

QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF SILVIO CAMILLERI
ONOR. IMHALLEF TONIO MALLIA
ONOR. IMHALLEF JOSEPH AZZOPARDI**

Seduta ta' nhar il-Gimgha 24 ta' Gunju 2016

Numru 15

Rikors numru 85/16

**Transport Services for Disabled Persons
Co-Operative Limited (K83)**

v.

**Id-Direttur Generali tad-Dipartiment tal-Kuntratti, Id-Direttur
Generali tas-Central Procurement and Supplies Unit fi hdan
il-Ministru ghall-Energija u Sahha, u South Lease Limited (C65614)**

Il-Qorti:

Dan hu appell imressaq fl-1 ta' Marzu 2016 mill-kooperattiva rikorrenti wara decizjoni datata 11 ta' Frar, 2016, moghtija mill-Bord ta' Revizjoni dwar kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz referenza CT 2078/2015 (kaz numru 900).

Dan il-kaz huwa marbut mas-sejha ghall-offerti li hareg id-Direttur Generali tad-Dipartiment tal-Kuntratti ghal "*leasing of tail-lift vans with driver and fuel*". Ghal dan it-tender applikaw tlett offerenti, fosthom il-

kooperattiva appellanti, u s-socjeta` South Lease Ltd., liema socjeta` giet maghzula bhala l-offerent preferut; din giet maghzula bhala li kienet l-offerent li issottometta “*the cheapest priced tender satisfying the administrative and technical criteria*”. Il-kooperattiva appellant ma qabletx ma’ din id-decizjoni u ressqet appell quddiem l-imsemmi Bord li b’decizjoni tal-11 ta’ Frar, 2016, cahad l-appell u ikkonferma d-decizjoni tad-Direttur Generali tad-Dipartiment tal-Kuntratti. Id-decizjoni tal-Bord hija s-segwenti:

“Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 28 December 2015 and also through their verbal submissions during the Public Hearing held on 4 February 2016 and had objected to the decision taken by the pertinent Authority, in that:

“a) The Appellant contends that the Recommended Bidder was not compliant as the vans offered by the latter were not in Malta during the bidding stage. The Appellant also maintains that the vans offered by the same, were not fitted with tail-lifts;

“b) The Appellant maintains that the Recommended Bidder did not submit logbooks, insurance cover and certification of vans, as requested in the Tender Document;

“c) The Appellant also contends that the Recommended Bidder does not possess the required experience to execute the Tendered Service.

“Having considered the Contracting Authority’s “*Letter of Reply*” dated 28 January 2016 and the verbal submissions made by the latter during the Public Hearing held on 4 February 2016, in that:

“a) Since the two bidders for this Tender were both Administratively and Technically compliant, the Contracting Authority maintains that the Public Contracts Review Board’s intervention is uncalled for;

“b) The Contracting Authority contends that the Recommended Bidder had submitted the literature required and since the vans which were being offered by the latter were new vehicles, there was no need for the VRT Certificate. At the same instance, the Recommended Bidder had submitted “*Certificates of Conformity*” of the vans and the Evaluation Board made their adjudication according to the literature submitted, which showed that the vans had tail-lifts;

“c) The Contracting Authority confirmed that the Tender did not ask for previous experience

“Reached the following conclusions:

“1. With regards to the Appellant’s First Grievance, this Board after having examined the relevant documentation and having heard the submissions, would opine that it can be justifiably noted that the Tender did not dictate that the vans should be in Malta at the time of submission of the offers.

“The fact that the Recommended Bidder had submitted the “*Certificates of Conformity*” from the importer of these vans, confirm that the vehicles are brand new and “*were of Euro V*” classification. This was ample proof for the Evaluation Board to assess the Recommended Bidder’s offer on the documentation submitted by the latter.

“In this regard, this Board justifiably confirms that the Evaluation Board acted in a fair and transparent manner in its deliberation.

“With regards to the Appellant’s contention that the vans offered by the Recommended Bidders had no tail-lifts; this Board would refer to the Literature submitted by the Recommended Bidder, wherein, Tail-Lifts were included.

