



**QORTI TA' L-APPELL**

**S.T.O. PRIM IMHALLEF  
SILVIO CAMILLERI**

**ONOR. IMHALLEF  
TONIO MALLIA**

**ONOR. IMHALLEF  
JOSEPH AZZOPARDI**

Seduta tas-7 ta' Awwissu, 2013

Appell Civili Numru. 176/2013/1

**Pillow Space Frame Limited**

**v.**

**Direttur Generali tad-Dipartiment tal-Kuntratti**

Dan hu appell imressaq fl-10 ta' Gunju 2013, mis-socjeta` Pillow Space Frame Ltd wara decizjoni datata 22 ta' Mejju, 2013 moghtija mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (minn hawn 'il quddiem, imsejjah "il-Bord") fil-kaz numru 550 (CT/3004/2012).

Dan il-kaz huwa marbut ma' sejha ghall-offerti li harget l-agenzija Heritage Malta ghal manufattura u kostruzzjoni ta' *protective shelter* fuq it-tempji megalitici ta' Hal Tarxien. Ghall-ewwel is-sejha saret bil-procedura miftuha u kien hemm sitt operatori ekonomici li ppartecipaw f'din is-sejha. Fost ohrajn, il-konsorzju Malta Restoration Joint Venture (allura msejha Tekno Domus) gie skwalifikat ghaliex l-offerta tieghu kienet tinkludi biss kopja tal-bid bond u mhux id-dokument originali; il-kompetituri l-ohra ma kellhomx offerta accettabbli. Il-Kumitat Generali tal-Kuntratti ddecieda li jhassar din is-sejha ghall-offerti, izda peress illi l-agenzija Heritage Malta riedet tkompli bil-progett, talbet u ottjeniet il-kunsens tal-istess Direttur sabiex a tenur tar-regolament 39(3) tal-legislazzjoni sussidjarja, Avviz Legali 296/10, kif emendat, tkompli bl-ghoti ta' dan il-kuntratt pubbliku permezz ta' procedura negozjata. L-operaturi ekonomici kollha li kienu hadu sehem fis-sejha ghall-offerti bil-procedura miftuha, gew mistiedna sabiex jippartecipaw fil-procedura negozjata, izda kienu biss erbgha illi wrew l-interess li jippartecipaw. Matul l-istadju ta' evalwazzjoni, kienu biss tnejn mill-erba' konkorrenti illi kienu konformi mar-rekwiziti teknici u amministrattivi tas-sejha ghall-offerti bi procedura negozjata, li kienu s-socjeta` appellanti, Pillow Space Frame Ltd u l-konsorzju msemmi aktar qabel, Malta Restoration Joint Venture. Il-kuntratt inghata lil dan l-ahhar konsorzju.

Is-socjeta` appellanti resqet oggezzjoni quddiem il-Bord, li b'decizjoni tat-22 ta' Mejju 2013 ma laqax l-oggezzjoni tas-socjeta` appellanti u rrakkomanda t-telf tad-depozitu. Il-Bord wasal ghad-decizjoni tieghu fid-dawl tas-segweni konsiderazzjonijiet:

*"This Board,*

- *having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 1<sup>st</sup> March 2013 and also through its representatives verbal submissions presented during the hearing held on the 15<sup>th</sup> May 2013, had objected to the decision taken by the pertinent authorities;*

- *having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 22<sup>nd</sup> February 2013 the Contracts Department informed the appellant company that its offer had been ranked second and that the award of the tender was recommended in favour of Malta Restoration JV, (b) the appellant company was objecting for two main reasons, (1) the recommended bidder had not submitted the original bid bond in the open tender procedure which rendered its bid to be administrative non-compliant and, as a result, should not have been allowed to participate in the negotiated procedure and (2) the recommended bidder in the negotiated procedure had not participated in the original open tender, (c) in the 'Schedule of Tenders Received' pertaining to the original open tender procedure there was a note against the name of the recommended bidder, namely Malta Restoration JV, in the sense that it had not submitted an original bid bond, (d) whilst, in the light of that shortcoming, the recommended bidder should have been disqualified as it was not administratively compliant, yet, this bidder had been allowed to participate in the negotiated procedure and, subsequently, its offer was recommended for award, (e) the recommended bidder, namely Malta Restoration JV, did not appear on the Schedule of Tenders Received of the open tender procedure and the appellant company client had drawn the attention of the contracting authority that one of the tenderers who was participating in the negotiated procedure had not participated in the original open tender procedure and, as a consequence, it should not have been invited to take part in the negotiated procedure, (f) although this communication was acknowledged to have been received by Heritage Malta and that it had been forwarded to the Contracts Departments, still, it remained unanswered, (g) at one stage the contracting authority released information that the Contracts Department, by mistake, had listed on the Schedule of Tenders Received the name of the lead partner instead of the joint venture and, in the circumstances, it had requested confirmation from the Contracts Department as to whether by error it*

