

QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF JOSEP-H AZZOPARDI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF NOEL CUSCHIERI

Seduta ta' nhar it-Tnejn 25 ta' Ġunju 2018

Numru 6
Appell numru 49/2018

Rockcut Limited (C10164)

v.

Id-Direttur Ġenerali tad-Dipartiment tal-
Kuntratti; l-Awtorità dwar it-Trasport
f'Malta; *RM Construction Limited*
(C60040)

1. Dan huwa appell ta' *Rockcut Limited* ["*Rockcut*"] minn deċiżjoni tas-6 ta' Frar 2018 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [L.S. 174.04]. Il-każ quddiem il-Bord ta' Reviżjoni kien dwar oġġezzjoni ta' *Rockcut* kontra deċiżjoni tad-Dipartiment tal-Kuntratti ["id-Dipartiment"] illi titwarrab għax "*technically non-compliant*" offerta ta' *Rockcut* għal kuntratt għall-bini mill-ġdid ta' triq.
2. Il-fatti rilevanti seħnew hekk: kienet saret sejha mid-Dipartiment fl-interess tal-Awtorità dwar it-Trasport f'Malta ["l-Awtorità"] għal offerti

għall-bini mill-ġdid ta' triq. Fost id-dokumenti tas-sejha kien hemm elenku ta' dawk li ssejhu *technical specifications* li kienu mfissra f'serja ta' appendiċi, kull waħda dwar aspetti differenti tax-xogħlijiet bħal *e.g. testing to be carried out by the contractor, health and safety requirements, quality management, etc.* Dawn l-appendiċi kienu jispeċifikaw x'kellu jagħmel il-kuntrattur dwar dak l-aspett partikolari tax-xogħlijiet. Imbagħad kien hemm dak li ssejjaħ *technical questionnaire* fejn l-appendiċi kienu elenkati taħt xulxin, u taħt il-kolonna "*confirmation*" relativa għal kull wieħed mill-appendiċi l-oblatur kellu jikkonferma li joqgħod għall-kondizzjonijiet imnizzla f'dak l-appendiċi. Il-kondizzjonijiet tas-sejha jgħidu, taħt *Note 3*, illi, dwar dan il-*questionnaire*, "*no rectification shall be allowed; only clarifications on the submitted information may be requested*".

3. *Rockcut* tgħid illi mliet dan il-*questionnaire* u bagħtitu mad-dokumenti l-oħra relattivi għall-offerta tagħha. Għal xi raġuni jew oħra – x'aktarx għax *Rockcut* bagħtet dokument ieħor floku – il-*questionnaire* ma nstabx fost id-dokumenti tal-offerta u, għall-għanijiet ta' dan l-appell, *Rockcut* ma hijjex tinsisti li tassew bagħtitu.
4. Saru offerti minn *Rockcut* u mill-intimata *RM Construction Limited* ["*RM*"], fost oħrajn. L-orħos offerta kienet ta' *Rockcut* u t-tieni l-orħos offerta kienet ta' *RM*.
5. B'ittra tat-12 ta' Diċembru 2017 id-Dipartiment għarraf lil *Rockcut* illi l-offerta tagħha kienet twarrbet u illi l-kuntratt kien sejjer jingħata lil *RM*. Ir-raġuni għala l-offerta ta' *Rockcut* kienet twarrbet ġiet imfissra hekk:

»... .. the tender submitted by your company was found to be technically not compliant.

- »• Bidder did not submit the Technical Questionnaire. In view that the Technical Questionnaire falls under Note 3, therefore no rectification shall be allowed, it was agreed that Rockcut Ltd was deemed to be technically non-compliant and should not be considered further.«

6. *Rockcut* ressqet oġġezzjoni kontra d-deċiżjoni tad-Dipartiment quddiem il-Bord ta' Reviżjoni b'ittra tal-21 ta' Diċembru 2017. Ir-raġunijiet tal-oġġezzjoni u t-talbiet ta' *Rockcut* ġew imfissra hekk:

»... .. The Contracting Authority failed to provide the bidder with adequate information regarding the reasons for disqualification, thereby hindering the bidder's fundamental right to appeal.

