

QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar il-Ġimgħa 31 ta' Mejju 2019

Numru 30

Rikors numru 20/19

Rockcut Limited (C-10164)

v.

- 1. Malta Industrial Parks Ltd.**
- 2. Id-Direttur Ġenerali (Kuntratti)**
- 3. Schembri Infrastructures Ltd.**

Il-Qorti:

Dan hu appell imressaq fil-5 ta' Frar, 2019, mis-soċjeta` Rockcut Ltd wara deċiżjoni datata 22 ta' Jannar, 2019, mogħtija mill-Bord ta' Reviżjoni dwar il-kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-każ referenza CT 2245/2018 (każ numru 1248).

Dan il-każ huwa marbut ma' sejha għall-offerti li ħareġ il-Malta Industrial Parks Ltd. "for excavation works at MRH 005, Mrieħel Industrial Estate". Għal dan il-kuntratt intefgħu diversi offerti, u l-offerta tas-soċjeta` rikorrenti ġiet imwarba peress li ma indikatx fl-offerta tagħha fejn u kif se jsiru "the shotcreting works"; il-kuntratt ġie rrakkomandat li jingħata lis-soċjeta` konvenuta Schembri Infrastructures Ltd. Is-soċjeta` rikorrenti ressqet appell għall-quddiem il-Bord. Dan il-Bord b'deċiżjoni tat-22 ta' Jannar, 2019, ċaħad l-appell u kkonferma d-deċiżjoni tal-awtorita` kontraenti.

Id-deċiżjoni tal-Bord hija s-segwenti:

"This Board,

"having noted this Objection filed by Rock Cut Limited, (hereinafter also referred to as the Appellants) on 12 November 2018 referring to the contentions made by the latter with regards to the award of Tender of Reference CT 2245/2018 listed as Case No 1248 in the records of the Public Contracts Review Board awarded by the Malta Industrial Parks, (hereinafter also referred to as the Contracting Authority).

"Appearing for the Appellants: Dr Beryl Jean Buttigieg

"Appearing for the Contracting Authority: Dr John Bonello

"Appearing for the Department of Contracts: Dr Franco Agius

"Whereby the Appellants contend that:

- "a) their reply to the clarification regarding shotcreting did not alter their original offer. In this regard, the Appellants insist that by adding an explanation of shotcreting in the programme of works, the latter did not alter the dates or works in the excavation works but simply clarified what was already contained in their offer.

“This Board has also noted the Contracting Authority’s *“Reasoned Letter of Reply”* dated 19 November 2018 and also its verbal submissions during the Public Hearing held on 8 January 2019, in that:

- “a) Malta Industrial parks contend that the Appellants’ reply to the clarification request included a new item namely *“shotcreting”* which was not included in the programme of works in the Appellants’ original offer. In this regard, the Evaluation Committee, quite correctly, deemed such a reply to be a rectification of their offer and in this respect, this is not allowed, hence the Evaluation Board had no other option but to deem the Appellants’ offer as technically non-compliant.

“This same Board has also noted the testimony of the witness namely, Mr Noel Azzopardi, member of the Evaluation Committee who was duly summoned by Malta Industrial Parks.

“This Board has also taken note of the documents presented by Rock Cut Limited which consisted of:

- “1. Bill of Quantities;
- “2. Programme of works.

“This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned by Malta Industrial Parks, opines that the issue that deserves due consideration is Rock Cut Limited’s reply to the clarification request regarding *“shotcreting”*

“1. This Board would respectfully refer to the *“Bill of Quantities”* stipulated, in the Tender Dossier, with particular reference to item 3.05 (g) which requested a rate for *“supply and apply Grade C 25/30 shotcrete by a 100mm minimum thickness to the excavated walls.”* In this regard, this Board notes that in their offer, the Appellants failed to quote a rate for this particular item in the Bills of Quantities, and therefore, the Evaluation Committee, quite appropriately, requested a clarification to establish where, in the Appellants’ offer, shotcrete is included or indicated, as follows:

“Technical

““i) Programme of Works: Bidder is to indicate where in your programme of works are the shotcreting works included as requested in article 7 (c) (i) (b) of the Instructions to Tenderers and Technical Offer From – Programme of Works (b).”