“At the same instance, this Board would pertinently point out that the Recommended Bidder had signed the necessary documentation where he declared that all the specifications dictated in the Tender Document would be complied.

“In this respect, this Board credibly opines that this declaration was sufficient for the Evaluation Board to proceed with its adjudication. In this regard, this Board does not uphold the Appellant’s First Grievance.

“2 With regards for the Appellant’s Second Grievance, this Board, after having heard credible submissions from all parties concerned, opines that the Evaluation Board were informed that the Recommended Bidder would be using new vehicles and in this regard, the same Evaluation Board did not require a VRT Certificate.

“In the second instance, with regards to the non submission of logbooks by the Recommended Bidder, this Board opines that, since the vans to be used for Tendered Service are new and not yet registered with Transport Malta, the log books could not be submitted.

“At the same time, this Board notes that the Tender Document did not dictate the submission of the registration certificates of the vans. This Board also notes that the “*Certificate of Conformity*” issued by Gasan Enterprises confirms the booking of these vehicles with details of chassis numbers and other relevant information which enabled the Evaluation Board to arrive at its adjudication.

“This Board would respectfully point out that the submission of log books requested by the Contracting Authority was simply to assess whether the vans, which are to be utilised for the service hold a Euro V classification.

“In this regard, the “*Certificate of Conformity*” issued by Gasan Enterprises confirms that the new vehicles to be used by the Recommended Bidder, do in fact hold a Euro V classification.

“This Board would also like to point out that the Recommended Bidder declared that the vans to be used are to comply with all the conditions as dictated in the Tender Document.

“On the other hand, the Contracting Authority has other effective remedies should the Recommended Bidder fail to meet the said conditions. In this regard, this Board upholds the Evaluation Board’s decision to accept the concept that since the vans were not yet registered with Transport Malta, the submission of the logbooks was not possible.

“At the same instance, this Board would refer to the principle of “*substance over form*”, in that since the Evaluation Board was aware that the vans were to be new and not yet registered, the requisites of the logbooks submission did not carry any weight. In this regard, this Board does not uphold the Appellant’s Second Grievance.

“3. With regards to the Appellant’s Third Grievance, this Board would first of all point out that the Tender Document did not ask for any previous experience. Secondly, this Board credibly points out that the Tendered service is not of any specific nature which dictates previous experience. The tendered service consists of the “*Leasing of Tail-Lift Vans with Driver*”.

“Although Circular 19 dated 16 December 2015 specifically dictates that “*No experience is required for tenders below €500,000*”. The Recommended Bidder’s offer was €530,400. This Board would credibly apply the Principle of “*Proportionality*”, whilst acknowledging the favourable difference in price savings and public funds for that matter, to the direct advantage of the Contracting Authority. In this regard, this Board does not uphold the Appellant’s Third Grievance.

“4. On a general note, this Board credibly opines that, from the relative documentation and submissions by the Appellant Company

and the Contracting Authority, there was no tangible proof or evidence which indicates that the Recommended Bidder would not be capable of providing new vans as declared by the latter or that the same was not capable of providing the Tendered service. In this regard, this Board justifiably affirms that the Adjudication process was carried out in a just and transparent manner.

“This Board would like to also refer to the rectification of the Recommended Bidder’s offer which was made within the specified period as per clause 7.1.2 of the Tender Document where the Technical Specifications were rectified and accepted by the Contracting Authority.

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

Il-kooperativa appellanti appellat mid-decizjoni tal-Bord ghax issostni, fil-qosor, li l-vetturi tas-socjeta` preferuta ma humiex konformi ma' dak mitlub fis-sejha tal-offerti u ma gewx ipprezentati dokumenti li kienu ta' natura obligatorja.