»... ..

»Furthermore, and without prejudice to the above, the claim made by the Contracting Authority in its letter of regret is incorrect, which means that the decision to reject the appellant's bid was erroneous.

»That, from the above it follows that:

- »i. the deposit paid by the tenderer to lodge this appeal must be reimbursed as the Contracting Authority failed to provide adequate and complete information in its letter of regret;
- »ii. the tenderer must be re-integrated in the evaluation process- and
- »iii. as a consequence of his tender offer being the cheapest, should be awarded the tender in caption.«

7. Bid-deċiżjoni tas-6 ta' Frar 2018, li minnha sar dan l-appell, il-Bord ta' Reviżjoni iddeċieda hekk dwar l-oġġezzjoni ta' *Rockcut*:

»This board,

»Having noted the objection filed by *Rockcut Limited* (hereinafter referred to as the Appellant) on 22 December 2017¹, refers to the contentions made by the latter with regards to the award of Tender awarded by the Transport Malta (hereinafter referred to as the Contracting Authority).

»... ..

»Whereby the Appellant contends that:

- »a) the alleged fact that Transport Malta was not in receipt of the Questionnaire, which formed part of the conditions of

¹ L-ittra għandha d-data tal-21 ta' Diċembru 2017 iżda ġiet preżentata quddiem il-Bord ta' Reviżjoni fit-22 ta' Diċembru 2017.

the tender dossier. In this regard, *Rockcut Limited* insist that they have submitted this documentation and that all the information requested in the questionnaire was duly contained in their offer;

- »b) *Rockcut Limited* also maintains that upon non receipt of the questionnaire, the Authority should have sought clarification as to the missing document.

»This board also noted the Contracting Authority's letter of reply dated 3 January 2018 and its verbal submissions during the public hearing held on 30 January 2017, in that:

- »a) Transport Malta maintain that the questionnaire formed part the tender dossier and, at the same instance, this document was important for the Contracting Authority to assess the Appellants' capability and capacity in carrying out the tendered works.

»In this regard and in the absence of such documentation, the evaluation Board had no other option but to deem the Appellants' offer as being technically non-compliant.

- * b) Transport Malta also contend that no rectification was possible and clarifications were only possible on the submitted information. In this regard, the Appellants failed to submit the information as requested in the questionnaire.

»... ..

»This board, after having examined the relevant documentation pertaining to this appeal and heard submissions made by all parties concerned including the testimonies of the witnesses duly summoned, opines that the issues which merit consideration are:

- »1. The Non Receipt of Questionnaire;
»2. The Contents of the Questionnaire.

»1. The Non Receipt of Questionnaire

»... ..

»... .. there was no evidence that the questionnaire was submitted by Appellants.

»... ..

»In this particular case, the evaluation board was faced with a missing mandatory document – the questionnaire – and, since the latter was limited to Note 3 to Clause 7 of the Tender Document, which clearly states that “Only clarifications on submitted information may be requested”, the evaluation board had no other options but to discard the offer submitted by *Rockcut Limited*. No clarification could be made on missing documentation as this would have amounted to a rectification of the Appellants' offer, which is not allowable. In this regard, this board is credibly convinced that *Transport Malta* was not in receipt of *Rockcut Limited's* replies to the questionnaire which formed part of the tender's submissions and at the same time, this board confirms that the evaluation board carried out the evaluation process in a just, fair and transparent manner.

»2. The Contents of the Questionnaire

»First and foremost, this board justifiably opines that the questionnaire formed an integral part of the tender document and its relative stated conditions. From the submissions made, it was clearly established that the purpose of the questionnaire was not simply and solely to confirm or repeat what was declared by the bidder in his offer, but rather to assess, more in depth, the capacity and capabilities together with the *modus operandi* of the execution of the tendered works.

