



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar il-Ħamis, 25 ta' Frar, 2021.

Numru 6

Rikors numru 285/20/1

Alistair Bezzina

v.

St. Vincent De Paul Long Term Care Facility; Ministeru għall-Familja, Drittijiet tat-Tfal u Solidarjeta` Socjali, illum Ministeru għas-Solidarjeta` u l-Gustizzja Socjali, Familja u d-Drittijiet tat-Tfal; Nicholas Mizzi Gardening Services and Water Transport; u Nicholas Mizzi għal kull interess li jista' jkollu

Il-Qorti:

1. Dan hu appell imressaq fit-22 ta' Settembru, 2020, mir-rikorrent Alistair Bezzina wara deċiżjoni datata 3 ta' Settembru, 2020, mogħtija mill-Bord ta' Revizjoni dwar Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-każ referenza SVP 1379 (każ numru 1481)

2. Dan il-każ huwa marbut ma' sejha għall-offerti "*For the provisions of gardening services at St. Vincent De Paul Long Term Care Facility, Luqa*". Għal dan il-kuntratt kien hemm sitt offerti. L-Awtorita` kontraenti ddeċidiet li l-offerta tar-rikorrent ma kinitx l-orħos waħda u rrakkomandat li l-kuntratt jingħata lill-intimat Nicholas Mizzi. Ir-rikorrent Alistair Bezzina oġġezzjona u attakka l-validita` tal-offerta ta' Nicholas Mizzi quddiem il-Bord. Dan il-Bord fid-deċiżjoni tiegħu ma laqax l-appell tar-rikorrent u kkonferma d-deċiżjoni tal-Awtorita` kontraenti.

3. Id-deċiżjoni tal-Bord hija s-segwenti:

"This Board,

"having noted this objection filed by Mr Alistair Bezzina (hereinafter referred to as the Appellant) on 16th July 2020, refers to the claims made by the same Appellant with regard to the 'Call For Quotation' of reference SVP 1379 listed as case No. 1481 in the records of the Public Contracts Review Board recommended for award by St Vincent De Paul Long Term Care Facility (hereinafter referred to as the Contracting Authority).

"Appearing for the Appellant: Dr Jonathan Mintoff

"Appearing for the Contracting Authority: Dr Justyne Caruana

"Appearing for the Recommended Bidder: Dr Emmanuel Schembri

"Appearing for the Department of Contracts: Dr Daniel Inguanez

"Whereby, the Appellants contend that:

a) "The Evaluation process was not evaluated according to Law.

b) "The recommended bidder was not compliant at the time of submission of his offer.

- c) “The recommended bidder has no legal entity,
- d) “The recommended bidder’s offer was not financially compliant.
- e) “The Key Expert proposed by the preferred bidder is not compliant with the Authority’s requirements.
- f) “The recommended bidder’s offer is not compliant with Local and EU Regulations.

“This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 23rd July 2020 and its verbal submissions during the virtual hearing held on 28th August 2020, in that:

- a) “The Authority maintains that, the evaluation process was conducted in accordance with the Public Procurement Regulations.
- b) “Both the recommended bidder and Appellants were fully compliant however the main award criterion was the price.
- c) “The recommended bidder is clearly denoted to be Nicholas Mizzi, duly registered with the VAT Authority, performing commercial activities under the designation of ‘Nicholas Mizzi Gardening Services and Water Transport’.
- d) “Appellants ‘contention in this regard refers to the successful offerer’s hourly rate and in this respect the Authority referred to the DIER published weekly wages for 2020 which states that for ‘Agriculture & Allied Industries’, the minimum hourly rate is €4.48 and the recommended bidder’s hourly rate was €6.85.
- e) “The Key Expert proposed by the recommended bidder is indeed qualified to carry out the assigned duties.
- f) “The Alleged claim that the successful offer is not compliant with Local and EU Regulations, is totally unfounded and vague.

