

QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar il-Ħamis 31 ta' Jannar 2019

Numru 33

Rikors numru 303/18

Schembri Barbros Limited (C-9577), V&C Contractors Limited (C-13748) u Asfaltar Construction Limited (C-38006) f'isimhom *proprio* u eżerċenti l-kummerċ taħt l-isem ta' "ABB Joint Venture"

v.

- 1. Il-Korporazzjoni għas-Servizzi tal-Ilma**
- 2. Id-Direttur Ġenerali (Kuntratti)**
- 3. Rockcut Limited**

Il-Qorti:

Dan hu appell imressaq fis-17 ta' Diċembru, 2018, mis-soċjetajiet rikorrenti Schembri Barbros Ltd., V&C Contractors Ltd. u Asfaltar Construction Ltd. *proprio et nomine* wara deċiżjoni datata 27 ta' Settembru, 2018, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti

Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-każ li għandu riferenza CT 3026/2018 (każ numru 1210).

Dan il-każ huwa marbut ma sejħa għall-offerti li ħarġet il-Korporazzjoni għas-Servizzi tal-Ilma għal "*trenching and pipelaying works for the second class water (new water) distributor network in Mellieħa and Mgarr*". Għal dan il-kuntratt intefgħu erba' offerți u peress illi t-tender kienet maqsuma fi tliet *lots*, ġie rakkomandat illi *lot 1* u *2* jingħataw lis-soċjeta` Rockut Ltd, u *lot 3* lis-soċjeta` Bonniċi Bros Services Ltd. Is-soċjetajiet rikorrenti oġġezzjonaw bl-għoti tar-rakkomandazzjoni taż-żewġ *lots* lis-soċjeta` Rockut Ltd. u ressqu appell quddiem il-Bord. Dan il-Bord b'deċiżjoni tas-27 ta' Settembru, 2018, ċaħad l-appell u kkonferma d-deċiżjoni tal-Awtorita` kontraenti. Il-Bord ordna, pero` li d-depożitu mħallas għal dak l-appell jiġi rifus lis-soċjetajiet appellanti.

Id-deċiżjoni tal-Bord hija s-segwenti:

"This Board,

"having noted this Objection filed by ABB Joint Venture, (hereinafter referred to as the Appellants), on 18 August 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of Reference CT 3026/2018 (Lots 1 and 2) awarded by the Water Services Corporation, (hereinafter referred to as the Contracting Authority), listed as Case No 1210 in the records of the Public Contracts Review Board.

"Appearing for the Appellant: Dr Massimo Vella

"Appearing for the Contracting Authority: Dr Daniela Attard

“Whereby,

“a) the Appellants’ main objection refers to the fact that one of the Bidders was awarded two lots, when clause 9.2 of section 1 of the tender document, stipulates that *“only one lot can be awarded to any particular tenderer.”*”

“This Board has also considered the Contracting Authority’s verbal submissions during the Public Hearing held on the 18th September 2018, in that:

“a) The Water Services Corporation insists that it has strictly abided by all the conditions laid out in clause 9.2 of section 1 of the tender document. The Contracting Authority also contends that the Appellants’ offer was discarded simply due to the fact that the quoted price was too expensive and well over the estimated value.

“This same Board has also noted the testimony of the witness, namely Eng. Anthony Muscat, Secretary, Evaluation Committee, who was duly summoned by the Public Contracts Review Board.

“This Board after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, opines that the issue which should be considered, is the application of clause 9.2, section 1 of the tender document.

“1. Clause 9.2 of the tender document states that:

““Only one (1) Lot can be awarded to any particular tenderer. The tenderer whose offer is the cheapest fully compliant offer in more than one lot, will be automatically given the lot with the highest value. The same procedure shall be adopted for the second cheapest and this shall be applied until all available lots have been assigned. In the event that there are less recommended bidders than the available lots, the procedure identified above shall start again with the cheapest technically compliant bids available until all lots have been awarded.””

“This clause strictly stipulates the procedural formula which must be applied for the award criteria. It conditions the number of lots which can be awarded to any one bidder and provides remedies in the event that there are less compliant bidders than lots available. The first condition imposed by this clause is that a bidder can only be awarded one lot. In this particular case, this Board notes that this condition was applied during the evaluation process but there arose a situation where there were less compliant bidders than the available lots to be awarded. Again, this clause provides a remedy for such a situation, in that, the procedure would start again, for the remaining lots, selecting the remaining cheapest technically compliant bid, so that all the lots will be awarded. In this regard, the situation ended up by having Lot 1 still available, after the two compliant Bidders were awarded Lots 2 and 3 respectively, thus both Rockcut Limited and Bonnici Brothers Services

Limited were awarded one Lot each. During the second phase of the selection and award process for Lot No 1, the remaining offers ranked as follows:

Rockcut Limited	€1,254,808
Bonnici Brothers Services Limited	€1,633,611
ABB Joint Venture	€2,024,754

“It is quite obvious that the cheapest compliant bid was that of Rockcut Limited and in accordance with clause 9.2 of section 1, the Evaluation Committee carried out their evaluation process in a just and transparent manner. At the same instance, this Board notes that the chosen offer for Lot No 1 exceeded the estimated value by € 31,000, which is considered as reasonable, whilst the offer submitted by ABB Joint Venture was correctly deemed to be well over the estimated value. In this regard, this Board opines that the Evaluation Committee carried out its duties in accordance with clause 9.2 of Section 1 of the tender document, in a just and fair manner.

