the actual submissions of the bidder.

»In this particular case, the evaluation committee had to assess the technical literature which was submitted, and, after examining such documentation, the latter was found to be non compliant. The Appellants are contesting the fact that the

evaluation committee should have asked for clarifications since their offer was cheaper. In this regard, this Board would respectfully refer to note 2 B which states that,

»“Tenderers will be requested to rectify/submit only missing documentation within five working days from notification.”

»In this case, the documentation pertaining to the technical literature was not missing but did not include certain specifications and the requested presentation which represents the manufacturers’ original documentation in this regard, so that such submission was deemed to be technically non-compliant. Any clarification thereof would have amounted to a rectification, as the additional information would have been forthcoming so as to enable *Krypton Chemists Limited’s* offer to be compliant. In this regard, this board does not uphold Appellants’ third grievance.

»4. Proportionality

»In this regard, *Krypton Chemists Limited* maintains that the evaluation committee should have applied the principle of proportionality. In this particular case, the product being tendered for represented a medical/sanitary product which is intended to be used by vulnerable persons including persons with a disability, so that the Active Ageing and Community Care Department had the moral obligation to ensure that what is being offered is of the approved standard for the utilisation of the product. One of the requisites whereby the Contracting Authority could be assured of the quality of the product was to compare the technical specifications of the manufacturers’ publications with those as declared by the Appellants in their submitted technical offer, so that the provision and submission of the manufacturers’ technical literature was of critical importance.

»In this case, as previously stated, the Contracting Authority was presented with extracts of technical specifications taken from various documents which did not give the necessary comfort to the evaluation committee that such documentation was a true reflection of what a manufacturer of these products normally makes available on the market, apart from the fact that some of the specifications contained in the Appellants’ submissions did not meet the stated requirements.

»In this regard, this board opines that the Contracting Authority’s insistence to ensure that the products being offered are fit for the intended application and do not present health hazards to the end users is of the highest priority. In this case, the application of the principle of proportionality would have suppressed such a priority and any clarification to the Appellants’ offer would have created a rectification to their original submission. In this regard, this board opines that, in such a situation, the principle of proportionality could not be applied.

»5. The Reasons for Rejection of *Krypton Chemists Limited's* Offer

»This board would respectfully refer to the reasons given by the Active Ageing and Community Care Department, in its letter of rejection dated 7 August 2018, as follows:

»“Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the offer submitted by your company for Lot 1 and Lot 2 was found to be technically not compliant as follows:

»“As per section I, instructions to tenderers, number 7 (c) (ii), economic operator was requested to submit full descriptive technical literature as originally printed by the manufacturer. Literature uploaded by economic operator for the female disposable pads, male disposable pads, adult all in one diapers, pull up diapers and inco sheets are not considered to be original and printed by the manufacturer. Full descriptive technical literature as originally printed by the manufacturer was in fact submitted only for the children all in one diapers and children pull ups.”

»In the opinion of this board, sufficient information was submitted to the Appellants to enable same to identify the grounds on which their offer was discarded, with specific reference to the technical literature and even to those products which failed in this regard.

In view of the above, this Board:

- »i. does not uphold *Krypton Chemists Limited's* grievances;
- »ii. upholds the Active Ageing and Community Care's decision in the award of the tender;
- »iii) recommends that the deposit paid by the Appellants should not be refunded.«

8. *Krypton* ressqet appell minn din id-deċiżjoni b'rikors tal-31 ta' Ottubru 2018 li għalih id-Direttur tal-Kuntratti wieġeb fid-19 ta' Novembru 2018, *Pharma-Cos* wieġbet fil-21 ta' Novembru 2018, u l-Awtorità Kontraenti wieġbet fis-26 ta' Novembru 2018.

