

QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF JOSEPH AZZOPARDI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF ANTHONY ELLUL

Seduta ta' nhar it-Tnejn 9 ta' Marzu 2020

Numru 5

Appell numru 385/2019

Sultech & Co (P-1477)

v.

**Ministeru għal Għawdex, Direttorat
għall-Iżvilupp Reġjonali EkoGħawdex, u
Anthony Mercieca**

1. Dan huwa appell ta' *Sultech & Co* ["*Sultech*"] minn deċiżjoni tas-7 ta' Novembru 2019 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [L.S. 174.04]. Il-każ quddiem il-Bord ta' Revizjoni kien dwar oġġezzjoni ta' *Sultech* kontra deċiżjoni tal-Ministeru għal Għawdex ["il-Ministeru"] illi jwarrab offerta ta' *Sultech* u jilqa' dik ta' Anthony Mercieca ["Mercieca"] għal "*framework agreement for the provision, maintenance and regular collection of open skips at various sites in Gozo*".

2. Il-fatti rilevanti seħnew hekk: kienet saret sejħa mill-Ministeru għal offerti għal “*provision, maintenance and regular collection of open skips at various sites in Gozo*”. Fost il-kondizzjonijiet tas-sejħa kien hemm dik li tgħid hekk:

»The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.«¹

3. Fost dawk li għamlu offerta kien hemm *Sultech* u Mercieca. B’ittra tat-2 ta’ Awissu 2019 il-Ministeru għarraf lil *Sultech* illi sejra tintlaqa’ l-offerta ta’ Mercieca billi kienet l-aktar waħda vantaġġjuża għall-Ministeru u wkoll illi kienet tilħaq il-kriterji amministrativi u tekniċi.
4. B’ittra tad-9 ta’ Awissu 2019 *Sultech* ressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta’ Reviżjoni b’talba illi tinqaleb id-deċiżjoni tal-Ministeru. Bid-deċiżjoni tas-7 ta’ Novembru 2019, li minnha sar dan l-appell, il-Bord ta’ Reviżjoni iddeċieda hekk dwar l-oġġezzjoni ta’ *Saltech*:

»This board,

»Having noted the objection filed by *Sultech & Co* (hereinafter referred to as the Appellants) on 9 August 2019, refers to the claims made by the same Appellants with regards to the tender awarded by Ministry for Gozo (Eco Directorate) (hereinafter referred to as the Contracting Authority).

»... ..

»Whereby the Appellants contend that:

- »a) The preferred bidder is not compliant as he does not own the necessary equipment to carry out the tender works. In this regard, the equipment which will be utilised to execute the works is all owned by Mr Mario Mercieca and not the tenderer, namely Mr Anthony Mercieca;
- »b) The evaluation committee should have carried out the necessary investigation to establish whether the preferred

¹ *Criteria for award*, para. 9.

bidder had the necessary 'tool of trade' policy and other necessary permits to be eligible to carry out such type of works.

»This board also noted the Contracting Authority's 'Letter of Reply' dated 19 August 2019 and its verbal submissions during the hearing held on 28 October 2019, in that:

- »a) the Authority maintains that this is a service tender whereby the Authority is requesting the services of the provision, maintenance and regular collection of open skips. In this regard, as long as the service provider has the necessary equipment and permits, same can be eligible to carry out the tendered works and in this case the preferred bidder will be utilising the services of Mr Mario Mercieca, an employee who owns the equipment and necessary permits.

»... ..

»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 objective of the tender; and
 - »b) whether the preferred bidder was compliant or not for the execution of the Authority's objectives..
- »1. With regards to Appellants' first contention, this board would, first and foremost, refer to the Authority's objectives for issuing such a tender and, in this particular case, the Authority is requesting the provision of open skips for the particular purpose of collecting and transporting material to designated areas in Gozo, so that the tender is a service tender for the provision of equipment to achieve the desired collection and transportation of materials to particular sites.
 - »2. In this case the bidder, namely Mr Anthony Mercieca, submitted an offer for the provision of equipment to carry out the tendered service. The tender document itself did not stipulate that the bidder cannot subcontract or that the bidder himself must be the owner of such equipment. In this regard, this board would respectfully refer to clause 4.2.4 (Technical Specifications) which states that:
 - »"4.2.4 The transport and disposal vehicle for the open skip shall be duly covered with all relevant licenses and permits, including, but not restricted to, those of Environment and Resources Authority (ERA) and the Transport Authority."
 - »From the documentation made available to this board, same can confirm that the vehicle which the bidder declared to utilise for the tendered works is suitable and has the necessary licences and permits to execute the tendered service.
 - »3. This board notes that, the equipment to be utilised belongs to Mr Mario Mercieca, the son and employee of Mr Anthony Mercieca. The offer submitted by the preferred bidder declared that his son

