



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tlieta, 14 ta' Frar, 2023.

Numru 1

Rikors numru 434/22/1

Pharma-Cos Limited (C-2804)

v.

- 1. Services Gozo Directorate, fi ħdan il-Ministeru ta' Għawdex;**
- 2. Krypton Chemists Limited (C-8933);**
- 3. Direttur Ġenerali tal-Kuntratti għan-nom u in rappreżentanza tad-Dipartiment tal-Kuntratti, għal kull interess li jista' jkollu;**

Il-Qorti:

- 1. Rat li dan hu appell imressaq mis-soċjetà rikorrenti Pharma-Cos Ltd fl-24 ta' Ottubru, 2022, wara deċiżjoni li ta l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'l quddiem imsejjaħ "il-Bord") fl-4 ta'**

Ottubru, 2022, (b' *errata corrige* tat-12 ta' Ottubru, 2022) fil-każ referenza SPD3/2022/045 (każ numru 1791).

2. F'dan il-każ saret sejħa għal "*framework agreement for the provisions of incontinence diapers, pull-ups, pads and inco-sheet for senior citizens and persons with special needs for the Ministry of Gozo*", maħruġa mill-Ministeru ta' Għawdex u d-dipartiment tal-kuntratti. Is-soċjetà rikorrenti talbet rimedju qabel l-għeluq tas-sejħa *ai termini* tar-regolament 262 tal-Leġiżlazzjoni Sussidjarja 601.03. Il-Bord, fis-sentenza tiegħu, laqa' parti mill-aggravji tar-rikorrenti, bażikament waħda miż-*"żewġ"* ilmenti mressqa quddiemu, u ordna li nofs id-depożitu jiġi rifiuż lis-soċjetà rikorrenti. Id-deċiżjoni tal-Bord hija s-segwent:

"Whereby, the Appellant contends that:

a) Lack of predictability [creates ambiguity] - In each and every procurement, it is fundamental that provisions, criteria, conditions and any other condition stipulated within the tender document are clear and unambiguous. The clarity will ensure predictability as well as ensure that the tender document adheres to the fundamental procurement principle of transparency. It is the appellants view that the tender as re-issued does not satisfy this latter standpoint, in that it is neither clear, nor precise and definitely not unequivocal in the manner in which it has been drafted. Whilst acknowledging that the contracting authority upheld the recommendation by the PCRБ to shift 'responsibility onto the economic operator who would be awarded the largest lot' the contracting authority has presented a procurement document which is riddled with inconsistencies, unanswered positions, ambiguous criteria as well as crafted a watch and wait procurement.

b) Storage - insurance – Risk - The tender document in provision 1.1 holds that, "*Further to the supply of the items for Lot 1, the successful contractor shall also be responsible for the storing, transportation and distribution of all the items listed under all lots.*" It

thereafter in provision 12.1 suggests that, the supplies shall be insured against any kind of damage. The contractor shall be responsible for any damage or loss of supplies whilst in transit to the Distribution Centre and/or to the beneficiaries. It finally in provision 29.1 suggests that the contractor [presumably of Lots 2 and 3] shall bear all risks relating to the supplies until provisional acceptance at destination [being the distribution centre]. The above provisions show inconsistencies as to who will be responsible for what and till what stage.

c) Delay penalties - The tender document in provision 19.1 makes it clear that it is the obligation of the awarded contractor of LOT 1 to manage stock levels, in that it held that, *“The awarded contractor of Lot 1 must have ample stock to always satisfy demand and an expected buffer stock list is available within Section 3 - Technical Specifications of this dossier. The awarded contractor will also be provided on a monthly basis with an updated list of entitled beneficiaries under Scheme A with their respective product entitlement.”* In provision 21.1, the tender document imposes a penalty for whosoever breaches provision 19.1, by stating that, *“Further to the provisions of the General Conditions, a daily penalty of one hundred Euro [€100] shall be charged to the Contractor per day of delay on the period of Execution stipulated at article 19.1 of these Special Conditions and in the event of any failure to satisfactorily provide the requested supplies as stipulated in this Contract within any timeframes agreed in writing with the Contracting Authority,”* On its part, provision 29.5 of the tender document indicates that, *“The contractor of Lot 1 must ensure that at all times there is enough number of supplies at the Distribution Centre to be set up by the contractor, for the collection of items by the beneficiaries on a monthly basis.”* The tender document seems to absurdly suggest that, the defaults and breaches done and committed by the contractors for Lot 2 and Lot 3, including but not limited to the failure to supply the necessary stock, are to be absorbed by the contractor for Lot 1. The above provisions not just unclear and unequivocal, but absurd to say the least! The situations presented above are ambiguous and unclear and in accordance with article 262 [1][d] of the PPR, *“(d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure”*.

