

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 7

Rikors numru 143/18

Burmarrad Commercials Limited (C13537)

v.

Public Broadcasting Services Limited u Id-Direttur tal-Kuntratti

Il-Qorti:

Dan hu appell imressaq fis-27 ta' April, 2018, mis-socjeta` rikorrenti Burmarrad Commercials Limited wara decizjoni datata 17 ta' April, 2018, moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz numru 1151.

Dan il-kaz huwa marbut ma' ghoti ta' kuntratt mis-socjeta` Public Broadcasting Services Limited (il-PBS) lis-socjeta` rikorrenti ghal "*lease of various motor vehicles*". Ma kienx hemm sejha ghall-offerti valida qabel l-ghoti ta' dan il-kuntratt. Fid-19 ta' Frar, 2018, id-Direttur tal-Kuntratti hareg decizjoni taht ir-regolament 261(7) tar-Regolamenti dwar l-Akkwist Pubbliku, li biha gharraf lill-partijiet kontraenti li huwa qieghed ihassar numru ta' kuntratti dwar kiri ta' vetturi li saru bejniethom, u dan peress illi skont hu gew miksura diversi regolamenti applikabbli.

Fil-qosor ir-ragunijiet li wasslu lid-Direttur tal-Kuntratti jhassar dawn il-kuntratti kienu: (i) li s-sejhiet ghall-kwotazzjonijiet li pprecedew dawn il-kuntratti ma gewx imhabbra fuq il-pjattaforma tal-akkwist elettroniku tal-Gvern (ePPS); (ii) li fil-fajl tal-PBS ma nstabilitx dokumentazzjoni dwar kif inhadem il-valur stmat ta' dawn il-kuntratti; (iii) il-PBS ma tatx taghrif dwar il-jedd ta' appell mid-decizjoni taghha li taghti dawn il-kuntratti lill-appellanta; (iv) li l-akkwist gie artifizjalment maqsum f'numru ta' kuntratti separat sabiex ma ssirx sejha pubblika ghall-offerti u sabiex ma jinharigx avviz fil-Gurnal Ufficjali tal-Unjoni Ewropea; u (v) li l-appellanta nghatat trattament preferenzjali billi bi ftehim mal-PBS hija thalliet tirrevedi l-prezzijiet originali taghha.

Is-socjeta` rikorrenti ressqet oggezzjoni quddiem l-imsemmi Bord li b'decizjoni tas-17 ta' April, 2018 cahad l-oggezzjonijiet imressqa u

kkonferma d-decizjoni li ha d-Direttur tal-Kuntratti. Id-decizjoni tal-Bord
hija s-segwenti:

“This Board,

“Having noted this Objection filed by Burmarrad Commercials Limited (hereinafter referred to as the Appellants) on 1 March 2018, refers to the contention made by the same with regards to the cancellation of the contract by the Director of Contracts, (hereinafter referred to as the Director), between the Appellants and the Public Broadcasting Services, (hereinafter referred to as the Contracting Authority), such contract relating to the leasing of various motor vehicles to the Public Broadcasting Services.

“Appearing for the Appellants: Dr Keith Borg

“Appearing for the Contracting Authority: Dr Mark Vassallo

“Appearing for the Director of Contracts: Dr Franco Agius
Dr Christopher Mizzi

“Whereby the Appellants contend that:

- a) “They should not be held responsible if the contract to which they were a party to, was not in conformity with the Public Procurement Regulations. At the same instance, the Appellants insist that it was not their responsibility to ensure that the Contracting Authority conformed with such regulations;
- b) “The Appellants strongly maintain that there was no collusion whatsoever with the Public Broadcasting Services Limited, to obtain the award of the call for quotation;
- c) “In accordance with Article 960 of the Civil Code, the Appellants maintain that a contract cannot be cancelled unless there is an agreement between the parties thereto. In this regard, Burmarrad Commercials Limited consider even more so, the fact that a third party has no legal right to cancel a contract between two other parties to the same contract;
- d) “The Appellants also contend that the Director of Contract’s decision to cancel the contract was not legally correct, as such an action can only be taken through a court order and if any one party to the contract, does not honour his obligations thereto, so that the contract is still valid.

