



QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF MARK CHETCUTI
ONOR. IMHALLEF JOSEPH R. MICALLEF
ONOR. IMHALLEF TONIO MALLIA**

Seduta ta' nhar l-Erbgha, 27 ta' Jannar, 2021.

Numru 18

Rikors numru 317/2020

Multigas Limited (C-8318)

v.

Central Procurement and Supplies Unit, Id-Direttur tal-Kuntratti

Il-Qorti:

Dan hu appell imressaq fis-27 ta' Ottubru 2020, mir-rikorrenti Multigas Ltd., wara decizjoni datata 7 ta' Ottubru, 2020, moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'l quddiem imsejjah "il-Bord") fil-kaz referenza CT 2177/2019 (kaz numru 1496).

Dan il-kaz huwa marbut ma' sejha ghall-offerti li hareg ic-Central Procurement and Supplies Unit (il-CPSU) "for the supply of medical oxygen to be refilled in cylinders" (lots 1-3). Ghal dan il-kuntratt intefghet offerta wahda biss mis-socjeta` rikorrenti. Il-kumitat ta' evalwazzjoni skwalifika din l-offerta ghax tqieset "*technically non compliant*", u hassar il-process tas-sejha. Is-socjeta` rikorrenti appellat minn din id-decizjoni ghall-quddiem il-Bord li b'decizjoni tas-7 ta' Ottubru, 2020 cahad *in parte* l-appell, pero`, accetta li s-sejha tigi kancellata.

Id-decizjoni tal-Bord hija s-segwenti:

"This Board,

"having noted this objection filed by Multigas Ltd (hereinafter referred to as the Appellants) on 28th August 2020, refers to the claims made by the same Appellants with regard to the cancellation of tender of reference CT 2117/2019 listed as case No. 1496 in the records of the Public Contracts Review Board.

"Appearing for the Appellants: Dr Joseph Camilleri
Appearing for the Contracting Authority: Dr Marco Woods
Appearing for the Department of Contracts: Mr Nicholas Aquilina

"Whereby, the Appellants contend that:

- "a) Their concerns refer to the three reasons, given by the Authority, for the rejection of their offer namely non-submission of Identity card number of warranty engineer, standard of the medical oxygen and marketing authorisation certificate. In this regard, Appellants maintain that:
- "i. In the case of the non-submission of the ID card number of the Engineer, the Evaluation Committee could easily confirm the identity of same through the warrant number.
 - "ii. With regard to the standard of the medical oxygen, the product remained the same up to date of submission.
 - "iii. The marketing authorisation did not require renewal and the Authority did not request clarification.

“This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 23rd September 2020 and its verbal submissions during the virtual hearing held on 30th September 2020, in that:

- “a) The Contracting Authority maintains that the reasons for Appellants’ offer rejection were truly justified in that:
 - “i. With regard to the ID number of the warranty engineer, such information was missing.
 - “ii. With regard to the standard of the medical oxygen, the Summary of Product Characteristic (SPC) was incomplete.
 - “iii. The Marketing Authorisation Certificate (MAC) had expired and thus not valid.

“All the above requirements fell under note 3 where no rectification was allowable.

This same Board also noted the testimony of the witnesses namely:

Mr Mark Anthony Bonnici duly summoned by Central Procurement and Supplies Unit

Mr Alistair Cachia duly summoned by Multigas Ltd

Mr Mario Barbara duly summoned by the Public Contracts Review Board

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned opines that, it will treat Appellants’ grievances as follows:

“1. Non-Submission of ID Card Number of Engineer

1.1. This Board would respectfully refer to article 6, point number 4 (Technical Specification) which states the following:

“4. Prospective tenderers are required to make available to the Contracting Authority, at tendering stage; a declaration signed by the company’s warranted engineer that the cylinders and valves which will be used in this contract will be within the scope and compliant to LN 331/2002 and any other Maltese and European regulations that may be applicable. The declaration shall include the full name; identity card number and engineering warrant number of the signatory.”

1.2. The above-mentioned clause clearly dictates what documentation, with regard to the warranty engineer, is to be submitted, at tendering stage. In this particular case, Appellants failed to submit the identity card number of the Engineer.