“Rock Cut Limited’s reply to the above request was submitted in the form of a Gantt Chart, however showing an additional item, (shotcreting) and which was not included in the Appellants’ original

submission where the programme of works consisted of the following stages:

- "1. Commencement Date
- "2. Works
- "3. Mobilisation
- "4. Installation of Protection Measures if Required
- "5. Excavation Works
- "6. Reinstatement Works
- "7. Commissioning
- "8. Demobilisation
- "9. Completion Date
- "10. Handover

"In their reply, the Appellants submitted a revised Gantt Chart, showing the inclusion of shotcreting as follows:

- "1. Commencement Date
- "2. Works
- "3. Mobilisation
- "4. Installation of Protection Measures if Required
- "5. Excavation Works
- "6. Shotcreting Works (At 3m Excavation Depth Intervals) [this Board's underlining]
- "7. Reinstatement Works
- "8. Commissioning
- "9. Demobilisation
- "10. Completion Date
- "11. Handover

“It is obvious that the reply to the clarification request included an additional item of shotcreting in the programme of works which was not included in the original submitted documentations, as vividly confirmed by the technical witness, in his submissions, as follows:

“*Xhud: Wara din l-ittra aħna rċevejna programme of works updated fejn tidher ċara illi ddaħħal item number 6, shotcreting works at 3 meters excavation depth intervals. Jigifieri dan tniżżlet item oħra, m’għandhiex indikat. The original submission excavation works biss kien hemm imniżżel. In the updated għandna kemm l-excavation works kif ukoll miżjuda l-item tax-shotcreting works.*”

“This Board was also made aware of the importance of shotcreting which was requested in the Bills of Quantities under item 6 and which Rock Cut Limited had failed to indicate in their submission. In this regard, an extract from the testimony of the technical witness highlights the importance of this technical requirement as follows:

“*Xhud: Is-shotcreting bħala xogħlijiet, fix-xogħol li niltaqa’ miegħu kuljum u speċjalment f’dan ix-xogħol fejn aħna ser ninzlu 3 sulari, huwa item importanti. Huwa item li aħna dehrilna li għandu jkun imniżżel fil-fatt kif qiegħed imiżżel fil-BOQ u n-natura tax-xogħol, ma tistax int teskava iktar minn 3 metri mingħajr ma ddaħħal il-kelma shotcreting bħala xogħol imkien.*”

“Furthermore, this board also noted the importance of the application of the shotcreting, thus justifying the inclusion of such an important item in the excavation process and in this respect, this Board refers to an extract from the testimony of the witness as follows:

“*Xhud: Id-domanda għandha risposta sempliċi. L-items l-oħra huma parti mix-xogħol li għandu jsir. Id-differenza hi li jekk inti ma ddaħħalx ix-shotcreting f’dan ix-xogħol, fir-realta’ 3 metri biss tista’ taħdem u ma tistax tkompli il-kuntratt. Għax dan qed tipperikola, apparti l-ħajja tal-ħaddiema li hemm, ix-shotcreting ma tistax isir f’daqqa. Ma tistax teskava.*”

“In this regard, this Board is justifiably convinced that the inclusion of shotcreting under excavation works represent an important section of the tendered works. At the same instance, this Board also confirms that “shotcreting” was not included in the programme of works and the Bills of Quantities of Rock Cut Limited’s original submissions and that shotcreting item was indicated as an additional item to the Appellants’ original submission. In this regard, this board does not uphold Rock Cut Limited’s contention.

“2. On a general note, this Board would point out that the Bills of Quantities in the Tender Document denoted clearly that the shotcreting was a separate item under excavation works and in this respect, the

Appellants failed to indicate the shotcreting element in the original Programme of Works.

“One must acknowledge the fact that the Evaluation Committee has to abide by the principle of self-limitation in that, the latter must assess and evaluate each offer in accordance with the requirements of the Tender Conditions so that the principles of equal treatment and level playing field for all offers, are maintained throughout.

“On the other side of the coin, the Bidder must not take the opportunity to add or amend any items so declared in his original submissions, through a reply to a clarification request as this would be tantamount to a rectification.

“At the same instance, if in doubt on any particular item of the technical specification, Rock Cut Limited had the necessary remedies to clarify any issues which, in their opinion were not clear, however, this Board also notes that such available remedies were not availed of by the Appellants.

“In view of the above, this Board,

“i) upholds Malta Industrial Parks’ decision in the award of the contract;

“ii) does not uphold the contentions made by Rock Cut Limited;

“iii) directs that the deposit paid by the Appellants should not be refunded.”

Is-soċjeta` rikorrenti issa qed tappella mid-deċiżjoni li ħa l-Bord u ressqet aggravju li prinċipalment jgħid li hi kienet tat l-informazzjoni mitluba dwar ix-xogħlijiet ta’ *shotcreting*.

