QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar l-Erbgħa, 26 ta' Jannar, 2022.

Numru 4

Rikors numru 315/21/1

Arkafort Ltd (C65343)

v.

Malta College of Arts, Science Technology (MCAST)

Il-Qorti:

1. Dan hu appell imressaq mis-socjeta` rikorrenti Arkafort Ltd wara decizjoni li ha l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fl-4 ta' Ottubru 2021, fil-kaz b'referenza SPD/2021/065 (kaz numru 1629).

2. Dan il-kaz jirreferi ghas-sejha ghall-offerti li saret mill-MCAST "*for the supply, delivery and installation of Comsol Finite Element Analysis, solver and multiphysics simulator software or equivalent.*" Ghal din is-sejha jidher li kien hemm offerta wahda, dik tas-socjeta` rikorrenti, li pero` giet meqjusa *technically non-compliant*, u rrifjutata; l-MCAST ipproceda sabiex ikkancella s-sejha ghall-offerti li hu kien hareg.

3. Is-socjeta` rikorrenti appellat mir-rifjut tal-offerta taghha ghall-quddiem il-Bord li b'decizjoni tal-4 ta' Ottubru, 2021, cahad l-appell u kkonferma d-decizjoni li kien ha l-kumitat evalwattiv.

4. Id-decizjoni tal-Bord hija s-segwenti:

> "This Board,
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> Having noted this objection filed by Arkafort Ltd. (herein after referred to as appellant) on 1st July 2021, refers to the claims made by the same appellant with regard to the tender listed as case No.1629 in the records of the Public Contracts Review Board awarded by MCAST (herein after referred to as the Contracting Authority) and their verbal submissions during the hearing on 28th September 2021.
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> Having heard the testimony of witness Engineer Dr Alex Rizzo summoned by the Authority.
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> Having noted the minutes of the Board hearing on the 28th September 2021 reproduced above
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> Whereby, the appellants contend that:
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> a) Arkafort Ltd offered the requested software on which the Contracting Authority sought clarification and whilst agreeing that the battery design module includes fuel cells it stated that it covers most items and offered the Authority a different module which has all fuel cells

b) If the Authority wanted something different to what Appellant was offering it was possible for them to take up this offer – instead they decided to cancel the tender.

The Board also noted the letter of reply dated 7th July together with its verbal submissions during the hearing on the 28th September 2021.

Whereby, the Contracting Authority contends that:

a) A clarification was requested form the Appellant by the Departmental Contracts Committee. With reference to the battery and fuel cells module, the appellant was requested "to indicate where in your literature it is stated that the battery includes fuels cells". (Doc. MCAST3);

b) The Appellant replied to the clarification by stating that "The Battery Design Module includes fuel cell and covers most items, however additional module is available covering specific items". (Doc. MCAST4). As outlined in the appellants' attachment with the clarification response (Doc. MCAST5) the software includes both a Battery Design Module and Fuel Cell &Electrolyzer Module, however said Fuel Cell & Electrolyzer Module was not offered;

Malta College of Arts, Science and Technology contend that the one battery offered by Appellant ex admissis contained some but not all items and identified a different module which however was not offered to the Appellant.

The Board also noted the testimony of Engineer Dr Alex Rizzo (called as a witness by the Authority) who under oath displayed on screen the data evaluation requirement and indicated under Physics Interfaces section where the offer had failed to meet the tender requirements under the Hydrogen Fuel Cell heading.

In conclusion after the Board considered the arguments and documentation from both parties namely the appellant and the contracting authority, it concluded that not all the items requested by the contracting authority were offered.

The Board concludes and decides that:

a) Does not uphold the Appellant's Letter of objection.
b) Upholds the Contracting Authority's decision cancelling the tender.
c) Directs that the deposit paid by the Appellant not to be reimbursed."