“This Board also considered the Director of Contracts’ *“Letter of Reply”* dated 14 March 2018 and its verbal submissions during the Public Hearing held on 3 April 2018, in that:

- a) “The Director contends that the Appellants were obliged to be aware that such an award of the quotation was regulated by the Public Procurement Regulations and to this effect, they were also responsible and obliged to ensure that such regulations were adhered to by both parties to the contract;
- b) “The Director maintains that the fact that the Appellants entered into a legal obligations whilst knowing that the regulations of the *“Public Procurement”* were violated, does in fact, lead to an acceptance by the Appellants of this violation;
- c) “The Director of Contracts maintains that he had acted in accordance with the Contracting Authority and obligations bestowed upon him within the parameters of the *“Public Procurement Regulations”*;
- d) “The Director of Contracts insists that public procurement is regulated by the *“Public Procurement Regulations”* through which he has the authority to cancel such contracts due to specific circumstances.

“This same Board also considered the testimony of the witnesses namely:

1. “Mr Mario Gauci Junior, Director, Burmarrad Commercials Limited, duly summoned by the Appellants;
2. “Mr Edmund Tabone, Public Broadcasting Services, duly summoned by the Department of Contracts;
3. “Mr Anthony Cachia, Director General, Department of Contracts, duly summoned by the same Department.

“This Board also took notice of the following documents submitted by Burmarrad Commercials, which consisted of:

1. “Spreadsheet of Awards;
2. “Letter dated 6 December 2017 sent by the Director of Contracts to Burmarrad Commercials;
3. “Reply dated 7 December 2017 sent by Burmarrad Commercials to the Director of Contracts;
4. “Copies of e-mails between Burmarrad Commercials and the Public Broadcasting Services

“This Board, after having examined in detail the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, would respectfully point out that the jurisdiction of this Board is regulated by the Public Procurement Regulations and the grievances presented by Burmarrad Commercials Limited will be considered in their merit, within the parameters of such regulations.

1. “With regards to the Appellants’ First Grievance, this Board would establish, without any reasonable doubt, that Burmarrad Commercials Limited were aware that they are entering into a commercial agreement with a Public Entity, and that the latter entities, in so far as procurement is concerned, are regulated by the “*Public Procurement Regulations*”. In this regard, the Appellants’ were also obliged to be fully aware of the fact that Public Entities had specific procedures as to how and when such entities can issue quotations.

“Quotations are issued so that the Public Entities, through an evaluation process conducted by competent members of the entity itself, will adjudicate as to the best and most advantageous offer received. Such a procedure is an established and mandatory norm and all economic operators are fully aware of it. In this particular case, this Board cannot credibly establish that the Appellants were not cognisant of this procedure and cannot justify a circumstance where Burmarrad Commercials Limited entered into a commercial agreement with a Public Entity, blindfold.

“In this particular case, this Board opines that both parties to the agreement had the obligations to ensure that the agreement falls within the authorised parameters of the legal framework of both the Contracting Authority and the Appellants’ structure. In this respect, the onus falls on both parties to the contract and not solely on the Contracting Authority, to ensure that the latter entity had adhered to all the local regulations governing the same and that the proper procedure had been followed in the award of this contract.

“In this case, this Board would point out that ignorance of the law excuses nobody and such ignorance does not help or assist the lawbreaker that he did not know the regulations binding such contract which, eventually was entered into by the Appellants. In this regard, this Board justifiably opines that Burmarrad Commercials Limited were obliged to be fully aware that the Public Broadcasting Services was a Public Entity and as such, was regulated by the Public Procurement Regulations and in this respect, both parties had the obligations for the proper execution of this agreement.

“Burmarrad Commercials Limited’s claim that they were not responsible for the Public Broadcasting Services’ non-adherence to the latter’s internal regulations is not to be considered as a credible

excuse as the Appellants, being a party to the commercial agreement were also obliged to ensure that the other party to the contract has fulfilled his obligations in accordance within the parameters of his legal authoritative framework. In this regard, this Board does not uphold the Appellants' First Contention.