1.3. One has to acknowledge and appreciate that, the objective of the Authority to request the identity card number of the warranted engineer, was to ensure and identify the Engineer himself. In this regard, this Board notes that, the identity of the Engineer could have been followed up from the warrant number, however, this fact does not justify the non-submission of what was clearly requested by the authority and such documentation could not be clarified by

the Evaluation Committee since such information fell under note 3.

- 1.4. This Board does not dispute the fact that, the identity of the warranted engineer could have been extracted from the submitted warrant number however, the responsibility of the non-submission of such information should not be shifted on to the Evaluation Committee. In this respect, this Board would remind the Appellants that, whilst it is the duty and obligation of the Evaluation Committee to abide by the principle of self-limitation, even so it is the duty of appellants to ensure that, they submit all the information as duly stipulated in the tender dossier and in this regard, this Board does not uphold Appellants' first grievance.

“2. SPC of the Medical Oxygen

- 2.1. Clause 7a of the technical specifications dictates the submission of a 'Summary of Product Characteristics' (SPC) approved by the Licensing Authority. Such documentation is justifiably stipulated so that, the Evaluation Committee will ensure that, the product is duly certified by the competent Authority to possess all the requested characteristics which ensure safety and effectiveness, in its application to patients.
- 2.2. In this particular case, Appellants contend that, although 8 pages out of 9 of the SPC were submitted, the Authority was aware that, the product has not changed its characteristics since 2005 and the product is the same as is currently being supplied to the Authority.
- 2.3. Although, this Board may accept Appellants contention in this regard, same Board cannot ignore the fact that, this tender has been issued as a separate Public Procurement from that of the previous supply of the product and in this respect, reference to previous or current supplies of the product do not justify the non-submission of the full documentation of the SPC, as duly justifiably dictated in the tender dossier. At the same instance, Appellants did not present any credible evidence to justify such omission.
- 2.4. This Board would respectfully point out that its remit is to review the procedure adopted by the Evaluation Committee in its deliberations and to ensure that, the principles of the Public Procurement Regulations have been prudently adhered to and in this regard, the Evaluation Committee was presented with incomplete documentation of a mandatory requisite of the technical specifications of the product. The Evaluation Committee, quite appropriately, applied the principle of self-limitation and could not request clarifications on missing documentation.

2.5. One has to acknowledge the fact that, in this particular instance, the principle of proportionately does not correctly apply since the basic principle of self-limitation must not be suppressed and in this particular case, incomplete documentation was the main factor so that, no rectification was possible and in this regard, this Board does not uphold Appellants' second grievance.

“3. Marketing Authorisation Certificate

3.1. This Board would, refer to clause 7b, wherein the Authority stipulated that bidders had to submit a copy of the Marketing Authorisation of the product. Again, this Board would confirm that such a document was necessary so that, the Authority would be comfortably assured that, the supplier of the product is properly authorised to provide same.

3.2. In this particular case, this Board was made aware of the procedure for obtaining such an authorisation and noted that, Appellants did submit the Marketing Authorisation Certificate (MAC) and from the testimony of Mr Alistair Cachia, this Board noted that the submitted documentation was valid. At this stage of consideration, this Board would respectfully point out that, although the wording of the (MAC) did not denote that the certificate submitted did not require renewal, if in doubt, the Evaluation Committee could have requested a clarification prior to deeming such a certificate invalid. In this regard, from the testimony of Mr Cachia and from other submissions, made during the hearing, this Board upholds Appellants' contention in that, the certificate submitted by Appellants, did not require renewal and was thus valid.

“In conclusion, this Board opines that:

- a) With regard to Appellants' first contention, this Board justifiably confirms that, although the identity of the engineer could have been determined, by the Evaluation Committee, through the submitted warrant number, it was the responsibility of Appellants to ensure that what has been requested is actually submitted and the principle of self-limitation applies both to the Evaluation Committee and the bidder.
- b) With regard to Appellants' second grievance, this Board considers the importance of the 'Summary of Product Characteristic' to be of high mandatory relevance and noted that, the Evaluation Committee was not in a position to confirm the characteristics of the product with full certainty. At the same instance, this Board was not presented with justifiable evidence for such an omission on the part of Appellants.