owns the vehicle to be used and also included the necessary licences and permits, in the name of Mr Mario Mercieca, who will carry out the tendered services as a subcontractor of the preferred bidder. In this regard, this board does not find any irregularity as the tender document did not preclude sub-contracting whilst, at the same instance, the service will be provided by equipment having the necessary licences and permits to execute the service being requested by the Authority.

- »4. With regards to Appellants' claim that the preferred bidder will not be able to execute the service with one truck only, this board would respectfully refer to clause 4.2.9 (Technical Specifications) which stipulates that:

»“4.2.9 Prior to any contract award, the Contracting Authority reserves the right to confirm any tenderer's claims and submissions regarding the provision of open skips loader, contingency arrangements, and the availability of enough open skips resources for a continual, and an effective and efficient Contract Works and Services.”

»The above-mentioned clause provides the necessary provision to ensure that the bidder must prove that he has enough resources for the ongoing service during the term of the contract.

- »5. With regard to Appellants' second contention, this board, after having examined the documentation submitted by the preferred bidder, established that a 'tool of trade' policy was included in the name of Mr Mario Mercieca, the person sub-contracted by the bidder to carry out the tendered services under Mr Anthony Mercieca's responsibility.

»In conclusion, this board opines that:

- »a) the tender was for the provision of equipment, so that such equipment which will be utilised for tendered services had to possess the necessary permits and licences to enable the bidder to execute the service being requested by the Authority. In this particular case, this board finds that the equipment to be utilised possesses the necessary licences and permits;
- »b) the tender document does not preclude sub-contracting and the preferred bidder will be sub-contracting the utilisation of the tendered service to his son Mr Mario Mercieca, who owns the appropriate equipment to carry out the tendered service.

»In view of the above, this board:

- » i) does not uphold Appellants' contentions;;
- » ii) upholds the contracting decision in the award of the tender;
- »iii) directs that the deposit paid by the Appellants should not be refunded.«

5. *Sultech* ressqet appell minn din id-deċiżjoni b'rikors tas-27 ta' Novembru 2019 li għalih il-Ministeru wieġeb fid-9 ta' Jannar 2020.
6. Fl-ewwel aggravju *Sultech* tgħid illi l-proċess tas-sejħa għal offerti ma jiswiex għax waqt illi fis-sejħa għal offerti fuq l-*electronic public procurement system* jidher il-Ministeru bħala l-awtorità kontraenti, fuq dokument ieħor tas-sejħa jidher id-Direttorat għall-Iżvilupp Reġjonali EkoGħawdex. Dan, tgħid *Sultech*, "iqajjem dubju fi rigward tal-mod u l-manjiera ta' kif kien amministrat dan il-process, u li l-uniku mod li jista' jiġi sanzjonanti [sic] huwa li tiġi kkanċellat[a] din is-sejħa għall-offerti".
7. Ir-reg. 262 tal-L.S. 174.04 igħid illi:
 - »**262.** Kandidati prospettivi u offerenti jistgħu, qabel id-data tal-għeluq ta' sejħa għall-kompetizzjoni, jipprezentaw rikors b'raġunijiet quddiem il-Bord ta' Revizjoni:
 - »... ..
 - »(e) biex jikkancellaw is-sejħa għall-kompetizzjoni għar-raġuni li s-sejħa għall-kompetizzjoni tkun bi ksur ta' xi liġi jew x'aktarx tikser xi liġi partikolari jekk titkomplu.«
8. L-ilment ta' *Sultech* jolqot nuqqas jew irregolarità li, fil-fehma tagħha, kien għa' jeżisti qabel ma saret l-evalwazzjoni tal-offerti u, anzi, qabel ma għalaq iż-żmien li fih setgħu jintefgħu l-offerti. It-talba għat-tħassir tas-sejħa għal offerti għalhekk kellha ssir, kif irid ir-reg. 262, "qabel id-data tal-għeluq ta' sejħa għall-kompetizzjoni". *Sultech* mhux biss ma ressqitx dan l-ilment qabel id-data tal-għeluq tas-sejħa iżda wkoll lanqas ma ressqitu quddiem il-Bord ta' Revizjoni, u għalhekk ma tistax tressqu f'dan l-istadju.
9. L-ewwel aggravju huwa għalhekk miċħud.

