



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tlieta, 6 ta' Settembru, 2022.

Numru 2

Rikors numru 179/22/1

Mario Mercieca

v.

- 1. Id-Direttur tal-Kuntratti**
- 2. Governance of Agricultural Bio-Resources Agency**
- 3. JM Skips**

Il-Qorti:

1. Dan hu appell li ressaq ir-rikorrent Mario Mercieca wara deċiżjoni li fil-25 ta' April, 2022, ta l-Bord ta' Revizjoni dwar Kuntratti Pubbliċi (minn hawn 'l quddiem imsejjaħ "il-Bord") fil-każ referenza SPD8/2021/101 (każ numru 1703).

2. Dan il-każ jirreferi għal sejha għall-offerti li ħarġet l-aġenzija intimata “*for the provisions of services for the carting away of the solid fraction resulting from dewatering of livestock slurry*”. Għal din is-sejha kien hemm diversi offerti fosthom mir-rikorrenti, iżda l-offerta tar-rikorrenti ġiet skwalifikata għax ma ssodisfatx il-kriterji amministrattivi u tekniċi. Il-kuntratt ġie rakkomandat li jingħata lill-intimata JM Skips. Ir-rikorrent appella mill-iskwalifikazzjoni tiegħu għal quddiem il-Bord, li b’deċiżjoni tal-25 ta’ April, 2022, ċaħad l-appell li ressaq ir-rikorrenti. Is-sentenza tal-Bord hija s-segwenti:

“Having noted the letter of objection filed by Dr Alexander Scerri Herrera acting for and on behalf of Mr Mario Mercieca, (hereinafter referred to as the appellant) filed on the 14th February 2022;

Having also noted the letter of reply filed by Dr Kristina Busuttil & Dr George Attard acting for and on behalf of the Governance of Agricultural Bio-Resources Agency (hereinafter referred to as the Contracting Authority) filed on the 24th February 2022;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Lino Micallef t/a JM Skips (hereinafter referred to as the Preferred Bidder) filed on the 22nd February 2022;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 12th April 2022 hereunder-reproduced.

Minutes

Case 1703 – SPD8/2021/101 – Framework Contract for the Provision of Services for the Carting Away of the Solid Fraction resulting from Dewatering of Livestock Slurry

The tender was issued on the 11th November 2021 and the closing date was the 20th December 2021. The value of the tender, excluding VAT, was € 230,000.

On the 14th February 2022 Mr Mario Mercieca filed an appeal against the Governance for Agricultural Resources Agency as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to be best priced bid.

A deposit of € 1,150 was paid.

There were five (5) bidders.

On the 12th April 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr Mario Mercieca

Dr Alex Scerri Herrera Legal Representative

Contracting Authority – Governance for Agricultural Bio-Resources Agency

Dr Anthony Gruppetta Legal Representative

Dr Kristina Busuttill Legal Representative

Dr George Attard Legal Representative

Recommended Bidder – JM Skips

Dr Clement Mifsud Bonnici Legal Representative

Dr Jasmine Ellul Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then invited submissions noting that a preliminary plea had been raised.

Dr Clement Mifsud Bonnici Legal Representative for JM Skips said that by way of a preliminary plea it is being claimed that the Board must not take cognisance of the Appellant's appeal as it infringed the principle of *fraus omnia corrumpit*. This goes against the very essence of public procurement which only recognised individual participation

to remove the possibility of the creation of a cartel or of manipulating the system. The PPRs do not allow participation through two camps. Mr Mario Mercieca participated in the tender personally but also participated through J & M Mercieca. There is a distinct link between the two and ample documentary proof has been provided of this. PCRB Case 1449 deals with the same point of dual participation broadly whilst the Case Bonello vs Bonello (CA 1237/07) deals with the point on the principle of *fraus omnia corrumpit*. A tenet of the law is that people must act in good faith.

Dr Alex Scerri Herrera Legal Representative for Mr Mario Mercieca said that the PCRB functions are limited through Regulation 87 and it is not their function to decide how to evaluate a tender. If the Evaluation Committee missed the point raised by the preferred bidder then their decision stays. The scrutiny should be on the winning bid. The late filing of documents should be ignored and the preferred bidder did nothing to justify their position.

Dr Mifsud Bonnici stated that competition should be independent and free and this appeal should not even have been instituted. The General Rules covering Tenders have been broken and there has been a degree of disdain towards the competitive process. This might not be a normal case but the Board has to relay the message that this practice amounts to a cartel situation and is a criminal offence. The late documents referred to have not been disproven.

Dr Scerri Herrera said the role of the Board was to check on the merits of an award and not on the points raised – once the bidder met all terms then the award is valid. There is no article in law to back the basis of this appeal.

Dr Mifsud Bonnici said that the Evaluation Committee had been hoodwinked by Appellant's self-declarations which did not make the position obvious at that stage. The principle of fraud does not require further reinforcement by a specific law or legislation.