*had put down the name of the lead partner instead of that of the joint venture itself, (h) had it been informed of the correct state of affairs it would have raised other queries in its letter of objection such as the fact that (1) the lead partner had to undertake 50% of the works when, according to its website, the lead partner of the recommended bidder only employed five to six persons and (2) it was at this hearing that the appellant company has learned that the name of the lead partner had been mistakenly listed instead of that of the recommended tenderer, Malta Restoration JV, (i) the recommended bidder should not have been allowed to participate in the negotiated procedure because clause 20.1 stated, among other things, that “the guarantee ... .. must be an original ...” and that “Offers that are not accompanied with the mandatory Tender Guarantee by the closing date and time of the tender will be automatically disqualified”, (i) at the meeting held on site only three out of the six bidders participating in the negotiated procedure were present, (j) albeit the contracting authority had hinted that its budget for these works was limited, yet it refrained from, officially, divulging the estimated value of works, (k) if one were to take the bid bond as a yardstick, then the estimated value was of about €1.2 million, (l) the appellant company had quoted the price of almost €3.5 million and it was considered to be rather on the conservative side given the complexity of the works involved and, as a result, the appellant company opined that both the department's estimate of €1.2 million and the recommended price of €2.588 million were unrealistic and (m) one feared that the recommended joint venture would not be able to execute this contract as per published specifications given that the lead partner employed only 5 to 6 persons and had to undertake 50% of the works;*

- *having considered the contracting authority's representative's reference to the fact that (a) it was correct for one to state that (1) the appellant company had not submitted the original bid bond in the open tender procedure so much so that the company was disqualified from that tendering process and (2) for all that matters, the tenderers who participated in the open tender*

*procedure had been disqualified for one reason or other, except for one, but, then again, the offer of this compliant tenderer was too much on the high side and, as a result, it had to be refused for being well above the budget of Heritage Malta, (b) the open tender procedure had been cancelled because all offers received were found to be administratively or technically non-compliant except for one which, then again, was well beyond the budget and had likewise to be discarded, (c) it was then recommended to the Contracts Department to go for the negotiated procedure whereby all the bidders who participated in the open tender procedure were invited to take part and, in fact, they all did except for the compliant tenderer whose offer was too expensive, (d) although the appellant company's bid in the open tender procedure was non-compliant, yet in the negotiated procedure it submitted the information which was missing in its original submission and that opportunity was available to all the other bidders participating in the negotiated procedure, (e) the Contracts Department officer who filled in the Schedule of Tenders Received, which was eventually displayed on the Contracts Department's notice board, in the case of Malta Restoration JV, erroneously, quoted the name of the lead partner instead of the name of the joint venture and (f) since the evaluation board could not communicate with the bidders, it had informed the Contracts Department that the name of one of the bidders, namely Malta Restoration JV, had been erroneously quoted in the Schedule of Tenders Received;*

- *having also considered the department of contract's representative's testimony, particularly the references made to the fact that (a) the bid bond submitted by Malta Restoration JV in connection with the open tender procedure was a copy and not the original and that was the reason, or one of the reasons, for its disqualification from the open tender procedure, (b) when drawing up the Schedule of Tenders Received, the department, by mistake, displayed the name of the lead partner instead of that of the joint venture and (c) once the open tender procedure was cancelled then that was considered a closed case and that (1) the negotiated*

*procedure was a new process altogether except that the participants had to be the same bidders who participated in the open tender procedure and (2) the evaluation board of Heritage Malta had recommended that it proceeds with the negotiated procedure which recommendation was accepted by the General Contracts Committee;*

- *having also considered the recommended tenderer's representative's reference to the fact that (a) the only requirement for a bidder to participate in the negotiated procedure was that the bidder had participated in the open tendering procedure and that requirement had been satisfied by the recommended tenderer, especially once it had been made clear that a mistake had been committed when the contracting authority drew up the Schedule of Tenders Received, (b) the recommended tendering joint venture had been disqualified due to technical shortcomings and not because it had submitted a copy instead of the original bid bond and (c) none of the tenderers who had participated in the open tendering procedure had challenged within the prescribed time the cancellation of that procedure or had objected as to why a bidder had qualified administratively when it should not have qualified and therefore the open tender procedure should be considered a closed chapter reached the following conclusions, namely:*

*“1. The Public Contracts Review Board observes that there must have been something wrong with the department's estimate which was put at €1,230,000, excluding VAT, whereas the only compliant bid amounted to €3,499,811.63 and the recommended bid amounted to €2,239,435, after, evidently, reviewing the scope of works.*

*“2. The Public Contracts Review Board concurs with the procedure adopted by the contracting authority wherein, as a result of the fact that tenderers who had participated in the open tender procedure - except for one whose offer, albeit compliant, was too much on the high side - and who, for one reason or other, had been disqualified, the contracting authority decided to*

*recommend to the Contracts Department to go for the negotiated procedure whereby all the said bidders were invited to take part and, in fact, they all did (except for the compliant tenderer whose offer was too expensive).*

