



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tnejn, 20 ta' Marzu, 2023.

Numru 2

Rikors numru 542/22/1

Fremond Limited (C 20339)

v.

L-Aġenzija għas-Servizzi tal-Qorti u Dipartiment tal-Kuntratti

Il-Qorti:

1. Dan huwa appell imressaq mis-soċjetà rikorrenti Fremond Ltd., fl-24 ta' Novembru, 2022, wara deċiżjoni mogħtija mill-Bord ta' Revizjoni dwar Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fit-8 ta' Novembru, 2022 fil-każ b'referenza CT 2050/2022 (każ numru 1807);

2. Dan il-każ jirreferi għal sejha għall-offerti magħmula mid-Dipartiment tal-Kuntratti għan-nom tal-Aġenzija għas-Servizzi tal-Qorti għal *“lease of 48 plug-in-hybrid (PHEV) vehicles for the members of the judiciary”*. Jidher li tressqu tliet offerti għal dan il-kuntratt. Is-soċjetà rikorrenti ġiet skwalifikata mill-awtorità kontraenti bħala *“not administratively compliant”* peress li naqset milli tagħti dettalji dwar il-ħasil u t-tindif tal-karozzi (*“carwash and valeting services”*), u naqset ukoll milli tippreċiża meta l-karozzi se jasl Malta (*“time frame for vehicles”*). L-informazzjoni mitluba kienet indikata bħala mandatorja.

3. Is-soċjetà rikorrenti tgħid li hi wettqet d-doveri tagħha u tat l-informazzjoni kollha mitluba. Hi tgħid ukoll li kien messha ntalbet tagħmel kjarifika għall-offerta tagħha, u din ma kellhiex tiġi mwarrba. Is-soċjetà rikorrenti ressqet oġġezzjoni f'dan is-sens għall-quddiem il-Bord li, però, b'deċiżjoni tat-8 ta' Novembru, 2022, ċaħdilha t-talba għat-tħassir tad-deċiżjoni tal-awtorità kontraenti. Id-deċiżjoni tal-Bord hija s-segwenti:

“Whereby, the Appellant contends that:

a) **Carwash and Valeting service –**

The Contracting Authority provided the two criteria whereby Fremond was administratively non-compliant namely: *“The submission to this Criterion was deemed as inaccurate since the bidder stated that “Our car wash facilities are situated at Kirkop. We are open for 12 hours daily. An intensive car wash and valeting service is provided.” On the other hand, this Criterion specifically requested details from the bidder in relation to the frequency of the car wash and the frequency of the valeting service per month. Fremond Ltd did not submit any information pertaining to this requirement in the submission therefore, the Evaluation Committee has no option but to consider the submission as being technically non-compliant. Given that this information was specifically part of the Technical Offer (Note 3), and no rectifications are permissible for Note 3 items, the Tender*

Evaluation Committee has no option but to deem the submission as being technically noncompliance (sic) since the information requested (being frequency of the car wash and the frequency of the valeting service per month) was not submitted by the bidder.....”

The relevant provision in the tender document is clause 9.9 (8) whereby it has been specified that “8. *The contractor shall provide a monthly internal valeting service (Internal vacuum cleaning and other internal cleaning including the luggage compartment) and car wash on days as specified by the Court Services Agency.*”

In fact, a clarification was submitted - Question 7, whereby the Contracting Authority made reference to the above clause in the tender document. Although the Evaluation Grid Criteria refers to the frequency of the Carwash and Valeting services in relation to the marks that might be awarded but not that such could render a bid non-compliant.