After a short recess the Chairman stated that the Board has enough information to decide on the preliminary plea. He then thanked the parties for the submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 12th April 2022.

Having noted the objection filed by Mario Mercieca (hereinafter referred to as the Appellant) on 14th February 2022, refers to the claims made by the same Appellant with regards to the tender of

reference SPD8/2021/101 listed as case No. 1703 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alexander Scerri Herrera

Appearing for the Contracting Authority: Dr Kristina Busuttil, Dr Anthony Gruppetta & Dr George Attard

Appearing for the Preferred Bidder: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Whereby, the Preferred Bidder's preliminary plea is based on the following:

a) That, by way of a preliminary plea, this Board must not take cognisance of the Appellant's appeal in view of the overriding principle of *fraus omnia corrumpit* and/or the Appellant's lack of the requisite *locus standi* and this on the basis that the Appellant's bids (under TID 166139), and the bids submitted by J and M Mercieca (under TID 166107), ought to have been rejected and disqualified on the basis that these bidders have deceivingly and/or fraudulently misrepresented their association to the Contracting Authority and further their respective bids are in breach of the General Rules Governing Tenders and the law.

Article 3 of the General Rules Governing Tenders, the applicable version being 2.3 published in July 2021, reads as follows:

3.2 An Economic Operator may not, however, tender for a given contract both individually and as a partner in a joint venture/consortium.

3.3 An Economic Operator may not tender for a given contract both individually/partner in a joint venture/consortium, and at the same time be nominated as a subcontractor by any another tenderer, or joint venture/consortium.

3.4 An Economic Operator may act as a subcontractor for any number of tenderers, and joint ventures/consortia, provided that it does not participate individually or as part of a joint venture/consortium, and that the nominations do not lead to a conflict of interest, collusion, or improper practice.

b) Further, the submission of multiple tenders by the same individuals constitutes bid-rigging. The concept of bid-rigging requires that two or more undertakings (including individual self-employed traders) have coordinated their strategic commercial conduct with respect to a specific public procurement procedure. This definition of bid-rigging has been recently endorsed by the European Commission

in its Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground:

The term collusion in public procurement (often also referred to as "bid-rigging") refers to illegal agreements between economic operators, with the aim of distorting competition in award procedures.

This reflects the position taken in Article 57 (4) (d) of Directive 2014/24/EU as transposed in the blacklisting framework under Maltese law in Regulation 199(c) of the PPR. The law here expressly refers to "agreements with other economic operators aimed at distorting competition". This conduct is not only prohibited in the context of public procurement, but it is a breach of Article 5 of the Competition Act and potentially Article 101 of the Treaty on the Functioning of the European Union.

c) That, the Recommended Bidder submits that it has irrefutable evidence in its possession that Mario Mercieca (ID29081G) is a partner, or otherwise is associated with, or holds an economic interest in, J and M Mercieca and that he is the "M" in "J and M Mercieca" -- which is incidentally a loose partnership or association held with his brother Joseph Mercieca (ID8272G).

d) Therefore, both Mario Mercieca and J and M Mercieca have deceivingly and/or fraudulently misrepresented their association to the contracting authority and are in breach of the General Rules Governing Tenders and the law, and on this basis, the Appellant cannot raise this appeal before this Board for the aforementioned reasons and others which may be brought in due course.

This Board, after hearing submissions made by the Preferred Bidder's and Appellant's legal representatives, opines that the issue as mentioned by the Preferred Bidder would indeed fall within the remits of the PCRB.

Having said that, the General Rules Governing Tenders are very clear and unequivocal in section 3, whereby:

"3. Multiple Tenders

3.1 An Economic Operator may submit multiple tender offers*different options. In such instances, the same Bid Bond (Tender Guarantee) may be uploaded for each respective offer, as applicable.*

3.2 An Economic Operator may not, however, tender for a given contract both individually and as a partner in a joint venture/consortium.

3.3 An Economic Operator may not tender for a given contract both individually/partner in a joint venture/consortium, and at the same

time be nominated as a subcontractor by any another tenderer, or joint venture/consortium.

3.4 An Economic Operator may act as a subcontractor for any number of tenderers, and joint ventures/consortia, provided that it does not participate individually or as part of a joint venture/consortium, and that the nominations do not lead to a conflict of interest, collusion, or improper practice. (bold & underline emphasis added)”

Therefore, this Board agrees with the arguments as brought forward by the Preferred Bidder that this Board is not to take cognisance of the Appellant's appeal in view of the overriding principle of *fraus omnia corrumpit* and the Appellant's lack of the requisite *locus standi*. This on the basis that the Appellant's bids ought to have been rejected and disqualified, by the Evaluation Committee, on the basis that these bidders have deceivingly and/or fraudulently misrepresented their association to the Contracting Authority and further their respective bids are in breach of the General Rules Governing Tenders and the law.

In conclusion this Board;

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.”

