



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

EDWINA GRIMA

Seduta tal-25 ta' Frar, 2015

Appell Civili Numru. 33/2012

Trebee Ltd.

Vs

Id-Direttur tal-Kuntratti, Government Pharmaceutical Services

Il-Qorti,

Rat id-decizjoni moghtija mill-Bord ta' Revizjoni Dwar il-Kuntratti Pubblici fit-23 ta' April 2012, fejn giet ipprounzjata is-segwenti decizjoni fl-ismijiet premissi:-

“1. The Public Contracts Review Board agrees with the interpretation given to the specifications by the evaluation board wherein it was argued that the

implant did not have to be compatible with both the 3 tesla with the magnet removed and the 1.5 tesla with the magnet in place but that it had to be compatible with either one or the other.

2. *This Board, whilst appreciating the fact that the evaluation board chose to be inclusive rather than exclusive in its interpretation because although there were four manufacture3rs of these implants yet only one, represented by the appellant company, produced implants compatible with both the 3 tesla removable magnet and the 1.5 fixed magnet and had the evaluation board opted for this interpretation it would have excluded the other three manufacturers, yet predominantly, feels that such reasoning remained valid because, clinically, the discussion was ongoing as to whether it was beneficial to have removable magnet and, as a consequence, albeit it was too early to state if it was better to have a 3 tesla with removable magnet, yet it was a must that the product had to be at least compatible with a 1.5 tesla with fixed magnet. Also, as argued by the chairman of the evaluation board, once, presently, there was not enough evidence as to whether having removable magnets was a bonus, it was reasonable for one to opt for what was objectively – from a cost/benefit perspective – available at the moment. Such interpretation tends to accentuate the real scope of the specifications. In this context this Board also accepts the logic behind the reasoning made by the evaluation board, wherein, inter alia, it was argued that, considering that this contract was to run for three years the evaluation board had also to take into account the element of price and opt for a cheaper product so long as it was technically compatible and presently available being also fully cognizant of the fact that one could not rely on speculation as to what could take place in the next five or ten years when one hardly knew what developments might take place in the next two years.*

In view of the above, this Board finds against the appellant company.

However, having taken full cognizance of the fact that since there could have been a remote possibility that the specification, as state, could have given rise to a potential misinterpretation of scope, the Public Contracts Review Board feels that the filing of the objection by the appellant company was not made in a frivolous manner and, as a result, it recommends that the deposit paid for the appeal to be lodged be reimbursed."

Illi s-socjeta appellanti aggravata b'din id-decizjoni ressqet l-appell taghha fit-termini tas-segwenti aggravvji:

1. Illi l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici interpreta hazin il-klawsola dwar it-*technical specifications* tal-*Cochlear Implants* a fol.37 tat-*tender document* u dan billi minkejja li dik il-klawsola kienet miktuba b'mod car u inkewivoku inghatat tifsira li ma kenitx kompatibbli mal-kliem uzat.
2. Illi l-fatt illi il-klawsola giet interpretata b'mod differenti mit-tifsira ordinarja taghha wasslet sabiex is-socjeta appellanti sofriet pregudizzju kbir il-ghaliex hija setghet offriet prodott bhal dak li gie offrut mill-*bidders* l-ohra bi prezz ferm irhas izda billi it-*technical specifications* tat-*tender* kienu ighidu mod iehor hija offriet prodott kif specifikat bil-konsegwenza illi l-offerta taghha kienet iktar ghalja u ghalhekk giet skartata. Dan imur kontra d-dettami tal-gustizzja naturali u anke tal-principji tat-trasparenza essenzjali fil-gari pubblici.

Illi mill-fattispecje li sawwru dana il-kaz johorg illi fl-20 ta' Settembru 2011 id-Dipartiment tal-Kuntratti ghan-nom tal- Government Pharmaceutical Services kien habbar sejha pubblika ghall-offerti ghal-provvista ta' *cochlear implants* li huwa apparat elettroniku li meta jigi impjantat b'operazzjoni kirurgika jghin persuni li jkollhom diffikulta' fis-smiegh. Illi sussegwentement ghal dan gie nominat Kumitat ta' Evalwazzjoni kompost minn membri esperti f'dana il-

qasam sabiex issir l-evalwazzjoni tal-offerti sottomessi mill-operaturi. Billi gie stabbilit minn dana il-Kumitat illi z-zewg offerti sottomessi kienu jissodisfaw il-htigijiet teknici indikati fit-*tender document*, kwindi il-kuntratt kellu jigi assenjat skont klawsola 33 lill-offerent bl-irhas prezz. F'dan il-kaz l-offerent kienet is-socjeta Charles Degiorgio Limited li ressaq l-irhas offerta. Illi s-socjeta appellanti ressqet l-oggezzjoni taghha skont il-ligi ghal din ir-rakkomandazzjoni billi dehrilha illi kien biss il-prodott taghha li kien konformi teknikament mat-*tender document* u mhux dak tal-*preferred bidder* billi il-prodott taghha kien konformi mal-klawsola mertu ta' dana l-appell li jaqra hekk:

