

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 27 ta' Frar 2017

Numru 25
Appell numru 476/2016

Is-soċjetà civili *KPMG*

v.

Il-Ministru għall-Iżvilupp Sostenibbli,
l-Ambjent u Tibdil fil-Klima;
u *Price Waterhouse Coopers*

1. Dan huwa appell ta' *KPMG* minn deċiżjoni tal-20 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]. B'dik id-deċiżjoni il-Bord ta' Reviżjoni, wara oġġezzjoni ta' *Price Waterhouse Coopers* [*PWC*] kontra deċiżjoni tal-Ministeru għall-Iżvilupp Sostenibbli, l-Ambjent u Tibdil fil-Klima ["il-Ministeru"] illi titwarrab għax "*administratively not compliant*" offerta ta' *PWC* għal kuntratt għal "*auditing services to the Eco-Contribution Approving*

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

Body”, kien fassar id-deċiżjoni tal-Ministeru u ordna illi l-offerta titqies fost l-offerti validi.

2. Il-fatti rilevanti sefnew hekk: saret sejha mill-Ministeru għal offerti għall-kuntratt fuq imsemmi. Fost il-kondizzjonijiet tal-offerta l-para. 17.2 igħid hekk:

»17.2 The tenderer must provide a breakdown of the overall price in Euro (€). Offers are to be submitted up to two decimal points.«

3. Relevanti wkoll huwa l-para 16.1(f):

»16.1 (f) Financial Offer/Bill of Quantities ^(Note 3)

»(i) The Tender Form in accordance with the form provided in Volume 1, Section 2;

»(ii) A financial bid in the form provided in Volume 4.

»(iii) [Any other relevant documentation of a financial nature]

»Notes to Clause 16.1:

»... ..

»3. No rectification shall be allowed. Only clarifications on the submitted information may be requested.

»... ..

»Tenderers are NOT required NOR expected to submit, with their offer, any components of the tender document except those specifically mentioned in Clause 16.«

4. Il-*financial bid form* imsemmija fil-para. 16.1(f)(ii) hija mehmuża bħala Appendiċi A ma’ din is-sentenza.
5. Intefgħu tliet offerti: dik ta’ *KPMG*, dik ta’ *PWC* u dik ta’ terzi. L-offerta ta’ *PWC* kienet għall-prezz globali ta’ erbgħa u sebgħin elf euro (€74,000) u dik ta’ *KPMG* għal fiansa u sebgħin elf euro (€75,000). Iżda fil-waqt illi mal-offerta ta’ *KPMG* kien hemm ukoll *breakdown* tal-prezz b’tifsira ta’ kif waslet għall-prezz globali, mal-offerta ta’ *PWC* ma

kienx hemm *breakdown* b'hal dik. Il-Ministeru għalhekk warrab l-offerta ta' *PWC* u b'ittra tal-14 ta' Ġunju 2016 għarrafha illi r-raġuni għal dan kienet illi:

»No breakdown of the overall price was provided, as required by
... Clause 17.2 of the tender document.«

6. B'ittra tal-20 ta' Ġunju 2016 *PWC* ressqet oġġezzjoni kontra d-deċiżjoni li titwarrab l-offerta tagħha.
7. Bid-deċiżjoni tal-20 ta' Ottubru 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 21 June 2016² and also through their verbal submissions during the public hearing held on 18 October 2016 had objected [*sic*] to the decision taken by the pertinent authority, in that:

»a) *Pricewaterhousecoopers* contend that its offer was unfairly discarded due to the fact that they, quite correctly, quoted a "global price", which according to the contracting authority should have been accompanied by a breakdown of the said quoted price.

»In this regard, the appellant maintains that by submitting a "global price", he has satisfied all the conditions as stated on the "bid form" of the tender document.

»Having considered the contracting authority's "letter of reply" dated 27 June 2016 and also their verbal submissions during the public hearing held on 18 October 2016, in that:

»a) The Ministry for Sustainable Development, the Environment and Climate Change maintains that in accordance with clause 12 of the tender document, bidders had to provide a breakdown of the overall price.

»In this particular case, if the bidder had any doubt about the interpretation of this clause, he should have sought clarifications, prior to the submission of his offer.

