QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF CHRISTIAN FALZON SCERRI
ONOR. IMĦALLEF JOSETTE DEMICOLI

Seduta ta' nhar il-Ħamis, 1 ta' Frar, 2024.

Numru 9

Rikors numru 463/2023/1

Engineering & Technology Limited (C 5911)

v.

Id-Direttur tal-Kuntratti;
Water Services Corporation; u
Flowserve Spain S.L.

Il-Qorti:

1. Din hija sentenza dwar appell imressaq mis-soċjetà rikorrenti Engineering & Technology Limited fit-3 ta' Ottubru, 2023, wara deċiżjoni li ta l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ il-"Bord") fit-18 ta' Settembru, 2023 fil-każ bin-numru ta' riferenza

1911 - CT/2350/2022.

2. Dan il-każ jirreferi għal sejħa għall-offerti li ħarġet il-Korporazzjoni intimata, «*for the supply and delivery of pumps and energy recovery devices for the Reverse Osmosis Plants of the Water Services Corporation*.» Dan il-kuntratt ġie rakkomandat li jingħata lis-soċjetà appellata Flowserve Spain S.L., wara li l-offerta tas-soċjetà appellanti ġiet imwarrba peress li ma kinitx, «*the most cost effective offer satisfying the administrative and technical criteria*.»

3. Is-soċjetà appellanti ressqet ilment għal quddiem il-Bord fis-sens li l-prodott offrut mis-soċjetà Flowserve Spain S.L. ma kellux jiġi rakkomandat għall-aċċettazzjoni, peress li kien prodott «*ġdid*» u ma kienx ilu fis-suq għall-ħames snin kif iridu d-dokumenti tas-sejħa. Il-Bord ma aċċettax dan l-argument u kkonferma d-deċiżjoni li ħadet l-awtorità kontraenti. Id-deċiżjoni tal-Bord hija s-segwenti:

> *«This Board, having noted this objection filed by Engineering & Technology Ltd (herein after referred to as the appellant), on the 28th July 2023. The objection refers to the claims made by the same appellant against the Water Services Corporation (herein after referred to as the contracting authority) regarding the tender listed as case No. 1911 in the records of the Public Contracts Review Board and its verbal submissions during the hearing on 14th September 2023.*
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> *The Board also noted the letter of reply by the Contracting Authority dated 4th August 2023, together with its verbal submissions during the hearing on the 14th September 2023, and the submissions made by the preferred bidder during the hearing, as well as the testimonies of Mr Angel Abajas on behalf of the appellant and Engineer Kylie Alamango on behalf of the Contracting Authority.*

Finally the Board took into consideration the Minutes of the hearing of the Board on the 14th September 2023 appended above.

Whereby,

The Appellant contended that:

A. the product offered by preferred bidder was not compliant due to the fact that whilst using the existing patent which is acceptable, changes has been made to the product being offered and thus rendering the product a new one and does not satisfy the technical criteria of operating reliably and satisfactorily for at least five (5) years.

The above was counter argued by the Contracting Authority as follows:

A. According to the submission made by the preferred bidder, the product offered was compliant as it has been in the market for at least five years
B. Changes in the product which were meant for improvement do not render such a product a new product but were a normal process in the life of a product.

After the Board considered the arguments and documentation from both parties, the testimonies of the witnesses and the preferred bidder's submissions and taking note of the replies of the preferred bidder in the Technical Questionnaire (page 3), the Board's view was that the Appellant's claim is not sustainable.

The Board concludes and decides that:

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

4. Is-soċjetà rikorrenti issa qed tappella mid-deċiżjoni tal-Bord għal quddiem din il-Qorti u qiegħda ttenni l-aggravju tagħha li l-prodott tas-soċjetà Flowserve Spain S.L. huwa wieħed ġdid u mhux sempliċi titjib fuq il-prodott li ilu fis-suq.

5. Din il-Qorti wara li semgħet lid-difensuri tal-partijiet, u rat l-atti kollha tal-kawża u d-dokumenti esibiti, tinsab f'pożizzjoni li tgħaddi għas-sentenza tagħha;

Ikkunsidrat:

6. Illi l-meritu ta' dan il-każ idur ma fatti tekniċi, u ċjoè, jekk it-titjib li sar fuq il-prodott irendix dak il-prodott wieħed «*ġdid*» jew sempliċement irranġat għall-aħjar.

7. L-awtorità kontraenti eżaminat it-tibdil li sar u hi tal-fehma li t-tibdil fil-prodott, «*were meant for improvement (and) do not render such a product a new product but were a normal process in the life of a product*.» Il-Bord qabel ma' din is-sottomissjoni u għalhekk ċaħad l-argument tas-soċjetà appellanti li l-prodott hu wieħed ġdid.

8. Din il-Qorti tirribadixxi li *trattandosi* ta' materja teknika trid tagħti fidi lill-opinjoni tal-esperti fil-materja. Din il-Qorti tinnota li kemm l-awtorità kontraenti kif ukoll il-bord għandhom membri tekniċi fil-kompożizzjoni tagħhom, u dawn qablu li t-tibdil li seħħ fil-prodott huma «*improvements*» u l-pretensjoni tas-soċjetà appellanti mhux sostenibbli.

9. Din il-Qorti mhix teknika fil-materja, però hija eżaminat l-allegat bidliet li seħħu fil-prodott u tara li, fil-verità, il-prodott baqa' l-istess; seħħ biss titjib fil-*performance* tiegħu. Hekk, pereżempju, il-*maximum flowrate* tal-pompa żdied ukoll minn 1000PSI għal 1200PSI. Issemmew bidliet oħra, bħala li issa l-prodott hu magħmul minn *Titanium grade C3* flok *grade Z*, però, dawn, fil-fehma tal-Qorti, ma jagħmlux il-prodott offrut bħala wieħed «*ġdid»*.

10. Huwa veru li fl-atti hemm affidavit ta' espert Spanjol imqabbad mis-soċjetà appellanti, però, dan apparti li jgħid li fil-prodott offrut hemm «*material* changes» minn dak ta' qablu u li l-prodott offrut kif modifikat ilu fis-suq anqas minn tliet snin, dan ma jindikax li l-istess prodott għandu jitqies bħala wieħed «*ġdid»*. Quddiem il-Bord, dan l-espert irrefera għall-prodott bħala «*ġdid»*, però, ma setax jgħid jekk it-tibdil li sar kienx jew le «*improvements*». L-inġinier tal-Korporazzjoni appellata qal li l-bdil kienu «*improvements»* u dan it-tibdil «*give a better performance and exceed expectations»*. Din il-Qorti tara li d-deċiżjoni li ħadu l-esperti lokali fil-materja għandha tipprevali għax huma indipendenti mill-partijiet u hi sostnuta mill-analiżi li għamlet il-Qorti tal-bidliet li ġew indikati li saru.

11. L-aggravju tal-kumpanija appellanti għalhekk qed jitqies bħala mhux misħoqq.

Deċiżjoni

Għaldaqstant għar-raġunijiet fuq imsemmija, din il-Qorti qiegħda **tiċħad** l-appell tas-soċjetà Engineering & Technology Limited, bl-ispejjeż kollha kontra tagħha.

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Deputat Reġistratur
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