3. Ir-rikorrent issa qed jappella minn din id-deċiżjoni għal quddiem din il-Qorti u ressaq aggravju fis-sens li, skont hu, il-Bord ma huwiex mogħni bil-kompetenza neċessarja sabiex jesprimi ruħu fuq l-eċċezzjoni preliminari mqajma mill-parti appellata.

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

Ikkunsidrat:

5. Din il-Qorti ma taqbilx mas-sottomissjoni tal-appellant. Skont l-Artikolu 84 (u mhux 17 kif indika l-appellant fir-rikors tiegħu) tar-Regolamenti dwar l-akkwist pubbliku (Avviż Legali 352/2016 kif emendat-Leġiżlazzjoni Sussidjarja 601.03), il-kompetenza tal-Bord hija wiesgħa biżżejjed biex tkopri kull ilment li jitressaq quddiemha f'każ ta' sejha pubblika għall-offerti. Il-kompetenza tal-Bord, fil-fatt, hija s-segwenti:

“87. Tkun il-funzjoni tal-Bord ta’ Reviżjoni li jindirizza b’mod partikolari:

(a) tħassib jew ilmenti li jitqajmu, qabel ma jagħlaq iż-żmien għas-sottomissjoni ta’ offerta, minn kandidati jew persuni li għandhom interess jakkwistaw kuntratt pubbliku partikolari;

(b) ilmenti mressqa minn offerenti jew kandidati fir-rigward ta’ esklużjonijiet, offerti mhux konformi, deċiżjonijiet dwar għoti ta’ kuntratti jew kancellament ta’ proċeduri ta’ akkwisti wara l-aħħar data u ħin stabbiliti għas-sottomissjoni tas-sejha għall-offerta;

(ċ) talbiet għall-ineffettività ta’ kuntratt pubbliku kif stabbilit f’dawn ir-regolamenti;

(d) li jisma’ u jiddetermina kull każ assenjat lilu taħt dawn ir-regolamenti jew taħt xi liġi oħra; u

(e) li jisma’ u jiddetermina kull każ assenjat lilu f’sejha pubblika għal offerti jew kwotazzjonijiet, ukoll jekk dik is-sejha ma tinvolvi akkwisti pubbliċi.”

6. L-appellant ressaq ilment għal quddiem il-Bord fejn ikkontesta d-deċiżjoni tal-kumitat evalwattiv li tirrikmanda l-għoti tal-kuntratt lill-appellata JM Skips peress li din kienet l-orħos offerta. Quddiem il-Bord, din l-appellata qajmet aggravju marbut mal-prinċipju *fraus omnia corrumpit*, u peress li dan il-prinċipju huwa wieħed ġenerali li għandu dejjem jiġi mistħarreġ bħala prinċipju fundamentali tal-Ordinament Ġuridiku Malti, il-Bord eżamina dan l-ilment mill-oblatur preferut u ra li fil-fatt l-appellant aġixxa bi frodi u bi ksur tar-regolamenti applikabbli. Kien dmir tal-Bord li darba li tressqet allegazzjoni ta' frodi fil-kuntest ta' offerta partikolari li tressaq b'ilment quddiemu li jeżamina dik l-allegazzjoni għax ħadd, f'ebda proċedura, ma jista' jinqeda b'aġir illegali jew abbużiv biex jipprova jieħu xi vantaġġ.

7. F'dan il-każ jirriżulta li l-appellant tefa' żewġ offerti, waħda f'ismu u oħra f'isem "J and M Mercieca", li ġiet deskritta mill-Bord bħala "*a loose partnership or association held with his (Mario) brother Joseph Mecieca*". Issa, skont ir-regoli ġenerali li jiggvernaw is-sejħa għall-offerti, ma tistax issir offerta "*both individually and also as a partner in a joint venture/consortium*". Dan hu każ fejn l-appellant ipprova jgerfex il-kompetizzjoni u jaġixxi b'mod illegali u abbużiv. Għamel offerta f'ismu u ipprova jinheba wara assoċjazzjoni li għamel ma' ħuh biex jitfa' offerta oħra, u dan meta jaf jew messu kien jaf li dan ma setax jagħmlu. Id-deċiżjoni li ha l-Bord fil-kuntest hija għalhekk waħda korretta. Fid-dawl

ta' dan, għalhekk, għamel sew il-Bord li ma qiesx l-ilment tal-appellanti fil-kuntest tal-oblatatur preferut.

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell ta' Mario Mercieca billi tiċġad l-istess u tikkonferma d-deċiżjoni li ħa l-Bord ta' Reviżjoni ta' Kuntratti Pubbliċi fil-25 ta' April, 2022. L-ispejjeż jithallsu kollha mill-appellant Mario Mercieca.

Mark Chetcuti
Prim Imħallef

Joseph R. Micallef
Imħallef

Tonio Mallia
Imħallef

Deputat Reġistratur
da