

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 20 ta' Frar 2017

Numru 2
Appell numru 450/2016

Zombor Enterprises Ltd

v.

**Direttorat Proġetti u Żvilupp u
*Road Construction Company Limited***

1. Dan huwa appell ta' *Zombor Enterprises Limited* ["Zombor"] minn deċiżjoni tal-11 ta' Ottubru 2016 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2010 dwar il-Kuntratti Pubbliċi¹ [L.S. 174.04], dwar oġġezzjoni tal-istess *Zombor* kontra deċiżjoni tad-Direttorat Proġetti u Żvilupp ["id-Direttorat"] illi kuntratt għal "*hire of transport services of a reefer container between Malta and Gozo*" jingħata lil *Road Construction Company Limited* ["*Road Construction*"]. Ir-reefer container li għandu jingarr mill-kuntrattur huwa maħsub għall-ġarr ta' karkassi ta' bhejjem.

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

2. Il-fatti rilevanti seħnew hekk: saret sejha mid-Direttorat għal offerti għall-kuntratt fuq imsemmi. Il-kondizzjonijiet tas-sejha iġidu illi “*The sole award criterion will be the price. The contract will be awarded to the cheapest priced tender satisfying the administrative and technical criteria*”².
3. Saru żewġ offerti: dik ta’ *Zombor* u dik ta’ *Road Construction*, u ntgħażlet dik ta’ *Road Construction* li kienet l-orħos. B’ittra tat-30 ta’ Ġunju 2016 *Zombor* ġiet mgħarrfa illi l-kuntratt kellu jingħata lil *Road Construction*.
4. Saret oġġezzjoni quddiem il-Bord ta’ Revizjoni minn *Zombor* b’ittra tas-6 ta’ Lulju 2016. Safejn rilevanti għall-meritu tal-appell tallum, l-ittra ta’ oġġezzjoni tgħid hekk:

»... .. l-offerta ta’ *Road Construction Co. Ltd* ma kellhiex tiġi kunsidrata u kellha tiġi skwalifikata billi rriżulta li l-kumpannija kemm fi żmien li xeħtet l-offerta tagħha u sallum għad m’għandha l-ebda permess sabiex iġġorr u tidhol bil-karkassi mejta l-biċċerija ta’ Malta. Din kienet kondizzjoni *sine qua non* tat-tender u n-nuqqas tagħha kellha twassal biex tinvalida l-offerta u l-bord kellu jikkunsidra dan in-nuqqas qabel il-prezz kienet kemm kienet orħos l-offerta mixħuta mill-offerta tal-klijenta tiegħi.

»Barra minn hekk irriżulta wkoll li l-applikant magħżul mhuwiex mgħammar bil-makkinarju adatt għax-xogħol li għalih xeħet l-offerta tiegħu u dan in-nuqqas jagħti lok biex ix-xogħol ma jsirx b’mod professjonali u b’effiċjenza bħalma kien isir sallum. In-nuqqas ta’ *box loaders* min-naħa ta’ *Road Construction Co. Ltd* biex il-karkassi jiġu mgħobbija fil-friża ser iwassal għal nuqqas ta’ effiċjenza li kienet tingħata sallum.«

5. Bid-deċiżjoni tal-11 ta’ Ottubru 2016, li minnha sar dan l-appell, il-Bord ta’ Revizjoni iddeċieda hekk:

² Section 1, para. 9.1 tal-kondizzjonijiet tas-sejha.

»This Board,

»Having noted the appellant's objection, in terms of the "reasoned letter of objection" dated 6 July 2016 and also through their verbal submissions during the public hearing held on 4 October 2016 had objected [*sic*] to the decision taken by the pertinent authority, in that:

- »a) *Zombor Enterprises Ltd* contend that the recommended bidder did not possess the necessary permits for the transportation of carcasses from Xewkija, Gozo to the Abattoir in Malta at the time of tender submission;
- »b) *Zombor Enterprises Ltd* also maintain that the recommended bidder did not have the necessary transportation equipment to deliver these carcasses in conformity with all the sanitary regulations. In this regard, the appellant contains [contends?] that the evaluation board was not aware of this deficiency.

»Having considered the contracting authority's "letter of reply" dated 22 September 2016 and also their verbal submissions during the public hearing held on 4 October 2016, in that:

- »a) Ministry for Gozo maintain that there was nowhere in the tender document which stated that the bidders had to have the necessary permits. In this regard, the contracting authority informed the Public Contracts Review Board that any such permits can be obtained within 15 days;
- »b) Ministry for Gozo insist that the evaluation board were assured that *Road Construction Co Ltd* had the necessary equipment and vehicles to carry out the tendered works.

»Reached the following conclusions:

- »1. With regards to *Zombor Enterprises Ltd's* first grievance, this board after having examined the conditions laid out in the tender document justifiably acknowledges the fact that the latter did not request the bidders to present the necessary permits for the transport of carcasses from Gozo to Malta.