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

“Ms Claudia Muscat duly summoned by Mr Alistair Bezzina

“Mr Joseph Saliba duly summoned by Mr Alistair Bezzina

“Mr Omar Grech duly summoned by St Vincent De Paul Long Term Care Facility

“Mr Jason Grech duly summoned by St Vincent De Paul Long Term Care Facility

“Ms Frances Asciak duly summoned by the Public Contracts Review Board

“Mr Malcolm Borg duly summoned by St Vincent De Paul Long Term Care Facility

“This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned, will treat the merits of Appellants’ grievances as follows:

1. “With regard to Appellant’s first contention, this Board after having examined closely the evaluation report and its supporting documentation, cannot identify any incorrect action taken by the Evaluation committee to deem that, the adjudication procedure, adopted by the Committee, was not in conformity with the Public Procurement Regulations (PPR) or any other Law. In this regard, this Board would respectfully point out that, Appellant, in his ‘Letter of Objection’ did not indicate or mention any issue which might have breached any Regulation contained in the PPR. At the same instance, Appellant did not present any evidence to justify his alleged claim so that, in this regard this Board does not uphold Appellant’s first contention.

2. “With regards to Appellant’s second grievance in that, the recommended bidder was not compliant as at date of submission of his offer, this Board established, during the hearing that Appellant is referring to resources available by the recommended bidder. In this respect, the direct testimony of the witness namely, Mr Joseph Saliba of ‘Jobsplus’, confirmed that the recommended bidder was registered as self employed and employed three persons. In this regard, this Board took also into consideration the nature and magnitude of the tendered works and justifiably establishes that the labour resources which the recommended bidder has at his disposal are sufficient for the proper execution of the tendered works and in this respect, this Board does not uphold Appellant’s second contention.

3. “With regard to Appellant’s third contention, in that, the recommended bidder has no Legal Identity, this Board would respectfully point out the following issues:

- “Mr Nicholas Mizzi, is a self-employed person.
- Mr Mizzi has an identity card number.
- Mr Mizzi is registered with the VAT department.
- In his capacity, Mr Mizzi is entitled to participate in public tenders.

“Mr Nicholas Mizzi conducts his commercial activities through the designation of “Nicholas Mizzi Gardening Services and Water Transport”. In this respect, it is vividly clear that, this designation refers to the commercial activities of Mr Nicholas Mizzi without any

reasonable doubt and in this regard, this Board does not uphold Appellants third contention.

4. “With regard to Appellant’s fourth contention, this Board established, during the hearing, that Appellant is referring to the hourly rate quoted by the recommended bidder of €6.85, in his offer.

5. “This Board is not concerned as to whether the recommended bidder will make a profit or sustain a loss but rather that, the quoted rate is in accordance with Local Labour Regulations.

6. “This Board heard the testimony of the witness Mr Omar Grech, a representative from the Department for Industrial and Employment Relations (DIER) who stated that, the minimum wage payable to gardeners employed by a contractor, the latter of whom will provide gardening services to a Public Entity, is €6.69 per hour, however such rate does not include, holiday pay, sickness benefits, etc.

7. “Since, it is this Board’s main concern to ensure that, the preferred bidder’s rate does not involve any precarious working conditions, same Board communicated with the DIER to enquire and establish whether the rate of €6.85 is within the Local Labour Regulations and the following correspondence between this Board and the DIER ensued:

“Correspondence sent by this Board

*“Ms Diane Vella Muscat
Director General
Department for Industrial and Employment Relations
Dear Ms Vella Muscat,
Further to the telephone conversation with PCRB Chairman it would be appreciated if a reply to the following clarification will be forthcoming at your earliest.*

a) “A recommended bidder was awarded a tender for gardening services to a Local Council;

b) “The recommended bidder quoted an hourly rate of €6.85 per hour excluding VAT. Is such an hourly rate in accordance with Local Labour Regulations?”

*“Many thanks
Best wishes”*

“Received from DIER

“Dear Ms Vella

“In the case of the grade of a “Gardener,” those who offer their services in the public sector/service have to peg the employees, working as such, with the basic rate of the Government Scale as applicable in this case.

