



QORTI TA' L-APPELL

**ONOR. IMHALLEF
RAYMOND C. PACE**

Seduta tat-30 ta' Ottubru, 2012

Appell Civili Numru. 27/2011

Aurelia Enforcement Limited

vs

**Dipartiment tal-Kunsilli Lokali, Regjun Ghawdex u
Bord ta' Revizzjoni dwar il-Kuntratti Pubblici**

Il-Qorti,

I. PRELIMINARI.

Illi fl-4 ta' Lulju 2011 il-Bord ta' Revizzjoni Dwar Kuntratti Pubblici ppronunzja s-segwenti decizjoni fl-ismijiet premissi: -

"After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Dr Adrian Delia, legal representative of Aurelia Enforcement Ltd, the appellant company, stated that by means of a letter dated 13th April 2011, his client was informed that its tender was not successful since the "tender presented by Aurelia Enforcement Ltd is administratively non-compliant since the documents included in the tender do not show proof of experience and track record (minimum 5 years) in the local warden services."

Dr Delia made the following submissions:

i. in the case of the Gozo Region no mention had been made as to whether his client had a sufficient number of local wardens on its books to execute this contract but the only reason for exclusion was related to the 5 years minimum experience and, in this case, that had to be related to 'the local warden services';

ii. Clause 12 of the 'Instructions to Tenders' under 'Award' reads as follows:

"It is the intention of the Region to award the Contract on the basis of the cheapest and administratively compliant tender, having regard to the extent of compliance with the conditions specified in the tender documents and also the level of prices quoted; provided that the tender has been submitted in accordance with the requirements of the Tender Documents. Quality Standards, experience and track record (minimum 5 years), work plan proposed, company set up and conditions of work of employees, organizational capabilities and professionalism will be taken into consideration and will be the basis of the award."

There was no reference to the term 'in the local warden services' and the evaluation board therefore had to explain why in its deliberations it went beyond what was provided in the tender document;

iii. once the requirement of 5 year minimum experience was included under the 'Award' - and not under 'Selection Criteria' - the evaluation board could not exclude a bidder

*on administrative or technical grounds at award stage;
and*

iv. moreover, the decision of the Gozo Region was illegal because it was based on a criterion which was not included in the tender document, namely, it did not specify that the 5 years experience had to be 'in the local warden services'

Dr Georganne Schembri, legal representative of the Gozo Region, made the following submissions:

a. once the appellant company was alleging that certain provisions of the tender document were not in order or even illegal, one would have expected the said company, either not to take part in the tendering procedure or to take all legal measures that it deemed necessary to safeguard its interests;

b. the sole reason for exclusion was that the appellant company did not demonstrate that it had the experience requested at Clause 12 of the tender document;

c. the Gozo Region had requested an explanation from the drafters of the tender document, the Local Enforcement Systems (LES) Management Committee, and the reply by the chairman of that committee, Mr Maurice Caruana, was that the experience had to be in the provision of local warden services;

d. reference was made to:

"page 15 of the tender document - Tender Declaration - which stated that: 11. Our tender submission has been made in conformity with the Instructions to Tenderers, and in this respect we confirm having included in the appropriate packages as required, the following documentation: among them, (d) 'Technical Capacity' 'Experience as Contractor'"

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Dr Schembri stated that this confirmed that the experience requested at Clause 12 formed part of the technical selection criteria;

e. the clarifications, e.g. addendum no. 2, which formed an integral part of the tender document, indicated that the selection and award criteria were complementary;

f. considering the very title of the tender, the contracting authority expected the experience of the tenderer to be in the provision of local warden services;

g. in general, she agreed with the legal submissions that had been made by Dr Keith Grech, legal representative of the Central Regions, on this aspect of the appeal, particularly those relating to the following:

i. the appellant company did not have the required 5 years experience in the provision of warden services because the experience the company submitted referred to services rendered to private or public entities which were very different from those performed by a licensed local warden; and

ii. the contracting authority had the right and responsibility to put its mind at rest that the bidders were both, administratively and technically, competent to deliver the requested service.

Dr Samuel Azzopardi, Chairman of the Evaluation Board, under oath, declared that:

a. the appellant company did not have 5 years experience in local warden services;

b. albeit Clause 12 and para, (d) of the 'Tenderer's Declaration' referred to contractor's experience, yet the former indicated 5 years experience whereas the latter did not indicate the number of years;

c. at envelope two, stage one of the tenderers was found compliant whereas the other tenderer, the appellant company, was not found compliant;

d. the next step would have been the opening of envelope 3, which contained the price, and in this case Dr Azzopardi opined that the award had to be given on the basis of price and not the Most Economically Advantageous Tender (MEAT) principle;

e. the evaluation board felt that, in order to eliminate any doubts, a clarification had to be sought from the Chairman, Management Committee, Local Enforcement Systems, who, by email dated 17th February 2011, confirmed that the experience had to be in the provision of local warden services which, ultimately, was the scope of the tender under review.