»In this regard, the evaluation board followed the laid-out conditions of the tender document. In tenders of this kind, it is the responsibility of the bidders to ensure that he has all the necessary permits to operate the tender works.

»In this instance, the onus of having the necessary permits should not be shifted to the evaluation board. The latter is constituted to assess what has been submitted and whether such submissions are in accordance with the conditions dictated in the tender document.

»In this regard, this board credibly opines that to carry out the tendered works, certain permits are necessary and that *Road Construction Co. Ltd* is in duty bound to obtain these permits prior to the commencement of the tendered works.

»From submissions made, this board notes that this permit is a usual normal requirement for operators in this field of

work, so that in the absence of the permit the contractor cannot operate.

»At the same instance, this permit can be easily issued by the relative authority within a short period of 2 weeks, so that the non-possession of a permit at the time of submission of the tender document does not handicap the prospective bidder from making his submissions.

»In this regard, this board does not uphold *Zombor Enterprises Ltd's* first grievance.

- »2. With regards to the appellant's second grievance, this board opines that *Road Construction Co. Ltd* had made his submissions and assurances about the equipment and vehicles that were to be deployed for this tender and in this case the evaluation board was satisfied with the equipment being offered, whether owned or hired, and that these were in accordance with the requirements of the tender; hence the evaluation board assessed on what has been submitted.

»This board opines that it is the obligation of the recommended bidder to abide by the conditions and regulations as stipulated in the tender document.

»On the other hand, it is up to the Ministry for Gozo to monitor and ensure that the recommended bidder carries out the tendered works in accordance with the requisites of the tender; otherwise, remedial action is available. In this regard, this board does not uphold the appellant's second grievance.

»In view of the above, this board finds against *Zombor Enterprises Ltd* and recommends that the deposit paid by the appellant should not be refunded.«

6. *Zombor* ressqet appell minn din id-deċiżjoni b'rikors tal-31 ta' Ottubru 2016 li għalih *Road Construction* wieġbet fil-11 ta' Novembru 2016 u d-Direttorat wieġeb fl-14 ta' Novembru 2016.
7. Il-qorti tosserva, qabel xejn, illi għalkemm *Road Construction*, bħala l-kuntrattur magħżul, għandha interess manifest fl-eżitu ta' dawn il-proċeduri, tant illi kienet ukoll notifikata bl-atti u wieġbet għar-rikors tal-appell, isimha ma jidhirx fl-*occhio* tal-appell. Għalhekk, sabiex jitneħħa kull dubju, il-qorti tordna illi fl-*occhio* tal-appell, wara l-kelmiet

“Direttorat Proġetti u Żvilupp” jżiedu l-kelmiet “u *Road Construction Company Limited*”.

8. Ngħaddu issa għall-appell ta' *Zombor*. L-aggravju tal-appell hu illi l-offerta ta' *Road Construction* ma issodisfatx żewġ kondizzjonijiet tas-sejha għal offerti. Dwar l-ewwel kondizzjoni r-rikors tal-appell iġħid hekk:

»... .. waħda mill-kondizzjonijiet tat-*tender* kienet li l-kuntratt jingħata lill-applikant li jifja' l-orħos offerta u li ikun issoddisfa l-kriterji kollha amministrattivi u tekniċi. Is-servizz mitlub kien il-ġarr ta' *container chiller* tal-ġoxrin pied bil-karkassi tal-annimali mill-Biċċerija ta' Għawdex għal *Marsa Thermal Treatment Facility*. Amministrattivament ebda *container* bil-karkassi mejta ma jista' jiddaħhal fil-*Marsa Thermal Treatment Facility* jekk mhux bil-permess speċjali approvat lit-trasportatur bil-quddiem mill-*Environment Resources Authority*. Il-fatt li din ma kinitx kondizzjoni espliċita fit-*tender*, kienet bla dubbu kondizzjoni impliċita billi t-trasport mitlub kien destinat li kull *container chiller* jiddaħhal fil-*Marsa Thermal Treatment Facility* biex il-karkassi tal-annimali jinħarqu hemm. Għalhekk teknikament billi l-kumpanija *Road Construction Co. Ltd* ma kellhiex dan il-permess ma kinitx tissoddisfa dan il-kriterju amministrattiv. Kien biss l-appellant minn fost iż-żewġ offerti li saru li kien jissodisfa dan il-kriterju amministrattiv. Dawn il-*containers* jingħarru ta' kuljum minn Għawdex għal Malta u ma jagħmel ebda sens li offerent jagħmel l-offerta tiegħu meta kien priv minn dan il-permess meħtieġ senz'altru biex kull *container chiller* jiġi amess fil-*Marsa Thermal Treatment Facility*. Teknikament is-servizz ma setax jingħata mill-offerent rakkomandat sakemm jinħariġlu l-permess mill-*Environment Resources Authority*, liema permess ma huwiex wieħed awtomatiku. Għalhekk f'dan ir-rigward l-offerent rakkomandat ma kienx jissodisfa l-kriterji amministrattivi u tekniċi kollha, Bid-dovut rispett l-esponenti ma jaqbilx mad-deċiżjoni tal-bord li dan il-permess seta' jinkiseb wara u teknikament kull applikant ried ikun f'posizzjoni li jissoddisfa dan il-kriterju amministrattiv billi jagħti prova tal-kapaċità teknika tiegħu mal-applikazzjoni kif jitlob ir-regolament 52 ta' L.S. 174.04 b'waħda jew aktar mill-mezzi hemm elenkati.«