“It should be compatible with a 3 tesla MRI with the magnet removed and 1.5 tesla with the magnet in place. Please provide documentation to prove this. If removal of magnet is necessary, safety and reduced risks should also be documented.”

Illi l-Bord tar-Revizjoni dwar Kuntratti Pubblici cahad l-oggezzjoni imressqa mis-socjeta appellanti u a tenur tar-Regolament 85(5) tar-Regolamenti dwar il-Kuntratti Pubblici s-socjeta ressqet l-appell u dana dwar l-interpretazzjoni moghtija mill-Bord ta' din il-klawsola.

Id-Direttur tal-Kuntratti jilqa' ghal dana l-appell billi jishaq illi din il-Qorti ta' revizjoni ma ghandhiex tissindika apprezzament li sar minn nies esperti li jikkomponu il-Kumitat ta' Evalwazzjoni. Dan wasal ghal decizjoni, f'kamp purament tekniku, illi l-offerti kienu kollha konformi teknikament mal-ispecificazzjonijiet tat-*tender* u kwindi l-ghazla kellha necessarjament taqa' fuq il-valur ta' l-offerti billi tigi aggudikata lill-irhas wahda. Jishaq inoltre illi skont ir-regolament 85(9) tar-Regolamenti dwar il-Kuntratti Pubblici id-decizjonijiet tal-Bord ta' Revizjoni huma finali u konkluzivi dwra l-ghoti tal-kuntratti tant illi ir-regolament 85(8)(b) sahansitra jaghtihom l-istess effett ta' titolu ezekuttiv u

jistghu jigu enforzati bis-sahha tal-artikolu 273 tal-Kapitolu 12 tal-Ligijiet ta' Malta.

Fuq l-istess linja iwiegeb id-Direttur Central Procurement Services Unit, gja Government Pharmaceutical Services, fejn ghalkemm jaqbel illi it-terminologija uzata fil-klawsola surriferita ma huwiex wiehed felici, madanakollu ghandha tigi interpretata li tfisser illi l-prodott seta' ikun kompatibbli kemm ma' spesifikazzjoni “3 tesla MRI with the magnet removed” , kif ukoll ma' “1.5 tesla MRI with the magnet in place” u mhux necessarjament mat-tnejn f'daqqa billi il-kliem “if removal of magnet is necessary, safety and reduced risks should also be documented” hekk jimplikaw.

Il-perm tal-kwistjoni allura kienet qed iddur fuq il-kelma “**and**” uzata f'dina l-klawsola billi is-socjeta appellanti tishaq illi t-tender taghha kienet l-unika wahda li ipprovdiet prodott li kien kompatibbli maz-zewg rekwiziti (cioe' 3 tesla u 1.5 tesla) billi l-*preferred bidder* offra prodott kompatibbli ma' 1.5 tesla biss. Illi dwar l-interpretazzjoni ta' klawsoli f'kuntratti l-gurisprudenza id f'id mal-ligi fasslet regoli li ghandhom jigu osservati meta tinsorgi l-htiega ta' interpretazzjoni ta' klawsola kontrattwali:

Dan iwassal biex logikament l-gudikant jehtieglu jgharbel u jara, bejn iz-zewg interpretazzjonijiet possibbli, hekk posti quddiemu, liema minnhom hi l-izjed verosimili u konsistenti in subjecta materia ma' l-oggett tal-ftehim (Art 1005 tal-Kodici Civili) u l-izjed attinenti ghal presumibbli volonta' tal-kontraenti. Kif ravvisat fis-sentenza “Elena Micallef –vs- Edwardo Ciantar”, 3 ta' Jannar 1884 (Vol X p345), “quando insorgono difficulta' sulla intelligenza delle condizioni di un contratto e sulle sue conseguenze, la Legge fornisce alcune norme indicative e dimostrative e criteri direttivi, come mezzi d'interpretazione, senza vincolare la liberta' del giudicante, tenuto a prendere in calcolo le circostanze speciali in ciascun caso”. Dan kollu jikkonduci, b'necessita' guridika, ghall-ezami ta' dawk il-kanoni ta' l-ermenewtika applikabbli ghal kuntratti in generali, ben analizzati fid-decizjoni a Vol XII p265. (App.Inf. Clementino Caruana vs Emanuela Agius – deciza 22 ta' Novembru 2002)