10. Fit-tieni aggravju *Sultech* tgħid illi t-tweġiba ta' Mercieca għall-oġġezzjoni tagħha quddiem il-Bord ta' Revizjoni saret wara li għalaq iż-żmien ta' għaxart ijiem mogħti għalhekk fir-reg. 276(ċ) tal-L.S. 174.04.
11. Fil-fatt, il-Bord ta' Revizjoni osserva, presumibilmment dwar it-tweġiba ta' Mercieca, illi "*sending correspondence dealing with the appeal at the last minute was not acceptable. The objection raised will be treated in line with Public Procurement Regulations*". Għalkemm l-osservazzjoni illi t-tweġiba "*will be treated in line with Public Procurement Regulations*" hija x'aktarx ambigwa, għax ma tgħidx jekk il-Bord ta' Revizjoni jqisx li r-regolamenti jridu li t-tweġiba titqies jew illi titwarrab, jidher illi fil-fatt twarrbet għax fil-korp tad-deċiżjoni ma tissemmiex, u tissemma biss it-tweġiba tal-awtorità kontraenti.
12. Dan l-aggravju wkoll huwa għalhekk miċħud.
13. It-tielet aggravju jgħid illi l-awtorità kontraenti għamlet "apprezzament ħazin tal-fatti u tal-liġi li tirregola l-materja fuq diversi binarji", u huwa msejjes fuq l-argument illi Mercieca "ma kienx konformi mal-kriterji amministrativi u tekniċi".
14. Fil-fehma ta' *Sultech*, l-ewwel nuqqas li għandu jwassal biex Mercieca jitqies illi ma jissodisfax il-kriterji amministrativi u tekniċi huwa għax ma għandux vettura – *skip loader* – meħtieġa biex jaqdi l-obbligazzjonijiet tiegħu taħt il-kuntratt. Fil-fatt Mercieca fl-offerta kien qal illi sejjer jinqeda bil-vettura ta' ċertu Mario Mercieca, li hu ibnu, iżda ma weriex illi tassew Mario Mercieca huwa marbut, b'subappalt jew b'xi obbligazzjoni oħra, illi jipprovdi din il-vettura biex l-obblatur Mercieca

jkun jista' jinqeda biha għall-għanijiet tal-kuntratt. Il-polza ta' assikurazzjoni – *tool of trade indemnity insurance* – relativa wkoll hija fuq isem Mario Mercieca u mhux fuq isem l-oblatur.

15. Barra minn hekk, *Sultech* tgħid illi Mercieca wera li għandu disponibbli biss vettura waħda, li ma hijiex biżżejjed biex iwettaq l-obbligazzjonijiet taħt il-kuntratt.
16. Minkejja dan in-nuqqas, il-kumitat tal-għażla deherlu li seta' jassumi illi Mercieca kien sejjer jinqeda bil-vettura ta' ibnu għax kienu jafu "li huma missier u l-iben", u illi, ladarba l-vettura hija ta' Mario Mercieca, huwa sew illi l-polza ta' assikurazzjoni tkun fuq isem dan. Kien tal-fehma wkoll illi vettura waħda hija biżżejjed.
17. Fost il-kondizzjonijiet tas-sejħna għal offerti, taħt *technical specifications*, hemm dawn li ġejjin:
 - »4.1.1. This tender provides for the supply of open skips
 - »Any skip provided under terms of this contract must be delivered within 24 hours from an official request
 - »... ..
 - »4.2.4. The transport and disposal vehicle for the open skip shall be duly covered with all relevant licences and permits
 - »4.2.5. The Contractor must have his vehicles registered with the relevant authorities, and duly authorised to carry and transport waste to disposal sites. Bidders must submit, literature, details of ownership, licences and permits for the skip loaders being proposed under the term of this contract.
 - »... ..
 - »4.2.7. The Contractor must be in possession of a Tool of Trade indemnity insurance covering not less than € 50,000 per occurrence. Bidders must submit, as part of the literature, confirmation of a valid Tool of Trade insurance policy.
 - »4.2.8. Since the Contract works and services are necessarily ongoing, and required in a timely manner without any delays and/or interruptions, Bidders must ensure that they can cope with any contingency, including mechanical and/or other faults, whatever the

