

QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar il-Ġimħga 13 ta' April 2018

Numru 7

Appell numru 8/2018

Project Technik Ltd

v.

Direttur Ġenerali tal-Kuntratti
u l-Kulleġġ Malti tal-Arti, Xjenza
u Teknoloġija

1. Dan huwa appell ta' *Project Technik Limited* ["l-appellanti"] minn deċiżjoni tad-19 ta' Diċembru 2017 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti dwar l-Akkwist Pubbliku [L.S. 174.04], dwar oġġezzjoni tal-istess appellanti kontra deċiżjoni tad-Dipartiment tal-Kuntratti ["id-Dipartiment"] illi l-offerta tal-appellanti għal kuntratt pubbliku titwarrab u s-sejha għal offerti titfassar.
2. Il-fatti rilevanti seħnew hekk: saret sejha mill-Kulleġġ Malti tal-Arti, Xjenza u Teknoloġija ["il-Kulleġġ"] għal offerti għall-kuntratt għal

“construction of the MCAST Resource Centre at the MCAST Main Campus in Corradino using various environmentally friendly and energy efficient products”. Il-kuntratt kien maqsum f'erba' partijiet u l-appellanti għamlet offerta għat-tielet parti – lot 3 – dwar xogħlijiet ta' ġewwa jew *internal finishes*. Fost il-kondizzjonijiet tas-sejħa hemm dik li tgħid illi “No rectification shall be allowed. Only clarifications on the submitted information may be requested”¹. Kondizzjoni oħra tgħid illi “No tender may be amended or withdrawn after the deadline for submission”².

3. L-appellanti tefgħet l-offerta tagħha flimkien ma' *bill of quantities*. Dan il-*bill of quantities* igħid illi l-prezz totali tal-offerta, qabel it-Taxxa fuq il-Valur Miżjud [“TVM”] kien ta' miljun, erba' mija u sitta u disgħin elf, mija u sitta u għoxrin euro u tnejn u disgħin ċenteżmu (€1,496,126.92) iżda meta tgħodd flimkien il-partiti kollha individwali fil-*bill of quantities* it-total, dejjem qabel it-TVM, jigi miljun, erba' mija u wieħed u disgħin elf, mitejn u tmienja u sittin euro u tlieta u erbgħin ċenteżmu (€1,491,268.43).
4. Kif kellu s-setgħa li jagħmel taħt il-para. 17 tal-*General Rules Governing Tenders* dwar *Correction of Arithmetical Errors*, il-kumitat tal-għażla b'ittra tas-17 ta' Ottubru 2017 talab lill-appellanti tikkonferma u taċċetta illi ċ-ċifra ta' €1,496,126.92 kienet żbaljata, u illi ċ-ċifra korretta, barra t-TVM, kienet ta' €1,491,268.43.

¹ Note 3 to Clause 7 – Selection and Award Requirements.

² General Rules governing Tenders, para. 12.1.

5. B'ittra tat-2 ta' Novembru 2017 l-appellanti ammettiet l-iżball u ikkonfermat illi ċ-ċifra korretta kienet kif indikat fl-ittra tal-kumitat tal-għażla tas-27 ta' Ottubru 2017. Iżda flok waqfet hemm u ikkonfermat biss iċ-ċifra korretta, l-appellanti mal-ittra tagħha bagħtet *bill of quantities* suppost aġġustat.
6. F'dan il-*bill of quantities* ġdid, iżda, l-appellanti mhux biss ikkorreġiet l-iżball iżda wkoll – x'aktarx bi żball ieħor – bidlet ir-rati għal żewġ partiti: ir-rati oriġinali ta' dawn iż-żewġ partiti kienu ta' sbatax-il euro u ħamsa u għoxrin ċenteżmu (€17.25) u mitt euro u ħames ċenteżmi (€100.05), u r-rati l-ġodda għall-istess żewġ partiti kienu ta' sbatax-il euro u ħamsin ċenteżmu (€17.50) u mitt euro u ħamsin ċenteżmu (€100.50). Dan, naturalment, bidel il-prezz totali tal-offerta, għalkemm id-differenza kienet biss ta' erbgħa u erbgħin euro (€44) iżjed.
7. Lid-Dipartiment deherlu li dan kien bdil tal-offerta, bi ksur tal-kondizzjoni li l-offerti ma setgħux jinbidlu wara d-data tal-għeluq. Għalhekk b'ittra tal-14 ta' Novembru 2017 għarraf lill-appellanti li l-offerta tagħha tqieset "*financially non-compliant*" u għalhekk twarrbet. Billi ma kienx hemm offerti tajba għal *lot 3*, is-sejħa relativa tħassret.
8. L-appellanti ressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta' Revizjoni b'ittra tat-23 ta' Novembru 2017 u talbet lill-bord "*to immediately and completely suspend the adjudication process in relation to the tender ...*".