Mr Maurice Caruana, Chairman Management Committee, Local Enforcement Systems, under oath, gave the following evidence:-

i) he confirmed his advice given as per email dated 17th February 2011 that the experience of the tenderer had to be related to the provision of local warden services and that the 5 year minimum experience was included in Clause 12 of the tender document as a mandatory requirement;

ii) at the start the Management Committee, Local Enforcement Systems, had not included a specific number of years in terms of experience and that it was on the advice of the Contracts Department that the number of years was specified otherwise the adjudication would be subjective rather than objective;

iii) the purpose of the reform of the Local Enforcement Systems was to do away with the various present local council contracts for local warden services and to issue a tender at a regional level and, since this reform started in February 2009, the operators/contractors had ample time to make the necessary adjustment;

iv) albeit the Local Enforcement Systems Management Committee did not consider Regulation 52 with regard to whether a period of 3 or 5 years of experience was required, yet, in this regard, he rested on the extensive experience of the Contracts Department;

v) he considered Clause 12 was a crucial provision in the tender document and that the Department of Contracts had organized a seminar to thoroughly brief the committees that were to adjudicate these tenders; and

vi) he could not recall if the tender award was to be based on price only or the Most Economically Advantageous Tender (MEAT) principle.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 25th April 2011 and also through their verbal submissions presented during the hearing held on 10th June 2011, had objected to the decision taken by the pertinent authorities;*
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) in the case of the Gozo Region no mention had been made as to whether the appellant company had a sufficient number of local wardens on its books to execute this contract with the only reason for exclusion being the one which made reference to the 5 years minimum experience and, in this case, that had to be related to 'the local warden services', (b) once the requirement of 5 year minimum experience was included under the 'Award' - and not under 'Selection Criteria' - the evaluation board could not exclude a bidder on administrative or technical grounds at award stage and (c) the decision of the Gozo Region was illegal because it was based on a criterion which was not included in the*

tender document, namely, it did not specify that the 5 years experience had to be 'in the local warden services';

- *having considered the contracting authority's representative's reference to the fact that (a) once the appellant company was alleging that certain provisions of the tender document were not in order or even illegal, one would have expected the said company, either not to take part in the tendering procedure or to take all legal measures that it deemed necessary to safeguard its interests, (b) the sole reason for exclusion was that the appellant company did not demonstrate that it had the experience requested at Clause 12 of the tender document because the experience the company submitted referred to services rendered to private or public entities which were very different from those performed by a licensed local warden and (c) the clarifications, e.g. addendum no. 2, which formed an integral part of the tender document, indicated that the selection and award criteria were complementary;*

- *having taken note of the testimony given by the Chairman Management Committee, Local Enforcement Systems, especially the points referred to in connection with the fact that (a) the experience of the tenderer had to be related to the provision of local warden services and that the 5 year minimum experience was included in Clause 12 of the tender document as a mandatory requirement, (b) at the start the Management Committee, Local Enforcement Systems, had not included a specific number of years in terms of experience and that it was on the advice of the Contracts Department that the number of years was specified otherwise the adjudication would be subjective rather than objective and (c) since this reform started in February 2009, the operators/contractors had ample time to make the necessary adjustment,*

reached the following conclusions, namely:

1. *The Public Contracts Review Board cannot accept the claim made by the appellant company when its representatives stated that the company's local wardens*

are already trained; they have all the necessary resources to ensure the successful implementation of the contract and they will be able to continue without pause. As amply demonstrated during the hearing such claims were made with the presumption that the evaluation board would accept any of its declared three proposals as possibilities of a way forward, namely that, if successful, the company would be recruiting the other wardens that it would require, namely via 'transfer of business', 'call for applications' or a mixture of both. Now, considering that up to the closing date of tender submission the appellant company only had 5 wardens on its books, this Board feels that the evaluation board was provided with little comfort that the appellant company would be able to provide the requested service as from day one following the award and this regardless of the fact that no date was specified within which the successful tenderer had to start the service following the signing of the contract.