»Reached the following conclusions:

»1. This Board would like to justifiably treat this appeal by addressing two main issues, namely the "global price" and the "financial bid form" as follows:

² Id-data li tidher fuq l-ittra hija l-20 ta' Ġunju 2016.

»i) Global Price

»From the examination of the tender document, the Ministry for Sustainable Development, the Environment and Climate Change is requesting a price for a particular professional service, which in this case is auditing services.

»This board notes that there is no bill of quantities which needs to be completed by the prospective bidder. The contracting authority had also options to choose from either a global price or a unit price or a fee based price. However, the contracting authority opted to choose a “global price” quote. In this particular case, *Pricewaterhousecoopers* quoted, as requested in the tender document, a global price for the auditing services which are to be carried out.

»In this regard, this board opines that the appellant adhered to the conditions as laid out in section 1.3 of the tender document, which states that “This is a Global Price Contract”.

»ii) Financial Bid Form

»This board notes that page 54 of the tender document lays down the grid form to enable the bidders to quote the global price. At the same time, the financial bid form does not indicate how the “global price” is to be broken.

»It is highly logical that the “global price” quoted does not necessitate a breakdown as the quoted price is for professional services *i.e.* auditing services.

»With regards to the contracting authority’s contention that in accordance with clause 17.2 which stated that “The tenderer must provide a breakdown of the overall price *etc.*”, this board would like to justifiably point out that when and where a breakdown of the overall price is to be submitted, the tender document should specify the “headings” or “details of divisions” under which the bidder is bound to submit the breakdown.

»In this particular case, there was no bill of quantities to be completed as the latter did not apply to the tendered professional services.

»This board opines that clause 17.2 was a standard clause applicable to tenders where a breakdown of the total price was highly indicative for valuation purposes. In this particular case, once the professional service is delivered, payment thereto is made in accordance with the quoted price.

»This board, apart from the fact that it has not been credibly proven that the breakdown of the “global price” was necessary, also opines that the reason given for the rejection of the appellant’s offer does not merit a discarding of the latter.

- »2. From the submissions made during the public hearing and from the testimony given by the contracting authority, it was confirmed that perhaps the tender specifications should have been more direct and precise.

»In this regard, this board would like to emphasize the fact that the Ministry for Sustainable Development, the Environment and Climate Change is in duty bound to issue specifications in a tender document which are clear and without the necessity of having various interpretations or misunderstandings.

»In this particular case, this board is credibly convinced that if the breakdown of the global price was mandatory, the contracting authority should have issued a financial bid form showing the detailed section under which a breakdown is necessary.

»At the same instance, the breakdown should be uniform for all bidders so that the comparison would be possible. In this regard, the financial bid form showed no breakdown necessary but a global price for the tendered services.

»In view of the above, this board finds in favour of *Pricewaterhousecoopers* and recommends that:

- »a) The appellant's offer is to be reintegrated in the evaluation process;
- »b) The deposit paid by *Pricewaterhousecoopers* should be fully refunded.«

8. *KPMG* rressqet appell minn din id-deċiżjoni b'rikors tad-9 ta' Novembru 2016 li għalih *PWC* wiegħbet fl-1 ta' Diċembru 2016 u l-Ministeru wiegħeb fis-6 ta' Diċembru 2016.

9. L-ewwel aggravju ta' *KPMG* gie mfisser hekk fil-qosor:

»Il-Bord ta' Reviżjoni kien ... żbaljat meta sostna illi, ladarba dan kien *global price contract* ma kien hemm ebda obbligu illi l-offerenti jipprovdu *breakdown* tal-prezz. Dan għaliex ladarba fis-sejha għall-offerti ntalbet *breakdown* l-ebda offerent ma kellu l-jedd illi sempliċiment jinjora dak li ntalab mill-awtorità kontraenti.«

10. Marbut ma' dan l-ewwel aggravju huwa t-tielet aggravju, li effettivament huwa twegħiba għall-argumenti mressqa minn *PWC*. Billi l-ewwel u t-tielet aggravji huma marbuta, l-qorti sejra tqishom flimkien. It-tielet aggravju gie mfisser fil-qosor hekk:

