

QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tlieta 14 ta' Frar 2017

Numru:

Rikors Numru: 380/16

**Cateressence Limited (C-49407) u
CareMalta Group Limited (C-15462)
f'isimhom proprio u bħala eżerċenti l-kummerċ
bl-isem ta' CCE Joint Venture**

v.

- 1. Id-Direttur tal-Kuntratti għan-nom u in rappreżentanza tad-Dipartiment tal-Kuntratti;**
- 2. Is-Segretarju Permanenti tal-Ministeru għall-Familja u Solidarjeta` Soċjali, għan-nom u in rappreżentanza tal-istess Ministeru, għal kull interess li jista' jkollu;**
- 3. Il-Ministru għall-Familja u Solidarjeta` Soċjali, għan-nom u in rappreżentanza tal-Ministeru għall-Familja u Solidarjeta` Soċjali, għal kull interess li jista' jkollu;**
- 4. James Caterers Limited u Malta Healthcare Caterers Limited f'isimhom proprio u bħala eżerċenti l-kummerċ bl-isem ta' JCL & MHC Consortium, għal kull interess li jista' jkollhom;**

Dan hu appell imressaq fis-7 ta' Ottubru, 2016 mis-soċjetajiet rikorrenti Cateressence Limited u CareMalta Limited proprio et nomine, wara

deċiżjoni datata 20 ta' Settembru, 2016, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-każ referenza CT 2009/2015 (każ numru 967).

Dan il-każ huwa marbut ma' sejħa għall-offerti li ħareġ il-Ministeru intimat "*for public private partnership for the provision of comprehensive services to St Vincent de Paul long term care facility*".

Għal dan il-kuntratt intefgħu żewġ offeriti, waħda mill-konsorzja rikorrenti (CCE Joint Venture) u oħra mill-konsorzja intimata (JCL & MHC Consortium), bil-kuntratt jiġi rakkomandat li jingħata lill-añħar imsemmija konsorzju. Il-konsorzju rikorrenti appella minn din id-deċiżjoni lill-Bord, li b'deċiżjoni tal-20 ta' Settembru, 2016 cañad l-appell u ikkonferma d-deċiżjoni tal-awtorita` kontraenti. Id-deċiżjoni tal-Bord hi s-segwent:

"This Board,

"Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 3rd June 2016 and also their verbal submissions during the Public Hearing held on 23rd August 2016, had objecte3d to the decision taken by the Pertinent Authorit, in that:

- a) CCE Joint Venture contend tht, since the Tender had described the required output but left the mode and systems of delivery of same to the respective bidders, the Evaluation Board was obliged to act with transparnecey, clarity and legal certainty. The Appellant also maintains that the Public Contracts Review Board is not precluded from investigating the Evaluation procedure adopted on technical matters;
- b) The Appellant maintained that the Evaluation Board ignored the details of what was being offered by Appellant and yet again, since bidders were allowed a free hand in structuring their offer, the same Board should have asked for

clarifications where the Appellant's submissions were not clear enough. In actual fact, the Appellant was given full marks where the Tender was clear enough and deducted marks where Tender requirements were vague or unclear;

- c) CCE Joint Venture contends that, in its "*Letter of Reply*", the Contracting Authority included additional justifications which did not form part of the justifications as listed in its "*Letter of Rejection*". In this regard, the Appellant maintains that this is not allowable;
- d) The Appellant insists that certain issues which were regarded as missing or unclear were contained and explained in the manual duly submitted by same;
- e) CCE Joint Venture contends that great emphasis was placed on the "*Organization Chart*" whilst the details and expansion of the process were contained in the "*Manual*" which was ignored by the Technical Advisor of the Evaluation Board.
- f) Whilst the Contracting Authority stated, in its justifications, that the Appellant did not submit information of HACCP, the Appellant contends that he had submitted three plans, one for the Plant, one for St Vincent de Paule and another for the services for Food in the wards. In this regard as well, the Contracting Authority should have asked for clarifications.

