



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' Marzu 2020

Numru 12

Rikors numru 420/19

E.C. Municipals Limited [C62598]

v.

- (1) Dipartiment Tal-Kuntratti;**
- (2) Transport Malta; u**
- (3) Boat Maintenance Limited ghal kull interess li jista' jkollha**

Il-Qorti:

Dan hu appell imressaq fil-31 ta' Dicembru, 2019, mis-socjeta` rikorrenti E.C. Municipals Limited wara decizjoni datata 12 ta' Dicembru, 2019, moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz riferenza CT 2403/2018 (kaz numru 1392);

Dan il-kaz huwa marbut ma' sejha ghall-offerti li hareg Transport Malta "for the renewal of old navigational buoys, supply, installation and commissioning of new buoys".

Ghal dan il-kuntratt intefghu diversi offeriti, fosthom wahda mis-socjeta` appellanti rikorrenti, u ohra mis-socjeta` intimata Boat Maintenance Limited. Il-kumitat ta' evalwazzjoni ghall-ewwel iddecieda li jaccetta l-offerta tas-socjeta` rikorrenti, izda ftit wara instab li s-socjeta` rikorrenti naqset li tannetti dokument partikolari mal-offerta taghha, u allura d-decizjoni precedenti giet imhassra u l-offerta tas-socjeta` rikorrenti dikjarata *administratively non-compliant*. Il-kuntratt gie rakkomandat li jinghata lill-imsemmija socjeta` intimata.

Is-socjeta` rikorrenti ressqet oggezzjoni quddiem il-Bord, izda dan cahad l-appell u kkonferma d-decizjoni ahharija tal-kumitat ta' evalwazzjoni.

Id-decizjoni tal-Bord hija s-segwenti:

"This Board,

"having noted this objection filed by E.C. Municipals Ltd (herein after referred to as the Appellants) on 1 November 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2403/2018 listed as case No. 1392 in the records of the Public Contracts Review Board, awarded by Transport Malta (herein after referred to as the Contracting Authority).

"Appearing for the Appellants:

Dr Jan Karl Farrugia

“Appearing for the Contracting Authority: Dr Franco Galea

Dr Lucio Sciriha

“Whereby, the Appellants contend that:

a) “Their offer was deemed administratively non-compliant, due to the alleged fact that the Authority did not receive the ESPD form. In this regard, Appellants insist that, they had factually submitted the ESPD form in their original submissions and also in reply to the clarification request.

“This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 8 November 2019 and its verbal submissions during the hearing held on 28 November 2019, in that:

a) “The Authority maintains that Appellants’ ESPD form had not been uploaded in their original submissions, so that the Authority requested clarification from Appellants and asked to resubmit this missing documentation. In this regard, Appellants did not submit the requested documentation in reply to the clarification note dated 21 June 2019, so that Appellants’ offer was deemed administratively non-compliant.

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

“Mr Matthew Borg, duly summoned by E.C. Municipals Ltd

“Mr Jason Grech, duly summoned by the Public Contracts Review Board.

“This Board has also taken note of the documents submitted by E.C. Municipals Ltd which consisted of:

“Doc No. 1: Selection Criteria Declaration Form

“Doc No. 2: Electronic Receipt of ESPD

“And by the Contracting Authority which consisted of:

“Doc No. 3: Evaluation Clarification Report

“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 issue that merits consideration is the Appellants’ alleged submission of the ESPD form.

1. “First and foremost, this Board would point out that the European Single Procurement Document (ESPD) forms the core of the bidder’s submissions and on which the Evaluation Committee carries out its deliberations. The details contained in the ESPD represent a summarised declaration of whether the bidder is capable of executing the tendered works or services and in the case of supply, the type of

product he is offering to provide under the terms and conditions as stipulated in the tender document. The important role and objective for the submission of the ESPD cannot be more strongly emphasized.

2. “In this particular case, Appellants maintain that they had submitted the ESPD in the first instance, whilst the Authority can confirm that no such documentation was ever received at its end. In this regard, this Board examined all the documentation submitted by Appellants, in their offer and could not find any trace of an ESPD in the Appellants’ original submission.

3. “At the same instance, this Board noted the credible testimony given by the witness namely, Mr Jason Grech who confirmed that after checking with the developer of provider of the IT system, the latter confirmed the fact that, the receipt indicates that the bidder replied but did not upload the ESPD, so that the requested documentation (ESPD) was not received by the Authority.

