



MALTA

**QORTI TA' L-APPELL**

**ONOR. IMHALLEF**

**EDWINA GRIMA**

Seduta tas-27 ta' Mejju, 2015

Appell Civili Numru. 59/2012

**LABO-PHARM LTD**

**Vs**

**(1) Id-Direttur tal-Kuntratti,**

**(2) Il-Kulleġġ Malti tal-Arti, ix-Xjenza u t-Teknologija (MCAST)**

**(3) Technoline Ltd u Levo Laboratory Supplies Ltd ezercenti l-kummerc taht l-isem “Technoline Ltd – Levo Laboratory Supplies JV”, u kif ukoll l-istess konsorzju “Technoline Ltd – Levo-Laboratory Supplies JV”**

Il-Qorti,

Rat id-decizjoni moghtija mill-Bord ta' Revizjoni Dwar il-Kuntratti Pubblici fis-6 ta' Dicembru 2012, fejn giet ipprounzjata is-segweni decizjoni fl-ismijiet premissi:-

*“This Board,*

- *having noted that the appellant company, in terms of their ‘reasoned letter of objection’ filed on the 12<sup>th</sup> October 2012 and also through its representatives verbal submissions presented during the hearing held on the 27<sup>th</sup> November, 2012, had objected to the decision taken by the pertinent authorities;*
- *having noted all of the appellant company’s representatives’ claims and observations, particularly, the references made to the fact that (a) by email dated 5<sup>th</sup> October 2012 the Department of Contracts informed the appellant company that its offer was not successful and that the tender was recommend for award to Technoline Ltd-Levo Laboratory Supplies JV, (b) on the 11<sup>th</sup> October the Department of Contracts further informed the appellant company that its offer was administratively and technically compliant but it was not the cheapest, (c) the recommended offer was not compliant with regard to Clause 1.66.7 since the ‘fuel cell’ offered was not capable of generating a maximum or near to maximum power of “250W-300W” as stipulated in clause 1.66.5, (d) in order to reach the “250W-300W” the generator had to generate at least 250W, (e) the ‘fuel cell’ offered by the recommended tenderer was 25cm sq which was equivalent to 25W and, as a result, far lower than maximum or near maximum of 250W-300W set in the tender specifications, (f) the appellant company had reason to believe that the recommended bid was not technically compliant and made particular reference to Clauses 1.66.2, 1.66.5, 1.66.7 and 1.66.8 of Volume 3 ‘Technical Specifications’, which laid down the technical specifications of the single fuel cell test station system, (g) the recommended bidder did not offer an automated pressure control feature as requested in Clause 1.66.2 and as corroborated by Clause 1.66.8 which laid down that “Any control which has an option for automatic or manual control, should be provided with automatic control”, (h) although the appellant company was not certain as to the product offered by the recommended tenderers, still the appellant company was well aware of the products available on the marked and it was not the latter’s intention to embark on any fishing expeditions so much so that the appellant company had raised two specific issues namely the ‘fuel cell’ and the ‘test station’, (i) email dated 21<sup>st</sup> July 2012 (closing date of tender 7<sup>th</sup> August 2012) from Dr Nicolas Portail of Science Instruments stated, among other things, that “the specifications of the FCT-50 are OK for the tender requests. However, you have to know that the back pressure is not automatic. In other words if you can see and register the information about the pressure with the software, you have to manage this one manually”, (j) email dated 26<sup>th</sup> July 2012 wherein Dr Portail Science Instruments confirmed the following about the ‘back*

*pressure', namely that, "Only the monitoring is possible with our systems...The control is only manual...We have no option of automatic back pressure...It is possible to find systems with automatic back pressure but I am not sure that the price will not be the same", (k) once the manufacturers, BioLogic Science Instruments, had confirmed to the appellant company that the back pressure control was only manual then that meant that the test station was not fully automated and so non-compliant, (l) whilst the specifications referred to the 'automated water filling/purge' or 'humidification' which was upgradable, yet the issue under review concerned the 'back pressure control' which was another item, and (m) the appellant company had sought clarification from BioLogic Instruments as evidenced in the emails it presented at this hearing;*