9. Qabel ma tqis l-appell ta' *Krypton* il-qorti sejra tibda b'eċċezzjoni preliminari ta' nullità tal-appell imressqa minn *Pharma-Cos* li tgħid hekk:

»... l-appell da parti tas-soċjetà *Krypton Chemists Limited* kif interpost huwa irritu u dana għaliex mhux qed isegwi dak li *ad validitatem* huwa rikjest minn artikolu [recte, regolament] 285 tar-Regolamenti tal-2016 dwar l-Akkwist Pubbliku (L.S. 174.04), senjatament li r-rikors tal-appell

ikun indirizzat *inter alia* "... lill-awtorità responsabbli għat-tmexxija tas-sejha ...", li f'dan il-każ kien "id-Dipartiment tal-Kuntratti", u mhux kif erronjament indikat "id-Direttur tal-Kuntratti".

10. Din l-eċċezzjoni hija fiergħa. Id-dipartiment huwa rappreżentat mid-direttur tiegħu u għalhekk ir-rikors tal-appell sar sew. Barra minn hekk, l-art. 181B(1)(ċ) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili jgħid ċar illi "kawżi dwar kuntratti ta' provvista jew ta' appalt mal-Gvern jistgħu f'kull każ isiru mid-Direttur tal-Kuntratti".
11. L-eċċezzjoni sejra għalhekk tiġi miċħuda, u, billi tqis illi l-eċċezzjoni hija waħda fiergħa l-qorti wara li rat il-para. 10 tat-Tariffa A meħmuża mal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili sejra tordna lil *Pharma-Cos* tħallas lir-Regjstratur tal-Qrati spejjeż addizzjonali ta' ħames mitt euro (€500).
12. Il-qorti sejra issa tgħaddi biex tqis l-appell ta' *Krypton* li l-aggravji tiegħu huma sintetizzati hekk fir-rikors tal-appell:

»Konklużjoni 1 – il-konklużjoni tal-Bord ta' Reviżjoni li d-dokumenti sottomessi mill-appellanti ma kinux *originally printed* hija kompletament żbaljata u infondata kemm fil-fatt kif ukoll fid-dritt, u dan fl-ebda stadju ma ġie pruvat mill-Awtorità Kontraenti. L-appellanti ssostni wkoll illi l-bord ma seta' qatt jistrieħ fuq xieħda invalida, fallaċi u qarrieqa; liema xieħda kellha tiġi skartata fl-intier tagħha mill-Bord ta' Reviżjoni;

»Konklużjoni 2 – l-interpretazzjoni u applikazzjoni tal-Bord ta' Reviżjoni tal-obbligu impost bil-liġi fuq l-Awtorità Kontraenti li tikteb is-sejha b'termini ċari u mhux ambigwi, u l-inverżjoni tal-oneru fuq l-offerent li jitolb kjarifika, hija interpretazzjoni u applikazzjoni żbaljata tal-liġi;

»Konklużjoni 3 – l-interpretazzjoni u applikazzjoni tal-Bord ta' Reviżjoni tan-neċessità li awtorità kontraenti titlob kjarifika, u tal-proviżjoni [*sic*] tas-sejha immarkata bħala *Note 2B*, hija interpretazzjoni u applikazzjoni żbaljata tal-liġi u tat-termini tas-sejha;

»Konklużjoni 4 – l-interpretazzjoni u applikazzjoni tal-Bord ta' Reviżjoni tal-prinċipju tal-proporzjonalità hija interpretazzjoni u applikazzjoni żbaljata tal-liġi;

»Konklużjoni 5 – l-interpretazzjoni u applikazzjoni tal-Bord ta' Reviżjoni tal-obbligu li timponi l-liġi fuq l-Awtorità Kontraenti fir-rigward tal-

għoti ta' raġunijiet għall-iskwalifika ta' offerti hija interpretazzjoni u applikazzjoni żbaljata tal-liġi; u

»Depożitu – li l-Bord ta' Reviżjoni kien żbaljat fid-deċiżjoni tiegħu li jzomm id-depożitu.«