- c) With regard to Appellants' third contention, this Board confirms that the 'Marketing Authorisation Certificate' submitted by Appellants did not require renewal and was a valid certificate.

"In view of the above, this Board,

- i. does not uphold Appellants' first and second contentions,
- ii. upholds Appellants' third contention,
- iii. upholds the contracting Authority's decision to cancel the tender,
- iv. directs that, in view of the above, an amount of €1000 be refunded from the deposit paid by Appellants."

Is-socjeta` rikorrenti issa qed tappella mid-decizjoni li ta l-Bord ghal quddiem din il-Qorti u ressqet zewg aggravji. Ta' min isemmi li ghall-quddiem il-Bord, is-socjeta` rikorrenti ressqet tliet aggravji, viz, (i) li kien biss bi zvista li s-socjeta` rikorrenti naqset milli tinkludi n-numru tal-karta tal-identita` tal-inginier taghha, kif mitlub fid-dokumenti tas-sejha; (ii) li ma hux minnu li naqset milli tforni l-informazzjoni rikjesta u necessarja koncernanti l-istandards tal-*medical oxygen*, peress li inghad li l-verzjoni pprezentata ma kinitx wahda ricenti; u (iii) li lanqas ma kien minnu li l-*marketing authorization certificate* li gie pprovdut kien skada u ma kienx ghadu validu.

Il-Bord, laqgha t-tielet aggravju, izda mhux l-ewwel tnejn u b'hekk ikkonferma d-decizjoni tal-kumitat ta' evalwazzjoni li l-offerta tas-socjeta` rikorrenti tigi skwalifikata.

Is-socjeta` rikorrenti, kif inghad, appellat mid-decizjoni tal-Bord u qed tinsisti fuq l-ewwel zewg aggravji taghha li, skont hi, ghandhom mis-sewwa.

Wara li semghet it-trattazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawza u d-dokumenti esebiti, din il-Qorti sejra tghaddi ghas-sentenza taghha.

Ikkunsidrat;

Trattat l-appell, din il-Qorti tara, illi fuq l-ewwel ilment taghha, is-socjeta` rikorrenti ghandha ragun. Huwa minnu li l-offerta tas-socjeta` rikorrenti kellha tinkludi n-numru tal-karta tal-identita` tal-inginier taghha, izda dan in-nuqqas ma kellux iwassal ghall-konkluzjoni li l-offerta kienet *technically non compliant*. Dan in-nuqqas ma fih xejn li jolqot l-ispecificazzjonijiet teknici li riedet is-sejha u seta' facilment jimtela wara talba li ssir mill-kumitat ta' evalwazzjoni. L-inginier in kwistjoni iffirma d-dokument u anke pogga n-numru tal-*warrant* tieghu biex hekk ma kienx hemm problema ta' identifikazzjoni. In-numru tal-karta tal-identita` huwa wiehed kostanti u ma jistax jinbidel u dan in-nuqqas, ghalhekk, kien wiehed *de minimis* u seta' jittranga minghajr ma johloq pregudizzju lill-operaturi ekonomici l-ohra.

It-tieni ilment huwa aktar serju. Is-socjeta` rikorrenti tghid li hu minnu li hi ressqet certifikat antik koncernanti l-istandards tal-*medical oxygen*, pero`, il-karatteristici tal-prodott ma nbidlux sad-data li fiha giet sottomessa l-

offerta. Hija kienet diga` tforni prodott simili lis-CPSU a bazi ta' sejha precedenti, u darba li kollox baqa' l-istess ma dehrilhiex li kellha tressaq certifikat aggornat.