d) Tender violets (sic) the clarity requirement - An important requirement within tender documents and public procurement in general is the adherence to the clarity requirement, in that criteria and obligations are clearly spelt out on how these are to be met. It is clear through the wording of the tender document, that a contractual relationship is being forged, on the one hand between the Contractor of Lot 1 and on the other hand the Contractors of Lot 2 and Lot 3, and this in view of the collection of the stocks from, the risk/insurance consideration, the penalties allocation, and other similar situations.

The tender in provision 3.1 [order of precedence of contract documents] lists the documents forming part of this tender document: a) The contract b) The Special Conditions c) The General Conditions d) The Contracting Authority's technical specifications and design documentation e) The Contract's technical offer, and the design documentation f) The financial bid form g) The tender declarations in the Tender Response Format h) Any other documents forming part of the contract.

Whilst on its part, Section 4 of the tender documents lists the following as supplementary documentation; 4.1 - Draft Contract Form, 4.2 - Specimen Performance Guarantee, 4.3 - Specimen Tender Guarantee, 4.4 - Specimen Pre-financing Guarantee, 4.5 - Specimen Retention Guarantee, 4.6 - General Conditions of Contract, 4.7 - General Rules Governing Tendering.

There is no mention whatsoever of the agreements between the Contractors, nor a specimen copy of such agreement has been provided. The fact that the conditions of such agreement between these parties have not been laid out, viciates (sic) the clarity requirement as enunciated by the European Court of Justice. In addition to the aforesaid, it potentially creates an impossibility to properly execute the contract, as per article 262 [1][d] of the PPR, *“(a) to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform.”*

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 29th July 2022 and its verbal submission during the virtual hearing held on 27th September 2022, in that:

a) The Contracting Authority hereby submits that the manner in which the call for competition has been reissued is legally grounded and based on the decision of this Honourable Board's dated 27th May: 2022 (Case 1731-SPD3:2022:010). In fact following a call for remedies filed by Krypton Chemists Limited on the 29th March 2022 (vide ref: afore-mentioned). this Honourable Board after evaluating the case and hearing the necessary witness, arrived to the following decision: *“(a) To uphold the Appellant's concerns and grievances; b) To order the contracting authority to either: i. cancel the tender dossier and reissue in different lots as per point (d) above; or ii. modify the existing tender and split into lots as per point (d), above.”*

b) However, in this case, since the Contracting Authority could not modify the previous tender without first cancelling it, it proceeded

to cancel the previous tender and re-issue it as per point (d) of the judgement that read: *“Therefore, this Board agrees with the argumentation of the Appellant that in this specific case, the tender in question could have easily been issued in separate lots, one (1) to cater for the most used Adult range. i.e. items 6 to 9 and 12 to 20, and two other lots for ‘Paediatric’ (items 1 to 5) and Bariatric (items 10 to 11) related products respectively”.*

c) It follows that, should the Contracting Authority have decided not to follow the above-mentioned decision, it would have acted arbitrarily, and contrary to Article 268 of the Public Procurement Regulations that stipulates that: *“The Contracting Authority shall abide by the decision of the Public Contracts Review Board in the shortest time possible and where the contracting authority fails to implement the decision of the Public Contracts Review Board the latter may report the matter to the Minister responsible for that contracting authority”.*

d) In view of the above, the Contracting Authority hereby submits that it has acted in accordance with this Honourable Board's decision and abided with the law.

This Board also noted the Interested Party's Reasoned Letter of Reply filed on 3rd August 2022 and its verbal submission during the virtual hearing held on 27th September 2022, in that:

a) The Interested Party categorically contests the cancellation of this Tender. Contrary to the Applicant's claims, the Tender is clear and comprehensive and there is no doubt or ambiguity at least in the mind of the Interested Party as to the requirements and specifications of this Tender.

Therefore, the Applicant's first grievance is unfounded and misguided since there is no ambiguity or error to be clarified or removed in terms of Regulation 262(1)(d). The respective contractor's responsibility is clearly and unequivocally set out in the Tender, inter alia by means of the following:

a. Economic operators, including the appellant, are aware of the usages of commercial documents in supply contracts. In this sector it is well known that a delivery note is the accredited document where, after such note is signed, the supplier is no longer responsible for the supplies;

b. Clause 7.4 of the Tender stipulates that a delivery note must be provided by the respective contractor upon each and every delivery;

c. Clause 29.5 of the Tender states that in addition to a delivery note, an official must also be presented for each separate delivery;

d. Clause 13 of the Tender provides the mandatory requirements for all contractors that *“the supply and delivery of the diapers, pads, pull ups and inco-sheets at Distribution Centre shall commence within four (4) weeks from order to start supplies following date of last signature on the contract [...] The ordered consignment is to be delivered at the Distribution Centre during the first week of every month in the required quantities”*;

e. Clause 19.1 of the Tender unequivocally states that is it the obligation of the Lot 1 contractor to manage stock levels by means of a buffer stock whilst Clause 19.1(d) notes that penalties may be imposed should the ordered supplies not be delivered in the agreed timescales. The unilateral interpretation which arises from this is, in accordance with the underpinning principle regulating the entire Tender, that the penalties for failure to supply in terms of the agreed timescales will be attributed to the responsible contractor, whether under Lot 1, Lot 2 or Lot 3. On the other hand, the failure to effect delivery is necessarily attributable to the Lot 1 contractor, who has agreed to take on such responsibility in the first place(!)

b) The second grievance is in substance an extension of the first. It is entitled "Tender Violates the Clarity Requirement" but rather than rooting out ambiguities in the Tender, the Applicant proceeds to lament the absence of a specimen contract between the Lot 1 contractor and the Lot 2 and Lot 3 contractors. Regulation 262(1)(a) of the Regulations clearly states that a pre-contractual remedy may be requested *"to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform"*. The act of setting aside, by its very nature, implies and requires the presence of provisions to be set aside, and not the absence of a specimen contract which the Applicant has taken upon itself to recommend and dictate to this Honourable Board and the Contracting Authority to be inserted as part and parcel of this Tender.

To make matters worse, the Applicant is calling upon this Honourable Board to set aside *"all clauses and conditions which create the impossibility to perform procurement"* without even identifying the very clauses to begin with. Were this Board to accede to the Applicant's demand, and carry out such a unilateral exercise, the remit of its functions in terms of the Regulations would certainly be exceeded. In addition, the Interested Party respectfully submits that requiring

collaboration and co-operation between various contractors is not a novel idea which the Contracting Authority, or this Honourable Board for that matter, is rolling out for the first time to economic operators. It is a well-established principle that certain tenders require different successful contractors to work together cohesively towards fulfilling the procurement needs of the particular contracting authority in accordance with their respective contracts.

The Applicant has failed to substantiate its call for yet another tender document which can surely only serve to further complicate matters and delay the procurement procedure for this particular Tender, a demand which directly conflicts with the applicant's overall clamour for clarity. The Interested Party wishes to observe that the Applicant is currently the incumbent operator for the supply of incontinence diapers, pull-ups, pads and inco-sheet to the Contracting Authority and has every interest in maintaining the status quo.

On a final note, any action undertaken by the Contracting Authority or ordered to be carried out by this Honourable Board must be proportionate in measure. Cancelling the call for competition is certainly the antithesis of proportionality, a drastic and nuclear reaction which would be to the detriment of the Contracting Authority and all economic operators, with the natural and obvious exception of the Applicant as the incumbent supplier.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

There are two (2) main points / grievances to be dealt with. These are:

1. Storage - insurance – Risk
2. Delay penalties

The other points raised by the Appellant, i.e. 'Lack of predictability' and 'Tender violets (sic) the clarity requirements' are deemed to be supporting arguments, especially considering that the 'tool' to be used to nullify such arguments is the 'delivery note' document which is mentioned multiple times in the tender dossier. The signature of such accredited document is used to transfer responsibility from one party to another.