2. "With regards to the Appellants' Second Grievance, this Board would justifiably point out that whoever makes an accusation must provide concrete evidence to justify that a violation of law or regulation has, in actual fact, been committed and in this regard, this Board will consider occurrences where it opines that regulations of the Public Procurement have been breached, as follows:

i) "As mandatorily dictated in the "*Public Procurement Regulations*", the particular call for quotations was not published using the Governments' e-tendering system;

ii) "In accordance with Article 28 (i) of the Public Procurement Regulations, the estimated value of a procurement must be established by including all ancillary components of a particular procurement. In this particular case, the Contracting Authority, for some unknown yet unjustifiable reason, divided the same procurement into thirteen separate contracts as follows:

"Hence, if taken individually, the value of each contract is as follows:

- a. "Contract Agreement – BRL 732 (€ 230 monthly for 96 Months)
- € 22,080
- b. "Contract Agreement – BRL 739 (€ 235 monthly for 96 Months)
- € 32,160
- c. "Contract Agreement – BRL 745 (€ 600 monthly for 96 Months)
- € 57,600
- d. "Contract Agreement – BRL 734 (€ 230 monthly for 96 Months)
- € 22,080
- e. "Contract Agreement – BRL 735 (€ 230 monthly for 96 Months)
- € 22,080
- f. "Contract Agreement – BRL 733 (€ 230 monthly for 96 Months)
- € 22,080
- g. "Contract Agreement – BRL 737 (€ 270 monthly for 96 Months)
- € 25,920
- h. Contract Agreement – BRL 740 (€ 335 monthly for 96 Months)
- € 32,160
- i. "Contract Agreement – BRL 742 (€ 315 monthly for 96 Months)
- € 30,240
- j. "Contract Agreement – BRL 741 (€ 335 monthly for 96 Months)
- € 32,160
- k. "Contract Agreement – BRL 738 (€ 315 monthly for 96 Months)
- € 30,240
- l. "Contract Agreement – BRL 743 (€ 490 monthly for 96 Months)
- € 47,040
- m. "Contract Agreement – BRL 726 (€ 230 monthly for 96 Months)
- € 22,080"

“From the above schedule of contracts, this Board notes that some of the contracts entered into by Burmarrad Commercials Limited refer to the same model of vehicle for the same period of the lease. At the same instance, this same Board cannot comprehend as to why all the contracts were dated 12 June 2017 except for one dated 10 March 2017. From the above schedule, it can be easily deduced that the total value of this contract amounts to € 375,840, so that a proper call for tenders should have been issued and in this regard, this Board would refer to an extract from the testimony made by Mr Edmund Tabone wherein he stated that:

“Jiena mill-ewwel stressjajt il-punt li dan huwa element ta’ Tender u li anke jrid jitla’ Bord anke għax il-prassi tagħna qabel kienet hekk.”

“In this regard, this Board would respectfully refer to regulations 100 and 101 of the Public Procurement Regulations, wherein the procedure and values of Public Procurement are regulated. Such regulations form the basic principles as to how and when the calls for quotations and tenders are to be issued. In this particular case, the above regulations have all been breached and both parties to the agreement were obliged to be knowledgeable enough that such violations are illegal. This Board has credibly established that this procurement was split in an illogical and irregular manner, and yet with the knowledge and endorsement of both the Appellants and the Contracting Authority.

iii) “From the documentation presented, this Board notes that the Appellants were given the opportunity to revise their quotation, which is highly irregular, as this procurement is not subject to a negotiated procedure. In this regard, this Board would refer to an e-mail dated 1 December 2016 by Mr Mario Gauci Junior addressed to a number of PBS employees, stating:

“It was a great pleasure meeting you this morning. As discussed please find attached the revised quotations for the leasing of a fleet of vehicles for PBS”

“From the above e-mail, it is evidently clear that there was no commercial sense in splitting the Lease contract for the fleet into separate contracts and it was evident that the Appellants were asked by the Contracting Authority to change their original quotation. At the same instance, this Board was not presented with a schedule of quotations received for this procurement. In this regard, this Board is credibly convinced that the Appellants were fully aware of how this quotation was handled and at the same time, they were aware that they were given preferential treatment in revising their offer, which is highly irregular and breaches the Public Procurement Regulations.

