

QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar il-Ġimgħa 30 ta' Settembru 2016

Numru 31

Rikors Numru 164/16

Smart Office Supplies Limited

v.

**Ministru għall-Edukazzjoni u x-Xogħol
u
Jonathan Muscat Baron, eżerċenti l-kummerċ
bl-isem ta' Aska Trading Enterprises**

Dan huwa appell imressaq fil-15 ta' April, 2016, mis-soċjetà rikorrenti Smart Office Supplies Ltd. wara deċiżjoni datata 5 ta' April, 2016, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'l quddiem imsejjaħ "il-Bord") fil-każ referenza MEDE 410/2015.

Dan il-każ huwa marbut ma' sejħa għall-offerti li ħareġ il-Ministeru intimat "*for the supply and delivery of various stationery – for a period of*

twelve (12) months, with an option to extend to an additional period of twelve (12) months, - to Gozo College, together with the respective primary and secondary schools covered under these colleges.”

Għal dan il-kuntratt intefgħu diversi offerti, fosthom tal-appellant Smart Offices Supplies Limited li, però, ma gietx magħżula, bil-kuntratt jiġi rakkomandat li jingħata lis-soċjetà intimata, Aska Trading Enterprises. L-imsemmija soċjetà Smart Office Supplies Limited appellat minn din id-deċiżjoni lill-Bord li b'deċiżjoni tal-5 ta' April, 2016, ċaħad l-appell u ikkonferma d-deċiżjoni tal-awtorità kontraenti. Id-deċiżjoni tal-Bord hi s-segwenti:

“Having noted the Appellant’s Objection in terms of the *“Reasoned Letter of Objection”* dated 22 February 2016 and also through their verbal submissions during the Public Hearing held on 29 March 2016 had objected to the decision taken by the Pertinent Authority, in that:

- “a) The Appellant contends that his offer was deemed to be non compliant due to the fact that he did not Tender for all the items as listed in the Tender Document;
- “b) The Appellant also maintains that Clarification Number 1 did confirm that *“Any item which is not available on the market should be marked as N/A, (not available), so that, in the eventuality that some of the items, as listed in the Tender Document, did not exist or were no longer in use, was allowed by the Contracting Authority.”* In this regard, this Appellant could not quote for non-existing or obsolete items.

“Having noted the Contracting Authority’s *“Letter of Reply”* dated 25 February 2016 and also their verbal submissions during the Public Hearing held on 29 March 2016, in that:

- “a). The Contracting Authority maintains that it was made clear from the very start that bidders had to quote for all the items listed in the Tender Document. At the same instance, bidders were allowed to quote for equivalent items as long as supported documentation proved

and submitted its equivalency. In this regard, the Appellant did not quote for 17 items;

“b) The Contracting Authority contends that in Clarification Number 1, bidders were informed that should all of them fail to submit a quote for the same items, then these will be struck off from the Tender list so as to provide “*a level playing field for all*”. In this regard, the Contracting Authority maintains that this was not the case.

“Reached the following conclusions:

“1. With regards to the Appellant’s First Grievance, this Board, after having heard the submissions of both the Appellant Company and the Contracting Authority and after having examined the relative documentation, opines that Smart Office Supplies Ltd confirmed and admitted that they did not quote for all the items whilst this Board justifiably referred to Clause 3.2 wherein it is vividly denoted that “*Under no Circumstances will Tenders Document will be taken into consideration*”. In this regard, this Board does not uphold the Appellant’s First Grievance.

“2. With regards to the Appellant’s Second Grievance, this Board would refer and emphasise the reason behind Clause 2 of Volume 3 (Technical Specifications). The Contracting Authority instructed the bidders to mark those items which they could not quote for. In this regard, this clause would have been applicable if, certain items were not offered by all the bidders.

“The factual event shows that bidders did offer all the items as dictated in the Tender Document whilst the Appellant Company failed to do so. This Board justifiably opines that the decision taken by the Contracting Authority to deem the Appellant’s offer as non-compliant in accordance with Clause 2 of Volume 3 was correct and proper. In this regard, this Board does not uphold the Appellant’s Second Grievance.

“3. This Board is frequently being faced with appeals on matters which could have been avoided by applying a “*Pre-Contractual Concern*” or ask for Clarifications from the contracting Authority, prior to the submission of their offers. In this particular case, the points which were raised by Smart Office Supplies Ltd., with regards to the availability and obsolescence of items should have been clarified at the appropriate stage.