5. Is-socjeta` rikorrenti issa qed tappella minn dik id-decizjoni ghall-quddiem din il-Qorti bl-aggravju jkun li hija offriet dak li talab l-MCAST, partikolarment li l-batterija li offriet tinkludi *fuel cells.*

6. Wara li semghet lid-difensuri tal-partijiet u rat l-atti kollha tal-kawza u d-dokumenti esebiti, din il-Qorti sejra tghaddi ghas-sentenza taghha.

Ikkunsidrat.

7. Illi f'dan il-kaz is-socjeta` appellanti ressqet offerta b'lista ta' *modules* kollha li kien jinkludi s-*software* offrut minnha, liema lista kienet tinkorpora "*battery design module for use with COMSOL multiphysics*". Is-sejha ghall-offerta kienet tinkludi lista ta' *modules* li s-*software* kellu jinkludi, fosthom "*batteries and fuel cells module*". Is-socjeta` appellanti giet mitluba tghid fejn fil-letteratura tal-batterija li offriet, din tinkludi "*fuel cells*". Is-socjeta` appellanti, milli jidher, ma ghamlitx dan, izda nformat lill-MCAST illi l-*module* taghha kien jinkludi dak li kien rikjest mill-MCAST. Din tal-ahhar ma ghogbithiex ir-risposta u rrifjutat l-offerta li saritilha mis-socjeta` appellanti.

8. Is-socjeta` appellanti tghid li hi ghamlet dak kollu rikjest minnha mill-MCAST, pero`, fil-verita` dan ma ghamlitux. Hija kellha tindika fil-<u>letteratura</u> li l-*module* offrut kellu dawn il-"*fuel cells",* u mhux

semplicement tghid li hi offriet dak kollu rikjest. L-awtorita` kontraenti riedet *physical evidence* li dak li riedet kien jinsab fil-pakkett offrut, u s-socjeta` rikorrenti dan ma ssottomettietux.

9. Quddiem il-Bord xehed Dr Alex Rizzo, espert fil-materja, li wera fejn l-offerta kienet nieqsa, u li l-istess offerta "*failed to meet the tender requirements under the hydrogem fuel cell heading*". Is-socjeta` appellanti ma ressqitx l-espert taghha biex, forsi, jikkontradixxi dak li qal Dr Rizzo. Hi baqghet tghid li dan kien inkluz fil-lista taghha, pero`, fit-tender ma jidhirx li hemm inkluz il-*hydrogen fuell cell*. Huwa principju li, f'materja teknika, din il-Qorti mhux daqshekk kompetenti tezamina hija l-istess materja, u meta jkollha quddiemha xhieda ta' espert f'dik il-materja teknika li ma tkunx giet kontradetta jew kontestata b'argumenti teknici, ikun difficli ghaliha li twarrab dik ix-xhieda esperta. Ma tressqu ebda argumenti validi li jikkontrastaw max-xhieda ta' Dr Rizzo u lanqas ma gie ndikat bi preciz fejn fit-tender kien hemm din ic-cellula.

10. Huwa principju iehor f'dan il-kuntest li, f'gieh it-trasparenza, meta sejha titlob xi haga specifika, dak mitlub irid jigi offrut. Dan hu aktar f'dan il-kaz meta l-awtorita` kontraenti talbet, f'ittra ta' kjarifika, li tigi murija fil-letteratura relattiva fejn kienu indikati il-*fuel cells* li talbet, haga li s-socjeta` appellanti baqghet ma ghamlitx.

11. Ghalhekk, mill-kumpless tal-provi, din il-Qorti hi sodisfatta li s-socjeta` appellanti ma sehhilhiex turi li offriet dak kollu rikjest mill-awtorita` kontraenti, u l-offerta taghha giet irrifjutata kif kellu jsir.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell interpost ta' Arkafort Ltd., billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici fl-4 ta' Ottubru, 2021, f'dan il-kaz, bl-ispejjez jithallsu mill-istess socjeta` appellanti.

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Deputat Reġistratur
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