9. B'deċiżjoni tad-19 ta' Diċembru 2017, li minnha sar dan l-appell, il-Bord ta' Reviżjoni ma laqax l-oġġezzjoni u ikkonferma d-deċiżjoni tad-Dipartiment għal raġunijiet li fissirhom hekk:

»This Board,

»Having noted this objection filed by *Project Technik Limited* (hereinafter referred to as the Appellant) on 24 November 2017 refers to the contentions made by the latter with regards to the award of Tender of Reference CT 3011/2017 listed as Case No 1114 in the records of the Public Contracts Review Board, awarded by the Malta College of Arts, Science and Technology (herein after referred to as the Contracting Authority) whereby the Appellant contends that:

- »a) through their reply to the letter sent on 2 November 2017 they had confirmed the arithmetical correction made by the evaluation board and, through the same, they bound themselves to abide by all the conditions laid out in the tender document;
- »b) by submitting a revised bill of quantities they did not change their original submissions and, although there existed a difference of €44 from the original global price, such an occurrence should not affect their overall offer in the evaluation process.

»This board also noted the Contracting Authority's "letter of reply" dated 4 December 2017 and its verbal submissions during the public hearing held on 14 December 2017, in that:

- »a) the Malta College for Arts, Science and Technology contends that the Appellants' submission, by way of a second bill of quantities which included additional items, did, in actual fact, change the nature and price of the original offer. In this regard, such an action constituted a change of offer during the evaluation stage which is not permissible;
- »b) The Contracting Authority maintains that the difference of €44 in the global price is not the issue for discarding the Appellants' offer but rather the fact that during the submissions, by way of clarifications, there were additional items in the bill of quantities which were not included in the original offer.

»This board, after having examined the relevant documentation pertaining to this appeal and after having heard submissions by all the parties concerned, opines that the issue is the determination of whether the offer submitted by *Project Technik Limited* was amended or not, upon the reply to the clarification dated 27 October 2017.

- »1. First and foremost, this board would like to respectfully refer to the principle of self-limitation, whereby the conditions laid out in the tender dossier must be adhered to and respected in full by all parties to the tendering procedure, including the Contracting Authority. The principle of self-limitation safeguards the exist-

ence of fair level playing field and transparency, so that the conditions in a tender document represent contractual obligations which must be fulfilled by the prospective tenderer and one of the prime conditions is that offers cannot be changed after the closing date for submission or at any stage of the tendering process.

»In this particular case, the Appellants were given the opportunity to clarify and confirm an arithmetical adjustment to their offer which the Contracting Authority pointed out. Quite appropriately, *Project Technik Limited* confirmed such an adjustment in price; however, in addition to this confirmation, the Appellants submitted a “revised bill of quantities” wherein the additional items which were not included in the original bill of quantity were present so that the latter was different from the original one.

»At this particular stage of consideration, this board is ignoring the fact that the overall price difference resulted in €44 only, and rather assess whether *Project Technik Limited's* offer, through the revised bill of quantity, was amended. One has to acknowledge the fact that the bill of quantity represents the core of the technical offer of a bidder, so that the latter forms an integral part of the offer itself.