2. This Board feels that the appellant company aimed at pushing the argument somewhat a bit too far when it was contended that the decision of the Gozo Region was illegal because it was based on a criterion which was not included in the tender document, namely, it did not specify that the 5 years experience had to be 'in the local warden services'. Apart from the evidence given by the Chairman Management Committee, Local Enforcement Systems wherein the latter, inter alia, placed emphasis on the fact that the experience of the tenderer had to be related to the provision of local warden services, this Board feels that one could not expect the interpretation to be anything but.

3. The Public Contracts Review Board feels that the evaluation board's claim that the sole reason for the appellant company's exclusion was that the said company did not demonstrate that it had the experience requested at Clause 12 of the tender document because the experience the company submitted referred to services rendered to private or public entities which were very different from those performed by a licensed local warden was correct.

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In view of the above this Board finds against the appellant company and also recommends that the deposit paid by the latter should not be reimbursed."

Rat ir-rikors tas-socjeta' Aurelia Enforcement Limited (C-32322) datat 22 ta' Lulju 2011 a fol 1 tal-process fejn talbet lill-Qorti sabiex *in vista* tal-aggravji minnha mressqa tilqa' l-appell taghha u dan billi tirrevoka u thassar id-decizjoni tal-bord tal-appell. Bl-ispejjez.

Rat ir-risposta tal-appell tal-Bord ta' Revizjoni dwar il-Kuntratti Pubblici datata 16 ta' Awwissu 2011 a fol 18 tal-process fejn l-Bord issottometta li l-appell odjern ghandu jigi michud bl-ispejjez taz-zewg istanzi kontra l-appellant.

Rat li dan l-appell kien appuntat ghas-smigh ghas-seduta tat-26 ta' Jannar 2012.

Rat ir-risposta tal-appell tar-Regjun Ghawdex ta' Banca Giuratale datata 6 ta' Gunju 2012 a fol 25 tal-process fejn sostnew li ghar-ragunijiet hemm indikati l-appell ghandu jigi michud bl-ispejjez a karigu tas-socjeta` appellanti.

Rat il-verbal tas-seduta mizmuma fil-11 ta' Ottubru 2012 fejn meta ssejjah l-appell dehret Dr. Angele Vella ghad-Dipartiment tal-Gvern Lokali u Dr. Reuben Balzan ghall-Bord ta' Revizjoni ta' Kuntratti Pubblici, u Dr. Christine Calleja ghall-Kunsill Regjun ta' Ghawdex. Is-socjeta` appellanti u d-difensur taghha Dr. Adrian Delia msejjah diversi drabi baqa' ma deherx. Id-diffensuri l-ohra prezenti rrimettew ruhhom ghall-atti. L-appell gie differit ghas-sentenza in difett ta' ostakolu ghat-30 ta' Ottubru 2012.

Rat id-dokumenti esebiti.

Rat l-atti kollha l-ohra tal-kawza.

Rat l-atti kollha tal-istess kawza inkluz id-decizjoni tal-Bord ta' Revizzjoni Dwar Kuntratti Pubblici fl-ismijiet premessi datata 4 ta' Lulju 2011 .

II. KONSIDERAZZJONIJIET.

Illi l-appell odjern huwa fis-sens li (a) li l-Bord naqas fid-decizjoni tieghu sabiex jaghmel ezami mill-gdid u dettaljat tar-ragunijiet migjuba mill-awtorita' kontraenti ghat-twarrrib tal-offerti anzi skont l-appellant il-Bord qaghad biss fuq dak li gie sottomess quddiemu mill-partijiet; (b) kellha ssir differenza bejn is-*Selection Criteria* u l-*Award Criteria* fis-sens li kif stabbilit fis-sentenza tal-Qorti tal-Gustizzja Ewropea fil-kaz "**Lianakis AE vs Alexandroupolis et**" (24 ta' Jannar 2008) ma tistax tintuza s-*Selection Criteria* sabiex jigi moghti kuntratt, u lanqas jista' jintuza l-*award criteria* sabiex jigi mwarrab l-offerent b'dan allura li s-socjeta' appellanti qed issostni li ntuzat l-*award criteria* sabiex eskcludiet lis-socjeta' appellanti mill-konkorrenza taghha ghall-ghoti tat-*Tender*, u din il-materja ma jidhirx li giet ikkunsidrata fid-decizjoni tal-Bord minkejja sottomissjonijiet li saru fit-8 ta' April 2011 u 10 ta' Gunju 2011.

Illi dwar l-ewwel aggravju din il-Qorti thoss li fid-decizjoni tieghu l-istess Bord ikkunsidra effettivament l-aggravji kollha tas-socjeta' appellanti.