4. “This Board heard and treated similar cases where the system was being challenged and respectfully, would point out that whenever such claims were presented, claimants could not prove that what had been allegedly submitted was received at the other end, by the Authority.

5. “With regard to Appellants’ declaration in that such statement of verification from the systems developer should be in form of a written report, this Board would point out that, the evidence given by the witness was credible whilst, at the same instance, this Board could not trace an ESPD from Appellants’ submissions.

In conclusion, this Board opines that:

a) “The electronic receipt presented by Appellants does not indicate that the specific ESPD form had been received by the Authority.

b) “The verification by the system provider that no attachments were included in Appellants’ submissions is more than justifiable. In this regard, this Board does not deem that a written report from the system provider is necessary.

c) “Appellants did not present credible evidence to prove that the ESPD form was included in the submissions.

“In view of the above, this Board,

i. “does not uphold Appellants’ contentions,

ii. “upholds the Contracting Authority’s decision in the award of the contract,

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

Is-socjeta` E.C. Municipals Limited issa qed tappella mid-decizjoni li ha l-Bord ghal quddiem din il-Qorti, u ressqet aggravji fis-sens li darba li l-offerta taghha giet accettata ma setghetx tigi mwarrba sussegwentement, u li, f`kull kaz, id-dokument li l-kumitat ta' evalwazzjoni qal li ma kienx mehmuz mal-offerta, kien fil-fatt ipprezentat.

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 l-ewwel ilment tas-socjeta` rikorrenti huwa marbut mal-fatt li l-offerta taghha giet imwarrba wara li kienet accettata u nharget rakkomandazzjoni li l-kuntratt jinghata lilha. Li gara kien li waqt li kienu qed isiru t-thejjiet mehtiega sabiex jigi ffirmat il-kuntratt, instab li s-socjeta` rikorrenti ma kienet qatt ghaddiet il-*European Single Procurement Document* (ESPD) mal-offerta taghha. Dan id-dokument kien mitlub fis-sejha, u ghalhekk, id-Direttur tal-Kuntratti gharaf li l-offerta tas-socjeta` rikorrent kienet qieghdha tigi mwarba bhala *administratively non compliant*.

Din il-Qorti tgharaf li mhux necessarjament ghaliex l-offerta tas-socjeta` rikorrenti ma tnehhiex waqt il-process tal-evalwazzjoni allura dan ifisser li l-offerta taghha kienet konformi ma' dak li kienet tghid is-sejha. Nonostante li nharget rakkomandazzjoni li l-kuntratt jinghata lis-socjeta` rikorrenti, li ma hijiex decizjoni finali, jekk jigi skopert li, wara kollox, l-offerta kienet nieqsa minn dokument mandatorju, il-process tal-iffirmar tal-kuntratt kellu jieqaf. Il-fatt li l-offerta tqieset bhala "tajba" fil-fazi tal-evalwazzjoni, ma jfissirx li l-offerta kienet, fil-verita`, "tajba".

Il-ligi stess tikkontempla t-thassir ta' offerta jekk jirrizulta, f'xi stadju li kien hemm xi mankanza fl-offerta. Ir-regolament 15(1) tar-Regolamenti dwar l-Akkwist Pubbliku tghid li:

"Id-Direttur tal-Kuntratti ghandu d-dritt li jhassar ghotja ta' kuntratt f'kull waqt tal-process tas-sejha jew kwotazzjonijiet ukoll wara li jkun gie mhabbar l-offerent maghzul u jkun ukoll ghadda z-zmien biex jitressqu lmenti quddiem il-Bord ta' Revizjoni jew Qorti, jekk jinstab illi l-ghotja ta' dak il-kuntratt tkun saret bi ksur ta' dawn ir-regolamenti jew tkun inghatat b'mod li jiddiskrimina bejn l-operaturi ekonomi".

Fuq kollox, il-fatt li d-Direttur tal-Kuntratti jista' unilateralment imur lura mid-decizjoni tieghu dwar l-ghotja tal-kuntratt, giet accettata wkoll mill-qorti taghna. Ara per eżempju s-sentenza **BAC Limited v. Id-Direttur Generali tal-Kuntratti et** deciza minn din il-Qorti fis-16 ta' Dicembru 2016, li kienet dwar id-decizjoni tad-Direttur tal-Kuntratti li hassar ghotja ta' kuntratt ghaliex aktar tard kien instab li kien hemm nieqsa l-*bid bond* mal-offerta maghzula.

