

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, 27 ta' Settembru, 2019.

Numru 22

Rikors numru 233/19

The Computer Training Course Limited (C14158)

v.

Jobsplus u Domain Academy Limited (C18903)

Il-Qorti:

Dan hu appell imressaq fil-15 ta' Lulju, 2019, mis-socjeta` rikorrenti The Computer Training Course Limited wara decizjoni datata 25 ta' Gunju, 2019, moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'l quddiem imsejjah "il-Bord) fil-kaz referenza MEDE/MPU/JOBSPPLUS/019/2018 (kaz numru 1320).

Dan il-kaz hu marbut ma' sejha għall-offerti li harġet Jobsplus "*for the provision of ICT Summer Courses 2019*". Għal dan il-kuntratt intefghu zewg offerti, u cioè, wahda mis-socjeta` rikorrenti, u oħra mis-socjeta` intimata Domain Academy Ltd., li giet irrakomandata tiehu l-kuntratt mill-kumitat ta' evalwazzjoni. Is-socjeta` rikorrenti The Computer Training Course Limited ressqet oggezzjoni quddiem il-Bord, izda dan caħad l-appell u kkonferma d-decizjoni tal-kumitat tal-evalwazzjoni.

Id-decizjoni tal-Bord hija s-segwenti:

"This Board,

"having noted this objection filed by the Computer Training Course Limited (herein after referred to as the Appellants) on 3 May 2019, refers to the claims made by the same Appellants with regard to the tender of reference MEDE/MPU/JOBSPPLUS/019/2018 listed as case no 1320 in the records of the Public Contracts Review Board, awarded by Jobsplus (herein after referred to as the Contracting Authority).

"Appearing for the Appellants: Dr Stefan Zrinzo Azzopardi

"Appearing for the Contracting Authority: Jonathan C. Spiteri

"Whereby, the Appellants contended that:

"a) their main contention refers to the fact that, the way the points were allocated by the Evaluation Committee, was irregular. In this regard, Appellants maintain that, they had offered more than requested especially, in the two aspects namely 'Mitigation Strategies' and 'ways to motivate participants towards success'.

"This Board also noted the contracting Authority's 'Letter of Reply' dated 10 May 2019 and its verbal submissions during the hearing held on 5 June 2019, in that:

"a) the Authority insists that the evaluation process was carried out in a just and fair manner and Appellants' offer failed to include valid options which were beneficial to the trainees. In this regard,

the Authority contends that deduction of marks was only affected in respect of optional items and not on basic modules.

“This same Board also noted the testimony of the witnesses namely,

“Mr Ray Abela – duly summoned by the Computer Training Course Limited

“Ms Amber Darmanin - duly summoned by the Public Contracts Review Board

“Mr Paul Zammit – 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, including the testimony of the witnesses duly summoned, opines that, the issues that merit consideration are two-fold namely:

- “a) the mode of the allocation of marks and
- “b) the interpretation of the phrase ‘Over and Above’.

“1. Allocation of Marks

“With regards to Appellants’ contention that, the marks awarded in their offer were irregular, this Board would first and foremost, point out that, each evaluator, independently, allocated points on the merit of each technical item, submitted by each Bidder, so that the subjectivity element has been suppressed. At the same instance, this Board noted that the allocation of marks on the two items being contested by Appellants, was carried out on the basis that, proposals submitted by the latter, were not considered as valid, as such submissions were not ‘Over and Above’ as those stipulated in the tender document.

“2. With regards to the ‘Mitigation Strategies’ issue, Appellants were awarded three (3) points due to the fact that out of six (6) proposals submitted, only three (3) were considered to be ‘Over and Above’ those already stipulated in the tender dossier. Whilst, the preferred Bidder submitted eight (8) strategies and the Evaluation Committee considered only five (5) to be ‘Over and Above’ the stipulated ones. In this respect, this Board notes that the mode in which the points were allotted, was quite appropriate and the issue that really deserve due consideration is the interpretation of what is ‘Over and Above’, as such consideration formed the basic assessment measuring tool.

“3. This Board would also respectfully point out that, during the allocation of points, some form of comparison of offers must also be considered by the Evaluation Committee, whilst abiding by the

principle of self-limitation and in the particular case, this Board opines that, the Evaluation Committee, by comparing the offers, same endeavoured to select the most advantageous offer and had allocated the points accordingly.