nature or circumstances, and, therefore, have readily available means, other skip loaders and other open skip supplies, in order to continue providing ongoing open skip without interruptions.

»4.2.9. Prior to any Contract award, the Contracting Authority reserves the right to confirm any tenderer's claims and submissions regarding the provision of open skips loader, contingency arrangements, and the availability of enough open skips resources for a continual, and an efficient Contract works and services.«

18. Relevanti wkoll illi, fost it-tagħrif li kull oblatur kellu jagħti fil-*European single procurement document*, kellha tingħata twegiba għall-mistoqsija “*is the economic operator participating in the procurement procedure together with others?*” u “*does the economic operator intend to subcontract any share of the contract to third parties?*” u għal dawn il-mistoqsijiet l-oblatur Mercieca wieġeb le.

19. Kif sewwa tosserva *Sultech* fir-rikors tal-appell tagħha, il-Qorti tal-Gustizzja tal-Unjoni Ewropea fil-każ C-176/98 *Holst Italia spa v. Comune di Cagliari* qalet illi:

»29. ... where, in order to prove its financial, economic and technical standing with a view to being admitted to participate in a tendering procedure, a company relies on the resources of entities or undertakings with which it is directly or indirectly linked, whatever the legal nature of those links may be, it must establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract.«

20. Dan huwa wkoll rifless fir-reg. 235 tal-L.S. 174.04:

»235. (1) Fir-rigward tal-kriterji relatati ... mal-abbiltà teknika jew professjonali kif stabbilit skont ir-regolamenti 222 u 223, operatur ekonomiku jista', fejn dan ikun adegwat u għal kuntratt partikolari, jiddependi fuq il-kapaċitajiet ta' entitajiet oħra, irrilevanti min-natura legali tar-rabtiet li għandu magħhom. ... Meta operatur ekonomiku jkun irid jiddependi fuq il-kapaċitajiet ta' entitajiet oħra, dan għandu jagħti prova lill-awtorità kontraenti li huwa ser ikollu r-riżorsi meħtieġa għad-dispożizzjoni tiegħu, pereżempju, billi jippreżenta impenn minn dawk l-entitajiet għal dan il-għan.«

21. Il-Bord ta' Revizjoni osserva illi l-fatt li l-oblatur Mercieca sejjer jinqeda bil-vettura ta' ibnu ma joħloq ebda irregolarità għax "*the tender document did not preclude sub-contracting*", iżda l-kwistjoni ma hijiex jekk l-oblatur setax jagħmel sub-appalt iżda li kellu juri "*that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract*". Issa l-kwistjoni hi, ukoll fid-dawl tal-prinċipju ta' proporzjonalità, jekk il-fatt illi l-vettura hija ta' ibnu huwiex biżżejjed biex l-oblatur ikun wera li għandu d-disponibilità tal-apparat meħtieġ, kif fehem il-kumitat tal-għażla u qabel miegħu l-Bord ta' Revizjoni.

