

QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tnejn 6 ta' Frar 2017

Numru 7

Appell numru 426/2016

Nexos & Co. Ltd

v.

**Id-Direttur tal-Kuntratti; Università ta'
Malta; *MST AudioVisual Limited* għal
kull interess li jista' jkollha**

1. Dan huwa appell ta' *Nexos & Co. Limited* ["Nexos"] minn deċiżjoni tat-3 ta' Ottubru 2016 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti tal-2010 dwar il-Kuntratti Pubbliċi¹ [L.S. 174.04], dwar oġġezzjoni tal-istess *Nexos* kontra deċiżjoni tal-Università ta' Malta ["l-Università"] illi kuntratt għal "*supply, delivery, installation, testing and commissioning of specialised lighting*" jingħata lil *MST AudioVisual Limited* ["MST"].

¹ Illum sostitwiti bir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku.

2. Il-fatti rilevanti seħnew hekk: saret sejha mill-Università għal offerti għall-kuntratt fuq imsemmi. Il-kondizzjonijiet tas-sejha kienu jridu li ssir offerta għal *LED engine for dimming houselights, faders for light controller* u *LED driver for LED dimming houselights*, fost ħwejjeġ oħra. Dawn it-tliet *items* partikolari ma kinux maħsuba għal kunsinna minnufih meta jingħata l-kuntratt iżda biss jekk u meta tinqala' ħtieġa għalihom. Kellhom jissem mew fl-offerti biex jiġi iffissat minn issa kemm ikun il-prezz meta tinqala' l-ħtieġa 'l quddiem.
3. Saru żewġ offerti: dik ta' *Nexos* u dik ta' *MST*, u ntgħazlet dik ta' *MST* li kienet l-orħos.
4. Saret oġġezzjoni quddiem il-Bord ta' Revizjoni minn *Nexos* b'ittra tal-21 ta' Ġunju 2016. Safejn rilevanti għall-meritu tal-appell tallum, l-ittra ta' oġġezzjoni tgħid hekk:

»... .. reference is made to the following items found in Bill 2 of the Bill of Quantities in the Call for Tenders:

- »a. Item 2.17 - LED engine for dimming houselights;
- »b. Item 2.19 - Faders for light controller;
- »c. Item 2.22 - LED driver for LED dimming house lights;

»... ..

»Items 2.17, 2.19 and 2.22 are actually spare parts for other equipment (Theatrical Light Fittings) which is being provided by a separate tendering process, that is through Tender UM1983;

»These items are also particular to the brand of equipment they service, in the sense that one cannot use spare parts intended for another brand of equipment;

»This means that Items 2.17, 2,19 and 2.22 can only be provided by the recommended tenderer of Tender UM1983, which is the complainant company;

»This fact is being submitted to highlight the fact that it is logically impossible that the Technical Offer submitted by the recommended bidder could have ever been Technically Compliant.«

5. Bid-deċiżjoni tad-29 ta' Settembru 2016, li minnha sar dan l-appell, il-Bord ta' Reviżjoni iddeċieda hekk:

»This Board,

»Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 22 June 2016² and also through their verbal submissions during the Public Hearing on 20 September 2016 had objected [*sic*] to the decision taken by the Pertinent Authority, in that:

- »a) *Nexos & Co Ltd* contend that the University of Malta was not correct in requesting spare parts for equipment relating to another Tender. In this regard, the prospective bidders needed to know the make of the equipment in order to be able to offer, in particular, items 2.17, 2.19 and 2.22.

»The Appellants claim that *MST AudioVisual Ltd* could not have quoted for spare parts which were only designed for a specific type of brand of equipment, thus being technically non-compliant.

»Having Considered the Contracting Authority's verbal submissions during the Public Hearing held on 30 September 2016, in that:

- »a) The University of Malta maintains that *MST AudioVisual Ltd* was technically compliant and that they had quoted for the spare parts referring to items 2.17, 2.19 and 2.22 so that it was their responsibility to supply the same at the quoted parts should the need arises.

»Reached the following conclusions:

- »1. This board after having examined the relative documentation and heard submissions from all the parties concerned justifiably notes that certain arguments brought forward by *Nexos & Co Ltd* were somewhat based on assumptions, in that the Appellant is insisting that *MST AudioVisual Ltd* cannot supply these parts except from the original supplier.