“It is the onus of the prospective bidder to seek as much information or clarifications of the dictated Tender Conditions as possible to ensure that all the requested information submitted is to the satisfaction of the Contracting Authority concerned.

“4. This Board was informed during the Public Hearing that the Tender for the Lot has been cancelled as no bidder was compliant. However, this Board regrettably notes that the Appellant Company was not informed of this fact.

“Although the merit of this case is the submission of a non-compliant offer, this Board, as it had on many occasions, pointed out that the Public Procurement Regulations dictate that “*Specific Reasons*” had to be given to unsuccessful bidders to provide the latter with fair and just grounds on which to object.

“In view of the above, this Board finds against the Appellant Company, however in view of the above, this same Board recommends that the deposit paid by the Appellant should be reimbursed.”

L-imsemmija soċjetà Smart Office Supplies Limited issa qed tappella mid-deċiżjoni li ħa l-Bord għal quddiem din il-Qorti u ssostni (i) is-sejħha għall-offerti kienet tagħti wieħed x'jifhem illi offerenti kien permiss ma jikkwotax l-*items* kollha; (ii) l-offerta ta' Aska Trading Enterprises kellha tiġi meqjusa *technically non-complaint* hi wkoll; u (iii) is-sejħha għall-offerti kienet waħda irregolari għaliex tikser l-*standards* ta' *public procurement* mistenni mir-regolamenti tal-Unjoni Ewropea.

Wara li sem għet it-trattazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti eżebiti, din il-Qorti sejra tgħaddi għas-sentenza tagħha.

Ikkonsidrat:

Illi s-soċjeta` appellanti qed tilmenta mill-fatt, fl-ewwel lok, illi l-fatt li naqset milli tikkwota 17-il item mill-268 preżenti fil-*Financial Bid Sheet* ma kellux jiskwalifikaha. Hi tissottometti illi s-sejħa tal-offerti ma tindikax illi jekk ma jigux offerenti l-*items* kollha minn xi offerent partikolari dan ikun skwalifikat. Fil-fehma ta' din il-Qorti, pero`, klawsola f'dan is-sens ma kienx hemm għalfejn li tiġi espressa, għax jekk is-soċjetà rikorrenti ħarġet offerta għall-268 oġġett dak li jkun irid joffri dak in-numru. Altrimenti l-awtorita` kontraenti tispicċa jkollha tieħu diversi oġġetti minn diversi offerenti, meta l-hsieb tas-sejħa għall-offerti hu li jwassal għall-kuntratt wieħed ma' persuna waħda li tkun lesta toffri kollox – ma jagħmilx sens mod ieħor.

Is-soċjetà appellanti tirreferi għall-klawsola 3.2 tas-sejħa għall-offerti li tgħid illi offerent ikun skwalifikat jekk ma joffrix "*the whole of the quantity or quantities indicated for every lot included in his submission*", izda jgħid li din il-klawsola tirreferi għall-kwantità f'kull *item*, u mhux għall-*item per se*. Din id-differenza, li qed tipprova tagħmel is-soċjetà appellant, ma tregix, għax jekk fis-sejħa għall-offerti intalab numru speċifiku ta' oġġett partikolari, jekk tħalli l-kaxxa relattiva vojta (b'mod li ma tkunx qed toffri dak l-oġġett), ir-riżultat ikun l-istess daqs li kieku toffri numru anqas minn dak mitlub. Jekk is-sejħa ma tippermettix li l-offerent jagħti biss parti mill-kwantità mitluba għal dak l-oġġett partikolari, aħseb

u ara allura kemm ser jiġi aċċettat li l-offerent jipprovdi kwantità zero għal dak il-prodott – jiġifieri ma jipprovdi xejn.