"Having considered the Contracting Authority's "*Letter of Reply*" dated 18th August 2016 and also their verbal submissions during the Public Hearing held on 23rd August 2016, in that:

- a) St Vincent de Paule contends that although the Tender Document did not dictate the methodology of the whole process to achieve the desired output but left it to the discretion of the bidders, as long as the expected standards are taken into account by the latter; the Evaluation Board was not obliged to seek clarifications to rectify the particular bid;
- b) With regards to Appellant's alleged claim that the Contracting Authority had added on new justifications for the refusal of Appellant's bid, the Contracting Authority maintains that the reasons/justifications given in the "*Letter of Rejection*" were holistic and not individualised, so that what the Authority is doing is to explain in more detail the same justifications given in its "*Letter of Rejection*";
- c) The Contracting Authority contends that although the Evaluation Board, through its appointed expert did not delve in detail in the manual duly submitted by Appellant, the

Evaluation Board relied mostly on the “*Organization Chart*” and “*List of Employees*”;

- d) St Vincent de Paule confirm that although the plans submitted by Appellant did reflect the HACCP, the accompanying “*Organization Chart*” did not indicate the application of these standards, such as workings at the kitchen, etc.”

“Reached the following conclusions:

1. “Before treating the merits of the Contentions raised by the Appellant Company, this Board, would justifiably point out that its jurisdiction is, to assess the methodology and sequence of the Evaluation Process carried out, to ensure that there prevailed transparency, fairness and Level Playing Field. However, as per clause 85(2)(b) of the Public Procurement Regulations, this Board is also empowered to investigate any discriminatory Technical, Economic or Financial Specifications in the invitation to Tender, the contract documents or in any other document relating to the contract award procedure. In this regard, this Board, in its adjudications, will also take into consideration the Technical aspect without taking the role of an Evaluation Board. At the same instance, this same Board will also take the Technical Expert’s testimony into deep consideration.
2. “With regards to Appellant’s first and second Contentions, this Board, after having examined the relative documentation and heard submissions made by the Appellant Company and the Contracting Authority opines that, the fact that St Vincent de Paule allowed the Bidders to draft their own methodology as to how the end product will be processed and delivered, does not necessarily imply that the onus for clarifications is on the Contracting Authority. The onus remains on the prospective Bidder to seek clarifications where doubt or misunderstanding arises. In this particular case, the Authority dictated what is to be delivered with certain conditions but left the method of processing and delivering the end product to the Bidder so that it was the responsibility of the latter to seek clarifications where matters or conditions in the Tender Document were vague or unclear.

“At the same instance, this Board, after having heard submissions, finds no evidence that there existed vague or unclear conditions which might have hampered the Bidder from submitting the required end product to the Authority.

“The main and sole objective of this Tender was to provide a comprehensive catering service, ie the processing and

delivery of meals at an Old People's Home and in this regard, the Contracting Authority had to ensure that the service being proposed by the Bidders had to comply with the necessary regulations to deliver the output at a high level.

"The information stated in the Tender Document enabled the prospective bidder to formulate their own methodology of how this service can be delivered and in this regard, the Bidder had all the remedies to ask for clarifications from the Contracting Authority prior to submission of the Tender Document. The onus was on the Bidders to clear any misunderstanding or unclear items in the Tender:

"The Evaluation Board was advised by a catering expert on the Technical Issues of this Tender and from the testimony made under oath by the Technical Expert, the Appellant's offer revealed certain deficiencies when taking into account, the "*Organization Chart*" and methodology presented by Appellant.

"It has been credibly explained by the Technical Expert, that the "*Organization Chart*" duly submitted by Appellant will lead to a breach of the HACCP plan. Various examples were given during the expert's submissions which mainly dealt with items regarding "*Proposed Management and Staff*", "*Purchasing Protocol*" and "*Wet Area*". In all these areas, the Technical Expert credibly explained how such deficiencies would breach the HACCP plan. It is important to note that these deficiencies, according to the Technical Expert, on specific items, were of great importance in ensuring the output at a high level.