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

Ikkonsidrat:

Illi f'dan il-kaz kien hemm sejha ghall-vetturi li jkunu jistghu jgorru persuni b'dizabbilita`. Fost il-htigijiet elenkati fi klawzoli 10 u 12 tad-dokumenti tas-sejha kien hemm l-obbligu li l-offerent jipproduci mal-offerta tieghu (i) certifikat ta' *survey* tal-vetturi u (ii) certifikat tal-VRT validu; kellu jigi ipprezentat ukoll l-hekk imsejjah *logbook* ta' kull vettura

indikata ghas-servizz. Is-socjeta` preferuta ma iproduciex dawn id-dokumenti minhabba li ghal dan il-kuntratt hija kienet behsieba tuza vannijiet godda fjamanti. Il-vannijiet kienu ghadhom iridu jinxtraw, u ghalhekk din is-socjeta` ma setghetx tipproduci kopja tal-*logbook* taghhom biex turi li dawn il-vannijiet kienu jaqghu fil-kategorija tal-Euro 5.

Peress li l-vannijiet kienu se jkunu godda, kemm il-kumitat tal-ghazla kif ukoll il-Bord hassu li kellhom jaccettaw din l-offerta, avvolja dokumenti indikati bhala mandatorji ma gewx ipprezentati. Jidher li min hejja d-dokumenti tas-sejha ma basarx li kien ha jkun hemm offerenti li sejrjn jipprokuraw vannijiet godda u li se jkunu orhos minn min joffri vetturi wzati, imma haseb li l-offerenti kollha kienu sejrjn jinqdew b'vetturi ga uzati. Jibqa' l-fatt pero`, li ghalkemm il-vetturi offruti kienu "*the best value for money*", ma humiex konformi ma' dak mitlub. Din il-Qorti, f'kazijiet simili, mhux l-ewwel darba li ikkonfermat il-principju li offerent, anke jekk joffri prodotti ahjar, ghandu jkun skwalifikat jekk il-prodott offrut ma jkunx skont kif indikat fis-sejha. Il-principju ta' trasparenza jrid li l-kumitat ta' evalwazzjoni jimxi mad-dettalji teknici kif imnizzla fid-dokumenti tas-sejha, u mhux jiddeciedi li jaghzel liema li jidhirlu li hi l-ahjar offerta.

Kif qalet il-Qorti tal-Gustizzja tal-Unjoni Ewropeja fil-kaz **Sc Enterprise Focused Solutions SRL v. Spitalul Judetean de Urgenta` Alba Julia**

(Kawza numru C-278/14) deciza fis-16 ta' April 2015:

“L-obbligu ta' trasparenza huwa partikolarment mehtieg biex tassigura li ma jkun hemm ebda riskju ta' arbitrarjeta` min-naha tal-awtorita` kontraenti (ara, fir-rigward tal-Artikolu 2 tad-Direttiva 2004/18, is-sentenza SAG ELV Slovensko et, C-599/10, EU:C:2012:191, punt 25 kif ukoll gurisprudenza ccitata).

“Madankollu, din il-mira ma tintlahaqx jekk l-awtorita` kontraenti tista' teghleb il-kundizzjonijiet li tkun stabbiliet hija stess. Ghalhekk, huwa projbit li awtorita` kontraenti timmodifika l-kriterji tal-ghoti ta' kuntratt matul il-procedura tal-ghoti. Il-principji ta' ugwaljanza fit-trattament u non-diskriminazzjoni kif ukoll l-obbligu ta' trasparenza jkollhom, f'dan ir-rigward, l-istess effett fir-rigward tal-ispecificazzjonijiet teknici.

“Ghaldaqstant, il-principju ta' ugwaljanza fit-trattament u l-obbligu ta' trasparenza jipprojbixxu l-awtorita` kontraenti milli tirrifjuta offerta li tissodisfa l-ezigenzi tal-avviz ghall-offerti u li tib baza d-decizjoni taghha fuq ragunijiet li ma humiex previsti fl-avvizi (sentenza Medipac – Kazantzidis, C-6/05, EU:C:2007:337, punt 54).

“Konsegwentement, l-awtorita` kontraenti ma tistax tipprocedi wara l-pubblikazzjoni ta' avviz ghall-ghoti ta' kuntratt billi taghmel modifika fl-ispecificazzjoni teknika ta' wahda mill-elementi tal-kuntratt, bi ksur tal-principji ta' ugwaljanza fit-trattament u ta' non-diskriminazzjoni kif ukoll tal-obbligu ta' trasparenza. Huwa irrilevanti, f'dan ir-rigward, li l-element li tirreferi ghalih din l-ispecificazzjoni ma ghadux jigi manifatturat jew ma ghadux disponibbli fuq is-suq.”

Fil-ktieb ta' Sue Arrowsmith, “The Law of Public and Utilities Procurement” (Sweet & Maxwell, 3 Ediz. 2014), f'pagna 724 et seq., l-awtrici tosserva li, fil-waqt li l-kumitat ta' evalwazzjoni m'ghandux jirrigetta offerta li jkollha “*a minor violation of the rules*”, tqies li, fil-principju, huwa importanti li l-kumitat jimxi skont dak rikjest fis-sejha. Tghid hekk, fir-rigward:

“However, there are a number of arguments *against* either accepting non-conforming tenders or allowing their correction, either in general or in particular cases:

“1. To accept a non-conforming tender or allow it to be corrected may mean that the entity has not complied with the rules laid down for the procedure, which is an important aspect of transparency and equal treatment (in the latter case possibly both as an objective of the procurement process and a means to achieve other objectives). From the perspective of equal treatment, not to follow those rules involves unequal and unfair treatment of other tenderers. This is especially so if other tenderers have acted on the rules in preparing their own tenders and especially if these tenderers have been caused prejudice in doing so – for example, if their tenders are less attractive as a result of complying, or if they have incurred expenses in complying. Not following the stated rules also damages confidence in the system for the longer term, to the detriment of value for money.

“2. Rejecting non-conforming tenders encourages tenderers generally to take better care to comply with the requirements of the documents, to the general benefit of the procurement process as a whole.

“3. Any possibility of correction is open to abuse by economic operators in certain cases. Thus economic operators can deliberately plant errors or ambiguities, and then use the opportunity for correction to advance their own interests. For example, to take an extreme case, they could deliberately omit a particular price figure from the tender and after hearing other tender prices at tender opening (or from a procuring officer with whom they are colluding) could insert an appropriate figure to win the contract at the highest price they can get away with. Even if errors or ambiguities that involve conformity are not planted deliberately their existence might be open to a tenderer to exploit in this way.

“4. The possibility of accepting non-conforming tenders will often require that discretion is given to procuring entities to judge whether or not to waive or allow correction of the particular non-conformity, and such discretion can be abused to favour certain economic operators. From the perspective of EU procurement law the main concern will be that discretion in this area could be abused to favour national firms – for example, by allowing them to correct apparent errors in a way that allows them to improve their prices after the deadline, or by being more generous in allowing correction of genuine errors of national firms than of others.”

F’dan il-kaz, il non-konformita` mas-sejha ma tistax titqies “*a minor violation*”, ghax l-offerta hi nieqsa mid-dokumenti indikati bhala

mandatorji, u kwindi essenzjali, ghal kull offerta. Fil-fatt l-offerta tal-offerent preferut hija nieqsa minn dawk ic-certifikati u dikjarazzjonijiet li gew mitluba fis-sejha. Lanqas ma jirrizulta, b'mod konkluzziv, li l-vannijiet offruti mis-socjeta` rakkomandata huma maghmra b'*tail-lifts* u li jistghu jakkomodaw tlett *wheel chairs*. Ir-ritratti esebiti li ghalihom saret referenza mill-imsemmija socjeta` wara li giet mitluba tikjarifika l-offerta taghha fuq dawn l-aspetti, ma jindikawx car li l-vannijiet offruti kienu hekk mgammra.