9. Kif sewwa josserva *Zombor* fir-rikors tal-appell, il-kondizzjoni li kuntrattur ikollu l-permessi meħtieġa ma tissemmiex fil-kondizzjonijiet tas-sejha. Dan, naturalment, ma jfissirx illi kuntrattur jista' jwettaq il-kuntratt jekk ma jkollux il-permessi meħtieġa; ifisser biss illi ma kienx meħtieġ, biex tista' ssir offerta, illi dak il-permess ikun ġà nkiseb fil-

waqt li tintefa' l-offerta. *Zonbar* tippretendi illi l-offerta ta' *Road Construction* kellha titwarrab għax ma kellhiex il-permess meta tefgħet l-offerta; ladarba iżda ma kinitx kondizzjoni tas-sejha li l-permess ikun għa' nkiseb f'dak il-waqt, l-offerta ma tistax titwarrab għar-raġuni biss li ma tħarsitx kondizzjoni li ma kinitx fost il-kondizzjonijiet tal-offerta.

10. Din il-parti tal-aggravju hija għalhekk miċħuda.

11. Dwar it-tieni kondizzjoni li *Zonbar* tgħid li ma tħarsitx, ir-rikors tal-appell igħid hekk:

»Illi kondizzjoni oħra tat-tender kienet li "*the service provider shall also provide for the loading and unloading of the container on both sides*". Skont it-tender għalhekk ma kienx meħtieġ biss li l-offerent ikollu biss żewġ *trucks* iżda jeħtieġ ukoll li jkun mġhammar b'dak it-tagħmir meħtieġ biex jgħabbi l-container chiller mill-art għal fuq it-truck fil-Biċċerija ta' Għawdex u jhott it-truck fl-art meta jasal fil-Marsa Thermal Treatment Facility. Min fassal il-kondizzjonijiet tat-tender minkejja li talab minimu ta' żewġ trakkijiet biex iġorru l-container chiller mill-Biċċerija tax-Xewkija Għawdex għal Marsa Thermal Treatment Facility ma pprova xejn però kif l-istess container chiller ser jitgħabba u jinħatt minn fuq it-truck minkejja li din għamilha kondizzjoni wkoll fit-tender li s-service provider irid jipprovdi għat-tgħabbija u ħatt tal-container fiż-żewġ postijiet. L-esponenti ġab prova li huwa mġhammar b'żewġ low loader trucks ukoll fil-lista tal-makkinarju li ġiet sottomessa. L-offerent rakkomandat ma ssottometta ebda prova li huwa sa jkun mġhammar b'dan it-tip ta' makkinarju fiż-żewġ postijiet li huwa meħtieġ biex kull container chiller jitgħabba fuq it-truck u jinħatt minn fuq it-truck. Teknikament għalhekk l-offerta tal-offerent rakkomandat ma kinitx tissodisfa il-kriterji tekniċi kollha.«

12. Dan l-aggravju huwa x'aktarx fieragħ.

13. Il-kondizzjonijiet tas-sejha taħt ir-rubrika *Equipment* igħidu biss illi:

»In order to have the transport service guaranteed in case of breakdown of the truck, the contractor shall give evidence that s/he has at least two trucks at his/her disposal.³«

³ Section 4, para. 5.3 tal-kondizzjonijiet tas-sejha.

14. Ma jsemmu ebda *side loader* jew *box loader*. Imbagħad, fid-dokument imħejji mid-Direttorat biex jimtela' mill-oblatatur bid-dettalji tal-offerta, fil-parti li trid lista ta' *equipment proposed and available for the performance of the contract*, hemm indikazzjoni illi dan it-tagħmir jista' jkun *owned* jew *hired*. Fil-fatt *Road Construction* indikat illi, barra tagħmir ieħor bħal *cranes*, *tractor units* u *flat bed trailer* li huma proprjetà tagħha, għandha wkoll *side lifter* mikri. L-Ing. Jeffrey Muscat, president tal-kumitat li għamel l-evalwazzjoni teknika tal-offerti, xehed quddiem il-Bord ta' Revizjoni illi dan it-tagħmir huwa biżżejjed għall-għanijiet tal-kuntratt.
15. Billi għalhekk ma huwiex minnu illi l-offerta ta' *Road Construction* ma tissodisfax il-kriterji tekniċi, din il-parti tal-aggravju wkoll hija miċħuda.
16. Il-qorti għalhekk tiċċad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Revizjoni. L-ispejjeż kollha tal-appell tħallashom is-soċjetà appellanti *Zombor Enterprises Limited*.

Silvio Camilleri
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