"With regards to the allocation of marks, this Board opines that, the fact that CCE Joint Venture was given full marks on items which were clear in the Tender Document and deducted marks on items which seemed vague or unclear does not indicate that the Tender dictated ambiguous or unclear facts/conditions. If the Appellant felt that there were items in the Tender Documents which were unclear he could have asked for clarifications prior to his submission of his offer.

"This Board also notes that the Appellant did not raise any pre-contractual concern on the unclear issues which he is alleging were present in the Tender Document. In this regard, this Board does not uphold Appellant's first and second Contentions.

3. "With regards to Appellant's Third Contention, this Board, after having examined the relative documentation, opines that the fact that the Contracting Authority gave a more expanded explanation of the justifications on why the Appellant's Bid was rejected does not, in any way, represent or depict "*additional justifications*". From the Technical Expert's testimony and the Contracting Authority's submissions it has been proved that the alleged additional justifications were part and parcel of the main justifications' headings, such as, "*Management and Staff*", "*Purchasing Protocol*" and "*Wet Area*", so that the additional explanations and comments were purely amplification of the Evaluation Report which was communicated to the Appellant with the Letter of Rejection.

"In this regard, this Board cannot find any credible evidence that the Contracting Authority submitted additional justifications and in this respect, this Board does not uphold Appellant's Third Contention.

4. "With regards to Appellant's Fourth and Fifth Contention, this Board, after having heard the Technical Expert's submissions would treat these Contentions under two separate issues as follows:

"i) Submission of Manual

"As stated in the introductory paragraph of these adjudications, this Board had to rely heavily on the testimony given under Oath by the Technical Expert duly appointed, as advisor, by the Contracting Authority.

"From his testimony, the Expert confirmed that CCE Joint Venture did submit a Manual, which depicts the method and standards through which the output product should be processed and delivered.

"It was also confirmed and established that although the Expert went through the Manual, he had not gone in detail; However the same expert established his technical opinions on the "*Organization Chart*" submitted by the Appellant.

"At this stage, one had to differentiate between a Manual and an Organization chart. A manual is a Literature wherein the procedure and guidelines of how things should be done, is laid out. Whilst an Organization chart is a detailed organisation chart whereby it is stated of how things will be done or carried out. The difference clearly illustrates that the "*Organization Chart*" shows exactly how the processing and delivery of food at St Vincen de Paule is to be achieved. In

this regard this Board opines that the basis on which technical opinions were derived was on sound and reliable grounds.

“ii) Submission of Organization Chart

“The propose whu a detailed Organization chart was requested was due to the simple fact that throught he detailed organisation chart, one can assess the number of sections through which the process will be carried, the number of personell that will be allocated for the project, their grade and qualifications and the flow of the process itself to achive the desired output.

“Through the Organization chart submitted by Appellant, the Evaluation Board could not ascertain and confirm exactly what the ppellant would be able to carry out in the Tendeered process to its required standards.

“At the same instance, this Board opines that the Evaluation Board could only assess the Appellant’s offer on what has been submitted by the latter and at the same time, the Committee was not allowed to ask for information which was either not shown or information which went in breach to the HACCP plan.

“From the submissions made by the Technical Expert, it was evidently proved that the plan submitted by CCE Joint Venture failed to reach the required standards relating to “*Management and Staff*”, “*Purchasing Protocol*”, and “*Wet Area*”.

“At the same time, the Appellant Company failed to prove otherwise, that is, it conforms to all the Technical Requirements of the Tender Document. In this regard, this Board does not uphold Appellant’s Fourth and Fifth Contention.

5. “With regards to Appellant’s Sixth Contention, again, when one refers to the plans submitted, no reference was made to the “*Lift Installation*”, “*Drains Installation*”, “*Lighting Protection System*”, “*Bathroom Pull Chord Alarm*” and the PA system. Although the said items might have been included in the Appellant’s submissions, the Contracting Authority could not identify the presence of the same.

“If the plans for the maintenance of these four important issues were not submitted by Appellant, the Contracting Authority could not ask for clarifications on missing

documentation. In this regard, this Board does not uphold Appellant's sixth Contention.