»This board also noted that the information requested in the questionnaire contained details which could not be denoted in the tender dossier and which was important for *Transport Malta* to confirm the way and method for the successful execution of the works.

»The questionnaire contained detailed information as to how the various stages of works will be carried out and the resources to be applied by the successful bidder, and all this information provided the necessary tool for the evaluation board to better assess each offer in the correct perspective. At the same instance, this board would like to also point out that the replies to the questionnaire would enable the evaluation board to confirm that what the bidder has offered was possible through his means and capabilities to carry out the works as he so declared.

»This Board would also respectfully refer to the Appellants' quote of Case 1026 decided by this same board in a different composition on 7 March 2017, wherein it was stated that "Every effort should be made by the contracting authority to save a tender from being disqualified. In this respect, this board would like to point out that the above extract from a decision taken by this board referred to different circumstances and events, in that primarily the information requested by the authority was duly submitted and, in this particular case, the questionnaire which was a mandatory requisite of the tender was not received by the authority.

»3. On a general note, this board would also point out that the reason given by *Transport Malta* for the rejection of the Appellants' offer was very specific and direct

»In this regard, this board does not uphold *Rockcut Limited's* contention that the reasons for the rejections of their offer were not at all clear.

»In view of the above, this Board:

- »i) does not uphold *Rockcut Limited's* contention that the details and information contained in the questionnaire were the same as those which they have submitted in their offer;
- »ii) opines that, from documentation and testimonies of the witnesses, it was credibly established that *Transport Malta* was not in receipt of the Appellants' questionnaire;
- »iii) justifiably establishes that the notification that a document was uploaded in fact referred to a copy of the guarantee, which was not requested;
- »iv) confirms that the reasons given by *Transport Malta* for the rejection of *Rockcut Limited's* offer were clear enough for the

Appellants to be made aware as to why their offer was discarded;

»v) opines that *Transport Malta* could have indicated, in the letter of rejection, that *Rockcut Limited* submitted a copy of the guarantee instead of the questionnaire. In this regard, this board recommends that an amount of €5,000 is to be refunded.«

8. *Rockcut* ressqet appell minn din id-deċiżjoni b'rikors tas-26 ta' Frar 2018 li għalih id-Dipartiment u l-Awtorità wiegħbu fis-16 ta' Marzu 2018 u *RM* wiegħbet fis-26 ta' Marzu 2018.
9. Fl-ewwel aggravju *Rockcut* tgħid illi t-*technical questionnaire* ma jzid xejn mat-tagħrif mogħti fl-offerta iżda biss "l-informazzjoni li hemm fih hija riflessjoni, jew aħjar sommarju, ta' tagħrif li jingħata f'partijiet oħra tal-offerta". Tgħid għalhekk illi "l-kwistjoni li kellha tiġi investigata kienet jekk l-informazzjoni mitluba fit-*technical questionnaire* kinetx sottomessa f'partijiet oħra tal-offerta jew le" u illi, mix-xieħda tal-Perit David Vassallo, li kien il-president tal-kumitat tal-għażla tal-Awtorità, għandu jidher illi għal kull mistoqsija fil-*questionnaire* hemm tweġiba fl-offerta.
10. Id-Dipartiment u l-Awtorità wiegħbu illi min jagħmel is-sejħa għal offerti għandu jedd jagħżel x'dokumenti għandhom ikunu mehmuża mal-offerti u, ladarba l-kondizzjonijiet tas-sejħa jridu li mal-offerta jintefa' wkoll il-*questionnaire*, mela mal-offerta kellu jkun hemm ukoll il-*questionnaire*.
11. Igħidu wkoll illi jekk jitqiesu offerti li ma jħarsux il-kondizzjonijiet kollha, u jitħalla li jingħata tagħrif nieqes wara li jkunu nfetħu l-offerti, dan

jista' jwassal għal abbuż. Barra minn hekk, tkun qiegħda ssir diskriminazzjoni għax:

