



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 14

Rikors numru 349/20/1

Jean Paul Zerafa

v.

**Ministeru ghal Ghawdex; Joe Louis Caruana & Jason Caruana
Camenzuli/Caruana Tech Trading (Numru tal-VAT MT 1878926);
Joe Louis Caruana ghal kull interess li jista' jkollu; u Jason
Caruana Camenzuli ghal kull interess li jista' jkollu**

Il-Qorti:

1. Dan hu appell imressaq fit-13 ta' Novembru, 2020, mir-rikorrent Jean Paul Zerafa wara deċiżjoni datata 27 ta' Ottubru, 2020, mogħtija mill-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi (minn hawn 'il quddiem

imsejjaħ “il-Bord”) fil-każ referenza MGOZ/MPU T 37/2020 (każ numru 1504).

2. Dan il-każ hu marbut ma’ sejħa għall-offerti li ħareg il-Ministeru għal Għawdex “*for the delivery, hiring, set up and dismantling of tents to be used in various events in Gozo*”. Din is-sejħa kienet maqsuma f’sitt lottijiet. Għal dan il-kuntratt intefgħu diversi offerti. Fil-15 ta’ Settembru, 2020, l-Awtorita` kontraenti infurmat lir-rikorrent illi l-offerta tiegħu għal-lottijiet numri 1, 3, 5 u 6 kienu ntlaggħu, iżda għal-lottijiet numri 2 u 4 kienet intlaqqgħet l-offerta ta’ Caruana Tech Trading.

3. Din l-aħħar imsemmija soċjeta` oġġezzjonat għall-għażla li saret favur ir-rikorrent rigwardanti l-lot numru 5 u ressqet l-aggravju tagħha quddiem il-Bord. Dan il-Bord fid-deċiżjoni tiegħu laqa’ l-ilment ta’ Caruana Tech Trading u ordna li l-offerta ta’ din is-soċjeta` fir-rigward tal-lot numru 5 jerga’ jiġi evalwat.

4. Id-deċiżjoni tal-Bord hija s-segwent:

“This Board,

“having noted this objection filed by Caruana Tech Trading (hereinafter referred to as the Appellants) on 25th September 2020, refers to the claims made by the same Appellants with regard to the tender of reference MGOZ/MPU/T 37/2020 (Lot 5) listed as case No. 1504 in the records of the Public Contracts Review Board recommended for award by Ministry for Gozo (hereinafter referred to as the Contracting Authority).

“Appearing for the Appellants: Dr Jean Paul Grech

“Appearing for the Contracting Authority: Mr Marnol Sultana

“Appearing for the Preferred Bidder: Dr Jonathan Mintoff

“Whereby, the Appellants contend that:

a) “Their offer was unjustly rejected due to the fact that, it was deemed non-compliant due to the fact that, the Evaluation Committee failed to take into consideration that the dimensions of the tent may vary +/- 5%. In this respect, the offered product’s dimension of 7.3m is fully compliant.

b) “Appellants also refer to the preferred bidder’s alleged claim, that they, as bidders, had no juridical personality, so that their offer should be discarded. In this regard, Appellants maintain that, they trade under the name of ‘Caruana Tech Trading’ which is a partnership between Jason Caruana and Joe Louis Caruana, and their offer was also submitted in the name of ‘Caruana Tech Trading’, which is easily identified and properly constituted.

“This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 28th September 2020 and its verbal submissions during the virtual hearing held on 19th October 2020, in that:

a) “After having reviewed the literature submitted by Appellants (under note 2), the Authority confirms that, Appellants’ product dimensions of 7.3m does, in fact complies with clause 3 of section 3 of the tender document.

b) “With regard to the preferred bidders’ claim that Appellants do not have a legal identity, the Authority confirms that, ‘Caruana Tech Trading’ is a partnership, properly constituted, having a VAT number. Their offer was properly given an TID number thus can be identified as Mr Jason Caruana and Mr Joe Louis Caruana, trading under the name of ‘Caruana Tech Trading’.