"In view of the above, this Board finds against CCE Joint Venture and recommends that the deposit paid by the latter should not be reimbursed."

L-imsemmija konsorzju rikorrenti issa qed tappella mid-deċiżjoni li ħa l-Bord għal quddiem din il-Qorti għax issostni illi huwa kien ħaqqu jirċievu aktar marki minn dak li tah il-kumitat tal-għażla.

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

Ikkonsidrat:

Tajjeb jingħad fil-bidu li l-għażla f'dan il-każ kellha ssir fuq il-kriterji tal-*Most Economically Advantageous Tender (MEAT)*, li jfisser li l-evalwazzjoni tkun maqsuma fi tnejn: jingħataw punti fuq il-bażi teknika tal-offerta, li jkunu jiswew għal 60% tal-punti finali, u punti oħra fuq l-aspett finanzjarju tal-offerta, liema punti jiswew għal 40% tal-kriterju finali. L-ewwel jinħadem il-puntegġ fuq il-parti teknika, mbagħad irid jinħadem il-puntegġ fuq il-parti finanzjarja. Jekk għall-parti teknika, offernet ma jilħaqx il-marka ta' 50 minn 100, dan ma jkunx jista' jgħaddi għall-istadju finanzjarju. F'dan il-każ, kif ingħad, saru żewġ offerti li ġew evalwati mill-kumitat tal-għażla magħmul minn persuni mqabbda mir-

residenza ta' San Vinċenz de Paule, li kienu megħjuna minn żewġ esperti tekniċi. Meta dan il-kumitat temm l-evalwazzjoni tal-parti teknika, inħareġ riżultat li ta 96 punt minn 100 (*technical score* ta' 60%) lill-konsorzju intimat, u 82 punt minn 100 (*technical score* ta' 51.3%) lill-konsorzju appellanti. Mar-riżultat kien hemm ukoll tabella li kienet tagħti spjegazzjoni ta' kif ġew mogħtija l-punti lil kull wieħed minn dawn iż-żewġ konkorrenti. F'ħafna oġġetti l-konsorzju appellanti ġab punti massimi, pero`, kien hemm erba' oġġetti oħra li fihom ingħataw anqas punti.

Il-konsorzju appellanti tilmenta mit-tnaqqis ta' punti li ngħatat f'dawn il-każi.

Dan il-konsorzju ressaq diversi ilmenti fil-kuntest tad-deċiżjoni tal-Bord li, komplessivament, jolqtu l-apprezzament tal-provi minnu magħmul.

Qabel ma jiġi trattat il-meritu, din il-Qorti sejra titratta żewġ ilmenti preliminari mressqa mill-konsorzju appellanti.

Fl-ewwel lok tilmenta li l-Bord, fid-deċiżjoni tiegħu, ma pproduciex ix-xiehda kollha mismugħa, iżda biss sinteżi. Hija prattika quddiem il-Bord li xhieda li tinstema' viva voce ma tiġix traskritta, iżda tiġi rekordjata, bil-Bord jagħmel sinteżi ta' dak li jisma'. Ma hux mistenni li l-Bord, pero`, fis-sentenza tiegħu jirreferi għal kull parti mix-xhieda li jisma'. Kif intqal fil-kuntest tal-qradi ordinarji, "*il-Qorti m'hijiex tenuta li tindika fis-sentenza*

I-provi kollha li hi ikkonsidrat fl-apprezzament tagħha, u huwa biżżejjed li tissenjala l-motivazzjoni li a baži tagħha tkun waslet għall-konkluzjoni tagħha” – Borg v. Borg, deċiża minn din il-Qorti fil-31 ta’ Ottubru, 2014. Ma hux mistenni ili l-Bord joqgħod jindika x-xhieda kollha li xehedu, u lanqas ma jkun qed jonqos mid-doveri tiegħu jekk il-Bord jagħżel li, fid-deċiżjoni, jipproduci parti mix-xiehda. Dak li hu importanti hu li d-deċiżjoni tkun waħda li ssegwi u tirrifletti l-ħsieb tal-Bord.