Il-Qorti ghalhekk kellha tistharreg dwar l-uzu ta' hekk imsejjha *cochlear implants* (jew kif inhuma komunement magrufa bhala *hearing aids*) sabiex tasal

ghall-interpretazzjoni tal-klawsola mertu ta' dan il-gudizzju billi it-terminologija uzata ma hijiex wahda felici. Wahda mir-rekwiziti ta' dawn il-*cochlear implants* hija li iridu ikunu kompatibbli ma' proceduri ta' MRI jew ahjar *Magnetic Resonance Imaging* billi l-effetti manjetici li ghandhom dawn l-*implants* tista' ikollha effett fuq ir-rizultat tal-MRI ghal pazjent li ghandu dana l-apparat installat. Allura huwa necessarju illi dan l-apparat ikun kompatibbli ma' *magnetic field* ta' 1.5 *tesla* jew inkella ma' dak ta' 3 *tesla* izda f'dan l-ahhar kaz bil-kalamita tal-apparat tkun tista' titnehha. Dana ghaliex MRI b'*imaging* ta' 3 *tesla* jista' joffri imagini iktar cara minn dik b'qawwa ta' 1.5. L-appellanti izda jargumenta illi it-*technical specifications* indikati fit-*tender document* jindikaw illi l-apparat kellu ikun konformi maz-zewg specifikkazzjonijiet billi dawn kienu kumulattivi u mhux alternattivi ghal xulxin bl-uzu tal-kelma "and". Ighid illi li kieku il-klawsola kellha tinfitiehem b'dan il-mod huwa kien jitfa' offerta ghal apparat b'wiehed biss min dawn l-ispekkazzjonijiet u kien ikun jista' jinkonkorri mal-*bidders* l-ohrajn.

"Qabel ma jigi ttrattat il-meritu tal-appell tajjed illi din il-Qorti, qabel xejn, tirribadixxi li bhala Qorti tat-"tiolet istanza" f'dawn it-tip ta' kazijiet, ma hux mistenni li din tidhol biex tezamina d-dettalji teknici ta' kull offerta biex tara jekk offerta partikolari tissodisfax jew le r-rekwiziti teknici mitluba fis-sejha ghall-offerti. Din il-Qorti, kif kostitwita, la tista' u lanqas ghandha x-xjenza teknika mehtiega biex tevalwa materji li jmorru lil hinn mill-kompetenza taghha. Kif qalet il-Qorti Ewropea ta' Gustizzja (ECJ), f'kaz numru T-300/07 fl-ismijiet Evropaiki *Dynamiki v. Commission*, deciza fid-9 ta' Settembru, 2010:

"As a preliminary point, it should be recalled that the Commission enjoys a broad margin of discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (see, to that effect, Case T-145/98 ADT Projekt v Commission [2000] ECR II-387, paragraph 147; Case T-148/04 TQ3 Travel Solutions Belgium v. Commission [2005] ECR II-2627, paragraph 47; and Case T-437/05 Brink's Security Luxembourg v. Commission [2009] ECR II-0000, paragraph 193."

Dak il-kaz, hu veru, kien jolqot kaz mistharreg minn kummissjoni ewropeja, pero`, il-principju jibqa' li, bhala qorti ta' revizjoni, il-kompetenza ta' din il-Qorti hija necessarjament cirkoskritta.” (App.Sup – Steelshape Limited vs Direttur tal-Kuntratti et. deciza 7 ta' Awwissu 2013.