“2. This Board strongly feels that the said clause 9.2 deserves amplification, in that, although the clause itself provides the procedural formulae to establish the award criteria, no details and conditions are stipulated in choosing the remaining available lot/s, in the event that there are less recommended bidders than lots available. In this regard, this Board would expect that the Evaluation Committee should be clearly guided to take into consideration whether the chosen offer, in such circumstances, is within the estimated value and if not; up to what extent such an offer is to be deemed reasonable. At the same instance, a provision in the same clause should also define when such offers for the remaining lots are to be cancelled. Such conditions should be included in the said clause so that prospective bidders are well aware of the award criteria, should the event arises, as happened in this particular case.

“With regards to ABB Joint Venture’s contention in that, both their offer and the Recommended Bidder’s offer were above the estimated value so that the tender for Lot 1 should be cancelled, this Board acknowledges the argument presented by the Appellants, however, this Board takes into account the fact that the chosen offer is only slightly more than the estimated value whilst the Appellants’ offer is way above expectations. In this regard, this Board opines that due to the small difference that exists, the chosen offer is considered as a reasonable offer and the principle of proportionality applies in this case.

“3. This Board would also refer to the lack of submission of a “*Letter of Reply*” from the Corporation and in this regard, this Board regrets such an attitude from same. With regards to the “*Letter of Rejection*”, this Board regretfully notes that the Contracting Authority did not submit the correct reason for disqualification of the Appellants’ offer and, as had on many occasions, this Board expects an immediate response

and future corrective action from the Authority's end to oblige unsuccessful bidders with this mandatory requirement.

"In view of the above, this Board:

"i) does not uphold the contentions made by ABB Joint Venture;

"ii) upholds the decision of the Water Services Corporation in the award of Lot No 1;

"iii) instructs the Contracting Authority that, in future, in similar Tenders, will amplify clearly clause 9.2 of section 1 of the tender document to take into consideration the recommendations which this Board is proposing to avoid misinterpretation of the action to be taken by the Evaluation Committee, in the event that there are less recommended bidders than there are Lots available for award. Such procedural instructions should be clearly stipulated and included in Clause 9.2 of Section 1, in future tenders involving lots;

"iv) in view of the circumstances instigated by the subjective interpretation of clause 9.2, this Board recommends that the deposit paid by ABB Joint Venture should be fully reimbursed".

Is-Socjetajiet rikorrenti issa qed jappellaw mid-deċiżjoni li ha l-Bord u ressq u żewġ aggravji prinċipali: (i) waħda li skont ir-regolament 9.2 tat-tender, "*only one lot can be awarded to any particular tender*" u (ii) li l-Bord kien inkonsistenti meta aċċetta l-offerta ta' Rockut Ltd u ċaħad l-offerta tagħhom meta ż-żewġ offerti kienu jeċċedu l-istima magħmula mill-Awtorita` kontraenti.

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 fil-kuntest tal-ewwel aggravju, ir-regolament in kwistjoni jgħid, hu veru, dak li jingħad qabel, iżda jkompli billi jipprovdi illi f'każ li jkun hemm anqas offerti rakkomandati milli *lots*, terġa' issir evalwazzjoni biex il-*lots* li jibqgħu jingħataw lil min ikun offra l-anqas (din il-klawsola tinsab riprodotta fid-deċiżjoni tal-Bord). Ġara li wara li ġew allokat *lot 2* u *lot 3*, u ma kienx hemm offerta rħisa, cioe`, anqas mill-istima, għall-*lot 1*, il-proċess reġa' nfetaħ, u nstab li għal dan *lot 1*, l-irħas offerta kienet saret mis-soċjeta` Rockut Ltd, u allura din l-aħħar soċjeta` ġiet mogħtija ukoll dan il-*lot*.