Fit-tieni lok, wieħed irid japprezza li meta jkun każ ta’ kriterji tal-MEAT, ikun irid jingħata piż mhux biss lill-prezz imma wkoll lill-aspetti tekniċi tal-offerta. Dan l-añħar aspekt jinvolti neċessarjament opinjonijiet soġġettivi. Hu importanti li l-offerenti jkunu jafu liema huma l-elementi li bilfors iridu jiffurmaw parti mill-offerta tagħhom, u jingħataw indikazzjoni ta’ liema elementi ser ikunu l-aktar importanti waqt l-evalwazzjoni.

Dan kollu, pero`, ma jfissirx illi biex il-proċess tal-MEAT ikun wieħed ġust wieħed irid jikkwantifika bl-eżatt u b’mod konkret kif wieħed igib kull marka. Tabilhaqq ikun hemm każijiet meta d-dmir funzjonali jikkompreni l-użu ta’ diskrezzjoni tal-persuna li fuqha huwa impost dover. Hemm ċirkostanzi fejn wieħed ma jistax jagħmel normi oġġettivi minħabba li ċ-ċirkostanzi jkunu tant fluwidi u kangianti li ma jippermettux ir-rigidita` neċessarja tan-norma oġġettiva. F’każijiet bħal dawn l-evalwazzjoni ta’ bilfors trid tkun soġġetta għall-ġudizzju prudenti u diligenti tal-evalwaturi.

Mhux komputu ta' din il-Qorti li tidhol biex teżamina jekk, għal xi oġġett partikolari, il-konsorzju appellanti kienx ħaqqu xi punt jew tnejn aktar. Din hi Qorti ta' reviżjoni li dak li trid tara huwa jekk il-kumitat evalwattiv segwiex il-kriterji stabbiliti u jekk mexiex mal-parametri indikati fis-sejħa għall-offerti. Din il-Qorti ma tistax tfettaq dwar kif ingħataw il-marki individwali, speċjalment meta tqis li l-offerta tal-konsorzju appellanti ġia ġie eżaminat u mistħarreġ għal darbtejn.

Din il-Qorti trid tirrimarka wkoll, fid-dawl ta' kummenti mill-konsorzju appellanti li d-dokumenti tas-sejħa ma kienux qed jitolbu għall *manager* tal-*quality control and assistance* li dan irid bilfors ikun *full time*, li għalkemm dan huwa minnu, hu raġjonevoli li min joffri din il-posizzjoni fuq bazi *part time* jingħata punti anqas. Operatur ekonomiku li jrid jipprepara aktar minn elf ikla kuljum lil numru kbir ta' anzjani, ma jkunx qed ikun serju jekk jippretendi li b'persuna responsabbli mill-kontroll tal-kwalita` u l-assigurazzjoni tal-ikel u iġjene, impjegat fuq bażi *part time*, ikun jista' jissorvelja u jiżgura li l-kriterji meħtieġa jiġu mħarsa u segwiti minn dawk kollha involuti fl-operazzjoni. Persuna fuq bażi *part time* ma tkunx tista' tissorvelja l-proċess kollu tal-operazzjoni, sa minn qabel ma l-ikel jitwassal San Vincenz, u dan anke biex jara li jiġu esklużi riskji ta' *cross contamination*.

Meqjusa issa l-aggravji tal-konsorzju appellant, dan fl-ewwel lok jikkritika lill-Bord li straħ ħafna fuq ix-xieħda tal-espert John Cassar. Tajjeb li

jingħad li dan kien l-uniku xhud li tressaq quddiem il-Bord u l-konsorzju appellant ma deherlux li kellu jressaq xhieda biex isostnu l-każ tagħhom jew biex jikkontradixxu l-punti li fuqhom xehed dan ix-xhud. Dan ix-xhud spjega li hu eżamina d-dokumenti kollha li ġew sottometti mill-appellanti u li qies ukoll li l-HACCP (*Hazard Analyses Critical Control Plan*) manual li ressqu dan il-konsorzju. Dan il-manual (li skont il-konsorzju appellant ma ġiex meqjus mix-xhud) ma jgawdi ebda dritt ta' preċedenza fuq id-dokumentazzjoni l-oħra.