»In this regard, this board justifiably opines that, by doing so, the Appellants affected [*recte*, effected] a change in their technical offer. In this respect, this board would also refer to the clarification request dated 27 October 2017, with particular reference to paragraph two, whereby it was made vividly clear that:

»“It is to be noted that no rectifications are allowed and the clarifications are to include only information which has been already submitted.”

»Through the above mentioned clause in the request for clarification, the Malta College for Arts, Science and Technology reminded the bidder that only information on what has been submitted are [*recte*, is] to be clarified and not additions to the original offer. In this case, this board has not been presented with any credible evidence that the revised bill of quantities did not change the technical offer apart from the price issue which will be considered later. However, this board cannot discard the fact that the submission of the revised bill of quantities changed the contents and nature of the original technical offer and in this regard this board does not uphold *Project Technik Limited's* first contention.

- »2. With regards to the Appellants’ second contention, this board would respectfully emphasise that principles are not formulated on the nature of magnitude but rather on matters of procedures for attaining a particular objective, so that the fact that the difference in the overall prices is only €44 should not form the justification for a revised submission, different from the original.

»This board, would like to, again, stress that the principle of self-limitation must be fully adopted during all the stages of the tendering process, without any exception whatsoever. At the same instance, this board, as [it] had on many occasions, would

like to remind prospective bidders that it is their responsibility and obligation to ensure that their submissions are in adherence to all the conditions stipulated in the tender dossier. This board does not consider [that] the difference in price is sufficient justification to breach the principle of self-limitation and, in this regard, does not uphold the Appellants' second grievance..

»In view of the above, this board ... confirms the decision taken by the Malta College of Arts, Science and Technology in cancelling the tender for Lot 3 and therefore finds against *Project Technik Limited*.

»In view of the fact that this board is justifiably convinced that such an erroneous submission by the Appellants consisted of an inadvertent mistake, this same board recommends that the deposit paid by *Project Technik Limited* is to be fully refunded.«

10. *Project Technik Ltd* ressqet appell minn din id-deċiżjoni quddiem din il-qorti b'rikors tat-8 ta' Jannar 2017 li għalih wieġbu d-Direttur Ġenerali tal-Kuntratti fit-18 ta' Jannar 2018 u l-Kulleġġ fid-29 ta' Jannar 2018.

11. L-ewwel aggravju ġie mfisser hekk:

»Illli ladarba l-bord kien konvint illi s-soċjetà appellanti kienet ikkonfermat il-korrezzjoni indikata mill-*evaluation committee* u li d-diskrepanzi li rrizultaw fil-*BOQ* sottomessa fit-2 ta' Novembru 2017 ma kienu xejn għajr ir-riżultat ta' żball, allura ma kellux triq oħra għajr illi jilqa' l-appell interpost mid-deċiżjoni appellata;

»... ..

»Sabiex il-bord seta' verament iqis illi s-soċjetà esponenti kienet għamlet sottomissjoni ta' offerta ġdida kellu ta' bilfors iqis illi d-diskrepanza ma kienet żball xejn imma li din kienet mixtieqa mis-soċjetà esponenti. Madanakollu, ladarba l-bord, ġustament, qies illi d-diskrepanzi ma kienu xejn għajr ir-riżultat ta' żball, proprju kif kienet qed tishaq is-soċjetà esponenti *tramite* l-appell tagħha stess, allura l-bord ma kellux triq oħra għajr li jilqa' dak l-appell u mhux jiċċdu. La kien hemm l-iżball fir-redazzjoni tal-*BOQ*, allura huwa ċar illi l-offerta ma ġietx mibudla imma baqgħet dejjem l-istess u d-diskrepanza li rrizultat fiha huwa l-iżball lamentat u xejn iżjed.«