Fil-fatt jidher car mill-istess decizjoni li hija kkonsidrat li skont is-Sejha ghall-Offerti kienet mandatarja l-premessa li l-offerent kellu jkollu hames snin esperjenza u *track record* ta' hames snin, u mill-offerta maghmula mis-socjeta' appellanti jidher li hija ma kellhiex dawn in-numru ta' snin ta' esperjenza u dan kif rikjest b'mod mandatarju fil-klawsola numru 12 ta' *Instructions to Tenderers*.

Dwar l-element l-iehor li s-socjeta' appellanti ma kienitx f'posizzjoni taghti s-servizz rikjest b'hames *wardens* biss li kienu attwalment fuq il-kotba taghha, fid-decizjoni hawn appellata jinghad car li s-Sejha ghall-Offerti (OS) kienet tirrikjedi li l-inqas numru ta' sieghat kellu jkun ta' 796 siegha fil-gimgha li allura jfisser li meta divizi b'gimgha ta' erbghin siegha, kien hemm bzonn minimu ta' 20 *warden* li jirrizulta li l-socjeta' appellanti ma kellhiex.

Dawn kienu ghalhekk elementi li l-offerent kellu jkollu u jipprovdi fl-offerta u jidher li l-istess Bord ikkonsidra l-istess SO kienet irrikjediet l-istess bhala *Selection Criteria*, u allura d-decizjoni kienet fis-sens li la darba s-socjeta' appellanti ma ssodisfatx l-istess *criteria*, mela allura d-decizjoni tar-Regjun Ghawdex tal-Assocjazzjoni Kunsilli Lokali kienet korretta u fil-fatt cahdet l-istess.

Fil-fatt fil-konsiderazzjonijiet kollha moghtija mill-Bord jidher car li mhux minnu dak allegat mis-socjeta' appellanti li l-Bord ma ikkonsidrax is-sottomissjonijiet tal-appellanti, anzi jidher li dan sar u d-decizjoni hija ben motivata skont il-ligi.

Il-fatt li s-socjeta' appellanti ma qabltx mal-konkluzjonijiet tal-Bord ma jfissirx li l-Bord ma kkonsidrax dak minnha sottomess; fuq kollox kien oneru tas-socjeta' appellanti li tipprova dak allegat minnha kif provdut fl-**artikolu 562 tal-Kap. 12** u dan billi jgib l-ahjar prova (**artikolu 559 tal-Kap. 12**) u din il-portata huma s-sentenzi "**Roland Shaffrath vs Travel plc**" (P.A. – 28 ta' Gunju 2001); "**Saviour Farrugia nomine vs Margaret Vella et**" (A.C. – 9 ta' Frar 2001); "**Avv. Louis Bianchi nomine vs George Spiteri**" (A.I.C. (PS) – 14 ta' Lulju 2004); u "**Lawrence Attard vs George Attard**" (P.A. – 30 ta' Gunju 2011), haga li s-socjeta' appellanti ma ghamlitx u huwa wkoll fid-dawl ta' dan li l-istess decizjoni tal-Bord inghatat u ghalhekk dan l-ewwel aggravju qed jigi michud.

Illi dwar it-tieni aggravju jinghad u jirrizulta li l-aggravju tas-socjeta' appellanti kien gie ndirizzat fl-*Addendum No. 2* (5 ta' Jannar 2011) *para. 2 "Adjudication of Tenders"* li sostna li:-

"It is the intention of the Region to award the Contract on the basis of the cheapest technically and administratively compliant tender.... (cfr. Clause 12 of the "Instructions to Tenderers") is a basic principle of tenders evaluation procedures. Clarification of this statement is given in the remaining context of Clause 12 which mentions the criteria that will be applied in the process of selection and

award” (ara l-ahhar zewg paragrafi a fol. 7 tal-process tal-ittra datata 25 ta' Frar 2011).

Illi minn qari tal-istess decizjoni tal-Bord jidher car li tali rekviziti fis-Sejha tal-Offerta, mertu anke tal-appell mis-socjeta' appellanti quddiem il-Bord gew ikkunsidrati, kemm minhabba dak indikat fil-klawsola 12 tas-Sejha ghall-Offerti u wkoll minn dak li nghad *f'Addendum No. 2* (5 ta' Jannar 2011) para. 2 *“Adjudication of Tenders”* bhala parti mis-*Selection criteria* u la darba dawn ma gewx sodisfatti fl-offerta maghmula mis-socjeta' appellanti, mela allura l-Bord iddecieda li jikkonferma d-decizjoni tar-Regjun Ghawdex Assocjazzjoni tal-Kunsilli Lokali li l-offerta tas-socjeta' appellanti ma kenitx konformi ma' dak rikjest fl-istess *tender* b'dan li minhabba r-ragunijiet hemm indikati ma kienitx teknikament konformi mal-kriterji mandatarji ta' ghazla li kellhom ikunu kontenuti fl-istess offerta u ghalhekk kien hemm bazi sabiex l-istess socjeta' appellanti tigi skwalifikata.