»Rigward in-nuqqas tal-awtorità kontraenti illi tipprovdi *grid, table* jew indikazzjonijiet dettaljati dwar in-natura tal-*breakdown* l-argumenti tal-bord m'għandhomx mis-sewwa għaliex id-dokumenti tas-sejha stess kienu jispecificaw illi bħala parti mill-offerta finanzjarja/*bill of quantities* tagħhom, l-oblaturi setgħu jipprovdu kwalunkwe dokument ieħor illi seta' jkun siewi.«

11. Għal dawn l-aggravji *PWC* essenzjalment wiegbet illi għalkemm para.

7.2 jrid li jingħata *breakdown*, dak il-paragrafu huwa biss “klawżola li hija dejjem inkluża iżda mhux dejjem applikabbli”. Tgħid illi d-dokumenti tas-sejha għal offerti minn dipartimenti tal-gvern jiffasslu fuq *template* imħejji mid-Dipartiment tak-Kuntratti b'diversi paragrafi li wħud minnhom huma applikabbli għal ċerti tipi ta' kuntratti (e.g. jekk hux *global price* jew *unit price* jew *fee based*) u oħrajn għal tipi oħra. L-awtorità kontraenti meta tfassal is-sejha tagħzel liema paragrafi żżomm u liema tħassar. Għalkemm taqbel illi para. 17.2 huwa fost dawk li l-awtorità kontraenti ma għandhiex “fakoltà li tħassar”, madankollu tgħid illi “dan l-artikolu [17.2] japplika biss meta l-awtorità kontraenti tagħzel li titlob *breakdown* billi tagħzel il-formula adattata mill-formuli annessi mat-*template* u tipprovdi b'mod ċar kif għandu jigi maqsum il-prezz globali”. Fost il-*financial bid forms* li hemm fit-*template* il-Ministeru fil-każ tallum għażel waħda li ma fihix post fejn tagħmel *breakdown* għalkemm seta' għażel waħda b'post għal *breakdown*; dan, fil-fehma ta' *PWC*, ifisser illi *breakdown* ma hijjex meħtieġa, minkejja dak li jgħid il-para. 17.2.

12. Din il-qorti ma taqbilx illi *breakdown* ma jibqax relevanti meta l-offerta tkun bi prezz globali. Kif sewwa tosserva *KPMG*, meta l-kuntratt jingħata, bħal fil-każ tallum, lill-offerta l-aktar ekonomikament vantaġġ-

juża (li mhux dejjem tkun l-orħos waħda), il-mod kif l-oblatatur jasal għall-prezz globali jista' jkollu relevanza qawwija. Hekk, offerta li tiswa elf euro (€1,000) tista' tidher aħjar minn waħda li tiswa elf u ħames mija (€1,500). Iżda jekk imbagħad issib illi l-ewwel offerta tagħtik għaxar (10) sigħat ta' servizz b'mitt euro (€100) għal kull siegħa u t-tieni offerta tagħtik tletin siegħa (30) b'ħamsin euro (€50) għal kull siegħa, jista' jkun li aktar tkun taqbillek it-tieni offerta.

13. Il-fatt illi l-para. 17.2 baqa' jidher fost il-kondizzjonijiet tas-sejħa għal offerta jfisser illi dak il-paragrafu għandu jingħata effett u mhux, kif tgħid *PWC*, jitqies "mhux applikabbli". Dan, wara kollox, huwa prinċipju fundamentali tal-ermenewtika legali³.

14. Ma tistax taħrab mill-kondizzjoni imposta bil-para. 17.2 billi tgħid illi l-*financial bid form* ma fihiex post għall-*breakdown*, u illi l-para. 16 igħid illi "*Tenderers are not required nor expected to submit, with their offer, any components of the tender document except those specifically mentioned in Clause 16*". Il-para. 16.1(f)(iii) stess igħid illi l-oblatatur għandu jipprovdi "*any other relevant documentation of a financial nature*". Il-fatt illi fid-dokument tas-sejħa dawk il-kliem qegħdin f'parentesi kwadri ma jnaqqasx mill-forza kuntrattwali tagħhom u hija biss asserzjoni gratuwita ta' *PWC* illi kienet "biss ... svista tal-Ministeru li ma ħassarx paragrafu (iii)".