Gia` ladarba s-sejha ghall-offerti ezigiet li dawk il-precitati dokumenti jigu sottomessi flimkien mal-offerta relattiva, hekk kellhom jaghmlu l-offerenti kollha, u kemm-il darba kellu jigi konsidrat li dan ma kienx necessarju fil-kaz tal-vetturi godda, allura tali ezenzjoni kellha tinghata lill-offerenti kollha, li allura jkunu jistghu joffru vetturi godda, biex b'hekk kulhadd kien jitqieghed fl-istess livell. Ebda offerent, lanqas dak preferut, ma talab kjarifikazzjoni f'kaz li jigu offruti vetturi godda, u, ghalhekk, il-kumitat ta evalwazzjoni kellu jimxi strettament mal-kondizzjonijiet tas-sejha. Kif mexa dan il-kumitat, u l-Bord warajh, ma zammx *a level playing field*, u dan kien ta' pregudizzju ghall-interessi tal-offerenti l-ohra.

Fid-dawl tal-premess, id-decizjonijiet li hadu l-kumitat ta' evalwazzjoni u l-Bord huma zbaljati fil-ligi. Din il-Qorti, fic-cirkostanzi, tara li jkun aktar

ghaqli li thassar il-process kollu, sabiex l-awtorita` kontraenti tkun tista' tohrog sejha gdida li jwassluha taccetta, eventwalment, l-ahjar offerta. B'hekk, kulhadd ikun jista' jippartecipa "*on a level playing field*". Li dan jista' jsir hu ikkonfermat mill-istess awtrici fil-ktieb taghha fuq indikat. Fil-fatt a pagna 728-729 tghid hekk:

"In some cases the best solution from the perspective of national policy and the contracting authority may be to conduct a new tender – either a new round of tendering with existing tenderers or an entirely new award procedure. An authority might wish to do this, for example, if the reason for one or more non-conforming tenders is that the authority has drafted a poor specification that excludes some good solutions, and it wishes to retender with an improved specification that will enable it to get better value for money.

"In general, so as EU law is concerned, there is a general discretion to terminate an award procedure to commence a new one, as is discussed further at paras 7-321—7-322, provided that this is not done in violation of equal treatment (for example, terminating the procedure simply in order to allow a national supplier that has submitted a non-conforming tender a new opportunity to compete)."

L-ezempji hawn furniti jinkwadraw ruhhom perfettament f'dan il-kaz, u ghalhekk ikun jaqbel illi tinhareg sejha ghall-offerti gdida sabiex jigi assikurat li kull offerent jinghata trattament indaqs, u tkun tista' tinghata aggodikazzjoni li twassal ghal "*a better value for money*".

Fir-rigward tal-ilment relatat man-nuqqas ta' interess guridiku tas-socjeta` appellanti, din il-Qorti tirrileva li, ghall-fini ta' dawn il-proceduri, il-Bord imsemmi sab li din is-socjeta` appellant hija "*technically compliant*" u giet klassifikata t-tieni fil-process aggodikattiv. Fid-dawl tad-decizjoni li se tiehu din il-Qorti f'dan il-kaz, mhux mehtieg li jigi

ezaminat jekk, bhala fatt, is-socjeta` appellanti ressqietx offerta valida jew le, peress li l-process kollu se jithassar biex jinbeda mill-gdid. Inoltre, kontra din is-sejha tal-Bord ma tressaq ebda appell, hekk imsejjah, *del comodo*, u ma tarax kif din il-Qorti tista' tezamina materja li ma ngiebetx quddiemha kif titlob il-ligi.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell tas-socjeta` Transport Services for Disabled Persons Co-Operative Ltd. billi tilqa' l-istess, thassar u tirrevoka d-decizjoni li ha l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici fil-11 ta' Frar, 2016, u thassar ukoll d-decizjoni li ha l-kumitat ta' evalwazzjoni f'dan il-kaz, u thassar il-process kollu tas-sejha ghall-offerti, referenza numru CT 2078/2015, u tpoggi lill-partijiet kollha fil-posizzjoni li kienu qabel il-hrug tas-sejha.

Tordna li d-depozitu li sar quddiem il-Bord jigi imhallas lura lill-kooperattiva appellanti, u li l-ispejjez ta' din il-procedura jibqghu bla taxxa bejn il-partijiet.

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