

QORTI TAL-APPELL

IMHALLFIN

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

Seduta ta' nhar it-Tlieta 10 ta' Jannar 2017

Numru

Rikors numru 370/16

Waste Collection Limited

v.

Il-Kunsill Lokali Hamrun u Saviour Mifsud

Il-Qorti:

Dan hu appell imressaq fit-2 ta' Settembru, 2016, minn Saviour Mifsud, u iehor imressaq fis-7 ta' Settembru, 2016, minn Waste Collection Limited, wara decizjoni datata 17 ta' Awwissu, 2016, moghtija mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz referenza HLC/TDR/05/2015 (kaz numru 939).

Dan il-kaz huwa marbut mas-sejha ghall-offerti li hareg il-Kunsill Lokali tal-Hamrun “*for the collection of mixed household waste in an environmentally friendly manner*”. Ghal dan it-tender applikaw diversi offerenti, fosthom iz-zewg appellanti, Saviour Mifsud u Waste Collection Limited, bil-Kunsill jiddeciedi li jqies lil Saviour Mifsud bhala l-offerent preferut, bhala l-offerent li nghata “*the maximum points possible*”. Is-socjetà Waste Collection Limited ma qabltx ma din id-decizjoni u ressqet appell quddiem l-imsemmi Bord li b’decizjoni tas-17 ta’ Awwissu, 2016, laqgha l-appell tas-socjetà Waste Collection Limited, izda ordna li l-process tat-*tender* jithassar u jinhareg mill-gdid. Id-decizjoni tal-Bord hija s-segwenti:

“Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 27th January 2016, and also through their verbal submission during the Public Hearing held on the 24th May 2016, had objected to the decision taken by the Pertinent Authority, in that:

“a) Appellant Company contends that the Preferred Bidder did not possess, at the time of tendering stage, certain machinery which was compulsory, namely the Bin Washer. In this regard, Appellant maintains that the Contracting Authority did not abide by the consultant’s report wherein such a deficiency on the Preferred Bidder’s Offer was in fact highlighted.

“b) Appellant also maintains that the Preferred Bidder did not produce documented proof that the Bin Washer was paid for by the latter nor that the Bin Washer was registered in his name, prior to the closing date of the tender.

“Having considered the Contracting Authority’s ‘Letter of Reply’ dated 30th January 2016, and also the Authority’s verbal submissions during the hearings held on 24th May 2016 and 28th July 2016, in that:

“a) The Contracting Authority contends that, after having two evaluation committee members casting doubts as to the compliancy of the Preferred Bidder’s Offer, same authority engaged the services of an

expert namely Mr Raymond Pellicano, who also advised the Authority in preparation of the tender document; to prepare a report so that the evaluation process can continue. After the submission of such a report the Contracting Authority was also given assurances by the Preferred Bidder that the latter had the necessary Bin Washer.

“Reached the following conclusions:

“1. With regards to Appellant’s grievances, this Board, after having examined the relative documentation and heard submissions made by interested parties during the sittings held on 24th May and 28th July 2016, that the main issues regarding this appeal rest on two major factors and these are ‘Ownership of Bin Washer’ and special reference to the ‘Expert Report’ which are being treated as follows:

“i) Ownership of Bin Washer

“From documentation made available and from the Expert’s testimony it was clearly established that the Preferred Bidder was willing to procure the Bin Washer, provided he is awarded the tender. So that the Preferred Bidder is clearly stating that at the time of tendering, the Bin Washer was not owned by same. At the instance, this Board cannot be justifiably note that no reliable and credible documentary evidence was produced by Appellant to prove that the Bin Washes was in his possession prior to the 6th November 2015, the closing date of the tender. This Board would also mention that during the second sitting, it was presented with a commercial invoice dated 1st November 2015, which apart from the fact that it was not a fiscal invoice, same did not prove that the Bin Washer was delivered to Malta to the Preferred Bidder prior to the closing date of the tender, that is 6th November 2015. In this regard, this Board does not credibly accept that the Preferred Bidder owned and possessed the Bin Washer as at 6th November 2015.

“On the same issue of this Appeal, this Board noted that during the sitting held on 24th May 2016, the Preferred Bidder stated, under oath, that he had given Euros 13000 to the deliverer, namely a certain Mr Salvu to pay the supplier in England and deliver the Bin Washer to Malta. Mr Stephen Attard (Salvu) was called to the witness stand and during the sitting held on 28th July 2016, under oath, Mr Attard confirmed that he did not receive Euros 13000 to pay the supplier from the Appellant’s Company and his assignment was that of freight forwarded only. At the same time, Mr Stephen Attard could not confirm the date of delivery in Malta. In this regard this Board finds the Appellant’s testimony, given under oath, to be highly unreliable and not credible.

“ii) Consultant’s Report

“With regards to the issue of adherence to the Expert’s report, this Board would prudently point out that, after having heard the submissions made by the Contracting Authority and the Expert, namely Mr Raymond Pellicano, the latter of whom assisted in the preparation of the tender document, although the Contracting Authority is not bound by Law to adhere to the Expert’s advice certain deficiencies pointed out in the report should have been given due importance. This Board notes that from the Expert’s testimony, under oath, the Evaluation Committee did not heed the former’s advice in that, the Preferred Bidder was deficient in owning certain machinery, so that the evaluation committee were aware of such shortcomings and yet, this Board was informed that the evaluators relied on the documentation and assurances given by the Preferred Bidder without checking in depth the real ownership of the Bin Washer, in the absence of other mandatory documentation such as registration and Log Books. In this regard, this Board strongly feels that the evaluation process was not carried out in the proper manner, by not checking in depth ownership and other shortcomings as listed in the Expert’s report.