15. Lanqas ma huwx konkluziv l-argument ta' *PWC* illi "*t-tenderers* ma jistgħux jaqbd u jipprovdu *breakdown* huma Ma jistax isir

³ Art. 1004, Kod. Ċiv.

paragun oġġettiv ta' *financial bid forms* jekk kollha għandhom *break-down* differenti". Il-prezz totali ma nġiebx mill-arja: kull oblatur qies il-fatturi li jikkomponu l-prezz li jrid jitlob, u *breakdown* ifisser li jiġu elenkati dawk il-fatturi u l-prezz mitlub għal kull wieħed minnhom biex, meta tgħodhom, tasal għall-prezz globali.

16. Il-qorti għalhekk tilqa' l-aggravju li jrid illi biex offerta titqies valida l-oblatur kellu jipprovi *breakdown* kif irid il-para. 17.2 tal-kondizzjonijiet tas-sejha.

17. Dan ifisser bilfors illi l-offerta ta' *PWC* kellha titwarrab, jew setgħet *PWC* tintalab tagħti t-tagħrif meħtieġ biex tkompli titqies fost l-offerti validi? Fit-tieni aggravju tagħha *KPMG* tgħid illi "lanqas huwa aċċettabbli l-argument ta' *PWC* illi l-awtorità kontraenti setgħet jew messha titlobha kjarifika". Komplet tfisser l-aggravju hekk:

»Wieħed mill-argumenti mressqa minn *PWC* quddiem il-Bord ta' Reviżjoni kien fis-sens illi jekk l-awtorità kontraenti kellha problema bl-offerta ta' *PWC* hija setgħet facilment titlob kjarifika mill-offerent u, anzi, kienet obbligata illi tagħmel dan.

»Illi anke hawn, l-esponenti ma taqbilx. Skont in-noti għal artiklu 16.1, fir-rigward tal-offerta finanzjarja, *no rectification shall be allowed. Only clarifications on the submitted information may be requested.*

»Kif intqal, *PWC* stess tammetti fl-oġġezzjoni tagħha illi hija ma pprovdietx *breakdown* tal-prezz globali. Huwa ċar illi ladarba din l-informazzjoni ma ngħatatx, din ma kinitx materja ta' "kjarifika", u dan għas-sempliċi raġuni illi ma jistax jiġi kjarifikat element illi ma jinsabx fl-offerta. Kieku l-bord ta' evalwazzjoni talab kjarifika, kien ikun qiegħed jistieden lil *PWC* sabiex tipprovi informazzjoni illi ma tinsabx fl-offerta oriġinali tagħha. Dan imur lil hemm minn sempliċi kjarifika, u jwassal għal bdil fl-offerta nfisha. Naturalment, tali rettifika kienet tkun mhux biss bi ksur tas-sejha għall-offerti iżda wkoll ta' preġudizzju għall-oblaturi l-oħra, ibda biex għall-esponenti illi tat id-dettalji mitlubin minnha fis-sejha.

»Awtorità kontraenti ma tistax tistieden lill-offerent sabiex jirrettifika l-offerta tiegħu wara l-għeluq tas-sejha għall-offerti ħlief fejn huwa esplicitament permess fis-sejha għall-offerti. Li tintalab informazzjoni li ma tinstabx fl-offerta oriġinali jmur kontra l-prinċipji tat-trasparenza u tal-kompetizzjoni illi huma essenzjali fil-proċeduri tal-għoti ta' kuntratti

pubbliċi. Mhijiex ġustifikazzjoni illi l-awtorità tkun qed tipprowa tkun prattika. Dan huwa prinċipju illi ilu ferm stabbilit fl-ambitu tal-liġi Ewropea.«