- a) **Storage - insurance – Risk**

The appellant raises questions and doubts on provisions 1.1 (Section 3), 12.1 (Section 2) and 29.1 (Section 2). After hearing all relevant arguments on the matter, this Board opines that such provisions are clear and unambiguous. The point of transfer of responsibility is the delivery note.

Provision 1.1. states *“the awarded contractor of Lot 1 shall also liaise with the awarded Contractors of Lots 2 and 3 to collect the supplies from their premises”*. Therefore, it is logical to assume that till collection by contractor of Lot 1 from contractors of Lots 2 and 3, it is contractors of Lots 2 and 3 which are ‘responsible’ for such items. As soon as the contractor of Lot 1 collects such items / supplies and a delivery note is signed, the responsibility shifts onto the contractor of Lot 1.

Hence, this grievance of the appellant is not being upheld.

b) **Delay penalties**

The appellant raises questions and doubts on provisions 19.1 (Section 2), 21.1 (Section 2) and 29.5 (Section 2). This Board opines that in these provisions there may be an element of ambiguity in that it should be clarified by way of clarification note issued by the Contracting Authority that if the Contractors of Lots 2 and 3 do not supply the Contractor of Lot 1 with enough supplies as per the terms of the tender dossier, more specifically as per Sections 2 and 3, then for obvious reasons, such penalties are to be borne by Contractors of Lots 2 and 3 respectively. i.e. if Contractor of Lot 1 abides by all requisites of the tender, keeps the buffer stock level as required and when he requests re-supply from Contractors of Lots 2 and 3, he is not provided with such supplies, it would be unreasonable to impose penalties on contractor of Lot 1.

This, in the Board’s opinion, can easily and practically be solved by way of issuance of a clarification note from the Contracting Authority. Therefore, the principle of proportionality is also being respected and tender procedure can move forward.

Hence, this grievance of the appellant is being upheld.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Not to uphold the Appellant’s concerns and grievance on ‘storage, insurance and risk’;

- b) To uphold the Appellant's concerns and grievance on 'delay penalties';
- c) To order the contracting authority to issue a clarification note on 'delay penalties' grievance in line with the considerations and findings of this Board;
- d) To amend the 'Closing Date of the Call for Tenders' to the 14th October 2022;
- e) after taking all due consideration of the circumstances and outcome of this Call for Remedies, directs that half the deposit be refunded to the Appellant."

3. Is-soċjetà Pharma-Cos Ltd issa qed tressaq appell mid-deċiżjoni tal-Bord għal quddiem din il-Qorti, bl-aggravji jkunu li l-Bord iddeċieda ñażin dwar ilment imressaq u ma ddeċidiex fuq ilment imressaq minnha.

4. Issa li semgħet dak li kellhom xi jgħidu l-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti, il-Qorti tinsab f'pożizzjoni li tagħti s-sentenza tagħha.

Ikkunsidrat:

5. Is-soċjetà issa appellanti qed tgħid li hi ressqet tliet aggravji li kellhom jiġu ndirizzati mill-Bord: (i) li wħud mill-klawsoli kienu ambigwi; (ii) li kien hemm nuqqas ta' kjarezza f'uħud mill-klawsoli; u (iii) dubji dwar il-penalitajiet għal dewmien. Il-Bord qies l-ewwel żewġ aggravji bħala waħda - u ddeċieda li l-klawsoli kienu ċari u mhux ambigwi, u laqa' t-tielet ilment ("*delay penalties*") u ordna lill-awtorità kontraenti toħroġ nota ta'

kjarifika. L-aggravji tas-soċjetà appellanti quddiem din il-Qorti huma bażati fuq il-fatt li l-Bord ma kellux jiġma' ż-żewġ ilmenti tiegħu (li l-klawsoli "*creates ambiguity*" u li s-sejha tonqos mill-"*clarity requirement*") f'waħda, u f'kull każ ma jaqbilx mad-deċiżjoni tal-Bord fir-rigward. Dwar id-deċiżjoni tal-Bord riferibbilment għall-penali, is-soċjetà appellanti tidher li taqbel mal-mod kif il-Bord iddispona mill-materja tant li ma ressqitx appell minn dik il-parti tad-deċiżjoni appellata.