The bidder submitted that “*Our car wash facilities are situated at Kirkop, We are open for 12 hours daily. An intensive car wash and valeting service is provided*”. The latter falls exactly in the criteria stipulated by the Contracting Authority, both in clause 9.9 (8) and also in in the BPQR evaluation grid, thus it cannot be declared noncompliant, and had to be graded. Further, the Contracting Authority, for clarity's sake, should have requested the Bidder to clarify, if the information provided included the frequency listed in the Evaluation Grid, which clearly is, and beyond, since the bidder did not limit the frequency of the carwash or valeting, to the frequency requested by the Contracting Authority. That in view of the above the reasons for noncompliance of the bidder by Contacting Authority should be deemed not correct.

b) **Time frame for Vehicles**

The Contracting Authority provided the two criteria whereby Fremond was administratively non-compliant namely: “*The submission to this Criterion is not deemed as being technically noncompliant to the requirements of the Tender Document and the requirements of BPQR Evaluation Grid - Criterion 3 for the following reasons: Fremond Ltd's submission in response to this Criterion should have been a Gantt Chart and this document was not submitted. Seeing as the Tender Evaluation Committee is bound to ensure that the requirements of the tender document and those listed in the respective BPQR Evaluation Grid - Criterion 3 are met, the Tender Evaluation Committee noted that such a requirement was not adhered to by the bidder since a Gantt Chart was not included in the bidder's submission. Given that the Gantt Chart was part of the Technical Offer (Note 3), and no rectifications are permissible for Note 3 items, the Tender Evaluation Committee has no option but to deem the submission as being technically non-compliance since this specific document (being the Gantt Chart) was not submitted by the bidder. Therefore, the response to this Criterion is incorrect and not in line with the requirements of BPQR Evaluation Grid - Criterion 3.....”*

Gantt (sic) Chart - The request made by the Contracting Authority, in relation to the timing of the delivery of the vehicles on one principal requirement, that is, adherence to the timeframe of the delivery. The document provided by the Bidder, from Muscat Motors, it is clear that the timeframes will be adhered to, thus the principal information requested by the Contracting Authority was satisfied, that is the information requested was there.

The Contracting Authority requested that the said information be translated in for of a Gantt (sic) Chart. The Bidder is humbly submitting that, since the declaration in relation to the timeframe was supplied, the Gantt (sic) Chart is to be considered as a clarification and not a rectification, since the Gantt (sic) chart shall only display, in such form, the information initially requested by the Contracting Authority.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 7th October 2022 and its verbal submission during the virtual hearing held on 3rd November 2022, in that:

a) **Carwashing and valeting - Criterion 1.5 -**

Criterion 1.5 - relating to Carwash and valeting Service includes a requirement for bidders to submit a description to clearly state how the bidder would be providing valeting service and carwash. The details of which are referred to at Section 3 - Specification 4.14 of the Tender Document as well as in the evaluation grid. A gradation of marks was included in the evaluation grid of this mandatory requirement, thereby the Evaluation Committee had clear parameters what marks to allocate for which values. This invariably implies that the bidder was also aware of the parameters which involve different marks allocation. In the opinion of the defendant, it is obvious for a bidder who has taken cognition of such a gradation to deliver the parameters as gradation in order to secure himself a targeted amount of marks from the gradation.

In this case, the bidder did not provide a parameter he is committing himself to deliver to attain a certain mark from the gradation. In turn the bidder was extremely generic by asserting that he owns carwash facilities which are open daily. However, details of frequencies of the car wash and frequencies of valeting service per month were not submitted. Thereby the evaluation committee could not allocate marks for such a generic submission. The evaluation committee could not assume any parameters for which the bidder could commit himself to be given a mark under this heading. Should the evaluation committee have assumed and given marks under any of the gradation in the marking scheme of the tender this would have been in breach of the principles of transparency and equal level playing field. The allocation of marks in this scenario would have induced an added information to the bid which was not submitted.

Therefore, it is only plausible and in line with the principle of self-limitation that the Evaluation Committee had to allocate nil marks

under this section, which would invariably mean disqualification as this section was a mandatory requirement.

b) **Timetable of Activities -**

Under Criterion 3 - Timetable of Activities - Timing; the bidder was requested to commit himself to a timeframe of 10 months from the last date of signature on contract for the delivery of 48 vehicles. This information was required to be presented in the form of a Gantt (sic) Chart with the avenue to be supported by further documentation. This criterion was mandatory.