12. Id-Dipartiment wieġeb hekk:

»Għall-għanijiet ta' dan l-ewwel aggravju jingħad biss li l-Bord ta' Reviżjoni ma daħal fl-ebda kontradizzjoni fis-sentenza meta kkonferma l-iskwalifika tal-offerta minkejja li aċċetta li seħħ żball involontarju mill-kumpannija appellanti. Dak li ried jgħid il-Bord ta' Reviżjoni huwa li l-offerta għandha tiġi eżaminata fuq il-baži ta' dak miktub u mhux fuq il-baži tal-*animus* ta' min mela l-offerta. X'seta' kellu f'moħnu

I-offerent huwa irrilevanti jekk l-espressjoni tal-ħsieb tiegħu ġie mniżżel b'mod differenti fl-offerta tiegħu. Dan għaliex il-kumitat tal-għażla jrid jeżamina l-atti miktuba u mhux il-ħsieb tal-offerent;

»L-intenzjoni tal-offerent hija immaterjali jekk it-termini tal-offerta huma ċari u ma jesigux tfittxija tal-ħsieb tal-offerent. Sewwasew fil-każ tagħna l-iżball li l-kumpannija appellanti qed tgħid li kien hemm fit-tieni BOQ kien jikkonsisti f'indikazzjoni differenti fir-rata ta' żewġ *items*. Dan mhuwiex żball aritmetiku bħalma kien hemm fl-ewwel BOQ fejn sar għadd ħażin fit-total finali. L-iżball lanqas ma kien jikkonsisti f'ambigwiżità tal-offerta bħal meta jkun hemm diskrepanza bejn il-figuri u l-kliem jew diskrepanza bejn il-*unit price* u t-total tal-ammont meta wieħed jimmultiplika l-*unit price* mal-kwantità. Bil-kontra, in-nuqqas jew għelt kien jikkonsisti fil-fatt li bejn l-ewwel BOQ u t-tieni BOQ kien hemm rati differenti fir-rigward ta' żewġ *items* partikolari;

»Il-kumpannija appellanti tgħid li l-Bord ta' Revizjoni kellu jaċċetta l-offerta għaliex fl-ittra tat-23 [*recte*, 2] ta' Novembru 2017 hija kienet aċċettat l-iżball aritmetiku fl-ewwel BOQ. Tassew li kieku l-kumpannija appellanti ikkonfermat l-iżball aritmetiku biss, l-offerta tagħha kienet tkun valida. Iżda l-kumpannija appellanti ma waqfitx mal-konferma tal-iżball aritmetiku msewwi mill-kumitat tal-għażla, iżda ssoktat billi ppreżentat BOQ ġdid b'rati differenti. Huwa sewwasew fis-sottomissjoni ta' BOQ ġdid b'rati mibdula fejn naqset il-kumpannija appellanti. Il-Bord ta' Revizjoni kkonferma l-iskwalifika għaliex irraġuna li l-kumpannija appellanti ma kelliex tnewwel BOQ ġdid b'rati modifikati;

»X'wassal biex ikun hemm dan it-tibdil fir-rati huwa irrilevanti għaliex kif ingħad qabel il-kumitat tal-għażla jrid jiġġudika biss x'hemm mitkub u mhux x'suppost kienet l-intenzjoni tal-offerent. Sew jekk il-bdil fir-rata kien il-frott ta' traskuraġni, frott ta' żball tal-pinna, frott tas-sistema kompjuterizzata ħażina tal-offerent jew frott tal-għażla ħielsa tal-offerent li jbidel ir-rati, ma jagħmilx differenza fil-każ inkwistjoni. Li jgħodd huwa li r-rati nbidlu u dan ma kellux isir għaliex skont it-termini tas-sejha "*No tender may be amended or withdrawn after the deadline for submission*".«

13. Għandu jingħad qabel xejn illi, kif jidher minn din is-silta mid-deċiżjoni,

il-Bord ta' Revizjoni telaq mill-premessa illi l-appellanti ziedet xi partiti

ġodda fit-tieni *bill of quantities* li ma kinux dehru fl-ewwel wieħed:

»... .. the Appellants submitted a "revised bill of quantities" wherein the additional items which were not included in the original bill of quantity were present so that the latter was different from the original one.«

14. Dan iżda ma huwiex il-każ; li ġara hu li l-prezz ta' żewġ partiti fit-tieni

bill of quantities kien differenti mill-prezz tal-istess żewġ partiti fl-

ewwel *bill of quantities* u mhux li ziedu partiti ġodda. Dan qiegħed

jingħad biss għall-korrettezza, mhux għax huwa partikolarment relevanti għall-għanijiet ta' dan l-appell, għalkemm jista' jkun li kellu effett fuq id-deċiżjoni tal-Bord ta' Reviżjoni.