»Li kieku [il-Bord ta' Revizjoni] mexa mod ieħor u salva l-offerta tal-kumpannija appellanti dan kien ikun ifisser li kien ikun qed jagħtiha trattament preferenzjali fuq l-offerenti l-oħra għaliex ikun eżentata mill-preżentata ta' dokument meħtieġ bis-sejha u b'hekk ikun gie li xekkel u fixkel iż-żamma ta' kundizzjonijiet indaqs għal kulhadd.«

12. Dwar l-argument illi t-tagħrif mitlub fil-*questionnaire* jinsab f'partijiet oħra tal-offerta, id-Dipartiment u l-Awtorità jgħidu hekk:

»... .. ma hu veru xejn li dan il-kwestjonarju kien semplicement dokument li jirrepeti partijiet oħra tal-offerta, bħalma lanqas ma huwa veru dak li tgħid il-kumpannija appellanti li l-Perit David Vassallo aċċetta li l-kontenut tal-kwestjonarju seta' jinstab f'partijiet oħra tal-offerta;

»Kemm hu hekk, il-kwestjonarju li kellu jimtela' u jiġi sottomess minn kull oblatur huwa tassew id-dokument illi permezz tiegħu l-offerent kellu jindika u jikkonferma – punt b'punt – illi huwa qed jintrabat bl-ispeċifikazzjonijiet tekniċi li kienet qed titlob l-awtorità kontraenti f'din is-sejha għall-offerti;

»F'dan il-kuntest, il-linja ta' domandi li saru lill-Perit David Vassallo waqt is-smiġħ quddiem il-Bord ta' Revizjoni kienet ... ingusta, għaliex id-domandi li saru lill-perit kienu semplicement dwar jekk il-kapijiet imsemmija fil-kwestjonarju jissemmewx bnadi oħra fis-sejha għall-offerti. Għal dawn id-domandi, il-perit irrisponda iva; però, b'daqshekk ma kienx qiegħed jikkonferma jew jaqbel illi l-kumpannija appellanti laħqet ir-rekwiżiti tas-sejha għall-offerti u wisq anqas illi hija ntrabet bir-rekwiżiti tal-istess sejha. Dan għaliex id-dokument intiż sabiex l-oblaturi juru u jikkonfermaw illi qed jintrabtu b'dan il-mod kien biss dan il-kwestjonarju.«

13. *RM* essenzjalment wiegħbet illi ladarba l-kondizzjonijiet tas-sejha riedu li jimtela' l-*questionnaire* mela n-nuqqas li jimtela' u jintbagħat il-*questionnaire* huwa fatali, u ma hemm xejn aktar x'jingħad:

»... .. mit-tender huwa ċar li t-*technical questionnaire* huwa dokument fundamentali u integrali mill-offerta, fin-nuqqas ta' liema l-offerent ikun meqjus *technically non-compliant*. Li kieku ma kienx dokument ta' daqstant importanza ma kienx se jiġi indikat espressament fit-tender.«

14. Jekk tassew it-tagħrif mogħti fit-*technical questionnaire* jinsab f'partijiet oħra tal-offerta, u ma jżid xejn aktar, mela s-sanzjoni li titwarrab l-offerta għax ma ntbagħatx il-*questionnaire* tkun waħda sproporzjonata fiċ-ċirkostanzi, għax in-nuqqas ikun biss wieħed formali u mhux ta' sostanza. Billi jitħalla li jingieb il-*questionnaire* ukoll wara li jkunu nfetħu l-offerti ma jagħti ebda vantaġġ kompetitiv lill-oblatur għax b'hekk ma jkun qiegħed jinbidel jew jiżdied xejn fl-offerta, u ma tkun qiegħda ssir ebda diskriminazzjoni kontra l-oblaturi l-oħra.
15. Jekk, min-naħa l-oħra, fit-twegibiet għall-*questionnaire* jingħata tagħrif jew jingħataw impenji li ma jkunux ingħataw f'partijiet oħra tal-offerta, mela jekk jitħalla li jippreżenta l-*questionnaire* wara li jkunu nfetħu l-offerti l-oblatur ikun qiegħed jitħalla jibdel jew iżid mal-offerta oriġinali tiegħu, u b'hekk jingħata vantaġġ kompetitiv bi preġudizzju għall-oblaturi l-oħra.
16. Sewwa qalet *Rockcut* mela illi "l-kwistjoni li kellha tiġi investigata kienet jekk l-informazzjoni mitluba fit-*technical questionnaire* kinetx sottomessa f'partijiet oħra tal-offerta jew le".
17. *Rockcut* tgħid illi l-president tal-kumitat tal-għażla stess, il-Perit David Vassallo, ikkonferma fix-xieħda tiegħu li dak kollu mitlub fil-*questionnaire* kien għa jinsab f'partijiet oħra tal-offerta. Dan huwa kontestat mill-parti l-oħra.
18. Tassew, fit-twegiba tiegħu għall-mistoqsija ċara u diretta tal-Bord ta' Revizjoni dwar "x'kellu l-kwestjonarju differenti bħala dettalji li ma kienx hemm fl-offerta", il-Perit Vassallo kien x'aktarx evażiv meta qal:

»... .. ebda membru tal-bord mhu qed jara kull mistoqsija hix qiegħda x'imkien ieħor f'dan it-*tender* voluminuż u jgħid, "Dawn kollha qiegħdin x'imkien ieħor; mela dat-*tender* [*recte*, dan il-*questionnaire*] ma għandniex bżonnu".«

19. Effettivament ix-xhud ħarab mill-mistoqsija tal-bord. F'dan l-istadju għalhekk kien kompitu ta' *Rockcut* turi espressament u speċifikament fejn it-tagħrif mitlub fil-*questionnaire* kien għa jinsab f'partijiet oħra tal-offerta. Minflok, iżda, kull ma għamlet kien li talbet lix-xhud jikkonferma illi l-*headings* tal-*questionnaire* kienu jinsabu wkoll f'partijiet oħra tal-offerta. Iżda li tikkonferma li l-*headings* huma l-istess ma jfissirx li qiegħed tikkonferma wkoll illi t-tagħrif taħt dawk il-*headings* jinsab fl-offerta. Li kellha tagħmel *Rockcut* hu illi, b'referenza preċiża u speċifika għall-offerta tagħha, turi fejn jinsab dak it-tagħrif; dan ma għamlitix

20. Fin-nuqqas ta' xieħda aktar preċiża u speċifika, ma jistax jingħad illi *Rockcut* għamlet il-prova illi dak kollu mitlub fil-*questionnaire* kien għa jinsab f'partijiet oħra tal-offerta. L-aggravju għalhekk ma jistax jintlaqa'.

21. Fit-tieni aggravju *Rockcut* tgħid illi f'kull każ setgħet tintalab "kjarifika" mingħandha biex tagħmel tajjeb għan-nuqqas tal-*questionnaire*:

»... .. fl-eventwalità li l-awtorità kontraenti tat il-possibilità lill-esponenti li tagħmel kjarifika għad-dokument mankanti, l-esponenti setgħet faċilment tindika fejn tinsab l-informazzjoni fl-offerta mingħajr ma tbiddel xejn minnha. Mhux ghax kien hemm wisq ħtieġa, għaliex mill-kwestjonarju stess jirriżultaw riferenzi għal tali informazzjoni.«