6. Fil-fatt din il-Qorti taqbel li s-soċjetà appellanti ressqet tliet ilmenti għal quddiem il-Bord u mhux tnejn kif iddeċieda l-Bord. Hi lmentat mill-fatt li kien hemm ambigwià dwar minn kellu jkun responsabbli għall-oġġetti waqt it-traġitt tagħhom minn kuntrattur għall-iehor, u fit-tieni lok, li fid-dokumenti tas-sejha ma kienx ġie regolat kif il-kuntratturi setgħu joħolqu ftehim biex joperaw flimkien ("*ex post award joint venture*"). Dan l-aħhar ilment ma ġiex trattat mill-Bord.

7. Fil-kuntest tal-ewwel aggravju quddiem din il-Qorti, hija taqbel mal-mod kif il-Bord iddispona mill-materja. Ma tarax li hemm xi ambigwià u r-riskju marbut mat-traġitt. Diment li l-oġġetti jkunu f'idejn il-kuntratturi ta' *lots* 2 u 3 (peress li l-offerta hi ntiza li titqassam f'lottijiet), huma dawn li jkunu responsabbli. Hekk kif l-oġġetti jingabru mill-kuntrattur ta' *lot* 1, dan jassumi fuqu r-responsabbilità u r-riskji tal-oġġetti. Fi kliem iehor, mal-konsenja tal-oġġetti jgħaddu, kif inhu mistenni, ir-riskju fuq l-oġġetti. Il-

kuntrattur li jkun fil-pussess tal-oġġetti jrid jieħu f'isieb hu jkopri lilu nnifsu b'assikurazzjoni għar-riskji li skond l-kuntratt sejjer jassumi.

8. Dwar it-tieni aggravju tas-soċjetà appellanti, jidher li din għandha raġun għax il-Bord naqas li jiddiskuti l-materja. Il-kwistjoni ma hijiex involuta jew amalgamata mal-aggravju preċedenti u kellha tiġi trattata għal rasha. Kif ġiet imfassla s-sejha, jitnissel obbligu li numru ta' entitajiet għandhom jaħdmu u jikkoperaw flimkien. Għalhekk huwa ċar li qed ikun permess speċi ta' *ex post award joint venture*, iżda dan għandu jiġi spjegat kif se jopera u ndikat bl-aktar mod ċar x'inhuma l-kundizzjonijiet permissibbli ta' tali sħubija. Fil-ħruġ għas-sejha ġew mitluba ħafna dokumenti relatati mal-kuntratt u l-garanzija, iżda ma hux ċar x'tip u x'kundizzjonijiet tas-sħubija/koperazzjoni li hi permissibbli li ssir bejn ir-rebbieħ ta' *lot 1* u dawk tal-lottijiet *2* u *3*. Dan għandu jiġi spjegat b'mod ċar.

9. Din il-Qorti ma tarax li għandha tibgħat il-każ lura quddiem il-Bord biex jistħarreg dan l-ilment. Din il-Qorti tista' hi stess tordna lill-Awtorità kontraenti toħroġ nota ta' kjarifika anke fir-rigward ta' dan.

10. Fir-rigward tal-aggravju tas-soċjetà appellanti dwar l-ordni tal-Bord li jintradd biss nofs id-depożitu, din il-Qorti tara li l-Bord sewwa mexa f'dan il-kuntest. Għalkemm il-Bord mexa ħażin meta amalgama żewġ ilmenti flimkien kellu raġun li jiċċad l-ilment marbut mal-allegata ambigwià tal-

klawżoli relatati mar-responsabbiltà u riskju tal-oġġetti. L-aggravju relattiv qiegħed jiġi miċħud.

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell tas-soċjetà Pharma-Cos Ltd billi tilqa' l-istess *in parte* u tgħaddi biex tirriforma d-deċiżjoni li ta l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi fl-4 ta' Ottubru, 2022, fis-sens li tikkonfermaha, b'dana li żżid illi tordna lill-awtorità kontraenti toħroġ nota ta' kjarifika fil-kuntest tal-ilment tas-soċjetà appellanti marbuta mal-*"clarity requirement"* kif hawn fuq spjegat. Fl-istess ħin, temenda il-*"closing date of the call for tender"* għall-Gimgħa 17 ta' Marzu, 2023.

L-ispejjeż ta' dan l-appell jithallsu nofs mis-soċjetà appellanti Pharma-Cos Ltd u nofs mill-appellat Direttur Ġenerali tal-Kuntratti.

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Deputat Registratur
da