The allocation of points on the items being contested can be summarised, as follows:

“Item Allocated	Max Points	Prop. Submitted	Valid Proposals	Points
“ <u>Appellants</u> Mitigation Strategies (1Aii)	5	6	3	3
“ <u>Preferred Bidder</u> Mitigation Strategies (1Aii)	5	5	5	5
“ <u>Appellants</u> Motivation (1Ab)	5	6	6	4.7
“ <u>Preferred Bidder</u> Motivation (1Ab)	5	7	7	5

“In this respect, this Board opines that the allocation of points on the submissions made by both tenderers was justifiably carried out.

“4. ‘Over and Above’ Phrase

This Board would respectfully refer to clauses 9.3a and 9.3b (evaluation grid), which clearly refers to technical items on which Appellants are claiming that the awarded marks, were irregular, as follows:

“Criteria/Sub Criteria

A) *Rationale*

1. *A review of the terms of reference demonstrating the knowledge and understanding of the context of the eligible local, cohort of participants.*
 - a. *Understanding of the challenges of the cohort of eligible participants over and above those identified in this Tender document. (Refer to section 1.5 – Current state of Affairs of the Terms of Reference).*
 - i. *Challenges of the cohort of eligible participants (One mark will be allocated per valid way provided up to a maximum of five (5) marks)*
 - ii. *Ways to mitigate these challenges (One mark will be allocated per valid way provided up to a maximum of five (5) marks)*

“b. Valid ways to keep this cohort of eligible participants, interested and this attending the courses offered to him/her. One mark will be allocated per valid way provided u to a maximum of five (5) marks.”

“From the above-mentioned clause, the Authority is requesting proposals which are to be ‘over and above’ those already identified in the tender document, so that, any proposals which are already listed, are to be treated as invalid proposals.

“In this particular case, Appellants did submit proposals which were ‘Over and Above’ those stipulated, however, the other competing Bidder submitted more valid proposals regarding motivation, than the Appellants and quite appropriately, they were awarded more points.

“This Board opines that the above-mentioned clause referred to all the requirements, as stipulated in the tender dossier, and such a condition had to be taken in consideration as per terms of reference, as stated in section 1.5. At the same instance, this Board would also confirm that although both Bidders exceeded the minimum requirements, the Evaluation Committee had to assess which offer was the most advantageous and, in this regard, this Board notes that the preferred Bidder submitted more valid proposals with regards to ‘Motivation’ so that, quite appropriately, same obtained a better average mark.

5. This Board would also point out that, the fact that one evaluator did not award full marks to Appellants’ particular item, does not imply that the evaluation process was carried out in an irregular manner, but rather assert the fact that, the PBQR system’s end result is the most objective method of assessing an offer.

“In conclusion, this Board opines that:

“a) the allocation of points on each offer was carried out in a fair, just and transparent manner,

“b) the reference to clause 1.5 in clause 9.3 (evaluation grid) does not imply that the phrase ‘Over and Above’ should only apply to clause 1.5, but rather that ‘Over and Above’ implies all proposals so identified and listed in the tender dossier.

“c) Clause 1.5 is a descriptive reference of what is being requested by the Authority and the objectives to be achieved throughout the tendering process.

“In view of the above, this Board,

“i) Does not uphold Appellants’ contentions,

“ii) Upholds the Contracting Authority’ decision in the award of the tender,

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

Is-socjeta` The Computer Training Course Limited issa qed tappella mid-decizjoni li ta l-Bord ghal quddiem din il-Qorti u ressqet diversi aggravji, dik principali tkun li l-frazi “*over and above those identified in the tender document*”, li intuzat f’pagna 11 fil-punt 9.3 fit-*tender document* (il-paragrafu shih fejn intuzat din il-frazi gie kwotat fid-decizjoni tal-Bord f’paragrafu 4), ma kellhiex titqies li kienet qed tirreferi ghall-proposti li kellhom jitressqu bhala *mitigation strategies* u *ways to address challenges* imsemmija qabel fid-dokument, izda kellha tkun ristretta ghal dak stipulat fil-parti sezzjoni 1.5 *current state of affairs of the terms of reference*.