“This Board justifiably established that the whole procedure of the award of this procurement was handled solely by the Chief Executive

Officer of the Public Broadcasting Services and not through an evaluation committee and in this respect this Board cannot ignore the testimony given by Mr Edmund Tabone, who stated that:

“Is-Sur Bundy, fl-aħħar meeting hareġ il-quotation ta’ Burmarrad Commercials iffirmata minnu u ġiegħlna niffirmawha. Ninizzjalizzawha. Jien iffirmajt under duress”

“In this regard, this Board does not uphold Burmarrad Commercials Limited’s Second Contention.

3. “With regards to the Appellant’s Third and Fourth Contentions, this Board, as stated previously in these adjudications, will only consider the merits of these grievances within the parameters of the Public Procurement Regulations.

“With all due respect, Burmarrad Commercials Limited’s claim that a contract can only be cancelled either by mutual agreement of both parties or by a court order, does not feature credibly in this particular case for the following reasons:

- “The commercial agreement is between an economic operator, (Burmarrad Commercials Limited) and a public entity, (Public Broadcasting Services Limited), the latter of which is governed by the Public Procurement Regulations. The latter regulations are regarded as special regulations pertaining to Public Procurement and same regulations provide the necessary authorisation of the Director of Contracts to cancel a contract under certain circumstances. At the same instance, it is established that the agreement entered into by the Appellants constitute a Public Procurement agreement so that the procedures to be adopted in the process of attaining the procurement must conform with the regulations related to Public Procurement.

“One has to acknowledge and appreciate that public funds represent taxpayers’ contributions and the Government is in duty bound to safeguard and control such spending and at the same time, ensure that procurement is properly allocated and processed in a fair and transparent manner, hence the Public Procurement legislation provides the tools and guidelines through which such procurements are processed. At the same instance, the Director of Contracts may also implement corrective measures to regulate the Contracting Authorities who default from adhering to the procurement regulations. In fact, one of the duties is to report violations of the regulations in procurement procedures and take the necessary action and regulations 261 (7) specifically states that:

“The Director has the right to issue a decision terminating any contract or agreement that could have been reached or signed with a contractor, if it transpires that the award of the contract has been made in breach of these regulations or else by discriminating between economic operators”

“From the above regulations, it is an undisputable fact that the Director of Contracts has the right to cancel any contract if there appears to have occurred irregularities which in fact breach the Public Procurement Regulations and which, in the opinion of this Board, such an occurrence did in fact materialise for the following reasons:

- “No proper call for a Tender was issued;
- “The value of the procurement was irregularly and illogically split into parts which misinterpreted the actual value of the contract and which, in the opinion of this Board, was done for no beneficial gain to the Contracting Authority;
- “No proper evaluation procedure was carried out and in fact no Evaluation Board was appointed to assess all the quotations received;
- “The Contracting Authority could not even present a schedule of offers;
- “The Appellants were given the opportunity to revise their offer;
- “The Tendering and evaluation procedure was carried out by one and the same person;
- “The final endorsement for the award was enforced by the same person, who handled this call for quotation on members of the Authority without giving valid reasons as to why the Appellants’ offer was chosen for award;

“In this respect, this Board justifiably establishes that the award process of this Procurement breached various regulations and such a process swayed completely away from such procurement regulations, in fact, this Board opines that this particular procurement provides the perfect example of a strict non-adherence to all the principles of transparent public procurement. In this respect, this Board does not uphold Appellants’ third and fourth contentions.