The bidder did not submit the requested Gantt (sic) Chart and therefore the absence of a Gantt (sic) Chart had to be deemed as missing information which as part of the Technical Offer (Note 3) could not be rectified. Hence, the Evaluation Committee was correct in its deduction to disqualify the bidder under this heading. In line with the principle of level-playing field among bidders and self-limitation the bid is to be excluded from the ranking and hence disqualified as per reason given and this appeal dismissed.

In both instances mentioned above the evaluation committee could not opt for a rectification of the submission since did would involve a change in offer which is not possible under the Tender Document. The principle of self-limitation indicates that the evaluation committee is not able to do and act at free will but only according to what is indicated in the Tender Document. In these circumstances the Evaluation Committee had little leeway and its conclusions are only the logical reaction of the submission itself. Any derogation from this conduct would only result in a breach of the basic principles of public procurement.

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 witness duly summoned, will now consider Appellant's grievances.

a) **1st Grievance - Carwash and Valeting service -**

Reference is made to part 1.5 of the Evaluation Grid of the tender dossier, whereby what was required out of economic operators was clear and unambiguous. The write-up / description needed to include information on the **frequency** of car wash and valeting service. The submission of the Appellant did not include any information on the frequency of both car wash and / or valeting service. Whilst noting that such criteria fell under the remit of 'note 3', this Board opines that if the evaluation committee would have allowed for a rectification, this would have been tantamount to amending the original submission which is to be deemed as a change in the original bid of the economic operator, now appellant. The evaluation committee could also not assume any parameters in relation to frequency of service, and hence no marks could be allotted.

When considering all of the above, this Board opines that the evaluation committee correctly assessed the situation and acted in a proportionate manner. Henceforth, this Board does not uphold appellant's first grievance.

b) **2nd Grievance - Time frame for Vehicles –**

Part 3 of the Evaluation Grid as per the tender dossier states as follows: “*Timing – A description of the proposed timing plan – based on the timeframe of 10 months from the last signature on contract of delivery of the 48 vehicles **in the form of a Gantt (sic) Chart** which **may** be supported by further documentation to support the proposed timeline*”. (bold & underline emphasis added). This criterion was also listed as ‘Mandatory’.

The Board opines that what was required from economic operators was very clear. A Gantt chart was obligatory, whilst the supporting documentation was ‘optional’. In fact, the tender dossier uses the word ‘may’ in regards to further / supporting documentation.

Whilst it may correctly be argued that the declaration submitted contains sufficient information, economic operators cannot of their own accord decide what information is to be submitted and what is not so relevant. The Gantt Chart was specifically requested, was listed as a mandatory criteria and was also marked as ‘note 3’. This Board does not agree with argumentation brought forward by appellant that such an issue could have been corrected by way of a ‘clarification’ but in actual fact it required a ‘rectification’ which is not allowed as per ‘Note 3’.

Hence, this Board does not uphold the Appellant’s second grievance.

The 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 recommending the cancellation of the tender
- c) Directs that the deposit paid by Appellant not to be reimbursed.”

4. Is-soċjetà rikorrenti issa qed tappella mid-deċiżjoni tal-Bord għal quddiem din il-Qorti u bażikament ressqet l-istess aggravji li ressqet għall-konsiderazzjoni tal-Bord.

5. Wara li semgħet id-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti, tinsab f’pożizzjoni li tagħti s-sentenza tagħha.

Ikkonsidrat:

6. Fil-kuntest tal-ewwel aggravju, is-sejha riedet li kull oblatur jindika “*the frequency of the car wash and the frequency of the valeting service per month*”, iżda s-soċjetà appellanti qalet biss li għandha faċilità għall-ħasil tal-karozzi li tkun miftuħa tnax-il siegħa kuljum, u toffri “*an intensive car wash and valeting service*”. Hu ċar li s-soċjetà appellanti ma tatx l-informazzjoni mitluba. Hi ma kellhiex tgħid biss x’qed toffri bħala servizz lill-pubbliku, imma kellha tindika l-frekwenza tal-ħasil għall-karozzi tal-membri tal-ġudikatura. Kellha tgħid, per eżempju, li bħala parti mill-pakkett kienet qed toffri ħasil tal-vetturi darbtejn fil-ġimgħa u *valeting* darba fil-ġimgħa, iżda ma għamlet xejn minn dan. Hekk ikun jista’ jsir tqabbil ma’ servizzi li joffru oblaturi oħra. Li tgħid li l-“ħanut” ikun miftuħ tnax-il siegħa kuljum, ma tkun qed tgħid xejn dwar il-frekwenza tas-servizz offrut.