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 dan hu każ marbut ma' *tender* għal xogħol ta' skavar ġewwa l-Imrieħel. Kif soltu jiġri, fid-dokumenti mas-sejħa jkun hemm id-dettalji tal-informazzjoni li trid tkun mogħtija mal-offerta. Issa skont il-klawsola 7(C)(i), f'paġna 8 tad-dokument tas-sejħa, min ried jiġi meqjus għall-għoti ta' dan il-kuntratt, kellu d-dmir li jgħaddi t-tagħrif tekniku kollu dwar l-offerta tiegħu, "*through the prescribed Tender Response Format and by using the Tender Preparation Tool provided*".

Parti mit-tagħrif li kellu jiġi mnewwel kien jinkludi l-programm tax-xogħlijiet u *Graphics Works Schedule* (ara klawsola 7(C)(i)(b)). It-tagħrif tekniku kollu li l-offerent kien mitlub illi jgħaddi b'mod elettroniku kien imfisser fid-dokument bl-isem, "*Tenderer's Technical Offer*". Fost it-tagħrif li kellu jiġi mgħoddi mill-offerent kien hemm dak marbut mal-programm tax-xogħlijiet u *Graphics Works Schedule*. Dawn il-kriterji ġew imfissra b'dan il-mod:

"Programme of works.

"A detailed Programme of Works Including a Detailed Construction Management Plan in relation to this tender.

"This shall include:

"a) Mobilisation;

"b) all works involved as shown in the drawings and listed in the attached Bills of Quantities;

"c) completion; and

"d) commissioning and handing over of the works.

“This does not limit in any way Malta Industrial Parks from modifying the works or progress of works according to the exigencies at the time of modification.

“

“Graphic Work Schedule.

“A Graphic Work Schedule (Gantt Chart) in relation to the Execution of the Contract under Article 32 of the Special Conditions”.

Wieħed mix-xogħlijiet imniżżel fil-*Bill of Quantities*, li kellu jiġi mdaħħal fil-programm tax-xogħlijiet kien *item* numru 3.05 (g), li kien jaqra hekk:

“Supply and apply Grade C25/30 Shotcrete by a 100mm minimum thickness to the excavated walls.”

Ġara issa, li meta l-kumitat tal-għażla kien qiegħed jifli l-offerta tal-kumpanija appellanti, huwa ma setax issib fejn u meta fil-programm tax-xogħlijiet hija kellha l-ħsieb li twettaq ix-xogħlijiet bit-tagħmir tax-*shotcrete*. Kien għalhekk li permezz ta' ittra tal-25 ta' Settembru 2018, il-kumitat tal-għażla kiteb lill-kumpanija appellanti hekk:

“Programme of Works: Bidder is to indicate where in your Programme of Works are the shotcreting works included as requested in Article 7C(i)(b) of the Instructions to Tenders and Technical Offer Form – Programme of Works (b).”

Bi twegiba għal din l-ittra, il-kumpanija appellanti flok indikat fejn fil-programm tax-xogħlijiet oriġinali tagħha hija kienet semmiet f'liema waqt tal-proġett hija kienet beħsiebha taħdem bix-*shotcrete*, hija ressqet *gant chart* ġdida tax-xogħlijiet li kien jinkludi x-xogħol bix-*shotcrete* f'punt 6.

Il-kumitat tal-għażla ħass li l-kumpanija appellanti ma setgħetx tbiddel il-programm ta' xogħlijiet b'wieħed ġdid fl-istadju tal-għarbil tal-offerti. Għalhekk billi l-kumpanija appellanti baqgħet ma indikatx fejn fil-programm oriġinali tagħha hija kienet sejra tagħmel ix-xogħlijiet bix-*shotcrete*, il-kumitat tal-għażla qatagħha li l-offerta tal-kumpanija appellanti ma kinitx qagħdet mal-kondizzjonijiet tas-sejha u għalhekk għażel li jwarrab l-offerta tagħha permezz ta' ittra tat-2 ta' Novembru 2018.

Il-kumpanija appellanti tinsisti li kienet semmiet dan ix-xogħol fl-offerta oriġinali tagħha, pero`, fil-verita` hija naqset milli turi jekk u meta hija kienet ħa tagħmel ix-xogħol bit-tagħmir li jispara l-konkrit. Jista' jkun li kien fil-ħsieb tal-kumpanija appellanti li dan ix-xogħol isir f'waqtu, pero` ma semmietx dan ix-xogħol fil-programm tagħha tax-xogħlijiet, kif kien obligu tagħha li tagħmel skont il-kondizzjonijiet tas-sejha. Lanqas ma hi skuża li tgħid li x-xogħlijiet ta' *shotcreting* huma "ovvjament" inkluzi fix-xogħlijiet tal-iskavar, għax kif intwera, mal-offerta kellu jkun hemm skeda ta' xogħlijiet dettaljata, li kellu jinkludi l-użu ta' *shotcrete*.