13. Essenzjalment l-offerta ta' *Krypton* twarrbet għax fil-fehma tal-kumitat tal-għażla it-*technical literature* ma kinitx dik “*as originally printed by the manufacturer*”. Is-sejha riedet tifsira teknika tal-prodott ġejja mill-“origini” tal-prodott, *i.e.* minn min għamel il-prodott, u mhux interpretazzjoni ta' min qiegħed jagħmel l-offerta, kif, fil-fehma tal-kumitat tal-għażla, għamlet *Krypton*. Barra minn hekk lill-kumitat deherlu li l-interpretazzjoni mogħtija minn *Krypton* kienet differenti minn dik “originali” għax kien hemm xi dettalji li ma kinux jaqblu.
14. Il-kwistjoni mela hija jekk *Krypton* tatx *technical literature* originali f'dan is-sens u jekk l-ispeċifikazzjonijiet tekniċi offerti minnha kinux l-istess bħalk dawk tal-prodott innifsu.
15. *Krypton* tgħid illi d-dokumenti li hija ipprezentat mal-offerta kienu tassew dawk originali, u illi d-differenzi li deherlu li sab il-kumitat tal-għażla kienu għax il-kumitat qabbel id-dettalji mhux ma' dawk tal-prodott li offriet *Krypton* iżda ma' prodott ieħor. Tgħid ukoll illi xi differenzi oħra li sab il-kumitat tal-għażla (bħal stampi li dehru f'wieħed u mhux fl-ieħor, u *fonts* differenti) kienu għax il-kumitat qabbel mhux id-dokumenti preżentati minn *Krypton* ma' dawk originali iżda għax qabbel it-*technical literature* ma' *brochures* li jservu biss għal *marketing* u mhux biex jagħtu tagħrif tekniku.

16. Barra minn hekk, biex issaħħaħ l-asserzjoni tagħha li d-dokumenti minnha preżentati mal-offerta kienu tassew dawk oriġinalment magħmula minn min għamel il-prodott, *Krypton* ippreżentat quddiem din il-qorti ittra minn *Santex S.p.A.* (is-soċjetà li tipproduċi l-prodotti li offriet *Krypton*) li tgħid illi:

»It is hereby being declared and confirmed that the technical literature submitted by *Krypton* in its offer (a copy of which technical literature is attached to this letter as “Annex A”) is the official and authentic technical literature as originally printed by *Santex S.p.A.* for the products mentioned therein.

»It is further emphasized, for the sake of clarity, that I confirm that the attached technical literature as submitted by *Krypton* in its offer on said tender has not been edited or amended by *Krypton* in any manner and that the contents therein are as originally issued by *Santex S.p.A.* and supplied to *Krypton* for submission in its offer.«

17. Id-Direttur tal-Kuntratti, wara li jgħid illi jmiss lil *Krypton* l-oneru tal-prova li d-dokumenti preżentati mal-offerta kienu tassew oriġinali, u illi “d-dmir tal-kumitat tal-għażla mhuwiex li fid-deċiżjoni tiegħu jipprova r-raġuni tal-iskwalifika imma li jindika r-raġuni tal-iskwalifika”, jinsisti illi fil-fatt lil *Krypton* ma seħħilhiex li tagħmel prova tal-oriġinalità tad-dokumenti minnha preżentati mal-offerta.

18. Għalkemm taqbel mad-Direttur tal-Kuntratti illi l-oneru tal-prova qiegħed fuq *Krypton*, din il-qorti tosserva illi lil *Krypton* seħħilha turi għallinqas illi r-raġunijiet imressqa mill-kumitat tal-għażla għala qiesu d-dokumenti bħala mhux oriġinali ma għandhomx mis-sewwa għax imsejjsa fuq żball, viz. li t-tqabbil sar mhux bejn dokumenti preżentati minn *Krypton* u dokumenti oriġinali, iżda bejn dokumenti preżentati minn *Krypton* u dokumenti ta’ terzi li ma għandhomx x’jaqsmu mal-prodotti li offriet *Krypton*.