“In view of the above, this Board,

- i) “Upholds the Director of Contracts’ decision to cancel the contract/agreement entered into between Burmarrad Commercials Limited and the Public Broadcasting Services for the leasing of vehicles;
- ii) “Does not uphold the contentions made by Burmarrad Commercials Limited;
- iii) “Recommends that the deposit paid by the Appellants should not be refunded;

iv) “In view of the fact, that this Board is convinced that there were irregularities in this Procurement Procedure, this same Board orders the Contracting Authority to carry out any necessary investigation into this award and take all the necessary legal action that would be deemed appropriate after such investigation”.

Is-socjeta` Burmarrad Commercials Limited appellat mid-decizjoni li ha l-Bord ghal quddiem din il-Qorti u ressqet aggravju principali fis-sens li fil-fehma taghha hija ma kinitx tahti ghall-irregolaritajiet li setghu gew imwettqa mill-PBS u allura l-kuntratti ma kellhomx jithassru. Hija taqbel li, bhala fatt, kien hemm irregolaritajiet fit-tfassil tal-kuntratt.

Wara li semghet it-trattazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawza u d-dokumenti esebiti, din il-Qorti sejra tghaddi ghas-sentenza taghha.

Ikkonsidrat:

Illi qabel xejn, tajjeb li jigi senjalat li s-socjeta` appellanta ma tikkontestax il-fatt li l-kuntratt in kwistjoni gew maghmula bi ksur ta' diversi regolamenti. Hi tissottometti illi nonostante dan, hija m'ghandhiex tbatl l-konsegwenzi talli l-PBS ma segwietx il-ligi.

Din il-Qorti ma tistax taccetta din is-sottomissjoni. Kuntratt li jkun inghata bi ksur tal-ligi, ma jistax jibqa' fis-sehh, u jekk huwa illegali ebda Qorti ma tista' tippermetti li dan jibqa' in vigore qiesu xejn m'hu xejn.

Skont l-Artikolu 990 tal-Kodici Civili, kuntratt projbit mil-ligi jkollu kawza illecita, u kuntratt b'kawza illecita huwa null.

Kif qalet din il-Qorti, Sede Inferjuri, fil-kawza **Mizzi v. Debono** deciza fil-11 ta' Jannar, 2006, kwalunkwe haga li tkun projbita mil-ligi bhala oggett, il-kuntratt relattiv ikun "*invalidu ghax ikun nieqes minn wiehed mir-rekwiziti tieghu, u ma jkunx jista' jkollu effett*".

Is-socjeta` rikorrenti tghid hazin fl-appell taghha li r-Regolamenti dwar l-akkwist pubbliku ma jghoddux ghaliha izda jghoddu biss lill-awtoritajiet kontraenti bhal ma hija l-PBS. Ir-regolamenti jghoddu ghall-akkwisti pubblici kollha li jsiru mill-Gvern ta' Malta (regolament 3). Jissokta jinghad li l-PBS hija mnizzla fost l-awtoritajiet kontraenti msemija fil-lista tal-Ewwel Skeda tar-Regolamenti. Ghalhekk skont ir-regolament 16(1)(a), il-PBS hija marbuta li thares dawn ir-regolamenti fl-akkwisti taghha. Ifisser dan ukoll, li la s-socjeta` appellanti thajret li tiehu kuntratti ma' min huwa soggett ghal dawn ir-regoli, hija wkoll giet awtomatikament esposta ghal dawn ir-regoli.

Kien korrett ghalhekk il-Bord meta tenna fis-sentenza tieghu li s-socjeta` appellanti kienet marbuta li toqghod mar-Regolamenti dwar l-Akkwist Pubbliku ladarba hija kienet qegheda tiftiehem mal-PBS, li hija entita` pubblika. Tassew, la hi ghazlet li tidhol ghal kuntratt pubbliku, soggett

kif inhu ghal certu regolamenti, hija kellha tizgura li l-kuntratti moghtija lilha kienu konformi ma' dawn ir-regolamenti. F'dan is-sens ghalhekk l-argument tas-socjeta` appellanta li skont ir-regolament 16, hija l-awtorita` kontraenti biss li hija marbuta li thares ir-regolamenti, ma tantx jista' jkun ta' wisq ghajnuna ghalha.