22. Din il-qorti ma tistax taqbel mal-konkluzjoni tal-kumitat tal-għażla tal-Bord ta' Revizjoni. Huwa minnu illi konsiderazzjonijiet ta' proporzjonalità jistgħu jwassluk biex taħseb illi meta missier u iben jaħdmu flimkien dak li hu ta' wieħed sejjer ikun jista' jinqeda bih l-ieħor ukoll; madankollu, dan mhux dejjem u bilfors huwa l-każ. Ma ntweriet ebda rabta kuntrattwali bejn il-missier u l-iben, jew illi l-iben huwa marbut legalment li jagħti s-servizz lill-missier. Jekk l-iben huwa operatur ekonomiku indipendenti ma hemm xejn li jzommu, jekk isib opportunità aħjar, li jinqeda bir-riżorsi tiegħu għal xogħol ieħor u mhux dak ta' missieru. Barra minn hekk, il-prova tad-disponibilità tar-riżorsi tat-terz – f'dan il-każ tal-iben – hija meħtieġa "*whatever the legal nature of those links may be*", u fil-każ tallum dik il-prova ma saritx, bla ma ngħidu wkoll illi Mercieca ma indikax fuq il-*europaen single procurement document* illi sejjer jinqeda bis-servizzi ta' terzi.

23. Għalhekk il-qorti ma taqbilx mas-sottomissjoni tal-Ministeru fit-tweġiba tiegħu għall-appell illi “għalkemm huwa utli li tiġi indikata r-relazzjoni bejniethom, il-fatt illi Mario Mercieca ma ġiex indikat espressament bħala sotto-kuntrattur jew li kien hemm prova illi dan huwa impjegat tiegħu, ma kienx punt li fuqu kellha titwarrab is-sejha kif qed tippretendi l-kumpanija appellanti”; mhux biss huwa “utli li tiġi indikata r-relazzjoni” iżda huwa meħtieġ.
24. Ukoll, ma jidherx illi ġiet indirizzata sew il-ħtieġa għal “*contingency arrangements*” kif iridu l-para 4.2.8. u 4.2.9 tat-*technical specifications* u jekk hemmx arrangamenti għall-eventwalitajiet imsemmija f’dawk il-paragrafi.
25. Dan kollu huwa biżżejjed biex titfassar id-deċiżjoni li l-kuntratt jingħata lil Mercieca, iżda dan ma jfissirx illi l-offerta ta’ Mercieca għandha titwarrab bla ma titqies mill-ġdid, flimkien mal-offerti validi l-oħra, fid-dawl tal-konsiderazzjonijiet magħmula fuq. Sewwa jgħid il-Ministeru fit-tweġiba tiegħu illi, dwar l-obbligu tal-oblatur “[to] *provide data concerning subcontractors and the percentage of works to be subcontracted*”², hemm in-nota 2(B) illi tgħid illi l-oblaturi għandhom jagħtu kull tagħrif nieqes fi żmien ħamest ijiem wara li ssirilhom talba għalhekk. Fiċ-ċirkostanzi l-kumitat tal-għażla kellu d-dmir jitlob dan it-tagħrif nieqes qabel ma jgħaddi għad-deċiżjoni tiegħu.
26. Għal dawn ir-raġunijiet il-qorti tipprovdi dwar l-appell billi tħassar id-deċiżjoni tal-kumitat tal-għażla illi l-kuntratt jingħata lil Mercieca u

² Para. 7(B)(a) tal-*instructions to tenderers*.

tħassar ukoll id-deċiżjoni tal-Bord tal-Għażla, b'dan illi fiċ-ċirkostanzi d-depożitu mħallas minn *Sultech* sabiex setgħet tressaq l-oġġezzjoni tagħha quddiem dak il-bord għandha tintradd. Tordna illi l-proċess tal-għażla jsir mill-ġdid wara li l-kumitat tal-għażla jitlob u jingħata t-tagħrif meħtieġ kif imfisser fuq.

27. Billi ma ntlaqgħux l-aggravji kollha ta' *Sultech* huwa xieraq illi din tbatu sehem mill-ispejjeż tal-appell. Il-qorti għalhekk tordna li l-ispejjeż tal-appell jinqasmu hekk: sehem minn erbgħa ($\frac{1}{4}$) tħallsu *Sultech* u tliet ishma minn erbgħa ($\frac{3}{4}$) jħallashom il-Ministeru.

Joseph Azzopardi
President

Giannino Caruana Demajo
Imħallef

Anthony Ellul
Imħallef

Deputat Reġistratur
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