Il-kwistjoni ma kinitx relatata mal-fatt li ma kienx hemm *quote* għal dan ix-*shotcrete*, iżda mal-fatt li dan l-użu ma ssemiex fl-offerta. Il-Kumpanija appellanti kellha tforni programm dettaljat tax-xogħlijiet, li jinkludi "*all works involved as shown in the drawings and listed in the attached bills*

of quantities”, u mhux iressaq programm ġenerali tax-xogħlijiet, bl-idea li jkun ovvjju x’kien se jsir. Kellha tindika l-biċċiet tax-xogħol kollha biex b’hekk l-awtorita` kontraenti tkun tista’ ssegwi l-iter proċedurali tal-ħidma.

L-argument li l-prezz offrut kien ovvjament jinkludi xogħol ta’ *shotcreting* ma jregġix, għax wieħed m’għandux jistenna li l-awtorita` kontraenti tifhem x’kellu f’moħħu kull offerent, jew tippresumi hi kif ix-xogħol sejjer isir. Hu għalhekk li l-offerta kellha tindika b’mod ċar u dettaljat il-programm tax-xogħlijiet, u jindika kull biċċa xogħol li jkun sejjer iwettaq.

Il-fatt li, wara l-ittra tal-awtorita` kontraenti tal-25 ta’ Settembru, 2018, il-kumpanija appellanti flok indikat fejn, fl-offerta oriġinali tagħha, kien inkluż dan ix-xogħol, resqet *gantt chart* ġdida, u fih indikat b’mod espress ix-xogħol tas-*shotcrete*, juri li l-kumpanija għarfet in-nuqqas tagħha u pprovat issewwih b’dokument ġdid. Kif osservat din il-Qorti fil-kawża fl-ismijiet “**Projekte Global Ltd. v. Kunsill Lokali Marsaskala**”, deċiża fis-7 ta’ Ottubru, 2014.

“Meta r-regolamenti tas-sejħa jesigū b’mod espress ċertu tip ta’ dokument, dak id-dokument kif rikjest irid ikun ipprezentat sal-għeluq taż-żmien għall-offerti. Ikun kontra l-prinċipju tat-trasparenza jekk offerent jitħalla jissostitwixxi dokument b’ieħor wara l-għeluq taż-żmien”.

Fl-istess sens hija s-sentenza ta’ din il-Qorti fil-kawża fl-ismijiet “**Pharma-Cos Ltd v. Central Procurement and Supplies Unit**”, deċiża fid-29 ta’

April, 2016, fejn ukoll sar enfaži, f'ġieħ it-trasparenza, li t-termini tas-sejħa jiġu segwiti b'mod l-istess għal kulħadd.

Kif tajjeb osserva d-Direttur Ġenerali (Kuntratti), jekk ir-regoli tas-sejħa jimponu l-preżentata ta' tali tagħrif, hu mistenni li offerenti li jieħdu sehem f'dik is-sejħa joqogħdu għal dawk ir-regoli. Wara kollox ir-regoli tas-sejħa qegħdin hemm biex jiġu mħarsa u mhux biex jiġu mwarrba. Biex jiġi żgurat il-ħarsien ta' dawn il-prinċipji, l-awtorita` kontraenti hija obligata li tosserva strettament il-kriterji li hija stess tkun stabiliet (ara f'dan is-sens is-sentenza tad-29 ta' April 2004, **Il-Kummissjoni v. CAS Succhi Di Frutta S.p.A, C-496/99, punt 115**);

Dan mhux każ ta' sempliċi "*amplification of details*", għax li ġara kien li l-offerta kien hemm nuqqas ta' dettalji rilevanti u kif mitluba fis-sejħa. L-offerta kienet karenti mid-dettalji tal-programm tax-xogħlijiet, u kien biss wara li ġiet ippreżentata *gantt chart* ġdida li ġie indikat kif u meta kien sejjer isir ix-xogħol ta' *shotcrete*. L-offerta kellha tindika l-fażijiet kollha tax-xogħol u kif u meta se jsiru kull fażi biex l-istess xogħlijiet ikunu jistgħu jiġu segwiti dettaljatament.

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell tas-soċjeta` Rockut Ltd. billi tiċħad l-istess u tikkonferma d-deċiżjoni li ħa l-Bord ta' Revizjoni dwar Kuntratti Pubbliċi fit-22 ta' Jannar, 2019.

L-ispejjeż relattivi ma dan l-appell jitħallsu mill-kumpanija appellanti
Rockcut Ltd.

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