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:

Qabel ma jigi trattat il-mertu tal-appell, trid tigi mistharrga eccezzjoni preliminari li rressqet Jobsplus marbuta mal-fatt li s-socjeta` appellanti talbet li l-kuntratt jinghata lilha, haga li din il-Qorti ma taghmilx. Dan huwa minnu, pero` dan in-nuqqas da parti tas-socjeta` appellanti ma jwassalx ghan-nullita` tal-appell li jista' jigi deciz fuq it-talba principali, li hi talba ghat-thassir u r-revoka tad-decizjoni tal-Bord.

L-aggravju preliminari qieghed, ghalhekk, jigi michud.

Trattat issa l-mertu tal-appell, senjatament l-applikazzjoni tal-frazi “*over and above those identified in this tender document*”, din il-Qorti taqbel mad-decizjoni tal-Bord li, mill-kuntest tad-dokument kollu, huwa car li dik il-frazi kienet mahsuba biex turi li l-offerent irid iforni ideat, lil hinn minn dawk ipprovdu ti fl-istess dokument tas-sejha, li setghu jintuzaw biex jikkumbattu certi problemi ta' interess li jista' jkollhom il-partecipanti.

Il-frasi “*in this tender document*”, jigifieri, ghall-fini tad-dokument kollu, ma thalli l-ebda dubju li l-problemi (“*challenges*” kif uzat fid-dokument) kollha indikati fi kwalsiasi parti tad-dokument tas-sejha, u konsegwentement, ezempji li ntuzaw biex jispjegaw modi ta' kif dawn il-problemi setghu jigu meghluba, ma kellhomx jintuzaw mill-offerent fil-proposti li huwa kellu jressaq biex jinghataw punti fir-rigward. Huwa proprju dan li ghamlet is-socjeta` appellanti. Hi rressqet sitt proposti, imma tlieta biss gew accettati

bhala tajbin, ghax it-tlieta l-oħra kienu biss riproduzzjoni ta' dak li kien indikat fid-dokument tas-sejha stess. Is-socjeta` preferuta ressqet hames proposti "godda", biex nghidu hekk, u ghalhekk inghatat aktar punti mis-socjeta` rikorrenti.

Mhix logika s-sitwazzjoni li bhala soluzzjoni għall-problemi, toffri l-istess ideat li huma imsemmija fid-dokumenti għas-sejha, u tippretendi li tiehu punti għal dawk l-istess ideat. Il-frazi "*over and above*" tqieset, kif kellha tkun, li kienet applikabbli għar-rekwiziti kollha li kellhom jigu sodisfatti mill-offerenti, u li b'hekk il-*preferred bidder* korrettement inghata aktar punti mis-socjeta` appellanti proprju għaliex dan ressaq aktar proposti validi.

Il-frazi "*in this tender document*" ma thalli ebda dubju li l-problemi kollha indikati fi kwalsiasi parti tad-dokumenti tas-sejha u konsegwentement, eżempji li ntuzaw biex jispjegaw modi ta' kif certi problemi setghu jigu meghluba, ma kellhomx jintuzaw mill-offerent fil-proposti li huwa ressaq u dan sabiex jinghata punti fir-rigward.

Għar-rigward tal-kumment tal-Bord fejn qal li z-zewg offerenti kienu eċċedew il-"*minimum requirements*", hu car li dan kien lapsus da parti tal-Bord, u dak li probabbilment ried isostni kien li z-zewg offerenti kienu, bhala fatt, ressqu numru ta' proposti li bhala numru kienu eċċedew ir-

rekwiziti. B'daqshekk ma jfissirx li l-istess Bord ikkunsidra wkoll li kull proposta kienet valida.

Il-fatt li x-xhieda li instemghet mill-Bord setghet ma gietx traskritta u ma kinitx quddiem l-istess Bord, ma taffetwax il-validita` tad-decizjoni tal-Bord, peress illi kien dan l-istess Bord li sema' x-xhieda u ha notamenti ta' dak li intqal (kif jidher mill-istess decizjoni). Il-Bord, ifisser, ha konjizzjoni u qies kull ma ntqal quddiemu fl-ghoti tad-decizjoni tieghu.

Ghaldaqstant, ghar-ragunijiet premessi tiddisponi mill-appell ta' The Computer Training Course Ltd. billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord fil-25 ta' Gunju, 2019, bl-ispejjez relatati ma' dan l-appell jithallsu mis-socjeta` appellanti The Computer Training Course Ltd.

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Deputat Registratur
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