QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar il-Ġimgħa 29 ta' Marzu 2019

Numru 22

Rikors numru 286/18

Labo-Pharm Ltd. (C-39816)

v.

Il-Kummissarju tal-Pulizija in rappreżentanza tal-Korp tal-Pulizija (“Malta Police Force”)
u
Elodiz Limited (“EloDiz”)

Il-Qorti:

Dan hu appell imressaq fit-22 ta' Awwissu, 2018, mis-soċjeta` Labo-Pharm Ltd. wara deċiżjoni datata 7 ta' Awwissu, 2018, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ “il-Bord”) fil-każ li għandu referenza MHAS/103/2018 (każ numru 1188).

Dan il-każ huwa marbut ma' sejħa għall-offerti li ħareġ il-Kummissarju tal-Pulizija "*for the supply and delivery of handheld laser Raman spectrometer devices to the Malta Police Department*". Għal dan il-kuntratt intefgħu diversi offerti u peress li t-*tender* kienet maqsuma f'diversi *lots*, is-soċjeta` rikorrenti tilmenta mill-fatt li lott 1 u lott 2 ma ġewx rikomandati li jingħataw lilha, iżda minflok lis-soċjeta` intimata Elodiz Ltd. Is-soċjeta` Labo- Pharm Ltd. ressqet appell għall-quddiem il-Bord. Dan il-Bord b'deċiżjoni tas-7 ta' Awwissu, 2018 ċaħad l-appell u kkonferma d-deċiżjoni tal-awtorita` kontraenti.

Id-deċiżjoni tal-Bord hija s-segwenti:

> "Having noted this Objection filed by Labo-Pharm Limited, (hereinafter referred to as the Appellants), on 14 May 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of Reference MHAS/103/2018 listed as Case No 1188 in the records of the Public Contractors Review Board, awarded by the Malta Police Force, (hereinafter referred to as the Contracting Authority).
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> "Appearing for the Appellants: Dr John L Gauci
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> "Appearing for the Contracting Authority: Inspector Charlot Casha
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> "Whereby, the Appellants contend that,
>
> > "a) Apart from the fact that their product is fully compliant, the Preferred Bidder's offer does not meet as basic requirement, in that, it cannot detect drugs and other substances contained in paper or cardboard materials, in other words through materials.
>
> "This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 25 May 2018 and also its verbal submissions during the Public Hearing held on 26 July 2018, in that:
>
> > "a) The Malta Police Force maintains that the technical specifications were stipulated as such, so as to meet the Contracting Authority's requirements and in this respect, the Recommend

Bidder's offer did meet all the specifications so dictated in the Tender Dossier.

"This same Board has also noted the testimony of the witnesses duly summoned by Labo-Pharm Limited namely,

"1. Dr Robert Stokes

"2. Inspector Charlot Casha

"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 witnesses, opines that the major issue worth of consideration is whether the Appellants' alleged contentions with regard to the technical compliance of the Preferred Bidder's product, are factual or not.

"First and foremost, this Board would respectfully refer to the technical specification requirement, Item 14, of the Tender Document which specifies that the product must have a "*non-contact analysis*" feature, so that the device must be able to positively identify materials that are:

"a) Exposed in Free space;

"b) Contained in clear plastic bags/containers;

"c) Contained in coloured plastic bags/containers;

"d) Contained in clear glass containers;

"e) Contained in coloured glass containers;

"f) Packed in paper, cardboard and/or fabric

"From the submissions made, this Board was made aware that the Appellants' major objection is that the product of the Preferred Bidder does not detect drugs or substances through paper and cardboard, as there are classified as opaque materials.

"This Board noted that the Preferred Bidders' offer met the required specifications as dictated in the Tender Dossier, in all the above mentioned requisites. At the same instance, the technical specifications do not mention "*opaque material*" and in the respect, there arises the issue as to whether paper and cardboard packing, can be considered as opaque materials. This Board had to reply substantially on the testimony of the Chairman of the Evaluation Committee, who has extensive experience in the subject matter and extracts from such testimony illustrate the main objective of the Tender Specifications in this regards, as follows:

““*Question: Am I right in saying that from your experience in the Police Force, most paper cardboard or fabric containers, at least a huge chunk and I mention 25% are indeed opaque?*

““*Reply: I cannot say the percentage but there are some that are opaque. As much as there are some others which are translucent*.””

“This Board noted that the Contracting Authority laid out their objectives with certain specifications to suit the attainment thereof. The Preferred Bidders’ offer such technical conditions and the offer was much cheaper than the Appellants’ product, so that the Malta Police Force conducted its evaluation process in accordance with the Public Procurement Regulations. At the same instance, this Board, after having considered all the issues raised by the parties concerned during the Hearing, opines that the Evaluation procedure was carried out in a fair and transparent manner.