*having considered the contracting authority's representative's reference to the fact that (a) the recommended offer included a 25cm sq fuel cell which could generate power up to about 175W, (b) the tender document did not set a 'minimum' power but a maximum or near minimum power of 250W-300W and the evaluation board considered 175W as more than adequate, (c) one had to keep in mind that the more power that went into the test station the more accelerated would be the wear and tear on the test station which would shorten its life span, (d) one of the options proposed by the appellant company included a fuel cell of 50W which the evaluation board considered up to tender specifications even though one could have preferred the 175W fuel cell, (e) the contracting authority as careful not to fix the power required but to leave a good measure of leeway and one had also to keep in view that the 'fuel cell' was a very minor component or accessory of this equipment, (f) the automation issue did not arise in the case of the 'fuel cell', (g) the appellant company seemed to allege that the technical evaluation carried out by the contracting authority was deficient and reached incorrect conclusions, (h) whilst the 'test station' was the main item requested in this tender and represented the bulk of the expenditure, the 'fuel cell' was only an accessory the cost of which ran into a few thousand euros, (i) the two offers presented by the appellant company and the offer presented by the recommended tenderer were all found compliant with tender specifications, (j) the test station was the main component and represented practically the whole cost of this project, (k)the technical specifications issued by the manufacturer, BioLogic Science Instruments, provided by the recommended bidder with its original tender submissions clearly indicated an 'Automated FCT-50S/Z fuel cell tester with EIS option' and then listed all the relative functionalities including the 'back pressure control', (l) there was other evidence in the manufacturer's technical literature which clearly indicated that the equipment proposed by the recommended tenderer was fully automated, (m) the email dated 26<sup>th</sup> July*

*2012 was correct to state that “It is possible to find systems with automatic back pressure but I am not sure if it is an option or not. Moreover, I am sure that the price will not be the same” – because, apparently, the recommended tenderer did just that, namely it found an automated system at a higher price, (n) albeit, during the evaluation exercise, the evaluation board was not in possession of the emails produced by the appellant company’s representatives during the hearing, yet, from the technical literature available to it at technical evaluation stage, it was quite clear that the test station was fully automated and, among the list of items that it included, one found the back pressure control, (o) given the declarations by the manufacturer in the emails that the appellant company presented at the hearing which were not available at adjudication stage – and the manufacturer’s technical specifications available at technical evaluation stage, one would have had doubts as to whether the test station proposed by the recommend bidder was indeed fully automated or not, (p) once in the software specifications it was stated that “The temperature, pressure and flow rates of gases and water level are monitored and controlled in the software.... then it certainly followed that the equipment as fully automated with regard to the pressure and it could not be otherwise”, (q) one had to note that reference to ‘back pressure control – 0.5 bars manual’ was made in the options available and ® from the second paragraph under ‘Automatic Water Filling/Purge’, namely “These new automatic instruments enlarge the FCT range. Nevertheless, existing FTCs can still be upgraded in the factory” it was argued, that as a result, the FCT model/range was upgradable to automatic standard;*

- *having also considered the recommended tenderer’s representative’s reference to the fact that clause 1.66.1 ‘Minimum functions’ referred to ‘highly automated’ unit suitable for complete single fuel cell testing and, as a consequence, it was not correct to state that the equipment requested had to be ‘fully automated’,*

*reached the following conclusions, namely*

1. *The Public Contracts Review Board argued that, whereas the manufacturer’s technical literature available at adjudication stage seemed quite clear with regard to the equipment being automated, on the other hand, an official from the same manufacturer, BioLogic, was also confirming that the back pressure of FCT-50 was only manual with no automatic option. This Board feels that had the evaluation board been in possession of both versions from the same source it would have perhaps asked for a clarification. It was with this in mind that the Public Contracts Review Board decided to seek further official clarification in regard from the same supplier.*

*On Thursday, December 06, 2012 12:01 PM, this Board received the following formal explanation via email from Mr Herve` BONIN, European Sales Manager & Support, Bio-Logic SAS:*

**QUOTE**

*Our FCT-50S/Z Fuel cell station is said automated as it can run some long term testing on a PEMFC (ageing), thanks to the automatic built water filling & purging system.*

*All parameters for a test are set by software automatically or regulated by FC-Lab Software.*

*The back pressure is set manually on the front panel (for both gas line with a view fo the exact value adjustment into the software), and once done, it is regulated by the software into the unit and the measurement loop for the time duration requested by the user for the test.*