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

“Mr Jason Grech, Assistant Director, Department of Contracts duly summoned by the Public Contracts Review Board

“This Board, after having examined, in detail, the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witness duly summoned opines that, the issues that merit consideration are two-fold namely:

a) “Appellants’ product compliance

b) “Appellants’ legal identity –an issue raised by the preferred bidder.

1. “Appellants product was Rejected due to the following reasons:

“Kindly note that:

- *“your offer for Lot 5 was considered as Technically Non-Compliant because the height of mid-point requested was 7.2m while that offered was 7.3m;*
- *“your offer for Lot 6 was considered as Technically Non-Compliant because the height of mid-point requested as 7.2m while that offered was 7.3m.”*

2. “This Board would respectfully refer to clause 3 of the technical specifications which clearly states that:

“3. Sizes of tent may vary by +/- 5% for Lot 2 to Lot5. Sizes of tent for Lot 1 and for Lot 6, width shall be between 34 meters and length shall be between 14 and 15 meters and height shall be minimum 4 meters at the sides for Lot 1 and minimum of 5.2 m at the sides of Lot 6.”

“This Board would also confirm that, the dimensions of Appellants’ product does , in fact, comply with the dimensions’ parameters, as per clause 3 above and it must be mentioned that, the Authority, in their ‘Reasoned Letter of Reply’, confirmed such a fact.

3. “The preferred bidders, in their ‘Letter of Reply’ to Appellants’ objection, raised the issue of the legal identity of Appellants in that, their e-tender is in the name of a sole trader whist Appellants are claiming that they are a partnership.

4. “In this regard, this Board has examined closely the documentation, in its possession and noted the testimony of Mr Jason Grech, the latter confirming that, the system has the option of accepting the offer of a sole trader or in the name of the partnership. In this particular case, Appellants were registered as a sole trader but later on, changed to a partnership. This Board also noted the fact that, the EPPS system allows such a facility provided, the TID number remains the same and in this particular case, the TID number remained unchanged.

5. “With regard to the VAT registration of Appellant, this Board carried out the necessary enquiries with the relevant Authority and can confirm that, the VAT number can be registered in the name of a sole trader or a partnership and in the case of a partnership, such registration can also be made in the name of either the partnership’s name or the partners jointly. In this respect, tis Board cannot identify any irregularity with regards to Appellant’s VAT registration.

6. “With regard to Appellants’ juridical identity, this Board would summarise the situation as follows:

- “Appellants’ offer was submitted under the trade name ‘Caruana Tech Trading’
- “‘Caruana Tech Trading’ is a trade name under which a partnership between Messrs
- “Jason and Joe Louis Caruana carry out their commercial activity.
- “The VAT number of Appellants is registered in the name of the Caruana brothers forming the partnership.
- “The TID number of Appellants’ offer remained unchanged throughout the tendering process.

“In this regard, this Board opines that, Appellants do have an identity with the Contracting Authority and the VAT Department. It must also be stated that, prior to the allocation of a VAT number, the relative department carries out the necessary checks to verify that the entity or person registering, is in fact identifiable and has a juridical personality.

“In conclusion, this Board opines that:

- a) “Appellants’ offer is compliant with clause 3 of the technical specifications.
- b) “Appellants’ identity is regular and properly constituted to participate in the Public Tenders.

“In view of the above, this Board,

- i. does not uphold the Contracting Authority’s in the decision for the recommendation of award,
- ii. “upholds Appellants’ contention,
- iii. “confirms that Appellants’ identity is properly indicated,
- iv. “directs the Authority to carry out a re-evaluation process,
- v. “directs that Appellants; offer be re-integrated in the Evaluation Process,
- vi. “directs that the deposit paid by Appellants be fully refunded.”

5. Ir-rikorrent issa qiegħed jappella mid-deċiżjoni li ħa l-Bord għal quddiem din il-Qorti, u dan peress illi qed jallega li d-deċiżjoni tal-Bord hi bażata fuq apprezzament ħażin tal-fatti u tal-liġi li tirregola l-materja.