7. Din l-indikazzjoni tal-frekwenza hija mandatorja u s-soċjetà appellanti ma tistax taħrab minnha. Din is-sejha kienet twassal għall-għoti ta’ kuntratt fuq bażi ta’ punti, u din l-informazzjoni kienet meħtieġa biex skont min joffri l-aħjar servizz jingħata aktar punti. Dan il-qbil ma setax isir minħabba n-nuqqas ta’ informazzjoni min-naħa tas-soċjetà appellanti, u peress li l-informazzjoni kienet mitluba speċifikament, ma kienx hemm triq oħra għall-awtorità kontraenti ħlief li tiskwalifikaha.

8. L-awtorità kontraenti ma setgħetx lanqas titlob rettifika peress li din l-informazzjoni kienet parti mill-offerta teknika (*Note 3*), u s-sejha kienet speċifika fejn tgħid li ebda rettifika ma kienet permessibbli għall-informazzjoni mitluba f'dik in-nota. F'kull każ, din il-Qorti osservat kemm il darba li meta d-dokumenti tas-sejha jitolbu ċerta informazzjoni, din trid tingħata kif mitlub, aktar u aktar meta dik l-informazzjoni tkun indikata bħala mandatorja.

9. Fir-rigward tat-tieni aggravju, hawn ukoll id-dokumenti tas-sejha riedu dak li jissejjaħ a *Gantt Chart* fejn jiġi propost kif se jaslu l-vetturi Malta fuq perjodu ta' għaxar xhur. Din ma ġietx ippreżentata mis-soċjetà appellanti. L-offerta ta' din is-soċjetà kienet tagħti xi forma ta' indikazzjoni ta' meta kellhom jaslu l-vetturi, iżda ma ressqitx *Gantt Chart* kif kien espressament mitlub. Meta d-dokumenti tas-sejha jitolbu xi ħaġa speċifika din trid tingħata, u mhux tiġi ppreżentata xi ħaġa oħra li, forsi, tista' taqdi l-istess funzjoni.

10. Hawn ukoll, il-preżentazzjoni taċ-*Chart* kienet mandatorja u r-rikjesta kienet parti minn *Note 3* aktar qabel imsemmi, u għalhekk, l-awtorità kontraenti ma setgħetx titlob rettifika. Id-dokumenti mhux iffirmati li annettiet is-soċjetà appellata mal-informazzjoni li tat, setgħu jiġu ffirmati aktar 'il quddiem (ara "**Executive Security Services Ltd. v.**

Aġenzija għas-Sistema tal-Infurzar Lokali et” deċiza minn din il-Qorti fis-26 ta’ Ottubru 2022), iżda dak mitlub kellu jiġi prodott. Mhux każ li l-awtorità kontraenti titlob li jinġiebu d-dokumenti t-“*tajba*”, għax mhux kompitu tal-awtorità li titlob hi d-dokumenti. Id-dokumenti tas-sejha kienu ċari x’għandu jiġi pprezentat, u kull oblatur irid isegwi l-istruzzjonijiet mogħtija u mhux jistenna li l-awtorità tagħmel tajjeb għan-nuqqasijiet tiegħu.

Għaldaqstant, għar-raġunijiet premissi, tiddisponi mill-appell tas-soċjetà Fremond Limited billi tiċċhad l-istess u tikkonferma s-sentenza li ta l-Bord ta’ Revizjoni dwar Kuntratti Pubbliċi fit-8 ta’ Novembru, 2022, bl-ispejjeż kollha jithallsu mill-imsemmija soċjetà appellanti.

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