Imhabbat b'sitwazzjoni bhal din, fejn irrizulta li s-socjeta` rikorrenti naqset milli tipprovdi l-*European Single Procurement Document* (ESPD) skont kif mitlub f'klawzola 7(B) tad-dokument tas-sejha, id-Direttur tal-Kuntratti ma setax sempliciment jaghlaq ghajnejh ghaliex waqt il-process tal-evalwazzjoni hadd ma ntebah li dan id-dokument mandatorju kien nieqes, anke jekk dan il-fatt hareg fil-berah wara li nghalaq il-process tal-ghazla u wara li nharget ir-rakkomandazzjoni tal-accettazzjoni tal-offerta. Tassew gia ladarba nstab li dan id-dokument mandatorju kien nieqes anke jekk dan il-fatt hareg fil-berah wara li nghalaq il-process tal-ghazla u wara li nharget ir-rakkomandazzjoni tal-accettazzjoni tal-offerta, il-haqq u l-korrettezza kellhom iwasslu lid-Direttur tal-Kuntratti ghall-unika triq li jirtira l-ghotja tal-kuntratt.

Dwar l-aggravju hu, ghalhekk, michud.

Fit-tieni lok, is-socjeta` rikorrenti tghid li hi kienet ipprezentat mal-offerta d-dokument mitlub. Kif, pero`, xehed Jason Grech, haddiem fid-Dipartiment tal-Kuntratti, fost id-dokumenti pprezentati ma kienx hemm l-ESPD. Gie muri li s-sistema ta' registrazzjoni hija amministrata minn kumpanija barranija, u darba offerta tigi registrata elettronikament din ma tistax tintmiss, la minn min ikun tella' l-offerta u lanqas minn min ikun ircieva l-offerta. Kif ikkonstata fizikament il-Bord, meta acceda ghall-

offerta elettronica tas-socjeta` rikorrenti, dan id-dokument kien nieqes, anke wara l-istess socjeta` nghatat l-opportunita` li tressaqha wara talba ghar-rettifika.

Jista' jkun li l-*accountant* Matthew Borg tas-socjeta` rikorrenti kien minghalih li huwa kien baghat il-*European Single Procurement Document* (ESPD), izda l-verita` tibqa' li dan ma kienx il-kaz ghaliex is-sistema elettronica turi li dan id-dokument qatt ma kien intbaghat. Kif jinghad f'dawn ic-cirkostanzi *contra factum non valet argumentum* (ara f'dan is-sens is-sentenza **Al-Nibras for Science & Technology Limited v. Onorevoli Ministru tal-Edukazzjoni et** deciza fit-12 ta' Marzu 2019 fejn din il-Qorti kienet ukoll qiegħda tistharreg ilment dwar jekk verament kienx gie mtella' *attachment* ma' offerta sottomessa u din il-Qorti qagħdet ma' dak li jinsab registrat fis-sistema elettronica).

Il-fatt li s-socjeta` rikorrenti għandha ricevuta mahruġa awtomatikament mis-sistema elettronica ma jfissirx li hija tabilhaqq għaddiet id-dokument. L-ircevuta ticcertifika biss li tkun intbagħtet risposta u mhux ukoll li jkun gie mtella' u mehmuz xi dokument. Għalhekk l-ircevuta awtomatika mhijjex prova tat-tnewwil tal-*European Single Procurement Document* (ESPD), b'dana s-socjeta` ma tistax tistrieħ fuqha biex turi li hija kienet għaddiet il-ESPD;

Fil-kuntest tal-aggravju marbut mal-ordni tal-Bord li ma jintraddx lura d-depożitu li s-socjeta` rikorrent hallset biex setgħet tagħmel l-oggezzjoni tagħha, din l-ordni tidhol fost is-setgħat tal-Bord, u din il-Qorti ma tarax li, darba li s-socjeta` rikorrenti tilfet il-kaz, kienet irragonevoli d-decizjoni li jintilef ukoll id-depożitu. Ma jezistu ebda cirkostanzi speċjali li kienu jiggustifikaw ir-radd lura tad-depożitu.

Għaldaqstant, għar-ragunijiet premeżsi tiddisponi mill-appell ta' E.C. Municipals Limited billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord fit-12 ta' Dicembru, 2019, bl-ispejjeż relatati ma' dan l-appell jithallsu mis-socjeta` appellanti E.C. Municipals Limited.

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