



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, 15 ta' Novembru, 2023.

Numru 1

Rikors numru 451/23/1

A. Falzon Energy Projects Limited (C-51294)

v.

**Central Procurement and Supplies Unit, Direttur Ġenerali tal-
Kuntratti u Mekanika Limited (C-3238)**

Il-Qorti:

1. Rat li dan hu appell imressaq fis-7 ta' Settembru, 2023, mis-soċjetà A. Falzon Energy Projects Ltd. wara deċiżjoni li ta l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-21 ta' Awwissu, 2023 fil-każ referenza CT 2123/2022 (każ numru 1893).

2. Dan il-każ jirreferi għall-ħruġ ta' sejha għall-offerti "*for the provisions of mechanical and electrical maintenance services at Mount Carmel Hospital and mental health centres across Malta*". Is-soċjetà rikorrenti A. Falzon Energy Projects Ltd. ġiet rakkomandata favorevolment għall-kuntratt. Is-soċjetà intimata Mekanika Ltd. ressqet oġġezzjoni għal quddiem il-Bord, li kienet tikkonsisti f'żewġ aggravji, u ċjoè li l-offerta tas-soċjetà rikorrenti kienet waħda baxxa b'mod mhux normali, u li ma kinitx konformi teknikament ma' dak rikjest fis-sejha. Fil-kors tas-smiġh quddiem il-Bord is-soċjetà Mekanika Ltd. ingħatat il-permess u ressqet aggravju ieħor fis-sens li s-soċjetà rikorrenti għamlet sottomissjoni erroneja tal-offerta fuq is-sistema ePPS.

3. Bis-sentenza tiegħu tal-21 ta' Awwissu, 2023, il-Bord laqa' dan l-añhar aggravju ulterjuri u ħassar ir-rakkomandazzjoni li għamlet l-awtorità kontraenti. Is-sentenza tal-Bord għal dak li huwa rilevanti għall-mertu tal-każ hija s-segwenti:

"This Board also noted the Preferred Bidder's verbal submission during the hearing held on 11th July 2023 and the letter filed on 25th July 2023 (in relation to the 3rd grievance), in that:

a) Mr Anthony Falzon firstly clarifies and submits that it was always the Preferred Bidder's intention to submit the bid on behalf and for the company A. Falon Energy Projects Limited (C-51294) and not in his personal name as a sole trader. Mr. Falzon is the sole shareholder and director of the company A Falzon Energy Projects Limited (C-51294). He is also the only person vested with the legal representation of the same company. The Preferred Bidder submits that the company's account on the Electronic Public Procurement System was created by the company's administrative employees.

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 initially consider Appellant's third grievance.

a) The Board notes that during the testimony under oath of Mr John Camilleri, it became known that the Preferred Bidder, did not intend to submit his bid as a sole trader (Mr Anthony Falzon), but as a company (A. Falzon Energy Projects Ltd). Whilst the ePPS account used for the bid submission was that of Mr Anthony Falzon, listed as a sole trader, all evidence of technical and professional ability, including the technical offer form, related to A. Falzon Energy Projects Ltd. Moreover, it was also ascertained that A. Falzon Energy Projects Ltd was not listed as a sub-contractor to Mr Anthony Falzon (preferred bidder).

b) Reference is now made to rule 9.3 of the General Rules Governing Tenders ("GRGT") which states as follows:

*"Electronic Public Procurement System (ePPS) users holding a **sole trader account** are kindly reminded that their **account can only be used to submit tenders under their sole trader's name and not on behalf of any other organisation.***

*In case a tender needs to be submitted by any other type of Economic Operator (e.g. **Company**/Joint Venture/Consortium), an account needs to be created either through the ePPS as per Terms of Use for Economic Operators and **only this account must be used to submit the tender.** In the case where a person requires to submit a tender on behalf of an entity which may be an organisation or Joint Venture/Consortium, the submission must be performed through the account of the entity. The latter must assign the person an account to perform the submission on its behalf, if the person is not already assigned. The entity will be considered as the economic operator submitting the tender.*

.....

*The Department of Contracts/Contracting Authority/Sectoral Procurement Directorate or the Evaluation Board **will disqualify** Economic Operators who do not abide by the above instructions." (bold & underline emphasis added)*

c) It is this Board's opinion that the GRGT, in such a case, are clear in what should have been expected of the Contracting Authority. The use of the words "**will disqualify**" do not leave any element of leeway to the Evaluation Committee which should have disqualified the bid as submitted by Mr Anthony Falzon from the outset.

d) Reference is now also made to the argument presented by the Contracting Authority whereby they state that the Court of Appeal already pronounced itself in a similar situation in the case Firetech

Cross TLS Joint Venture vs Dipartiment ta-Kuntratti (Case 281/2015) decided on the 30th October 2015. This Board does not agree with such an argument due to the fact that in that specific case, the subject matter were two (2) companies which formed a Joint Venture (JV) for the sole purpose of bidding for that specific tender procedure. This is different to the case at hand where the issue revolves around a sole trader and a limited liability company. These two 'business types' are very different in nature, especially from a Company Law point of view.

Therefore, this Board upholds the Appellant's third grievance.

With such grievance being upheld, this Board deems it irrelevant to pronounce itself on the first and second grievances.

The Board,

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

- a) To uphold the Appellant's third grievance;
- b) To cancel the 'Notice of Award' letter dated 2nd May 2023;
- c) To cancel the Letter of Rejection dated 2nd May 2023 sent to Mekanika Ltd;
- d) To order the contracting authority to re-evaluate the bids received in the tender procedure whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant".