»In this regard, without having seen the recommended bidder's submission, the appellant is stating what might have happened which is not the case. This board has reviewed the recommended bidder's submission and can confirm that they did in fact, quote for the spare parts under reference 2.17, 2.19 and 2.22

»The tender document requested a quote and not proof of capability of supply of these spare parts. This board has firmly and credibly established that *MST AudioVisual Ltd* had quoted for these parts and was fully technically compliant.

- »2. It is to be noted that, from the submissions made by the technical engineers (under oath), it was also established that these spare parts were requested so that, if the need

² Id-data li tidher fuq l-ittra hija l-21 ta' Ġunju 2016.

arises, the supply of the same is guaranteed at a pre-established price.

»Since *MST AudioVisual Ltd* quoted for these spare parts, it will be his responsibility to supply the same at the quoted price. The purpose of the request for such parts was simply to ensure a “hedged” price, since the requirement of the same would be in the future.

»In this regard, this board opines that the University of Malta acted in a diligent manner in requesting a “quote” for these parts.

»Although *Nexos & Co Ltd* are insisting that these spare parts can only be supplied by the original maker of the equipment; it has been confirmed from the experts’ testimony that these parts can be obtained from other dealers and not from the original dealer only.

»This fact was also stressed upon by both technical experts summoned to give their testimony under oath. This board, after having heard the technical experts’ testimony, can credibly confirm that these spare parts could also be purchased from independent dealers other than the original maker. In this regard, this board does not uphold the appellant’s objections.

»In view of the above, this board finds against *Nexos & Co Ltd* and recommends that the deposit paid by the latter should not be refunded.«

6. *Nexos* ressqet appell minn din id-deċiżjoni b’rikors tal-24 ta’ Ottubru 2016 li għalih id-Direttur Ġenerali tal-Kuntratti [“id-Direttur Ġenerali”] wieġeb fil-31 ta’ Ottubru 2016 u l-Università wieġbet fil-11 ta’ Novembru 2016. *MST* ma wegħbitx bil-miktub. B’nota tal-5 ta’ Diċembru 2016 *Nexos* ċediet l-appell safejn magħmul kontra d-Direttur Ġenerali.

7. L-aggravju tal-appell ġie mfiżser hekk:

»... .. il-Bord tar-Revizjoni fid-deċiżjoni tiegħu jgħid illi l-argumenti tas-soċjetà appellanti kienu ibbażati fuq “assumptions”;

«Illi, bir-rispett kollu dovut, is-soċjetà appellanti tissottometti illi huwa proprju dan l-argument tal-oġġezzjoni u ta’ dan l-appell: Kif setgħet is-soċjetà appellata *MST AudioVisual Limited* toffri *spare parts*, b’liema prezz ikun, għal apparat li lanqas hi stess ma kienet taf, jew setgħet kienet taf, x’inhu?

»Illi dan l-argument jidher li sfugġa għal kollox lill-Bord tar-Revizjoni, illi argumenta illi l-fatt li s-soċjetà *MST AudioVisual* kwotat għal *parts* (billi

wieħed jassumi li rreferiet għalihom b'mod ġeneriku), dan kien biż-żejjed biex tiġi żgurata l-hekk imsejña *technical compliance*.

»Illi *inoltre* l-Bord tar-Revizjoni jgħid illi dawn l-*ispare parts* kienu rikjesti f'każ ta' bżonn biss u li l-prezz li offriet is-soċjetà *MST Audio-Visual Limited* kellu jiġi meqjus bħala "*hedged price*";

»Illi s-soċjetà appellanti ma taqbel xejn ma' din il-konklużjoni tal-Bord tar-Revizjoni;

»Illi biex wieħed jifhem f'termini li huma forsi aktar populist, jekk wieħed iġib l-analoġija ta' karozza, hawnhekk għandna sejña għall-offerti UM 1983 illi kienet titlob prezz ta' karozza, u l-offerent offra ditta partikolari bħal ngħidu aħna *Mercedes*. Is-sejña għall-offerti UM 1984, fost l-oħrajn, kienet titlob *spare parts* għal din il-karozza, bħal ngħidu aħna *clutch* u *brakes*;

»Illi issa hawnhekk wieħed irid iqis illi, peress li dawn is-sejñiet għall-offerti ħarġu kontemporanjament, u peress li dawn ġew mogħtija lil offerenti differenti u *cioè* UM 1983 lis-soċjetà appellanti u UM 1984 lis-soċjetà appellata, kien impossibli illi s-soċjetà appellata tikkwota l-*ispare parts* speċifiċi li kien hemm bżonn biex f'każ ta' ħsara jintramaw fuq l-apparat li qed tipprovdi s-soċjetà appellanti stess;