6. 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:

7. Trattat l-appell, din il-Qorti, tibda biex tgħid li kif intqal fir-rikors tal-appell, bil-kwotazzjoni tal-ktieb ta' **Prof. Andrew Muscat**, "*Principles of Maltese Company Law*", "*Maltese Law does not recognise the business concerns as a juridical person*". F'dan il-każ, pero`, jingħad testwalment fir-Regolament numru 56 tar-Regolamenti dwar l-Akkwist Pubbliku, li offerta tista' ssir minn "*grupp ta' tali persuni*", jgħid minn grupp ta' persuni fiżiċi, u f'dan il-każ, l-offerta saret minn tnejn min-nies li joperaw taħt l-isem ta' "*Caruana Tech Trading*". L-offerta saret b'dan l-isem, pero`, fil-verita`, saret minn Joe Caruana u Jason Caruana Camenzuli li joperaw taħt dak l-isem ta' negozju. M'hemm xejn irregolari dwar il-mod kif saret l-offerta.

8. In-numru tar-reġistrazzjoni għall-ħlas tat-taxxa fuq il-valur miżjud (VAT) huwa tal-aħwa Caruana. Kif ivverifika l-Bord, dan hu possibbli, fis-

sens, li hu permissibbli li tnejn min-nies joperaw fin-negozju tramite` isem ta' negozju ("*trade name*") bin-numru tal-VAT tagħhom personali. Kif ingħad, l-aħwa joperaw fisimhom personali għax l-isem ta' negozju li jużaw ma joħloq ebda "persuna" indipendenti. Li għandna, allura, hu żewġ persuni li joperaw personalment fin-negozju u bi sħab, u jużaw l-isem Caruana Tech Trading biex jidentifikaw ruħhom.

9. L-isem tan-negozju għandu valur ġuridiku u ekonomiku, u jista' jkun involut f'diversi negozji. Jista' jiġi trasferit "*inter vivos*" jew "*causa mortis*" flimkien man-negozju li jirrappreżenta. Huwa protett bil-liġi, fis-sens li ħadd ma jista' jikkupjah, pero`, m'għandux personalita` ġuridika indipendenti mill-persuni li jipparteċipaw fih. Dawn il-persuni jibqgħu jaġixxu huma bħala kummerċjanti, għalkemm jużaw l-isem minnhom magħżul biex jidentifikaw ruħhom minn oħrajn. M'għandhiex, għalhekk tinħoloq xi xisma bejn l-isem u l-membri, kif qed jipprova jagħmel l-appellant f'dan il-każ.

10. Dawn l-aħwa Caruana ma ħolqux *partnership* formali, almenu sal-mument li tefgħu l-offerta, iżda aġixxew bħala grupp ta' persuni fiżiċi bi sħab. La hu hekk, m'huwiex meħtieġ li dan il-grupp ikun registrat mar-Registratur għall-Persuni Ġuridiċi, għax mhux persuna ġuridika. Dan ma jeskludix lill-grupp ikun parti f'kuntratt f'ismu stess. Il-fatt li l-offerent

kompost minn grupp ta' nies, ma jkunx persuna ġuridika, ma jwassalx għall-iskwalifika awtomatika ta' offerent mill-proċess.

11. Anke jekk wara li ntefgħet l-offerta, saret xi bidla fin-nomenklatura jew *designation* tal-offerent, ma jfissirx li hemm xi nullita`, peress li l-offerta minnha nfisha ma nbidlitx, l-persuni wara l-offerta ma nbidlux, u lanqas ma nbidel in-numru tal-VAT abbinat mal-offerta.

12. Għalhekk, l-istess appell m'għandux jintlaqa'.

13. Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell tar-rikorrent Jean Paul Zerafa billi tiċhad l-istess u tikkonferma d-deċiżjoni li ta l-Bord ta' Revizjoni dwar il-Kuntratti Pubbliċi fis-27 ta' Ottubru, 2020, bl-ispejjeż jithallsu mill-istess appellant.

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Deputat Reġistratur
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