**UNQUOTE**

- 2. The Public Contracts Review Board took full cognisance of the fact that clause 1.66.1 'Minimum functions' referred to 'highly automated' unit suitable for complete single fuel cell testing and it feels that it was not correct for one to state that the equipment requested had to be 'fully automated'. As a result, this Board feels that the explanation received from the recommended tenderer's supplier suffices enough to demonstrate the suitability of the product being offered by the said tenderer. This Board has no reason to doubt that the product in question adheres to the specifications listed in the tender document under review.*
- 3. With regard to the 'fuel cell' the Public Contracts Review Board contends that, since the tender document did not set a 'minimum' power but a maximum or near minimum power of 250W-300W, the evaluation board was correct in considering 175W as more than adequate and in line with tender specifications.*

*In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed."*

*Illi s-socjeta appellanti aggravata b'din id-decizjoni ressqet l-appell taghha fit-termini ta' aggravvju wiehed u cioe' :*

## Kopja Informali ta' Sentenza

Illi fid-dawl tax-xhieda imressqa quddiem il-Bord ta' Revizjoni, l-istess Bord qatt ma seta' jirrakkomanda illi l-offerta tal-konsorzju Technoline Ltd – Levo Laboratory Supplies JV hija wahda konformi mar-rekwiziti tat-*tender*. Dan ghaliex l-apparat offrut mill-konsorzju ma kienx moghti b'*automated back pressure control* u ukoll ghaliex il-*fuel cells* proposti mill-isemmi konsorzju ma kenux jiggeneraw qawwa qrib il-massimu ta' 250 u 300 Watts, hekk kif mitlub fis-sejha ghall-offerti.

Illi mill-fattispecje li sawwru dana il-kaz johrog illi fit-12 ta' Gunju 2012, id-Dipartiment tal-Kuntratti ghan-nom tal-Kullegg Malti tal-Arti, Xjenza u t-Teknologija kien habbar sejha pubblika ghall-offerti ghal-provvista, kunsinna, installazzjoni u kummissjoni ta' taghmir xjentifiku. Illi sussegwentement ghal dan intefghu zewg offerti mill-operaturi ekonomici f'dan is-settur u cioe' is-socjeta appellanti u il-konsorzju appellat fejn wara li gie nominat Kumitat ta' Evalwazzjoni kompost minn membri esperti f'dana il-qasam sabiex issir l-evalwazzjoni tal-offerti sottomessi mill-operaturi, gie stabbilit illi z-zewg offerti kienu konformi ma' l-ispecificazzjonijiet teknici elenkati fit-*tender document* u kwindi abbazi tal-klawsola 32.1 tal-kuntratt pubbliku l-aggudikazzjoni saret a favur l-irhas offerta u cioe' favur il-konsorzju appellat. 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 mar-rekwiziti tat-*tender* u mhux dak tal-*preferred bidder* u ghalhekk ghalkemm l-offerta taghha kienet iktar ghalja minn dik tal-avversarju, il-kuntratt pubbliku kellu jigi aggudikat lilha. Dan ghamlitu fid-dawl tal-fatt illi l-prodott offert mill-konsorzju appellat kien il-mudell indikat bhala *Automated FCT-50S/Z fuel tester with EIS option* supplit mis-socjeta Bio-Logic SAS, li f'korrispondenza skambjata ma' dan l-fornitur qabel ma intefghet l-offerta minnhom u cioe' fiz-zmien meta s-socjeta appellanti kienet ghadha qed tfittex fis-suq ghal prodott

konformi ma' dak rikjest fis-sejha, kienet giet infurmata illi prodott bhal dak li finalment gie imressaq mill-konsorzju appellat, ma kienx konformi ma' dak rikjest u kwindi ghalhekk fittxet prodott iehor li kien iktar gholi fil-prezz.

Illi l-Bord tar-Revizjoni dwar Kuntratti Pubblici, izda, wara li ikkonsulta ruhu ma' rapprezentant tas-socjeta fornitur tal-prodott, Biologic SAS, 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 odjern.

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 u warajh mill-Bord ta' Revizjoni u dan iktar u iktar meta id-decizjoni hija wahda ibbazata purament fuq konsiderazzjonijiet teknici fejn gie deciz 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.