Dan il-manual kien jesprimi l-principji u l-miri li riedu jintlaħqu biex l-ikel jasal għand ir-riċipjent mingħajr kontaminazzjoni. Kellu jkollu miegħu *organogram* u *flow chart* li kellhom jindikaw b'mod prattiku l-persuni involuti fil-proċess u kif dan il-proċess kien sejjer jiġi implementat. Dawn id-dokumenti flimkien kellhom ikunu eżawrenti. Kif, pero`, xehed John Cassar,

“... .. from the information provided he could not be certain that the method of processing afforded ease of mind. In the organisation chart there was no information on how the cooking process was being undertaken in the kitchen. The same can be said of the preparation of the products before cooking started. The organisation chart failed to show who was doing what and doubts were raised that there was indicated no assignment of responsibility and that therefore anyone could be doing a particular task but not an identifiable employee. This afforded no guarantee of non-cross contamination.”

Għall-kumitat tal-għażla (li tajjeb jingħad, ma kienx kompost minn dan ix-xhud biss) l-istruttura organizzattiva suġġerita kienet tindika ċertu defiċjenzi. Il-problema, għalhekk, ma kenitx il-HACCP manual, iżda li l-implimentazzjoni prattika tiegħu, kif suġġerit, ma kienx jagħti serħan ta'

moħħ li l-iskop tal-manual kien sejjer jiġi milqugħ. Hekk, per eżempju, il-konsorzju appellant qatt ma spjegaw fejn, kif, min minn u meta kien ser isir il-proċess relatat mat-tindif, tqattiegħ u ipproċessar tal-ħxejjex, frott frisk, ħut, laħam u ħelu, la waqt l-istadju tal-preparazzjoni u lanqas waqt l-istadju tal-produzzjoni. L-HACCP manual waħdu ma jagħtix stampa ċara tal-operazzjoni li kien sejjer iwettaq il-konsorzju appellant u ried jinqara maċ-*charts* li kellhom jiġu ippreżentati u li kellhom juru kif, fil-konkret, il-ħsieb tal-manual kien sejjer jitwettaq. L-evalwazzjoni ssir wara li jitqies kollox, u, f'dan il-każ, il-kumitat tal-għażla ma qiesx li l-organizzazzjoni ssuġġerita kien jistħoqqilha punti massimi. Din il-Qorti, wara li qieset l-atti kollha, ma tarax li tressqulha konsiderazzjonijiet serji biżżejjed biex tvarja dan l-*assessment*.

Bit-tieni aggravju tiegħu, il-konsorzju appellant jikkontesta b'mod individwali kull deċiżjoni fejn il-kumitat tal-għażla iddeċieda li jnaqqas xi marka. Ġia` ingħad li mhux komputu ta' din il-Qorti li tidħol f'eżami mirqum tal-kontenut tal-offerti, u ma tistax tissostitwixxi d-diskrezzjoni tagħha għal dak tal-kumitat tal-evalwazzjoni, li kellu żewġ esperti jassistuh. Anke l-Bord daħal fid-dettal biex jeżamina l-ilmenti tal-konsorzju appellant, u għalkemm il-motivazzjoni tal-Bord mhix xi waħda twila, huwa eżamina u iddeċieda fuq l-aggravji tal-appellant, li, jista' jingħad, jirreduċu ruħhom fi kritika ta' opinjoni. Il-konsorzju appellant ġia` kellu "*two bites at the cherry*", u dan min-nies kompetenti fil-materja, u

din il-Qorti ma tarax li għandha teżamina l-lanjanzi aktar milli fil-qosor u għal dak li hu rilevanti.