18. *PWC* fil-fatt tiċċhad illi hija qatt qalet illi l-awtorità kontraenti kellha titlobha, bħala kjarifika tal-offerta tagħha, biex tagħti l-*breakdown* meħtieġ. Hija tgħid illi l-posizzjoni tagħha dejjem u konsistentement kienet illi ebda *breakdown* ma kien meħtieġ u illi għalhekk l-awtorità kontraenti ma kellhiex għalfejn titlob *breakdown*.
19. Bla ma tidhol fil-kwistjoni jekk *PWC* ressqitx jew le dan l-argument, il-qorti tosserva illi l-kondizzjonijiet tas-sejha ma jippermettux "*rectification*" jew korrezzjoni tal-offerta iżda jippermettu "*clarifications*". Issa jekk tagħmel offerta li tiswa elf euro u mbagħad tgħid illi ċ-ċifra kellha tkun mhux elf euro iżda disa' mija jew elf u mija tkun qiegħed ċertament tagħmel korrezzjoni jew *rectification* tal-offerta. Iżda jekk l-offerta kienet u baqgħet ta' elf euro u sussegwentement tisser li s-somma ta' elf euro wasalt għaliha billi għoddejt għaxar partiti ta' mitt euro kull waħda ma tkun qiegħed tagħmel ebda korrezzjoni tal-offerta iżda biss tisser kif wasalt għaliha: fi kliem ieħor tkun qiegħed tagħmel kjarifika tal-prezz, wieħed mill-elementi li għa qiegħed fl-offerta u li bil-kjarifika mhux sejjer jinbidel.
20. B'hekk ma tkun qiegħed tiegħu ebda vantaġġ mhux xieraq: ma tkunx biddilt l-offerta biex tagħmilha aktar kompetitiva jew vantaġġjuża għalik għax l-offerta tkun baqgħet li kienet. Jekk kull ma jkun meħtieġ biex offerta ma titwarrabx ikun li tippermetti kjarifika bħal din, ċertament ma tkunx miżura proporzjonata li – kif trid li jsir *KPMG* – il-kjar-

ifika ma tippermettix u l-offerta twarrabha. Iżjed u iżjed il-miżura ma tkunx proporzjonata jekk, kif tosserva *PWC* fit-twegiba tagħha, tkun floq dubju dwar l-interpretazzjoni tal-kondizzjonijiet tas-sejha billi flimgħoddi f'kazijiet bħal dak tallum tkun aċċettajt offeriti mingħajr *break-down* għalkemm kien hemm kondizzjoni bħal dik tal-para. 17.2.

21. Fil-fehma tal-qorti, għalhekk, għalkemm il-kondizzjonijiet tas-sejha jridu *breakdown* u l-offerta ta' *PWC* ma tatx dak il-*breakdown*, il-konsegwenza ma għandhiex tkun li titwarrab l-offerta iżda li *PWC* tingħata żmien biex tagħmel il-kjarifika meħtieġa u l-offerta tagħha, wara li ssir dik il-kjarifika fiż-żmien li jingħata, titqies flimkien ma' dik ta' *KPMG*.
22. Il-qorti għalhekk tirriforma d-deċiżjoni tal-Bord ta' Reviżjoni: tikkonfermaha fejn ordnat illi l-offerta ta' *PWC* titqies fost l-offerti validi b'dan, iżda, illi qabel ma jsir hekk *PWC* għandha tingħata żmien sabiex tagħti *breakdown* biex tfisser kif waslet għall-prezz globali tal-offerta tagħha kif igħid u jrid il-para. 17.2 tas-sejha għal offeriti.
23. Fiċ-ċirkostanzi kull parti għandha tħallas l-ispejjeż tagħha

Silvio Camilleri
President

Giannino Caruana Demajo
Imħallef

Noel Cuschieri
Imħallef

Deputat Registratur
mb

Appendiċi A

VOLUME 4 - FINANCIAL BID

N.B - Three decimal points do not exist as currency; therefore such offers cannot be accepted. Offers are to be submitted up to two decimal points.

Global price for Auditing Services to the Eco-Contribution Approving Body. Audit upon the Procedures of Packaging Waste Years 2013 and 2014 as outlined in the Tender Document, Advert Number/.....:

Description	Total including Taxes, Other Duties & Discounts <u>but</u> exclusive of VAT Amount in Euro (€)
<p>AUDITING SERVICES TO THE ECO-CONTRIBUTION APPROVING BODY. AUDIT UPON THE PRODUCERS OF PACKAGING WASTE YEARS 2013 AND 2014.</p>	<p>€.....</p> <p>Amount in Words:</p> <p>.....</p> <p>.....</p> <p>.....</p>

Signature:

(the person or persons authorised to sign on behalf of the tenderer)

Date: