

QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF JOSEPH AZZOPARDI
ONOR. IMHALLEF JOSEPH R. MICALLEF
ONOR. IMHALLEF TONIO MALLIA**

Seduta ta' nhar il-Gimgha 13 ta' Lulju 2018

Numru 1

Rikors numru 63/18

Clentec Limited (C48089)

v.

**Automated Revenue Management Services Ltd (C46054) u
Specialist Group Cleaners Ltd (C65296)**

Il-Qorti:

Dan hu appell imressaq fil-5 ta' Marzu 2018, mis-soċjeta` rikorrenti Clentec Ltd. wara deċiżjoni datata 13 ta' Frar 2018, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (min hawn 'il quddiem imsejjah "il-Bord") fil-każ referenza ARMS/T/004/2017 (każ numru 1128).

Dan il-każ huwa marbut ma' sejha għall-offerti mis-soċjeta` Automated Revenue Management Services Ltd. *“for the provision of environmentally friendly cleansing services of ARMS Ltd”*. Saru diversi offeriti għal dan il-kuntratt, bl-offerent preferut tkun is-soċjeta` rikorrenti Clentec Ltd. Is-soċjeta` Specialist Group Cleaners Ltd, li kienet ukoll tefgħet offerta, oġġezzjonat għall-fatt li l-offerta tagħha għiet imwarrba *“as it was considered to be abnormally low”*. Hi, għalhekk, tablet it-tħassir tad-deċiżjoni li s-soċjeta` Clentec Ltd. tiġi dikjrata l-offerent preferut.

Il-Bord laqa' din l-oġġezzjoni u ħassar id-deċiżjoni tal-awtorita` kontraenti, u ddeċieda li l-offerta tas-soċjeta` Specialist Group Cleaners Ltd. *“is to be reintegrated in the evaluation process”*.

Id-deċiżjoni tal-Bord hija s-segwent:

“This Board,

“Having noted this objection filed by Specialist Group Cleaners Limited (herein after referred to as the Appellant) on 12 January 2018, refers to the Contentions made by the latter with regards to the award of Tender of Referejnca ARMS/T/004/2017 listed as Case No 1128 in the records of the Public Contracts Review Board, awarded by ARMS Limited (herein after referred to as the Contracting Authority).

“Appearing for the Appellant: Dr John Bonello

“Appearing for the Contracting Authority: Ing Mark Perez

“Whereby, the Appellant contends that:

- “a) He disagrees with the Contracting Authority’s alleged decision that their offer was abnormally low. In this regard, Specialist Group Cleaners Limited maintain that their offer covered the minimum wage payable to workers as prescribed by law and through various decisions of this Board and the Court of Appeal, such offers are not to be deemed as abnormally low.

“This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 18 January 2018 and its verbal submissions during the Public Hearing held on 6 February 2018, in that:

- “a) ARMS Limited insists that since the Appellants declared that in their offer, apart from the cost of wages, there was also included all other expenses/ When one considers such inclusions, the Contracting Authority deemed that the cost of the minimum wage as prescribed by Law would not be covered.

“This same Board also noted the testimony of the witness namely, Ing Mark Perez duly summoned by this same Board. The Transcript of the latter is herewith attached.

“This Board after having examined the relevant documentation to this appeal and heard submissions made by all interested parties, including the testimony of the witness duly summoned by this same Board, opines that the main issue of this appeal is ARMS Limited consideration of Specialist Group Cleaners Limited’s offer as being abnormally low. In this regard, this Board would like to first and foremost define what is considered to be as an abnormally low offer.

“1. In the current economic climate, there is often keen competition between economic operators, which submit competitive low-price bids in order to secure work and maintain their presence on the market. Low-price can, potentially result in significant financial benefits to Contracting Authorities. It may also be “*too good to be true*”. It is in this context that the concept of “*abnormally low Tenderers*” arises. In other words, the concept is nevertheless generally recognized as referring to the situation where the price offered by an economic operator raises doubts as to whether the offer is economically sustainable and can be performed properly. One of the risks in such a situation is where there is doubt as to whether the economic operator will be compliant with social and labour laws.

“Abnormally low offers can be identified by any one of the following methods:

- An analysis of the price (costs) proposed by an economic operator in comparison with the objective of the procurement;
- A comparison made between the Tender price and the average price proposed by the other compliant Bidders.”

“In this particular instance, it is not this Board’s or Evaluation Committee’s jurisdiction to delve into whether, through their offer, the Appellants will make a profit or sustain a loss on the particular project as long as the Contracting Authority is assured that the minimum wage to be paid is accounted for in the Appellants’ offer.

“In this case, this Board notes that the minimum wage is covered and therefore does not deem that the offer submitted by Specialist Group Cleaners Limited is abnormally low.

“2. This Board justifiably notes that the Evaluation Committee, initially recommended the Appellant’s Bid for the award. However, due to the fact that ARMS Limited felt that it had to bear, arrived at the conclusion that the latter’s offer did not cover the minimum wage.

In this regard, this Board refers to previous decisions taken by this Board and confirmed by the Court of Appeal, in that, one should not calculate whether the Bidders’ offer will be profitable or not, but as long as there is left no room for precarious working conditions and the Contracting Authority obtained the necessary confirmation from the successful bidder that all the Tendered works, as stipulated, will be carried out at the quoted offer, the offer should be accepted.

“In view of the above, this Board:

- i) Revokes the decision of ARMS Limited in the award of the Tender;
- ii) Upholds Specialist Group Cleaners Limited’s contention and recommends that the latter’s offer is to be reintegrated in the Evaluation Process;
- iii) Recommends that the deposit paid by the Appellants is to be fully refunded.”

Is-soċjeta` Clentec Ltd. appellat mid-deċiżjoni li f'ha l-Bord għal quddiem din il-Qorti u ressqet aggravju wieħed, fis-sens li meta sar l-appell mis-soċjeta` Specialist Group Cleaners Ltd., mal-istess appell, ma sarx id-depożitu fl-ammont rikjest mil-liġi.

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:

Illi skont il-liġi, meta jsir appell quddiem il-Bord irid jingħata depożitu ekwivalenti għal 0.50 fil-mija tal-valur stmat iffissat mill-awtorita` kontraenti tal-offerta sħiħa, li f'dan il-każ kien ta' €110,000. Id-depożitu, għalhekk, kellu jkun ta' €550, iżda fil-fatt, mal-appell tagħha, is-soċjeta` Specialist Group Cleaners Ltd. għamlet depożitu ta' €400. Jidher li dan kien riżultat ta' żball ta' kalkolazzjoni aritmetika, u qabel is-smiġħ tal-appell quddiem il-Bord, sar aġġustament fl-ammont imħallas bħala depożitu. Din iċ-ċirkostanza ġiet innotata espressament mill-Bord "*in a brief introduction*" qabel is-smiġħ tal-appell.

Is-soċjeta` appellant Clentec Ltd. kienet preżenti għas-smiġħ, u kienet ukoll mgħejjuna bl-avukat tagħha, iżda ma qajmet ebda oġġezzjoni

għall-aġġustament li sar u għad-dikjarazzjoni tal-Bord. Hi anzi ippermettiet li l-appell jitkompla bid-diskussjoni fil-meritu u pparteċipat b'mod attiv fl-istess diskussjoni. Kwindi, din is-soċjeta` ma tistax, f'dan l-istadju, tissolleva aggravju li ma ġiex sollevat fi stadju opportun.

Hu prinċipju magħruf li din il-Qorti, bħala qorti ta' revizjoni, ma tistax tiddiskuti materja li ma ġietx diskussa fil-qrati jew tribunal inferjuri. F'dan il-każ, in-nuqqas ta' depożitu fl-ammont preskritt kien senjalat mill-Bord stess qabel is-smiġħ tal-appell, u ġie nnotat ukoll li sar pagament ulterjuri. Is-soċjeta` appellanti ġiet, għalhekk, mgħarrfa bin-nuqqas li minnu qed tilmenta llum, u ma ssollevat ebda tħassib jew aggravju dwar l-istess. Ma tistax issa, f'dan l-istadju ta' appell quddiem din il-Qorti, tissolleva dan l-allegat nuqqas.

Għaldaqstant, għar-raġunijiet premissi, tiddisponi mill-appell tas-soċjeta` Clentec Ltd. billi tiddikjara l-istess bħala irritu u null, tastjeni milli tiegħu konjizzjoni tal-istess u tikkonferma in toto s-sentenza li ta l-Bord ta' Revizjoni dwar Kuntratti Pubbliċi fit-13 ta' Frar, 2018.

L-ispejjeż ta' dawn il-proċeduri jitħallsu mis-soċjeta` appellant Clentec Ltd. u peress li tqis dan l-appell bħala wieħed fieragħ u vessatorju, tikkundanna lill-appellant sabiex, ai termini tal-paragrafu 10 tat-Tariffa A tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili u tar-Regolament 288

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tal-Avviz Legali 352 tal-2016 (L.S.174.04) iħallas ukoll, bħala spejjeż addizzjonali, is-somma ta' elf Euro (€1000) lir-Registratur tal-Qrati.

Joseph Azzopardi
Prim Imhallef

Joseph R. Micallef
Imhallef

Tonio Mallia
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Deputat Registratur
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