Il-proċedura adoperata kienet waħda korretta u l-fatt li s-soċjeta` offerenti tingħata żewġ jew aktar *lots* kien previst fit-*tender* stess. Ir-regolament, kif anke esprima ruhu l-Bord, seta' kienet miktuba b'mod aktar dettaljat, pero`, is-sens tagħha jinftiehem. L-iskop tar-regolament huwa biex il-*lots* kollha jiġu assenjati u jekk ma jkunx hemm offerti biżżejjed, il-proċess ta' assenjazzjoni jerġa' jibda bl-offerti kollha, inklużi dawk li lilhom kien ġia ġie assenjat *lot*, jipparteċipaw. Fil-fehma tal-Qorti din it-tifsira toħroġ oġġettivament ċara minn qari tar-regolament fil-kuntest tas-sejħa. Huwa veru li l-kriterji jridu jkunu ben definiti, pero`, lanqas ma għandu jistenna li dak li jkun jiġi "*spoon fed*". L-interpretazzjoni mogħtija ma hijiex waħda soġġettiva, kif qal il-Bord, iżda hija bażata fuq qari oġġettiv tal-istess klawsola, u hija waħda non diskriminatorja għax tpoġġi lil kull offerenti fl-istess xkaffa.

Fil-kuntest tat-tieni aggravju, huwa ċar anke mir-regolamenti dwar l-Akkwist Pubbliku, li l-Awtorita` kontraenti tista' twarrab offerta li l-prezz tagħha jeċċedi l-baġit tal-Awtorita` (regolament 2 tal-Legislazzjoni Sussidjarja 174.04 u regolament 18.1 tal-General Rules Governing Tenders) u hekk ġara f'dan il-każ fir-rigward tas-soċjetajiet rikorrenti. Dawn legalment għamlu offerta inaċċettabli u ġew, għalhekk skwalifikati.

Is-soċjetajiet rikorrenti jargumentaw li allura anke l-offerta ta' Rockut Ltd. kellha tiġi skwalifikata għax l-offerta tagħha kellha prezz ukoll għola mill-baġit tal-Awtorita`. Dan hu minnu, pero`, filwaqt li offerta tas-soċjetajiet rikorrenti kienet 64% ogħla, madwar €800,000, dik ta' Rockcut kienet biss ta' 1.8%, madwar €22,700. Fid-dawl tal-prinċipju ta' proporzjonalita` li għandu jnebbi il-proċess tal-għażla, din il-Qorti tapprezza li d-differenza fis-sejha ta' Rockcut għandha titqies bħala waħda *de minimis*, u ma tarax li l-offerta tagħha kellha tiġi wkoll imwarrba. Kollox jiddependi mill-każ, iżda din il-Qorti tara illi differenza sa massimu ta' 3% tkun tollerabbli u offerta m'għandhiex titwarrab meta d-differenza tkun sa hekk. Ovvjament differenza ta' ftit aktar minn 3% tista' wkoll tkun *de minimis*, pero`, f'għieħ it-trasparenza u l-kjarezza f'dawn l-affarijiet, din il-Qorti qed tistabilixxi massimu ta' 3% fid-differenza bejn il-prezz offrut u l-baġit tal-Awtorita` kontraenti.

Is-soċjetajiet rikorrenti jilmentaw mill-fatt illi huma, meta jitfgħu l-offerta, ma jkunux jafu l-baġit kemm hu. Dan hu veru, pero`, jgħodd għall-kulħadd. Jekk il-valur stmat jiġi ppubblikat minn qabel ikun hemm ir-riskju kbir li offerenti joffru l-istess prezzijiet eżatt u b'dan il-mod l-Awtorita` kontraenti tiġi f'qagħda li ma tkunx tista' tagħzel aktar liema hi l-aqwa offerta. B'dan il-mod, wieħed ikun ukoll qed iwaqqa' l-okkażjonijiet tagħha li tirċievi offerenti li jkunu anqas minn dak il-valur stmat u b'hekk tiflew iċ-ċans li tikseb kuntratt b'valur li jkun vantaġġjuż għaliha.

Apparti dan jista' jingħad ukoll illi f'dan il-każ intalbet *bid bond* li ma teċċedix il-valur ta' żewġ miljun euro. Dan il-valur ma kienx jirrispekkja bi preċis il-baġit tal-Awtorita`, (li kien ta' madwar €1,200,000) pero`, kien indikazzjoni ta' x'kienet qed tistenna l-Awtorita`. Fil-fatt, filwaqt li l-prezz tal-offerta tas-soċjeta` rikorrenti kien jaqbeż din il-figura dik ta' Rockcut Ltd. ma kenitx taqbeż din il-figura.

L-istima għall-fini tal-*bid bond* m'għandhiex x'taqsam mal-baġit tal-Awtorita` li m'għandux ikun superat, pero`, din ir-riferenza qed issir f'dan il-każ biex tiġi ndikata l-qabża kbira fil-prezz tal-offerta tas-soċjetajiet rikorrenti.

Għaldaqstant għar-raġunijiet premessi, tiddisponi mill-appell tas-soċjetajiet rikorrenti appellanti billi tiċċhad l-istess u tikkonferma fis-sħiħ id-deċiżjoni li ta l-Bord fis-27 ta' Settembru, 2018.

L-ispejjes marbuta ma' dan l-appell jitħallsu mis-soċjetajiet rikorrenti appellanti *in solidum*.

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Deputat Reġistratur
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