Trattati l-ilmenti b'mod individwali, din il-Qorti tara li dawn ma humiex misthoqqa. Hekk, dwar il-persuna inkarigata mid-*dishing out*, l-appellanti ipproponiet li dan isir minn *kitchen helper*, li hu persuna jgħin fit-tindif tal-kċina. Li tafda lil dan l-istess persuna bit-tqassim tal-ikel, tkun qed tirriskja u hu għalhekk li ma għabix marki għolja fir-rigward. Hekk ukoll, l-appellanti flok *head chef* offriet *chef production*, li mhux l-istess. Dan juri kemm il-preparazzjoni tal-*organogram* ma kienx preċiż u kellu nuqqasijiet li kellhom iwasslu għal tnaqqis fil-punti. Kien mistenni wkoll li l-konsorzju appellant jiggerantixxu li jixtru prodotti biss mingħand dawk il-fornituri li huma akkreditati u li jiggerantixxu speċifikazzjonijiet dettaljati u korretti tal-prodotti li jiġu mitluba u konformi mar-regoli tal-HACCP. Skont dak iddikjarat fil-manual tiegħu, il-konsorzju appellant kien se jkun hu stess li sejjer juża s-sistema ta' verifika u ta' kontroll biex jevalwa u jiċċekkja il-kwalita` u l-affidabbilita` tal-prodott mixtri.

Jingħad ukoll li dan isir skont iċ-ċirkostanzi u s-sitwazzjoni tal-mument fir-rigward tal-prodott lokali, li jista' jagħti x'jifhem li din il-verifika tkun waħda sparodika, bi ħsara għall-ħtiġijiet tal-anzjani.

L-awtoritajiet governattivi ħallew f'idejn kull offerent biex joffri l-pakkett tekniku skont ir-riżorsi tiegħu. Jekk dan il-pakkett hu nieqes f'ċerti

dettalji, il-kumitat tal-għażla ma jistax jiġi mčanfar għax sab li l-pakkett kien nieqes mid-dettal. Kif qalet din il-Qorti fil-kawża **Steelshape Ltd. v. Direttur tal-Kuntratti**, deċiż fis-7 ta' Awwissu, 2013, dak li offerent irid jgħid jew joffri, jrid ikun speċifikat fl-offerta, u ma għandux jippretendi li jingħata opportunita` li jirranġa jew iżid mal-offerta. L-offerta tal-appellant kienet tiggarantixxi *minimum standards*, li bilfors iwassal għal tnaqqis fil-punti.

Hekk ukoll, l-offerta tal-konsorzju appellant ma tiggarantixxix li sejjer jiġi eżerċitat kontroll strett f'kull ħin u f'kull mument fuq dak kollu li jinxtara u jintuża tul il-preparazzjoni, il-produzzjoni u t-tqassim tal-ikel fil-kontenituri u fit-*trolley dollies*. Dan ma jistax jiggarantixxi *total traceability* f'każ li jinqala' xi inċident ta' *cross contamination* jew *food poisoning*.

Kuntrarjament għal dak li jissottometti l-konsorzju appellant, ma jirriżultax li ġew ippreżentati *flow charts* dwar *purchasing protocols*.

Fil-kuntest tal-*Food Production System*, qatt ma ġiet ippreżentata *floor plan* tal-kċina, u ma hemmx referenza għas-sistema fil-HACCP manual. Kien hemm nuqqas ukoll li ma jissemma' xejn fuq il-*hot kitchen*. Dwar il-*bar coding*, jidher li sar tnaqqis ta' punti peress li ma hux ipprovdut għal kull tip ta' ikel li jidħol fl-imħażen. Il-linja ta' produzzjoni hija nieqsa

mid-dettal, b'mod li dak ipprezentat jista' jagħti x'jifhem li l-affarijiet ser isiru skont il-ġurnata u kif jinħass il-bżonn, mingħajr struttura stabbilita.

Dwar il-manutenzjoni, il-konsorzju appellant joffri perjodi ta' tlett xhur, sitt xhur u anke sena, li huma tali li, fil-fehma tal-Qorti, jkabbru r-riskju li jkun hemm ħsara li tibqa' għaddejja mingħajr ma din tiġi verifikata fil-ħin.

