

# QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF SILVIO CAMILLERI  
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO  
ONOR. IMĦALLEF NOEL CUSCHIERI

Seduta ta' nhar il-Ġimgħa 27 ta' Mejju 2016

Numru 20  
Rikors numru 125/2016

*John Micallef Builders Limited*

v.

**Id-Direttur Ġenerali tad-Dipartiment tal-Kuntratti; Id-Direttur Ġenerali tas-Central Procurement and Supplies Unit** fi ħdan il-Ministeru għall-Affarijiet Interni u Sigurtà Nazzjonali; *Central Power Installations Limited*

1. Dan huwa appell ta' *John Micallef Builders Limited* ["l-Appellanti"] minn deċiżjoni tal-4 ta' Marzu 2016 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2010 dwar il-Kuntratti Pubbliċi [L.S. 174.04], illi ċaħdet appell tal-istess Appellanti minn deċiżjoni illi l-offerta tagħha għal kuntratt "*for the extension of the Centre of Residential Restorative Services*" tiġi mwarrba għax "*technically non-compliant*".

2. Il-fatti rilevanti seħnew hekk: saret sejħa mid-Dipartiment tal-Kuntratti [“id-Dipartiment”] għal offerti għall-kuntratt fuq imsemmi. Fost il-kon-dizzjonijiet tas-sejħa kien hemm dik illi tgħid hekk:

»7. Selection and Award Requirements

»7.1 In order to be considered eligible for the award of the contract, tenderers must provide evidence that they meet or exceed certain minimum criteria described hereunder.

»... ..

»Notes to Clause 7.1:

»1. ... ..

»2. Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five working days from notification.

»3. No rectification shall be allowed. Only clarifications on the submitted information may be requested.«

3. Daħlu ħames offerti, fosthom dik tal-Appellanti u dik tal-intimata *Central Power Installations Limited*.

4. B’ittra tal-1 ta’ Frar 2016 id-Dipartiment għarraff lill-Appellanti illi “*the tender submitted by your company was deemed to be technically non-compliant*”. L-oqsma fejn l-offerta nstabet *technically non-compliant* ġew imfissra hekk:

»Trace Heating – For the Trace heating no proof of CE marking of the product was submitted. ... ..

» Second class booster set – In the submittal of Second class booster set, the pump did not include a variable speed controller as specified ... ..

»Cold water booster set – In the submittal of Cold water booster set, the pump did not include a variable speed controller as specified ... ..

»Sediment and combination UV/Biological Filter – For the Sediment and combination UV/Biological filter only a UV filter was submitted, and this did not include any CE marking as specified ... ..

»Mechanical Section – In article 62 of the Technical Specifications, “Literature to be submitted with tender”, out of 30 pieces of equipment only 5 items were submitted and ... .. only one item from the whole list, that is, storage tanks is considered as acceptable. ... ..

»ELV Systems - Fire alarm – a conventional fire alarm system was submitted when an Addressable Analogue system was specified in article 67 of the technical specifications ... ..

»ELV Systems - Nurse Call – equipment is not vandal proof as specified in article 84.2 of the technical specifications ... ..

»PC Controlled Security System – the system does not the facility to record audio speech and filter music as specified in article 84.3 ... ..  
...«

5. B'ittra tad-9 ta' Frar 2016 l-Appellanti ressqet oġġezzjoni quddiem il-

Bord ta' Reviżjoni u talbet:

- » 1) The decision of the Contracting Authority is reviewed and, in view of the above, the decision to declare the bid submitted by *John Micallef Builders* as technically non-compliant is annulled.
- »2) Give direction to the Contrating Authority that prior to re-evaluating the bid submitted by *John Micallef Builders*, the obligations set by Note 2 cited above are fully respected.
- »3) Give the contracting authority all other necessary orders and directions that in view of the above indicated submissions [*sic*].«

6. Bid-deċiżjoni tal-4 ta' Marzu 2016, li minnha sar dan l-appell, il-Bord

ta' Reviżjoni iddecieda hekk:

»The Board,

»Having noted the Appellant's objection, in terms of the "Reasoned [Letter] of Objection" dated 11<sup>th</sup> February 2016<sup>1</sup> and also through their verbal submissions during the Public Hearing on 25 February 2016, had objected [*sic*] to the decision taken by the pertinent Authority, in that:

- »a) The Appellant contends that the Literature which was submitted online allowed the Contracting Authority to rectify and clarify under clause 7 c 2 (ii). The Contracting Authority did not apply this clause, hence the Appellant's Literature was being declared as non-conforming with what was requested in the Tender Document and thus being disqualified;
- »b) The Appellant Company maintains that through the witnesses during the Public Hearing, it was evidently proved that their offer was fully compliant, yet the reason why the Appellant's bid was discarded was due to the fact that the Literature did not conform with the Technical Specifications as submitted by the same Appellant. In this regard,

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<sup>1</sup> L-ittra ta' oġġezzjoni għandha d-data tad-9 ta' Frar 2016 iżda waslet għand il-Bord ta' Reviżjoni fil-11 ta' Frar 2016.

the Appellant contends that he was not given the opportunity to clarify.