“In view of the above, this Board,

“i) Upholds the decision taken by the Malta Police Force in the award of the correct;

“ii) Does not uphold Labo-Pharm Limited’s contention that ELoDiz’s product is not technically compliant;

“iii) 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 ressqet aggravju fis-sens li l-offerta tas-soċjeta` Elodiz Ltd. ma kellhiex tiġi aċċettata għax mhijiex waħda konformi b’mod tekniku. Is-sejħa għall-offerti kienet tirrikjedi apparat sabiex jintuża mill-Korp tal-Pulizija sabiex jidentifika sustanzi narkotiċi u prodotti kimiċi u ta’ splussiv. Skont is-soċjeta` rikorrenti l-apparat offrut minn Elodiz Ltd. mhuwiex kapaċi jidentifika dawn is-sustanzi tramite kontenituri *opaque*, ossija kontenitur li ma jkunx trasparenti.

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

Ikkonsidrat:

Illi kif ingħad, is-soċjeta` issa appellanti tissottometti illi l-apparat tas-soċjeta` Elodiz Ltd. ma jidentifikax sustanzi narcotiċi, kimiċi u splusiv tramite ħġieġ *opaque*. Dan hu ammess miċ-chairperson tal-awtorita` kontraenti. Is-sejħa għall-offerti, pero`, ma talbitx din il-kapaċita` fl-apparat offrut. Is-sejħa talbet apparat li jwettaq *non-contact analysis* ta' dawn is-sustanzi li jkunu:

a) exposed in free space;

b) contained in clear plastic bags/containers;

c) contained in coloured plastic bags/containers;

d) contained in clear glass containers;

e) contained in coloured glass containers;

f) *packed in paper, cardboard and/or fabric;*

L-apparat tas-soċjeta` Elodiz jissodisfa dawn ir-rekwiżiti, u ma tistax titqies li mhijiex konformi b'mod tekniku għax ma jissodisfax xi ħaġa mhix mitluba. Skont il-Cambridge English Dictionary, il-kelma *opaque* tfisser "*preventing light from travelling through, and therefore not transparent or translucent*", filwaqt li skont l-Oxford Dictionaries il-kelma tfisser "*not able to see through; not transparent*". F'dan il-każ, l-awtorita` kontraenti ma talbitx li l-apparat ikun jista' jidentifika sustanzi anke tramite dan it-tip ta' ħġieġ. Altru illi l-kontenitur ikun ta' ħġieġ ikkulurit, u altru li jkun ta' ħġieġ *opaque* li ma jippermettix dawl jgħaddi minnu.

Jista' jkun li l-apparat tas-soċjeta` Elodiz Ltd. ma jkunx jiswa għas-sitwazzjonijiet kollha ta' kif is-sustanzi in kwistjoni jistgħu jkunu traċċjati, pero`, l-offerta tagħha tkopri dak mitlub, kif aċċerta ruħu l-Bord. Forsi, il-prodott tas-soċjeta` appellanti jkun aħjar (għalkemm hemm dubju kemm l-apparat offrut minnha jista' jaqra minn kull tip ta' kartun), pero`, l-offerta trid tkun tal-oġġett mitlub, u darba l-apparat tas-soċjeta` Elodiz Ltd. jissodisfa l-kriterji u hu l-orħos wieħed, l-offerta ma tistax tiġi mwarba.

Il-kelma *opaque* ġejja mil-Latin li tfisser skur ("*dark*") li tindika materjal speċjali li jmur lil hemm minn dak mitlub fis-sejħa, u hu differenti minn materjal sempliċiment kulurit jew trasparenti. Kif drabi oħra osservat din

il-Qorti, il-prinċipju ta' trasparenza jrid li l-kumitat ta' evalwazzjoni jimxi mad-dettalji tekniċi kif imniżżla fid-dokumenti tas-sejħa, u mhux jiddeċiedi li jagħżel liema jidhirlu li hi l-aħjar offerta.

Mid-dizzjunarju Ingliż ta' Cambridge, għall-kelma *opaque* jissemmew il-kliem, bħala *synonyms , "cloudy, dense, frosted, misty, murky, thick, turbid*". Ebda waħda minn dawn il-kliem ma intużat fis-sejħa għall-offerti, li jkompli juri kemm ma kienx il-ħsieb tal-awtorita` kontraenti li titlob apparat li jkopri anke viżjoni minn din il-kwalita`.

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell ta' Labo-Pharm Ltd. billi tiċħad l-istess u tikkonferma d-deċiżjoni li ta l-Bord fis-7 ta' Awwissu, 2018.

L-ispejjeż relattivi jitħallsu mis-soċjeta` appellanti Labo-Pharm Ltd.

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

Deputat Reġistratur
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