Kollox ma' kollox, din il-Qorti tara li l-kumitat ta' evalwazzjoni kien raġjonevoli fil-ġudizzju tiegħu, u kellu raġunijiet validi biex ma jassenjax marki massimi lill-konsorzju appellant. Kumitat bħal dan irid jingħata ċerta flessibilita` biex ikun jista' jwettaq dmiru, u l-fatt li offerent ma jaqbilx ma' ċerti marki mogħtija, ma jfissirx li l-istess għandhom jiġu skartati.

Kif osservat il-Qorti Ewropea tal-Ġustizzja fil-każ **TNS Dimarso NV v. Vlaams Gewest**, deċiż fl-14 ta' Lulju, 2016 (każ numru C-6/15):

“The Court has held that an evaluation committee must be able to have some leeway in carrying out its task and, thus, it may, without amending the contract, award criteria set out in the tender specifications or the contract notice, structure its own work of examining and analysing the submitted tenders.

“The leeway is also justified by practical considerations. The contracting authority must be able to adapt the method of evaluation that it will apply in order to assess and rank the tenders in accordance with the circumstances of the case.”

Dak li hu importanti hu li l-offerti jiġu evalwati bl-istess metodu u f'siekb, u mhux każ jiġi trattat mod u każ ieħor b'aktar leġġerezza. F'dan il-każ, ma jidherx li sar xi ħaġa hekk u l-offerti ġew trattati bl-istess mod u bl-applikazzjoni tal-prinċipju ta' trasparenza.

Isegwi, għalhekk, li l-ilmenti tal-konsorzju appellanti ma jirriżultawx ġustifikati.

Hu ovvjw wkoll li r-regoli tal-*"weighting"* li japplikaw għal kull kriterju, għandhom, fil-prinċipju, jkunu pre-stabbiliti u jinġiebu għall-attenzjoni ta' kull min hu interessat, iżda r-raġunijiet għall-applikazzjoni ta' dan il-*"weighting"*, jistgħu ikunu varji u mhux bilfors marbuta ma' tip wieħed ta' kriterju. F'dan il-każ, is-soċjeta` appellanti ma ġietx skwalifikata, u jidher li ssodisfat is-*selection criteria* biex tkun tista' tikkompeti, pero`, dan ma jfissirx li, fl-għoti tal-punti, waqt l-evalwazzjoni teknika tal-offerti, ma jistax jittieħed in konsiderazzjoni wkoll ta' ċerta kriterji li setgħu intużaw biex is-soċjeta` appellanti ġiet magħżula biex tikkompeti. Fil-każ **Lianakis and Others**, deċiż mill-Qorti Ewropea tal-Ġustizzja fl-24 ta' Jannar, 2008 (każ numru C-532/06), li ma kenitx tittratta materja bħal każ in eżami, intqal li għalkemm id-Direttiva tal-Unjoni Ewropea li fuqha l-liġi Maltija hija bażata,

"... .. does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously,"

fir-realta` ż-żewġ proċeduri huma regolati b'regoli differenti. Jibqa' l-fatt, pero`, li fid-dawl tal-flessibbilita` li jgawdi l-kumitat ta' evalwazzjoni, dak li intqal qabel ma jistax jiġi eskluż. Il-proċess hu wieħed, għalkemm komplessiv, u din il-Qorti hija tal-fehma li dak li sar f'dan il-każ jissodisfa l-kriterji tal-liġi fil-materja.

Għaldaqstant, għar-raġunijiet premessi, tidisponi mill-appell interpost mis-soċjetajiet Cateressence Limited u CareMalta Group Limited proprio et nomine billi tiċġad l-istess u tikkonferma d-deċiżjoni li ta l-Bord ta' Revizjoni dwar il-Kuntratti Pubbliċi fl-20 ta' Settembru, 2016 f'dan il-każ, bl-ispejjeż kontra l-istess soċjetajiet appellanti *in solidum*.

Silvio Camilleri
Prim Imħallef

Tonio Mallia
Imħallef

Joseph Azzopardi
Imħallef

Deputat Reġistratur
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