»Having Considered the Contracting Authority's "Letter of Reply" dated 15 February 2016 and also their verbal submissions during the Public Hearing held on 25 February 2016, in that:

- »a) The Contracting Authority contends that, as requested in the Tender Document, bidders had to submit the Technical Literature of the equipment being offered. Apart from the fact that the Literature did not conform to the Technical Specifications as submitted by the same, the Appellant's offer omitted a Technical Offer for certain components;
- »b) The Contracting Authority maintains that it would have been futile to ask for Clarifications on missing or non-compliant items as this would lead to a Clarification as stated in Note 7.1.3.

»Reached the following conclusions:

- »1. With regards to the Appellant's First Contention, this Board, after having examined the relevant documentation and heard the submissions of all parties concerned, opines that the Appellant's Contention is not quite correct in stating that the only reason why their bid was discarded was that the Literature submitted by the latter did not conform with the Tender's Technical Specifications, in that:

- »a) First of all, this Board would like to refer to the "Letter of Rejection" dated 1 February 2016 wherein the reasons why the Appellant was technically not compliant were clearly stated and referred to specific components such as "*Trace Heating*", "*Second Class Booster Jet*", "*Cold Water Booster Set*", "*Sediment and Combination UV/Biologicalat Filter*" etc. This is ample evidence that there were specific Technical reasons why the Appellant's offer was rejected;
- »b) This Board would like to treat also the importance of the Literature which was requested in the Tender Document. This Board had, on many occasions, stated that the Technical Literature should corroborate with [*sic*] what had been submitted in the Technical or Offer so that the Technical Literature should not replace or supersede any missing information in the Technical Offer. The Technical Literature should reflect what has been submitted in the Technical Offer.

»This Board justifiably opines that the Appellant failed to submit a Technical Offer for all the components as dictated in the Tender Document and this Board also credibly notes that the Contracting Authority vividly stated the reasons for discarding the Appellant's Offer. In this regard, this Board does not uphold the Appellant's first Contention.

- »2. With regards to the Appellant's Second Contention that he was not given the opportunity to clarify any Technical

issues, this Board, after establishing the reasons why their offer was discarded, would justifiably refer to “Notes to Clause 7.7.3” of the Tender Document wherein it is clearly dictated that the Technical Specifications, with particular reference to Clauses 7.1 (c) (ii), (a), (b), (c), (d), (e) fall under Clause 7.1 note 3 i.e. “No Rectification shall be allowed”.

»In this regard, it has been clearly established that apart from the issue of the Technical Literature there were clear Technical reasons why the Appellant was deemed as non-compliant. This Board would also like to point out that the Evaluation Board did not ask for any clarifications. If so, this would have lead to a “Rectification” which is not allowed.

»The same Evaluation Board had to evaluate the Appellant’s offer on documentation submitted by the latter. In this regard, this Board does not uphold the Appellant’s Second Contention, which stated that the Appellant was not given the opportunity to clarify any Technical issues.

»In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.«

7. L-Appellanti ressqet appell minn din id-deċiżjoni b’rikors tat-22 ta’ Marzu 2016 li għalih id-Dipartiment u l-Ministeru għall-Affarijiet Interni u Sigurtà Nazzjonali wiegħbu fil-11 ta’ April 2016 u *Central Power Installations Limited* wiegħbet fit-18 ta’ April 2016.
8. L-ewwel żewġ aggravji tal-Appellanti huma marbuta ma’ xulxin u ġew minnha mfissra hekk:

»Is-soċjetà rikorrenti qed tappella mid-deċiżjoni tal-Bord għax issostni li l-offerta tagħha kienet teknikament konformi u hija kellha tingħata l-opportunità li tikkorreġi l-letteratura annessa biex tkun konformi mal-offerta mressqa minnhha.

»... ..

»Illi għalhekk l-aggravju huwa ċar u manifest billi, la r-rekwiżiti tal-klawżola 7.C ii (a) sa (e) ġew sottomessi u n-nuqqas misjub mill-Evaluation Committee kien relativament għal kwistjoni ta’ letteratura li taqa’ taħt il-klawżola 7C (i) *Literature as per Form marked ‘Literature’*, għaldaqstant kienet tapplika n-Note 2 li tistipula illi: “Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five working days from notification”.

»Dwar it-tieni kontestazzjoni tas-soċjetà appellanti li ġiet konsidrata mill-Bord huwa evidenti li d-deċiżjoni tal-awtorità kontraenti li tiċċhad l-offerta tal-appellanti kienet ibbażata fuq dak li kien hemm fil-letteratura li ġiet preżentata mill-appellanti.

»Għalhekk qabel ma *tender* jiġi dikjarat teknikament *non compliant*, l-awtorità kontraenti kellha titlob lit-*tenderer* “*to clarify/rectify any incorrect and/or incomplete documentation and/or submit any missing documents*”. F’dan il-każ dan ma sarx, a preġudizzju tas-soċjetà appellanti.