Jekk kien hemm illegalita` din tghodd ghal kulhadd u mhux ghal parti wahda biss. Jigifieri jekk fil-kaz tallum il-kuntratti ffirmati bejn il-PBS u s-socjeta` appellanti kienu illegali, dawn kienu illegali ghat-tnejn li huma.

Xejn ma jiswa lis-socjeta` appellanta li tghid li hija ma kellhiex tort f'dak imwettaq mill-PBS. Dan ghaliex jekk il-PBS ma setghetx taghti dawk il-kuntratti skont il-ligi, u allura dan necessarjament ifisser li s-socjeta` appellanta wkoll ma setghetx tircievi dawk il-kuntratti.

Din il-Qorti lanqas ma tqis li s-socjeta` appellanta kienet in bona fede fil-process li wassal ghall-ghoti tal-kuntratti. Din il-Qorti hi perswaza li s-socjeta` appellanti kienet taf x'inhu jigri, l-aktar meta s-servizz li kienet hadet gie maqsum fuq numru ta' kuntratti minflok fuq kuntratt wiehed u meta, din is-socjeta` bi ftehim mal-PBS, kienet qegheda tbiddel il-prezzijiet originali, haga li ebda offerent ma jista' jithalla jaghmel. Anke l-fatt li s-sejha ghall-kwotazzjonijiet ma saritx fuq il-pjattaforma tal-

akkwist elettroniku tal-Gvern kienet irregolari, u kellha tiftah ghajnejn is-socjeta` appellanti li kienet qed issir xi haga kontra l-ligi.

Kuntrarjament ghal dak li ssottomettiet is-socjeta` appellanti, is-sitwazzjoni prezenti hija ben differenti ta' meta funzjonarju ta' kumpanija jiffirma kuntratt ghan-nom tal-kumpanija meta ma jkunx awtorizzat jaghmel dan. Hawn ghandna kaz, min-naha l-ohra, fejn funzjonarju tal-PBS iffirma kuntratt bi ksur tal-ligi, li hi materja li tipprexxindi mir-relazzjoni interna tal-funzjonarju u l-PBS.

Lanqas ma hu validu l-argument li darba li l-kuntratt gie ffirmat ma jistax jithassar jekk mhux bil-kunsens tal-partijiet kontraenti. Kif jghid l-Artikolu 992(1) tal-Kodici Civili, huma validi biss il-kuntratti "*maghmula skont il-ligi*", u mhux dawk li jsir bi ksur tal-ligi. Diga rajna li d-Direttur tal-Kuntratti, bis-sahha tal-imsemmi regolament 261(7), kellu s-setgha jhassar kull kuntratt jew ftehim li jkun sar ma' kuntrattur bi ksur tar-regolamenti. Din mhux xi setgha jew diskrezzjoni insindikabbli, ghax fil-fatt, kif qed tipprova taghmel is-socjeta` appellanti, l-ezercizzju ta' dik is-setgha tista' tigi attakkat quddiem il-Bord u din il-Qorti, u dan fuq aspetti kemm fattwali u kemm legali.

L-allegat pregudizzju li sofriet is-socjeta` appellanti meta l-kuntratt gie mhassar, huwa irrilevanti ghall-kwistjoni.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell tas-socjeta` Burmarrad Commercials Limited billi tichad l-istess u tikkonferma in toto s-sentenza li ta fis-17 ta' April, 2018, il-Bord ta' Revizjoni dwar il-Kuntratti Pubblici.

L-ispejjez ta' dawn il-proceduri ghandhom jithallsu mis-socjeta` appellanti Burmarrad Commercials Limited u peress li din il-Qorti tqis dan l-appell bhala wiehed fieragh u vessatorju, tikkundanna lill-appellanti sabiex, ai termini tal-paragrafu 10 tat-Tariffa A tal-Kodici ta' Organizzazzjoni u Procedura Civili, ihallas ukoll, bhala spejjez addizzjonali, is-somma ta' Euro 1000 lir-Registratur tal-Qrati.

Joseph Azzopardi
Prim Imhallef

Joseph R. Micallef
Imhallef

Tonio Mallia
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Deputat Registratur
mb