“As per the Schedule of Grades found in Appendix N of the “Public Service Employees Collective Agreement covering period 2017-2024,” “Gardeners” fall under salary scale 16 (other industrial grades).

“This means that the pegging of such employees working with the contractor, who wins the tender, have to be pegged (paid) at least to the basic of Salary Scale 16.

“To facilitate this procedure, each year DIER together with Department for Contracts issues a Circular in which lower salary scales (most frequently in use by subcontractors) are broken down in hourly rates. This means that as per Contracts Circular N° 01/2020 dated 6th January 2020 the:

- *“**Minimum payable basic rate excluding (net of)** Statutory Bonuses, Vacation Leave, Sick leave, Public Holidays, NI and Maternity fund contribution is €6.69 per hour. To note however, that an employer may pay the employee a higher rate than **€6.69.***
- *“The **rate Payable to Contracts** is that of **€9.40** which is inclusive of €6.69 (Basic Rate) €1.01 (Vacation Leave) €0.25 (Statutory Bonuses) €0.52 (Public Holidays) €0.67 (NI) €0.23 (Sick Leave) €0.03 (Maternity Leave Fund)*

*“Regards
Diane Vella Muscat
Director General
Department for Industrial and Employment Relations”*

8. “With regard to Appellant’s fifth contention in that, the Key Expert is not compliant, this Board noted the testimony of Ms Frances Asciak, an evaluator, who vividly stated that Mr Mizzi has a good knowledge of gardening and landscaping. At the same instance, from Mr Mizzi’s CV, this Board also notes that, Mr Mizzi (Named Expert) holds a diploma in horticulture. In this regard, from the testimony of Ms Asciak and the CV of Mr Mizzi, this Board is convinced that Mr Mizzi is qualified enough to execute the tendered gardening services, so that, this Board does not uphold Appellant’s fifth contention.

“In conclusion, this Board, opines that,

- a) “The evaluation process was carried out in accordance with the Public Procurement Regulations.
- b) “The recommended bidder has enough manpower to carry out the tendered services.
- c) “The recommended bidder has an identity and is eligible to participate in Government Tenders. This Board also establishes that, the designated name of “Nicholas Mizzi Gardening Services and Water Supply”, refers and relates directly, without any doubt, to the commercial activities of Mr Nicholas Mizzi.

d) “The recommended Bidder’s rate of €6.85, covers the minimum net wages payable to the recommended bidder’s employees and this Board is not concerned whether the bidder incurs a loss or realises a profit on the outcome of the tendered works.

e) “The Key Expert indicated in recommended bidder’s offer is sufficiently qualified to execute the tendered services.

f) “This Board does not identify any justifiable cause to treat Appellant’s sixth contention.

“In view of the above, this Board,

“i. does not uphold Appellant’s contention,

ii. “Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,

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

4. Ir-rikorrent issa qiegħed jappella mid-deċizjoni li ħa l-Bord għal quddiem din il-Qorti, u dan peress illi qed jallegga li; (a) l-oblatatur fil-każ m’huwiex persuna fiżika jew persuna ġuridika; (b) l-Awtorita` kontraenti naqset li titlob ġustifikazzjoni tal-prezz; u (c) il-Bord żbalja meta rrikonoxxa lil St. Vincent De Paul Long Term Care Facility bħala l-Awtorita` kontraenti.

5. Wara li semgħet dak li kellhom xi jgħidu d-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti, din il-Qorti sejra tgħaddi għas-sentenza tagħha.

Ikkonsidrat:

6. Trattat l-appell, din il-Qorti tinnota li l-ewwel aggravju huwa simili għall-ewwel aggravju li ġie sollevat (mill-istess avukat difensur) fil-kawża “**Jean Paul Zerafa v. Ministeru għal Għawdex et**”, rikors numru 349/20, li ġie deċiż illum ukoll. F’dik il-kawża ġiet sollevata l-kwistjoni li l-oblatur Caruana Tech Trading m’għandiex personalita` ġuridika u ma setghetx tagħmel offerti. Din il-Qorti, f’dik is-sentenza, qalet li għalkemm dan kien minnu, ma kellhiex tinħoloq xi xisma bejn l-isem tan-negozju u l-membri tal-istess, kif qed jipprova jagħmel l-appellant f’dan il-każ, u l-offerta kellha titqies valida.