15. Din il-qorti taqbel mal-Bord ta' Reviżjoni illi d-differenzi fit-tieni *bill of quantities* kienu riżultat ta' żball mhux ta' intenzjoni li tinbidel l-offerta, kif wara kollox tixhed l-istqarrija tal-appellanti fl-ittra tat-2 ta' Novembru 2017 meta tgħid illi "*we accept these adjustments* (magħmula mill-kumitat tal-għażla) *accordingly*". Taqbel ukoll illi l-iżball ma kienx żball aritmetiku, għax kien żball fir-*raw data* u mhux żball fil-proċessar aritmetiku ta' dawk id-*data*. Ma taqbilx iżda illi l-konsegwenza kellha tkun li titwarrab l-offerta.
16. Il-kondizzjonijiet tas-sejħa għal offerti jgħidu illi l-offerta ma tistax tinbidel wara li jagħlaq iż-żmien biex jintefgħu offerti. Il-konsegwenza għalhekk kellha tkun li titwarrab il-bidla, b'mod li l-oblatur jibqa' marbut bl-ewwel offerta, u mhux li titwarrab l-offerta, aktar u aktar meta, fil-każ tallum, l-appellanti stqarret espressament li aċċettat l-"agġustament" magħmul fl-ewwel offerta tagħha mill-kumitat tal-għażla u qieset ruħha marbuta bl-offerta kif "agġustata" jew iċċarata.
17. F'dawn iċ-ċirkostanzi t-tfassis tal-offerta kien sproporzjonat u mhux meħtieġ, partikolarment meta tqis illi ġie aċċettat li ma kien hemm ebda ħsieb li tinbidel l-offerta u illi l-appellanti ma hija sejra tiegħu ebda vantaġġ kompetitiv fuq l-oblaturi l-oħra.
18. Billi, għal dawn ir-raġunijiet, sejjer jintlaqa' l-ewwel aggravju ma jibqax meħtieġ li l-qorti tqis ukoll l-aggravju l-ieħor tal-appellanti.

19. Il-qorti għalhekk tilqa' l-appell, tħassar d-deċiżjoni tad-Dipartiment tal-Kuntratti tal-14 ta' Novembru 2017 u d-deċiżjoni tal-Bord ta' Reviżjoni tad-9 ta' Diċembru 2017, ħlief fejn ordnat illi d-depożitu mħallas mill-appellanti jintradd lilha, u tordna li jitkompla l-proċess tal-għażla tal-offerti, b'dan li l-offerta originali tal-appellanti, kif iċċarata fl-ittra tal-Kulleġġ tas-27 ta' Ottubru 2017 u fit-tweġiba tal-appellanti tat-2 ta' Novembru 2017, titqies fost l-offerti validi.
20. Billi dan l-episodju kien provokat minn żball tal-appellanti, huwa xieraq illi din tbatu sehem mill-ispejjeż. Il-qorti għalhekk tordna illi l-ispejjeż kollha tal-appell, fosthom ukoll dawk tal-Kulleġġ, jinqasmu hekk: sehem minn tlieta ($\frac{1}{3}$) tħallsu l-appellanti *Project Technik Limited* u żewġ ishma minn tlieta ($\frac{2}{3}$) jħallashom id-Direttur Ġenerali tal-Kuntratti.

Silvio Camilleri
President

Giannino Caruana Demajo
Imħallef

Noel Cuschieri
Imħallef

Deputat Registratur
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