F'każ ta' prodott li ma jkunx jinsab fis-suq, il-kjarifika maħruġa wara l-ħruġ tas-sejha għall-offerti ippermettiet li jiġi indikat bħala *N/A (not available)*. Hu biss f'ċirkostanzi fejn ħadd mill-offerenti ma jkun jista' jipprovdi għal xi prodott partikolari, li dak li jkun jista' jagħmel din ir-rimarka. F'dan il-każ is-soċjetà appellanti imliet uħud mill-*items* b'din ir-rimarka, għalkemm setgħet toffrihom ta' kwalità superjuri kif kien konċess u kif għamel ħaddieħor. Il-kjarifika kienet tindika b'mod ċar li huwa biss f'każijiet fejn prodott ma jeżistix jew m'għadux jintuża, li offerent jista' jikteb *N/A* u ma jiġix ikkonsidrat bħala *technically non-complaint*. Is-sejha riedet li kemm jista' jkun, l-offerta ssir għall-*items* kollha, tant li ippermettiet lil dak li jkun joffri xi ħaġa oħra ekwivalenti jew ta' kwalità superjuri għal dak mitlub. Hu biss fejn xejn ma kien disponibbli minn ħadd, li offerent seta' jniżżel "*N/A*". Is-soċjetà appellanti ma ikkonformatx ruħha ma' dan.

Kellu wkoll fl-offerta jindika jekk l-oġġett offrut kienx *compliant* jew le, u f'każ li le jispjega għaliex. Is-soċjetà appellanti osservat u indikat fl-offerta li xi wħud mill-prodotti li offriet kienu "*non-compliant*", pero`, ma spjegatx ir-raġuni għal dan. Dan hu nuqqas ieħor tas-soċjetà appellanti.

Din il-Qorti, fis-sentenza tagħha tal-24 ta' Ġunju, 2016, fil-kawża fl-ismijiet **Transport Services for Disabled Persons Cooperative Ltd. v. Id-Direttur Generali tad-Dipartiment tal-Kuntratti et.**, enfasizzat fuq il-ħtieġa ta' konformità kważi assoluta tal-offerta ma' dak mitlub fis-sejha. Varjazzjonijiet minimi kienu aċċettabbli, pero`, li toffri biss parti minn dak mitlub, huwa nuqqas li jmur lill-hinn minn sempliċi varjazzjoni.

Fil-kuntest tal-aggravju marbut mal-offerta tas-soċjetà Aska Trading Enterprises, ghandu jingħad li l-istess sejha għall-offerti tipprovdli li wieħed jista' joffri prodotti li għalkemm ma jkunux eżatt bħal dak mitlub, ikunu ekwivalenti jew superjuri għal dak li ġie mitlub joffri, bl-offerent ikun jista' jniżżel dawk id-dettalji, kif meħtieġ. Dan hu li ġara f'dan il-każ. Wara li l-kumitat ta' evalwazzjoni qies il-prodott ipprezentat mill-offerent u ivverifika ma' dak li kien mitlub, wasal għall-konklużjoni li l-prodott li ġie offrut mis-soċjetà intimata kien jissodisfa r-rekwiziti, anzi kien superjuri meta mqabbel ma' dak li oriġinarjament ġie mitlub mill-awtorità kontraenti.

Fir-rigward tat-tielet aggravju, marbut mal-irregolarità tas-sejha, din il-Qorti tirmarka illi s-soċjetà appellanti hu biss f'dan l-istadju li qed tqajjem dan l-ilment. Fil-fatt, qatt ma kien hemm kontestazzjoni min-naħa tas-soċjetà appellanti qabel l-għeluq tas-sejha għall-offerti, u din

ippartecipat b'mod attiv fil-proċedura li jindika li kienet qed taqbel mal-kontenut tal-istess dokument.

Oltre dan, id-Direttiva tal-Unjoni Ewropea li għaliha tirreferi s-soċjetà appellanti, tippermetti deroga għaliha f'każ li l-valur tal-kuntratt ikun anqas mit-*threshold* stabbilit; fir-regoli jingħad li japplikaw biss "*to the tenders whose monetary value exceeds a certain amount*". F'dan il-każ, il-valur tas-sejha huwa ferm anqas minn dawk imsemmija fid-Direttiva u kwindi r-regoli tagħha ma japplikawx.

L-aggravji tas-soċjetà appellanti qed jiġu, għalhekk miċhuda.

Għaldaqstant, għar-raġunijiet premeżzi, tiddisponi mill-appell ta' Smart Office Supplies Limited billi tiċhad l-istess u tikkonferma s-sentenza li ha l-Bord ta' Revizjoni dwar il-Kuntratti Pubbliċi fil-5 ta' April, 2016, bl-ispejjeż kontra s-soċjetà appellanti.

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Deputat Registratur
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