Fuq l-istess linja iwiegeb il-konsorzju appellat li jishaq illi l-prodott tieghu kien konformi ma'l-ispecificazzjonijiet teknici, kif l-istess jishaq il-Kullegg Malti ta'l-Arti, ix-Xjenza u it-Teknologija. Dan ta'l-ahhar jirrileva illi minn madwar mija u tmienja u sittin oggett li kienu jikkomponu din l-attrezzatura xjentifika, kienu biss iz-zewg komponenti tat-*test station* u il-*fuel cell*, li qanqlu l-ilment mis-socjeta appellanti. Jishaq illi dwar il-*back pressure control* tat-*test station* inghad fil-klawsola numru 1.66.1., illi dan ghandu ikun *highly automated* u mhux *fully automated* kif donnha qed tifhem is-socjeta appellanti. L-istess jista' jinghad fir-rigward tal-*fuel cell* fejn fis-sejha ma kienx specificat il-minimu ta' qawwa (*wattage*) li kellha tiggera sabiex l-istess tkun konformi mar-rekwiziti izda biss il-massimu ta'l-istess. Fi kwalunkwe kaz il-valur ta' dawn iz-zewg komponenti huwa wiehed irrizorju meta imqabbel mal-valur shih tat-*tender*.

Minn ezami allura ta' l-atti ta' dan l-appell ma hemmx dubbju illi dak rimess ghal gudizzju ta' din il-Qorti huwa apprezzament mill-gdid ta' provi li instemghu u gew valutati mill-Bord qabel ma ghadda ghad-decizjoni tieghu. Ma ingieb l-ebda argument gdid li jista' b'xi mod iwassal lil din il-Qorti tissindika tali apprezzament, iktar u iktar tenut kont tal-fatt illi din il-Qorti mhijiex moghnija b'*expertise* tekniku, kif kienu l-membri teknici tal-Kumitat ta' l-Evalwazzjoni u warajh il-Bord ta' Revizjoni, li kellu s-setgha jitlob l-ghajnuna ta' esperti in materja biex ighinuh ahjar jifli il-lanjanzi tas-socjeta appellanti.

**“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.*



## Kopja Informali ta' Sentenza

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*. Di piu mill-lanjanzi imressqa mis-socjeta appellanti, din il-Qorti ma tistax tara kif l-argumenti taghha jistghu jintlaqghu billi l-fehmiet tal-Kumitat tal-Evalwazzjoni u wara il-konkluzjonijiet raggunti mill-Bord ta' Revizjoni kienu gusti fid-dawl tar-rekwiziti stabbiliti fis-sejha ghall-offerti. Illi ibda biex, il-fatt illi il-*back pressure control tat-test station* gie indikat bhala li ghandu ikun *highly automated* u mhux *fully automated*, fil-fehma ta' din il-Qorti kellu iwassal ghal valutazzjoni kemmxejn differenti ta' l-ispecificazzjonijiet teknici necessarji biex il-prodott offert ikun *technically compliant*. Is-socjeta appellanti ghalhekk erronjament fittxet prodott b'specificazzjonijiet ghola minn dak rikjest u ghalhekk bi prezz ukoll iktar gholi tant illi ghalhekk spiccat tillfet it-tellieqa fl-aggudikazzjoni. L-istess jinghad ghal qawwa tal-*fuel cell* li mhux necessarjament ried ikun wiehed gholi u cioe' qrib il-massimu ta' 250 sa 300 Watt indikat fl-ispecificazzjonijiet.

Illi maghdud dan kollu ghalhekk din il-Qorti ma tarax illi ghandha tiddisturba id-diskrezzjoni adoperata kemm mill-Kumitat tal-Evalwazzjoni kif ukoll mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici billi l-konkluzjonijiet minnhom raggunti kienu konformi mal-ispecificazzjonijiet teknici imfassla fis-sejha ghall-offerti mertu ta' dan il-kaz.

Ghal dawn il-motivi, l-appell qed jigi michud u id-decizjoni appellata ikkonfermata.

L-ispejjez ta' dina l-istanza ghandhom jigu sopportati mis-socjeta appellanti.

**< Sentenza Finali >**

-----TMIEM-----