19. Tassew illi, kif ukoll igħid id-Direttur tal-Kuntratti, l-ittra ta' *Santex S.p.A.* ma hijiex l-aħjar prova għax ma hijiex maħlufa, iżda ma jidherx li hija l-prassi, u lanqas ma kien mitlub fil-kondizzjonijiet tas-sejha, illi d-dokumenti preżentati mal-offerta jkunu mwettqa bil-ġurament. Għall-għanijiet tal-kawża tallum huwa biżżejjed illi ntweri b'mod li jikkonvinci lill-qorti illi s-suspetti dwar l-"originalità" tad-dokumenti ta' *Krypton* ma kinux ġustifikati.

20. L-Awtorità Kontraenti wiegħbet għal dan l-aggravju billi tgħid illi *Krypton* ma ipprezentatx mal-offerta tagħha d-dokumenti kollha iżda biss xi wħud minnhom. Kompliet hekk:

»... .. jeżistu *leaflets* apposta fejn jindikaw b'mod viżiv il-prodott u jiddeskrivu l-karatteristiċi tiegħu, liema *leaflets* isiru mill-manifattur. Ix-xhud Zahra fil-fatt esebiet xi *leaflets* bħal dawn, riferibbilment għal xi prodotti li kienu jiffurmaw parti mis-sejha għal offerti u wriet li fil-fatt dawn jeżistu. Is-soċjetà appellanti nfisha fil-fatt ipprezentat mal-offerta tagħha xi wħud minn dawn il-*leaflets*, iżda biss għal xi prodotti u mhux għal oħrajn. Is-soċjetà appellanti nfisha għalhekk għażlet illi ma toqgħodx ma' dak li kien qed jiġi rikjest mid-dokument tat-*tender*, u fejn dehrilha ipprezentat *leaflets* stampati mill-manifattur, iżda għal prodotti oħra dehrilha illi għandha tiġbor tabelli ta' informazzjoni, tagħmilhom f'dokument wieħed, u tipprezentahom f'din il-forma lill-bord tal-għażla. Illi f'kull każ għalhekk fattwalment kien korrett il-bord tal-għażla li jiddeciedi illi fil-fatt id-dokumenti miġjuba mis-soċjetà appellanti ma kinux dawn stampati mill-manifattur, proprju għaliex l-istess soċjetà appellanti wriet li jeżistu dawn id-dokumenti u ma ipprezentathomx«

21. Dan l-argument jolqot dokumenti nieqsa u mhux dokumenti li ma humiex oriġinali. Din kienet tkun raġuni għala l-kumitat tal-għażla seta' talab li jinġiebu d-dokumenti nieqsa u mhux li jwarrab l-offerta. F'kull każ *Krypton* uriet illi l-*leaflets* li ssemmi l-Awtorità Kontraenti huma *marketing brochures* li ma humiex maħsuba biex jagħtu tagħrif tekniku, u għalhekk ma kinux meħtieġa taħt il-kondizzjonijiet tas-sejha.

22. L-Awtorità Kontraenti tgħid ukoll illi d-dokumenti bit-tagħrif tekniku preżentati minn *Krypton* fihom din il-klawsola:

»Santex is not responsible for the improper contents of this folder. Therefore it reserves the right to review and/or modify those sections without penalizing the general characteristics of the product.«

23. Tkompli tgħid hekk:

»Illi din il-limitazzjoni ta' responsabilità kellha bir-raġun tqajjem dubji serji f'moħħ il-membri tal-bord tal-għażla, fl-ewwel lok għaliex kienet qed tipprovdi għad-dritt ta' *Santex* illi tirrevedi jew timmodifika l-kundizzjonijiet imsemmija fid-dokument, mingħajr iżda, skond hi, ma tippreġudika l-karatteristiċi ġenerali tal-prodott. B'dan l-argument, iżda, kienet qiegħda tirriżerva li tiddel il-karatteristiċi speċifiċi tal-prodott, li huma wkoll importanti ħafna f'kamp bħal dan tal-kura ta' anzjani u tfal u persuni b'diżabilità. Limitazzjoni bħal din ma kinitx tinstab, min-naħa l-oħra, fid-dokumenti riċerkati mill-bord tal-għażla, ... li huwa l-faxxiklu stampat mill-manifattur kif misjub fuq l-*internet*. Kollox jindika għalhekk li din il-limitazzjoni ta' responsabilità tnizzlet speċifikament għad-dokument preżentat fl-offerta in kwestjoni, u kienet maħsuba speċifikament għal din l-offerta. Wieħed ma jstax għalhekk jagħti tort lill-membri tal-bord tal-għażla illi, malii raw din il-limitazzjoni ta' responsabbiltà daqs-hekk ġenerika u ambigwa, qamulhom dubji serji dwar l-intenzjonijiet tal-offerent.«