Illi minn dan jidher car li l-istess Bord ikkonsidra tali rekviziti bhala mandatarji ghall-process ta' kwalifikazzjoni tas-socjeta' appellanti bhala offerent kwalifikat sabiex jippartecipa ghall-ghoti jew *award* tat-*tender* u dan huwa anke konformi ma' dak ritenut fis-sentenza tal-Qorti tal-Gustizzja Ewropea fil-kaz **“Lianakis AE vs Alexandroupolis et”** (24 ta' Jannar 2008) fejn inghad li:-

“the criteria selected as ‘award criteria’ by the contracting authority relate principally to the experience, qualifications, and means of ensuring proper performance of the contract in question. Those are criteria which concern the tenderers’ suitability to perform the contract and which therefore do not have the status of ‘award criteria’ pursuant to Article 36 (1) of Directive 92/50”. Consequently it must be held that in a tendering procedure, a contracting authority is precluded by Article 23 (1), 32, and 36 of Directive 92/50 from taking into account as ‘award criteria’ rather than as ‘qualitative selection criteria’ the tenderers experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline”.

Illi f'dan il-kuntest jirrizulta li s-Sejha Ghall-Offerti kienet cara f'dan ir-rigward u l-kriterji mertu ta' dan l-appell kienu ben identifikati fl-istess Sejha ghall-Offerti u dan kif jidher anke mill-artikolu 12 fuq citat.

Dan iktar u iktar meta jirrizulta li wara appell mis-socjeta' appellanti kien hemm ukoll decizjoni tal-Bord datata 14 ta' Marzu 2011 fejn il-Bord kien iddecieda li s-Sejha ghall-Offerti kienet bizzzejjed cara dwar x'kienu l-kriterji li fuqhom kien ser jigi aggudikat, minn liema decizjoni lanqas sar appell quddiem din il-Qorti. Fil-fatt wara din id-decizjoni s-socjeta' appellanti baqghet partecipi fl-istess process ta' aggudikazzjoni sakemm ircevw l-ittra datata 13 ta' April 2011 mertu ta' dan l-appell ("Doc. 3"). B'hekk dan it-tieni aggravju qed jigi michud ukoll u l-appell qed jigi michud.

Illi ghall-kompletezza jinghad li l-Bord ta' Revizzjoni dwar il-Kuntratti ma huwiex il-legittimu kontradittur u ghalhekk qed jigi lliberat mill-osservanza tal-gudizzju u dan ghall-istess ragunijiet moghtija fid-decizjoni odjerna fl-ismijiet premessi – Appell Numru 28 tal-2011 u allura qed ssir riferenza ghall-istess decizjoni.

III. KONKLUZJONI.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi**, billi fil-waqt li tilqa' l-ewwel eccezzjoni fir-risposta tal-appell datata 16 ta' Awwissu 2011 tal-Bord ta' Revizzjoni dwar il-Kuntratti Pubblici u tiddikjara li ma huwiex il-legittimu kontradittur u ghalhekk tillibera l-istess mill-osservanza tal-gudizzju, tilqa' r-risposta tal-appell tar-Regjun Ghawdex datata 6 ta' Gunju 2012 biss in kwantu l-istess hija konformi ma' dak hawn deciz, **tichad l-appell interpost mis-socjeta' appellanti Aurelia Enforcement Limited fir-rikors tal-appell taghha datat 22 ta' Lulju 2011 ghaliex l-istess appell huwa nfondat fil-fatt u fid-dritt ghar-ragunijiet hawn decizi u ghalhekk tikkonferma d-decizjoni appellata tal-Bord ta' Revizzjoni Dwar Kuntratti Pubblici datata 4 ta' Lulju 2011 fl-ismijiet "Aurelia Enforcement Limited vs**

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**Dipartiment tal-Kunsilli Lokali, Regjun Ghawdex et''
(Kaz. Numru 301) għall-finijiet u effetti kollha tal-Ligi.**

**Bl-ispejjez kollha kontra s-socjeta' appellanti Aurelia
Enforcement Limited.**

Moqrija.

< Sentenza Finali >

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