»Illi m'hemmx għalfejn li wieħed ikun tekniku sabiex jirrealizza illi *clutch* ta' *Mercedes* m'huwiex l-istess bħal *clutch* ta' *Toyota*;

»Illi issa hawnhekk, terġa' u tgħid, qed nitkellmu fuq apparat illi huwa ferm speċjalizzat fil-qasam tekniku awdjoviziv u li ċertament ma jistax jitħaddem b'*parts* ġenerici kif ipprova jalludi l-Bord ta' Revizjoni;

»Illi għaldaqstant dan ifisser illi l-offerta tas-soċjetà appellata *MST AudioVisual Limited* ma setgħet qatt kienet *technically compliant* u dan minħabba impossibilità ċara li hija setgħet qatt tikkwota għal *item 2.17, 2.19 u 2.22*, li fattwalment ma kinitx taf x'kellhom ikunu, aħseb u ara kemm setgħet tikkowta għalihom.«

8. Essenzjalment l-argument huwa dan: it-tliet *items* fuq imsemmija huma *spare parts* għal apparat ieħor li kienet ħarġet sejña oħra għal offerenti għalih. Meta *MST* għamlet offerta għal dawn l-*ispare parts* ma kinitx taf għal liema mudell partikolari ta' apparat kienu meħtieġa għax f'dak il-waqt ma kienx magħruf min rebaħ il-kuntratt għal dak l-apparat u għalhekk ma kinitx taf x'marka ta' *spare parts* kienet meħtieġa, u ma setgħetx tagħmel offerta għal *spare parts* li kienet għadha ma tafx ta' liema marka huma.

9. Il-qorti tosserva, qabel xejn, illi l-esperti tekniċi li għamlu l-evalwazzjoni tal-offerti kienu sodisfatti illi t-tliet *items* partikolari “huma ġeneriċi biżżejjed biex [t]jixtrihom minn *suppliers* differenti”³. Fi kliem ieħor, jekk l-apparat huwa ta’ marka partikolari magħmul minn ditta partikolari, l-*ispare parts* għalih jistgħu jkunu ta’ ditta oħra. Ma ngibitx prova li tmeri dan.
10. Aktar minn hekk iżda, l-obbligazzjoni ta’ min jirbaħ il-kuntratt hija li jissupplixi dawn l-*items* mhux issa, iżda meta jinqala’ l-bżonn għalihom, meta allura jkun jaf għal liema mudell ta’ apparat huma meħtieġa. Ukoll jekk ikunu meħtieġa *spare parts* “tad-ditta”, il-kuntrattur li jirbaħ il-kuntratt ikun obligat li jiksibhom, iqumu kemm iqumu, u jfornihom lill-Università bil-prezz li offra, ukoll jekk b’hekk jagħmel telf. Jista’ jiksibhom mingħand *Nexos* stess jekk din tkun l-*agent* tad-ditta, jew jista’ jiksibhom direttament mingħand id-ditta, jew jista’ jiksibhom mingħand fornituri oħra, ukoll jekk barra minn Malta. Mnejn jiksibhom huwa indifferenti; l-obbligazzjoni tiegħu hi li jiksibhom, iqumu kemm iqumu, u jfornihom lill-Università bil-prezz miftiehem minn issa.
11. Il-kwistjoni għalhekk ma hijiex waħda ta’ *technical compliance*, kif trid tpingiha *Nexos*, iżda ta’ riskju kummerċjali li taħt il-kondizzjonijiet tas-sejha jrid jerfgħu l-kuntrattur, mhux l-Università. *MST* effettivament, u kif riedu l-kondizzjonijiet tas-sejha, ħadet fuqha r-riskju li tikseb l-*items* meta jkunu meħtieġa bi prezz li ntrabtet bih minn issa.

³ Ara x-xieħda tal-Ing. Charles Cuschieri quddiem l-Assistent Ġudizzjarju fit-22 ta’ Diċembru 2016.

12. L-aggravju, li huwa x'aktarx fieragħ, huwa għalhekk miċħud.

13. Il-qorti għalhekk tiċħad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Revizjoni. L-ispejjeż kollha tal-appell tħallashom is-soċjetà appellanti *Nexos & Co. Limited*.

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