22. İzda ma tistax tingħata kjarifika ta' tagħrif li ma ngħatax; kjarifika sservi biss biex tagħmel aktar ċar tagħrif ġà mogħti li izda ma huwiex ċar bizzejjed.
23. Il-kjarifika li setgħet tagħmel *Rockcut* kellha tkun tal-asserzjoni tagħha illi t-tagħrif mitlub fil-*questionnaire* kien ġà mogħti fl-offerta. Kif intqal fit-trattazzjoni tal-ewwel aggravju, izda, *Rockcut* naqset milli turi kif u fejn, fl-offerta tagħha, jinsab it-tagħrif li ried il-*questionnaire*
24. Dan l-aggravju wkoll għalhekk ma jistax jintlaqa'.
25. Fit-tielet aggravju *Rockcut* tgħid illi l-fatt illi fid-deċiżjoni tiegħu l-Bord ta' Revizjoni irrakkomanda li jintraddulha ħamest elef euro (€5,000) mid-depożitu li kellha tagħmel biex setgħet tressaq l-oġġezzjoni tagħha quddien l-istess bord, juri illi kien hemm nuqqas min-naħa tal-Awtorità:
- »Illi minn hawnhekk jirriżulta car li l-istess bord sab mankanza da parti tal-Awtorità intimata. Fiċ-ċirkostanzi, ġjaladarba l-esponenti setgħet kienet tqiegħdet f'posizzjoni li tirregola ruħha aħjar, ma kellux jiġi rifiuż biss parti u ċjoè s-somma ta' €5,000 mid-depożitu ta' €21,627, izda d-depożitu sħiħ u għalhekk, anke hawnhekk, id-deċiżjoni timmerita li tiġi sindikata.«
26. Għalkemm fl-aggravju jingħad illi kellu jintradd id-depożitu kollu, il-qorti tifhem illi dan l-aggravju jolqot id-deċiżjoni kollha tal-Bord ta' Revizjoni u mhux biss id-deċiżjoni dwar l-ispejjeż. Fil-fatt it-talba fir-rikors tal-appell hija illi din il-qorti tħassar id-deċiżjoni tal-Bord ta' Revizjoni, id-deċiżjoni li titwarrab l-offerta ta' *Rockcut* u d-deċiżjoni li l-kuntratt jingħata lil *RN*, u tordna li l-evalwazzjoni ssir mill-ġdid b'dan li

titqies ukoll l-offerta ta' *Rockcut*, ma hemmx talba għar-riforma tad-deċiżjoni tal-Bord ta' Reviżjoni fejn din tolqot ir-radd tad-depożitu.

27. Dwar il-meritu tal-aggravju l-qorti tosserva illi l-Bord ta' Reviżjoni irrakkomanda li tintradd parti mid-depożitu għar-raġuni biss illi “*Transport Malta could have indicated, in the letter of rejection, that Rockcut Limited submitted a copy of the guarantee instead of the questionnaire*”.
28. B'dan it-tagħrif *Rockcut* kienet tkun tista' tirregola ruħha mhux dwar l-offerta – li meta ntbagħtet l-ittra tal-Awtorità kienet ġà mwarrba – iżda dwar jekk toġġezzjonax bl-aggravju li l-*questionnaire* kien fil-fatt intbagħat. Fil-fatt quddiem il-Bord ta' Reviżjoni *Rockcut* ressqet aggravju illi l-*questionnaire* kienet bagħtitu, iżda dak l-aggravju ma tennitux quddiem din il-qorti wara li ġie mfisser lilha x'kien l-iżball tagħha, viz. li bagħtet kopja żejda tal-garanzija flok il-*questionnaire*.
29. Ladarba iżda dan il-fatt b'ebda mod ma jolqot id-deċiżjoni li titwarrab l-offerta, dan l-aggravju ma jistax jintlaqa'.
30. Il-qorti għalhekk tiċċad l-appell u tikkonferma d-deċiżjoni appellata. L-ispejjeż tal-appell tħallashom l-appellanti *Rockcut Limited*.

Joseph Azzopardi
President

Giannino Caruana Demajo
Imħallef

Noel Cuschieri
Imħallef

Deputat Registratur
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