7. Kwindi, din il-Qorti tagħmel referenza għall-konsiderazzjonijiet tagħha fil-kawża l-oħra, taddathom *mutatis mutandi* għal din il-kawża, u tgħid li l-offerta li saret minn Nicholas Mizzi Gardening Services and Water Services hija valida, u allura qed jiġi miċhud l-ewwel aggravju tal-appellant.

8. Fil-kuntest tat-tieni aggravju, l-ilment tar-rikorrent huwa li b’offerta ta’ €9.40 fis-siegħa li għamel l-offerent preferut, Nicholas Mizzi mhux sejjer ikopri l-ispejjeż kollha tax-xogħol li l-istess Mizzi se jkollu jwettaq f’St. Vincent De Paul Long Term Care Facility, u r-rikorrent jgħid li l-Awtorita` kontraenti kellha titlob ġustifikazzjoni tal-imsemmi prezz.

9. Din il-Qorti taqbel mad-deċiżjoni tal-Bord fir-rigward. L-offerent Nicholas Mizzi ressaq dikjarazzjoni li hu, fit-tħaddim tal-kuntratt, sejjer jimxi skont il-liġijiet kollha tal-pajjiż in konnessjoni mal-paga u l-kondizzjonijiet tal-ħaddiema, u jekk dan il-prezz huwa baxx, irid jara hu kif sejjer ifendi dan il-kuntratt. Jista' jkun li din il-persuna twettaq negozji oħra u għandha ħsieb tpaċi t-telf li forsi tiġġenera minn dan il-kuntratt ma' qligħ li tagħmel minn xogħol ieħor. Kemm-il darba, l-oblatur iffirma d-dikjarazzjoni opportuna, l-Awtorita` kontraenti m'għandhiex għalfejn tagħmel verifiki ulterjuri. Kemm-il darba mbagħad jirriżulta li waqt l-eżekuzzjoni tal-kuntratt, il-kuntrattur mhux qed jonora l-obbligi tiegħu jew b'xi mod qed jippejka u joffri servizzi inferjuri, imbagħad iva l-Awtorita` kompetenti għandha l-obbligu li tassigura li l-kondizzjonijiet tal-kuntratt jiġu onorati, u fin-nuqqas tiegħu l-passi kollha meħtieġa u opportuni, inkluż infurzar u saħansitra wkoll terminazzjoni tal-kuntratt.

10. Dan it-tieni aggravju qed jiġi, għalhekk, miċhud.

11. Dwar it-tielet aggravju, din il-Qorti ma tarax li l-ilment relattiv huwa ta' rilevanza għall-eżitu tal-kawża. Jekk sar żball, dan ma jirriflettix la fuq il-validita` tal-offerta u lanqas fuq il-validita` tad-deċiżjoni tal-Bord. Il-facilita` appellata hija entita` pubblika, debitament rikonoxxuta mid-Dipartiment tal-Kuntratti u approvata bħala l-Awtorita` responsabbli. Il-fatt li, fil-verita`, l-Awtorita` kontraenti huwa l-Ministeru għall-Familja,

Drittijiet tat-Tfal u Solidarjeta` Soċjali, ma jwassal għall-ebda nullita` u l-
importanti hu li l-materja tiġi ċarata kif qed tiġi b'din id-deċiżjoni.

12. Dan l-aġġar aggravju qed jiġi wkoll miċċhud.

13. Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell tar-
rikorrent Alistair Bezzina billi tiċċhad l-istess u tikkonferma s-sentenza li ta
l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi fit-3 ta' Settembru, 2020, bl-
ispejjeż ta' din l-istanza jitħallsu kollha mir-rikorrent appellant Alistair
Bezzina.

Mark Chetcuti
Prim Imħallef

Joseph R. Micallef
Imħallef

Tonio Mallia
Imħallef

Deputat Reġistratur
rm