»Illi s-soċjeta appellanti tikkontendi illi jekk qed tittieħed linja fina bejn x’inhil letteratura u x’inhil tekniku allura ma kienx ikun hemm il-ħtieġa fir-regolamenti tat-*tender document* illi ssir distinzjoni bejn it-tnejn. La saret din id-distinzjoni, affarijiet illi jikkonċernaw letteratura jaqgħu taħt il-kappa tar-Regola 7 C(i) u għaldaqstant peress illi kien hemm nuqqas fil-letteratura sottomessa kien hemm il-possibilità ta’ rettifika a bażi tan-*Note 2*, iżda dan ma sarx.

»Saret din id-distinzjoni sabiex ikun hemm linja ċara bejn dik li hija letteratura u l-ispeċifikazzjonijiet tekniċi. Is-soċjetà appellanti tikkontendi illi bil-mod kif ġie deċiż dan it-*tender* din id-distinzjoni qed titneħħa u b’hekk kien hemm *shifting of goal posts* peress li mhux qed issir distinzjoni bejn dawn iż-żewġ speċifikazzjonijiet. Hekk jista’ jinħoloq każ fejn min ikun qed jiddeċiedi jista’ jagħmel dan b’arbitrarjetà u b’nuqqas ta’ f’haris tar-regolamenti stretti illi joħorġu mit-*tender document*.«

9. L-argument tal-Appellanti f’dawn iż-żewġ aggravji jidher illi hu illi kien hemm inkompatibilità bejn l-ispeċifikazzjonijiet tekniċi tal-offerta tagħha u d-deskrizzjoni ta’ dawk l-ispeċifikazzjonijiet fil-“letteratura”, presumibilmment għax riedet toffri l-prodott “X” li għandu l-ispeċifikazzjonijiet deskritti fl-offerta, u wriet ċar li qiegħda toffri prodott “X”, iżda bi żball ipprovdiet il-letteratura ta’ prodott “Y” li għandu speċifikazzjonijiet oħra. Għalhekk, tgħid l-Appellanti, kellha tingħata fakoltà “*to rectify any incorrect documentation*”.
10. L-Appellanti kien ikollha argument li kieku tassew l-ispeċifikazzjonijiet tekniċi tal-offerta tagħha kienu kompatibbli ma’ dak li riedet is-sejħha iżda twarrbet għax ipprezentat dokumenti bi żball li juru speċifikazzjonijiet oħra. Iżda kif jidher mill-ittra tal-1 ta’ Frar 2016 (li biha d-Dipartiment għarraf lill-Appellanti li l-offerta tagħha ġiet imwarrba) l-

offerta twarrbet għax il-prodotti offerti nfushom ma kinux kif riedet is-sejha għal offerti. Li kieku l-Appellanti tħalliet tibdel il-“letteratura” kienet tkun qiegħda effettivament tinqeda bid-dokumenti godda biex tibdel is-sustanza tal-offerta: fi kliem il-Bord ta’ Revizjoni, “*this would have lead to a “Rectification”* [tal-offerta, mhux tad-dokumenti] *which is not allowed*”.

11. Li ma tistax issir bidla fl-offerta għal kuntratt pubbliku wara li jkunu magħrufa l-offerti ta’ oblaturi oħra huwa prinċipju bażiku u fundamentali. L-ewwel żewġ aggravji – li l-qorti tqishom x’aktarx fiergħa – huma għalhekk miċħuda.

12. It-tielet aggravju huwa msejjes fuq il-prinċipju ta’ proporzjonalità, u ġie mfiisser hekk:

»Huwa kuncett importanti ferm fil-qasam tal-ghoti ta’ kuntratti pubbliċi li awtoritajiet kontraenti m’għandhomx joħolqu barrieri [sc. ostakoli] biex iżomrnu operatori ekonomiċi milli jieħdu sehem f’sejħiet pubbliċi. Wara kollox l-iskop wara dawn is-sejħiet pubbliċi mhuwiex li teskludi operatori ekonomiċi imma li tiftaħ għall-kompetizzjoni biex b’hekk il-Gvern ikollu aktar minn fejn jagħżel u b’hekk ikun hemm aktar ċansijiet li l-offerta magħżula tkun tassew *the best value for money*.

13. Li trid l-Appellanti iżda ma huwiex li titħares il-proporzjonalità iżda li tingħata vantaġġ mhux xieraq billi titħalla effettivament tbiddel l-offerta tagħha wara li taf x’kienu l-offerti tal-kompetituri tagħha. Ma hemm xejn sproporzjonat f’li, fl-interess tat-trasparenza u tal-*par condicio* tal-oblaturi, ma tħallix li oblatur jibdel is-sustanza tal-offerta tiegħu kif trid tagħmel l-Appellanti.

14. Dan l-aggravju, li wkoll fiċ-ċirkostanzi jitqies fieragħ, huwa għalhekk miċħud.

15. Għal dawn ir-raġunijiet il-qorti tiċċad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Reviżjoni. L-ispejjeż ta' dan l-appell tħallashom is-soċjeta appellanti *John Micallef Builders Limited*.

Silvio Camilleri  
President

Giannino Caruana Demajo  
Imħallef

Noel Cuschieri  
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Deputat Registratur  
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