Tradott dan l-insenjament ghal din il-vertenza, huwa evidenti illi din il-Qorti ma tistax u lanqas ghandha il-kompetenza illi iccaqalaq dak mistharreg mill-Kumitat tal-Evalwazzjoni kompost minn esperti in materja li dehrilhom illi l-prodotti li kellhom ghall-ezami quddiemhom kienu kollha *technically compliant* mat-tender specifications u li allura kienu kollha kompatibbli mal-klawsola mertu ta' dana l-appell. Illi ghalkemm minn qari tal-klawsola in kontestazzjoni ghandu johrog illi it-terminologija uzata fl-ewwel frazi tindika illi z-zewg spesifikazzjonijiet huma kumulattivi, madanakollu bil-frazi sussegwenti, imbaghad huwa evidenti illi dan ma kellux ikun il-kaz billi il-klawsola tindika illi jekk l-prodott ta'l-offerent ikun kompattibli biss ma' 3.0 tesla MRI, allura huwa irid jipprovdi dokumentazzjoni illi jiggerantixxi is-sigurta tal-prodott. Dan ghaliex kif jidher mis-sottomissjonijiet maghmula minn Mario Said li kien membru tal-bord ta'l-aggudikazzjoni u konsulent “*clinically the discussion was ongoing as to whether it was beneficial to have a removable magnet and, as a consequence, albeit it was too early to state if it was better to have a 3 tesla with removable magnet, yet it was a must that the product had to be at least compatible with a 1.5 tesla with fixed magnet.*” U kien ghalhekk minhabba in-nuqqas ta' certezza dwar is-sigurta li jista' joffri il-prodott ghal pazjent illi giet imposta il-kundizzjoni fuq l-offerent illi jekk il-prodott kien kompatibbli ma' “3 tesla MRI” kellu ikun hemm id-dokumentazzjoni li tiggerantixxi s-sigurta tieghu, kuntrarjament ghal prodott l-iehor. Ghalhekk kieku kien il-kaz illi l-ispecificazzjonijiet kienu kumulattivi, bhal kif isostni l-appellanti, kienet tkun superfluwa il-kundizzjoni l-ohra dwar il-provvista ta-dokumenti dwar is-sigurta tal-prodott.

Din l-interpretazzjoni hija imsahha bl-evalwazzjoni maghmula mill-Kumitat tal-Evalwazzjoni u l-esperti li jikkomponuh li mill-*expertise* taghhom necessarjament fehmu dak li riedet tfisser din il-klawsola u li allura ma setgħtex ikollha tifsira differenti kif qed jipprova jagħtiha l-appellanti.

Johrog mill-atti illi kien fatt risaput illi s-socjeta appellanti biss kellha dan it-tip ta' prodott x'toffri, u allura ma kienx ikun hemm in-necessita għas-sejha għall-offerti sabiex isir l-akkwist, għaliex din setgħet issir "by direct order" u dan is-socjeta appellanti messha kienet tafu. Tant hu hekk illi mill-atti quddiem il-Bord ta' Revizjoni jirrizulta is-segwent:

"Mr. Marlon Sultana, representing the contracting authority, informed those present that there were no previous calls for tenders to purchase this product but a direct order had been placed for a product compatible with both the 3 tesla without magnet and 1.5 tesla with the magnet fixed."

Dan necessarjament ifisser illi kien fatt stabbilit għal min huwa intiz f'dana il-qasam illi fuq is-suq kien hemm operatur wiehed biss li kellu prodott kompatibbli maz-zewg specifikkazzjonijiet izda għall-ewwel darba saret is-sejha għall-offerti x'aktarx għaliex il-prodott b'wahda biss miz-zewg specifikkazzjonijiet kien irhas fil-prezz. Inoltre kien ukoll fatt risaput illi l-beneficċji ta' prodott kompatibbli ma' "3 tesla MRI" fejn allura l-*imaging* meta isir l-ezami ikun iktar car, ma humiex affermati minn studji xjentifici u dana minhabba r-riskju għall-pazjent fejn ikollha titnehha il-kalamita (magnet) qabel isir l-ezami. Stabbilit dan, allura, ir-ragunament magħmul mill-Kumitat ta' l-Evalwazzjoni illi jagħzlu prodott illi kellu is-sigurta kollha għall-pazjent abbinat mal-fatt illi kien qed jipprezenta l-orhos prezz, kien wiehed gust u din il-Qorti ta' revizjoni hija tal-fehma illi ma għandhiex tiddisturba dan l-apprezzament iktar u iktar meta is-socjeta appellanti necessarjament kienet edotta minn dawn

Kopja Informali ta' Sentenza

il-fatti u setghet wasslet ghall-interpretazzjoni gusta tal-klawsola fid-dawl tal-istudji xjentifici li isawwru dana l-prodott.

Ghaldaqstant ghal dawn il-motivi, l-appell qed jigi michud u id-decizjoni tal-Bord qed tigi ikkonfermata.

L-ispejjez ikunu ghak-karigu tas-socjeta appellanti.

< Sentenza Finali >

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