4. Is-soċjetà rikorrenti issa qed tappella minn din id-deċiżjoni għal quddiem din il-Qorti, u ressqet żewġ aggravji marbuta mal-permess li ta l-Bord biex jitressaq aggravju ulterjuri, u mal-validità tal-istess aggravju.

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

Ikkonsidrat:

6. Trattat l-ewwel aggravju, is-soċjetà appellanti qed tilmenta mill-fatt li l-Bord ippermetta li jitressaq aggravju ġdid fil-kors tas-smiġh tal-każ u dan meta kien għadda ż-żmien għall-preżentata ta' aggravji u ma tax opportunità lis-soċjetà tissottometti l-pożizzjoni tagħha fuq il-punt kellux jew le jitressaq aggravju ġdid. Jirriżulta li fil-kors ta' smiġh ta' xhud, is-soċjetà Mekanika Ltd. talbet li tressaq aggravju ġdid. Il-Bord ma semax trattazzjoni fuq din it-talba, iżda issospenda s-seduta għal ftit minuti, u meta kompli bis-seduta ddekreta li kien sejjer jaċċetta l-aggravju l-ġdid, u talab li jsiru sottomissjonijiet fuq dak l-aggravju l-ġdid.

7. Din il-Qorti tista' tapprezza l-argument tas-soċjetà Mekanika Ltd., u kien ikun aħjar li l-Bord qabel ma ddecieda li seta' jitressaq aggravju ulterjuri, jisma' x'għandhom xi jgħidu l-partijiet dwar it-talba infisha. Dan in-nuqqas, però ma jwassalx għan-nullità tad-deċiżjoni tal-Bord. Dak li hu importanti hu li l-Bord ma ssorprendiex lill-partijiet u ta lill-istess partijiet iċ-ċans li jressqu sottomissjonijiet fuq l-aggravju sollevat. In-natura tal-aggravju hi tali li l-Bord seta' anke issollewaha *ex officio* peress li tolqot il-validità tal-offerta nfisha; l-importanti hu li l-partijiet jingħataw l-opportunità jittrattaw il-mertu ta' dak l-aggravju. F'dan il-każ, fil-fatt ġie verbalizat li l-Bord stieden lill-partijiet li, jekk xtaqu, iressqu

sottomissjonijiet fuq il-punt. Fil-fehma tal-Qorti, il-mod kif il-Bord strada l-materja ma jwassalx għan-nullità tad-deċiżjoni tiegħu u l-ewwel aggravju qiegħed għalhekk jiġi miċħud.

8. Fil-kuntest tat-tieni aggravju, marbut mal-mertu tal-aggravju ulterjuri, jirriżulta li l-appellanti A. Falzon Energy Projects Ltd. għandha kont fuq is-sistema ePPS, filwaqt li d-direttur tagħha, u l-uniku detentur tal-ishma tal-istess, is-Sur Anthony Falzon, għandu kont personali wkoll bħala *sole trader*. Meta s-soċjetà appellanti ġiet biex tintavola l-offerta tagħha f'din is-sejha, hija illoggjat ġewwa s-sistema tal-ePPS fuq il-kont personali tad-direttur f'ismu proprju bħala "Anthony Falzon" u mhux bħala s-soċjetà appellanti "A. Falzon Energy Projects Ltd." Dan l-istat ta' fatt qatt ma ġie kkontestat. Is-soċjetà appellanti tgħid li dan għamlitu inkonxjament u bi żball.

9. Jibqa' l-fatt, li dak li sar seħħ bi ksur tar-regolamenti appożiti, partikolarment ir-regolament 9.3 tal-General Rules Governing Tenders u kwotat mill-Bord fis-sentenza tiegħu. L-iżball ma kienx wieħed klerikali imma fundamentali għax jirriżulta li ġew involuti żewġ persuni fl-istess offerta waħda. Ir-regolament ikkwotat jgħid b'mod ċar illi offerta li tintefa' minn kumpanija trid tkun akkompanjata biss mill-kont tal-istess kumpanija, altrimenti l-offerta trid tiġi skwalifikata. L-iżball mhux xi haġa li tista' tiġi rimedjata b'semplici kjarifika għax tolqot is-sustanza tal-offerta u hija espressament regolata b'liġi.

10. Din il-Qorti taqbel ukoll mal-osservazzjoni tal-Bord dwar l-irrelevanza tas-sentenza ta' din il-Qorti tat-30 ta' Ottubru, 2015, fil-kawża fl-ismijiet "**Firetech Ltd. et v. Dipartiment tal-Kuntratti**". Iċ-ċirkustanzi ta' dik il-kawża kienu *tota caeli* differenti minn dawk ta' din il-kawża u l-prinċipju enunċjat f'dik il-kawża ma jistax jiġi applikat għall-mertu ta' din il-kawża. Dan lanqas ma hu każ ta' offerent li biddel l-*istatus* tiegħu (bħal meta *sole trader* jibda jinnegozja taħt *partnership*), iżda ta' zewġ persuni distinti u pre-eżistenti, u li l-offerta saret minn waħda minnhom b'kont tal-oħra.

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell tas-soċjetà A. Falzon Energy Projects Ltd. billi tiċhad l-istess u tikkonferma d-deċiżjoni li ta l-Bord ta' Revizjoni dwar Kuntratti Pubbliċi fil-21 ta' Awwissu 2023.

L-ispejjeż ta' dan l-appell jitħallsu kollha mill-imsemmija soċjetà appellanti.

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