Hawnhekk ta' min jispjega x'inhuwa l-SPC (*Summary of Product Characteristics*). Fil-qosor, kull sena jigi ppubblikat ufficjalment *manual* li jissejjah "Pharmacopeia" u li jinkludi d-dettalji (*specifications*) ufficjali tal-prodotti medici kollha li jinsabu fis-suq. L-ossigenu medicinali wkoll huwa inkluz f'dan id-dokument. Mal-offerta taghha, is-socjeta` rikorrenti ressqet kopja tal-*specifications* tal-prodott hekk kif jinsabu fl-edizzjoni tal-2005. L-Awtorita` kontraenti dehrilha ghalhekk li kellha twarrab l-offerta – mhux tant minhabba xi nuqqas fil-prodott offert, izda pjuttost ghaliex l-SPC li suppost jirreferi ghall-prodott mhuwiex wiehed aggornat.

Dan ic-certifikat huwa importanti ghall-evalwazzjoni tal-offerta, u ghamlet hazin is-socjeta` rikorrenti li ressqet verzjoni antika – u di piu`, bl-ahhar pagna nieqsa!

Dik is-socjeta` ma kellhiex tassumi li l-kumitat ta' evalwazzjoni jaf li ma nbidel xejn mic-certifikat prezentat li kien jirrisali ghas-sena 2005. Mhux kompitu ta' dak il-kumitat iqabbell ic-certifikat tal-2005 ma' dak allura ricenti tal-2019, izda kien dmir l-offerent li jara li jressaq id-dokumenti kollha mitluba u rilevanti. Il-fatt li l-prodott meritu tas-sejha in kwistjoni ilu

jigi supplit lis-CPSU taht *specifications* identici huwa irrilevanti, ghax il-kumitat ta' evalwazzjoni jrid jipprocedi a bazi tad-dokumenti sottomessi ghal dik is-sejha partikolari. Kull offerta trid issegwi dak mitlub fis-sejha, u jekk intalbet, kif inhu li jkun mistenni, li tigi pprezentata l-ahhar edizzjoni tal-SPC, ma kellux isir mod iehor.

Dan id-dokument ma kienx semplicement dokument supplementari li jaghti prova tal-konformita` tal-offerta mal-ispecificazzjonijiet teknici. Is-sejha ghall-offerta riedet li d-dikjarazzjoni li tinkludi l-SPC jikkostitwixxi fihom infushom kundizzjonijiet teknici necessarji biex l-offerta tkun wahda konformi. Fi kliem iehor, sabiex il-prodott offrut jitqies li jissodisfa l-ispecificazzjonijiet teknici kien jehtieg li jkun hemm certu tip ta' dokumentazzjoni fir-rigward tieghu. Ghalhekk, dan huwa kaz ta' nuqqas ta' sottomissjoni ta' dokument essenzjali biex l-offerta tigi kkunsidrata.

Kif osservat din il-Qorti fil-kawza "Rockcut Ltd v. Malta Industrial Parks Ltd et", deciza fil-31 ta' Mejju, 2019,

"Kif tajjeb osserva d-Direttur Generali (Kuntratti), jekk ir-regoli tas-sejha jimponu l-prezentata ta' tali taghrif, hu mistenni li offerenti li jiehdu sehem f'dik is-sejha joqogħdu għal dawk ir-regoli. Wara kollox ir-regoli tas-sejha qegħdin hemm biex jigu mharsa u mhux biex jigu mwarrba. Biex jigi zgurat il-harsien ta' dawn il-principji, l-awtorita` kontraenti hija obbligata li tosserva strettament il-kriterji li hija stess tkun stabiliet (ara f'dan is-sens is-sentenza tad-29 ta' April 2004, Il-Kummissjoni v. CAS Succhi Di Frutta S.p.A, C-496/99, punt 115.)"

Dak li ressqet is-socjeta` rikorrenti mal-offerta tagħha ma kienx konformi ma' dak mitlub u kwindi għamlet sew l-awtorita` kontraenti li skwalifikatha.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell tas-socjeta` rikorrenti Multigas Ltd billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici fis-7 ta' Ottubru, 2020.

L-ispejjez ta' dan l-appell jithallsu tlett kwarti ($\frac{3}{4}$) mill-imsemmija socjeta` rikorrenti appellanti, u kwart ($\frac{1}{4}$) mill-intimat Direttur tal-Kuntratti.

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