24. Il-limitazzjoni ma kinitx tidher fuq id-dokumenti li niżżel il-kumitat tal-għażla għax daww id-dokument, kif diġà ngħad², kienu *brochures* maħsuba għal għanijiet ta' *marketing* u mhux biex jagħtu tagħrif tekniku.

25. Huwa minnu illi din il-limitazzjoni tħasseb lil min irid jagħżel il-prodott u li jkun irid ikollu moħħu mistrieħ illi l-prodott li sejjer jixtri jkollu l-ispeċifikazzjonijiet li fuqhom għamel l-evalwazzjoni tiegħu u mhux speċifikazzjonijiet oħrajn li jkunu nbidlu bejn l-għażla u l-offerta. Din iżda hija kwistjoni ta' evalwazzjoni tal-offerta u mhux raġuni biex

² Para. 15, *supra*.

titwarrab għar-raġuni mogħtija mill-kumitat tal-għażla, viz. għax id-dokument ma huwiex oriġinali.

26. *Pharma-Cos* ma weġbitx għal dan l-aggravju.
27. Għal dawn ir-raġunijiet il-qorti hija tal-fehma illi l-ewwel aggravju ta' *Krypton* għandu jintlaqa'.
28. Billi dan l-aggravju huwa biżżejjed biex jintlaqa' l-appell ta' *Krypton*, ma huwiex meħtieġ li l-qorti tqis ukoll l-aggravji l-oħra ħlief dak dwar ir-radd tad-depożitu li *Krypton* kellha tagħmel biex setgħet tressaq l-oġġezzjoni quddiem il-Bord ta' Reviżjoni. Dan l-aggravju, naturalment, għandu jintlaqa' wkoll ladarba l-qorti sejra taqleb id-deċiżjoni tal-kumitat tal-għażla u tal-Bord ta' Reviżjoni.
29. Għal dawn ir-raġunijiet il-qorti tipprovi dwar l-appell billi, wara li tiċċhad l-eċċezzjoni ta' nullità tal-appell imressqa minn *Pharma-Cos*, tħassar id-deċiżjoni tal-Bord ta' Reviżjoni u tħassar ukoll id-deċiżjoni tal-kumitat tal-għażla, u tordna li l-evalwazzjoni tal-offerti u l-proċess tal-għażla jsiru mill-ġdid, b'dan illi għandha titqies ukoll l-offerta ta' *Krypton* flimkien mal-offerti validi l-oħra. Tordna wkoll illi jintradd id-depożitu li ħallset *Krypton* biex setgħet tressaq l-oġġezzjoni quddiem il-Bord ta' Reviżjoni.
30. L-ispejjeż tal-eċċezzjoni ta' nullità tal-appell imressqa minn *Pharma-Cos* tħallashom l-istess soċjetà *Pharma-Cos Limited*, b'dan illi, għar-raġunijiet mogħtija fil-paragrafi 10 u 11 ta' din is-sentenza, il-qorti wara li rat il-para. 10 tat-Tariffa A mehmuża mal-Kodiċi ta' Organizzazzjoni

u Proċedura Ċivili tordna lil *Pharma-Cos* tħallas lir-Reġistratur tal-Qrati spejjeż addizzjonali ta' ħames mitt euro (€500). L-ispejjeż l-oħra tal-appell tħallashom l-Awtorità Kontraenti.

Joseph Azzopardi
President

Giannino Caruana Demajo
Imħallef

Noel Cuschieri
Imħallef

Deputat Reġistratur
gr