“2. With regards to the preferred Bidder’s contention,

- “That the deposit paid by Appellant is incorrect, this Board credibly notes that the deposit should have been €2250 and not €587 which represents the estimate value of €75000 per annum for four years at .75% as per regulation 84 clause 1 of Legal Notice 296 of 2010 in this regard, this Board upholds the preferred bidder’s grievance.
- “This Board would also refer to this preferred bidder’s allegation in that Appellant’s offer included a vehicle with a blacked – out number plate, which this Board finds very unusual. Also in this regard, this Board justifiably opines that the evaluation process was not carried out in the proper manner.

“In view of the above, this Board finds in favour of the Appellant Company and recommends that :

“a) The tender be cancelled and re-issued.

“b) The deposit paid by Appellant should be reimbursed”.

Iz-zewg applikanti milquta appellaw mid-decizjoni tal-Bord ghax isostnu, Saviour Mifsud li l-Bord ma kellux jidhol fil-meritu tal-kaz peress illi l-appell tas-socjetà Waste Collection Limited kien null u bla effett ghax ma sarx depozitu tas-somma li trid il-ligi, u Waste Collection Limited, li l-

Bord iddecieda hazin li jhassar it-*tender* ghax darba li Saviour Mifsud ma kellux jinghata l-punti li inghata, hu kellu jordna li l-kuntratt jinghata lilha.

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 din il-Qorti tara illi ghandha, fl-ewwel lok, tiddisponi mill-appell ta' Saviour Mifsud, ghax jekk ghandu ragun fis-sottomissjoni tieghu, l-appell ta' Waste Collection Limited quddiem il-Bord kellu jitqies null u ma kellux jigi kkonsidrat aktar mill-istess Bord.

Skont Artikolu 84(1) tal-Avviz Legali 296 tal-2010 (Regolamenti tal-2010 dwar il-Kuntratti Pubblici), li jinsab fit-Taqsima XIII ta' dan l-Avviz Legali u li jitkellem, b'mod generali, fuq il-procedura ghall-prezentata ta' appelli:

“....L-avviz ta' oggezzjoni ghandu jkun biss validu jekk flimkien mieghu ikun hemm depozitu ekwivalenti ghal wiehed fil-mija tal-valur stmat tal-offerta kif maghmula mill-offerent, izda f'ebda kaz m'ghandu d-depozitu jkun ta' anqas minn elf u mitejn euro (€1,200) jew izjed minn tmienjua u hamsin elf euro (€58,000)....”.

Fil-kaz, mal-appell taghha, is-socjetà Waste Collection Limited iddepozitat biss is-somma ta' €587 ghax qalet li d-depozitu kellu jkun

ekwivalenti ghal 1% tal-valur tal-kuntratt ghal sena wahda. Din il-Qorti mhux se tidhol, f'dan il-kaz, f'interpretazzjoni tal-klawzola relattiva tad-dokumenti annessi mal-hrug tat-tender, biex tara jekk id-depozitu kellux jigi kkalkolat fuq zmien ta' sena, kif tghid is-socjetà appellanti, jew fuq zmien ta' erba' snin, kif qal il-Bord, ghax ir-Regolament fuq imsemmi jiddisponi b'mod car li, f'kull kaz, id-depozitu ma ghandux ikun anqas minn €1,200. Id-depozitu ta' €587 li sar ma jissodisfax il-vot tal-ligi, u l-appell li ghamlet is-socjetà Waste Collection Limited quddiem il-Bord kellu jitqies mhux validu. Milhuqa din l-unika konkluzzjoni possibli, il-Bord kellu jieqaf hemm u mhux iqis l-appell fil-meritu. Jekk appellant ghandux jew le ragun fil-meritu tal-appell tieghu huwa immaterjali, jekk l-appell innifsu ma jkunx gie pprezentat kif trid il-ligi.

Darba li l-appell tas-socjetà Waste Collection Limited kien null, kien hekk *ab initio*, u d-decizjoni li ha l-Bord fuq appell null hija wkoll nulla u invalida. Milhuqa din il-konkluzzjoni, ifisser li l-appell ta' Waste Collection Limited quddiem din il-Qorti dwar il-meritu tad-decizjoni tal-Bord ma jistax jigi kkonsidrat u anqas milqugh.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell ta' Saviour Mifsud billi tilqa' l-istess u thassar u tirrevoka s-sentenza li ta l-Bord ta' Revizjoni dwar Kuntratti Pubblici fis-17 ta' Awwissu, 2016, u tiddeciedi li l-appell li ressqet is-socjetà Waste Collection Limited quddiem l-istess

Bord bhala irritu u null; fic-cirkostanzi, tichad l-appell tas-socjetà Waste Collection Limited.

Tordna wkoll li d-depozitu li sar mis-socjetà Waste Collection Limited ghall-appell taghha quddiem il-Bord jintilef, u li l-ispejjez marbuta ma' din il-procedura jithallsu kollha mis-socjetà Waste Collection Limited.

Silvio Camilleri
Prim Imhallel

Tonio Mallia
Imhallel

Joseph Azzopardi
Imhallel

Deputat Registratur
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