*“3. The Public Contracts Review Board opines that, despite the fact that, in the same way that the appellant company's bid in the open tender procedure was considered to be non-compliant, yet, since in the negotiated procedure it submitted the information which was missing in its original submission, then it was right for the contracting authority to allow it to participate but, at the same time, ensure that this opportunity - negotiated procedure - be equally made available to all the other bidders who had participated in the open tender procedure as, after all, all such bidders were considered as non compliant in the first instance.*

*“4. The Public Contracts Review Board opines that the explanation given under oath by the Contracts Department officer regarding the fact that the 'Schedule of Tenders Received', which was eventually displayed on the Contracts Department's notice board, in the case of Malta Restoration JV, had erroneously quoted the name of the lead partner instead of the name of the joint venture, was credible enough.*

*“In view of the above this Board finds against the appellant company. Furthermore, this Board recommends that the appellant company shall forfeit the deposit paid to lodge the appeal.”*

Is-socjeta` Pillow Space Frame Ltd ressqet dan l-appell quddiem din il-Qorti, bl-aggravju principali jkun li ghas-sejha tal-procedura negozjata kellhom jippartecipaw biss dawk l-offerenti li fis-sejha originali kienu tefghu offerta li kienet thares ir-rekwiziti formali tal-istedina ghall-offerti, b'mod li allura kellu jigi eskluż il-konsorzju Malta Restoration Joint Venture, li originarjament ma kienx tefa' offerta li kienet thares ir-rekwiziti formali.

Din il-Qorti ma taqbilx mas-sottomissjoni tas-socjeta` appellanti, u dan ghar-ragunijiet li gew spjegati b`mod car mid-Direttur Generali tad-Dipartiment tal-Kuntratti. Fil-fatt, dwar il-procedura negozjata, huwa importanti li wiehed izomm f`mohhu li skont ir-**regolament 39** hemm zewg ghamliet differenti ta` proceduri negozjati, hemm dik li hija kkontemplata fis-**subinciz (1)** li timxi bil-pubblikazzjoni minn qabel ta` avviz dwar kuntratt tal-UE u hemm dik ikkontemplata fis-**subinciz (2)** li ssir minghajr il-pubblikazzjoni minn qabel ta` avviz dwar kuntratt tal-UE. Din id-distinzjoni bejn dawn iz-zewg karatteristici ta` proceduri negozjati hija importanti hafna li tinzamm ghaliex skont ir-**regolament 39(1)** procedura negozjata bil-pubblikazzjoni minn qabel ta` avviz dwar kuntratt tal-UE hija regolata mir-**regolamenti 59, 66 u 72**, filwaqt li skont ir-**regolament 39(2)** procedura negozjata minghajr publikazzjoni minn qabel ta` avviz dwar kuntratt tal-UE hija regolata mir-**regolamenti 60, 67 u 73**.

Issa f`dan il-kaz it-tip ta` procedura negozjata li ssoktaw biha l-awtoritajiet governattivi wara li ma rnexxiex il-procedura miftuha, kienet dik ta` minghajr publikazzjoni minn qabel ta` avviz dwar kuntratt tal-UE. Allura skont ir-**regolament 39(2)** dan il-process kellu jkun regolat mir-**regolamenti 60, 67 u 73**.

Jigi b`hekk li r-riferenza li s-socjeta` appellanti taghmel fir-rikors tal-appell taghha ghar-**regolament 59(1)(a)**, dwar il-fatt li jistghu jiehdu sehem biss f`dan il-process dawk l-offerenti li fil-procedura miftuha kellhom l-offerta taghhom konformi mal-htigijiet formali tas-sejha, hija ghal kollox zbaljata. Dan ghas-semplici raguni li ladarba l-procedura negozjata uzata f`dan il-process kienet wahda ta` minghajr publikazzjoni ta` avviz dwar kuntratt tal-UE, allura r-**regolament 59** mhuwiex applikabbli ghaliha.

F`dan il-kaz, il-valur tat-tender inkwistjoni, anke wara li l-*budget* tieghu gie rivedut ghal figura ta` ftit aktar minn zewg miljun euros, jaqa' taht it-*threshold* ta' €6,242,000 stipulata mid-Direttiva tal-Unjoni Ewropea numru 2004/18/EC, b`mod li, allura, ma kienx mehtieg li ssir il-pubblikazzjoni ta' EU Contract Notice. La darba r-



Kopja Informali ta' Sentenza

regolament 59 ma jghoddx ghax-xorta ta' procedura negozjata inkwistjoni, taqa' l-bazi kollha tal-appell tas-socjeta` appellanti.

Taht ir-regolament 73 ma hemmx projbizzjoni jew esklużjoni bhalma nsibu fir-regolament 59 ghal dawk l-operaturi ekonomici li waqt il-procedura miftuha ma jkunux ipprezentaw offerta skont il-htigijiet formali tal-procedura tal-offerti. Ghalhekk il-fatt li l-konsorzju li rebah il-kuntratt, waqt il-procedura miftuha ma kienx ipprezenta bid bond originali, ma kellu ebda rilevanza ghal finijiet ta' partecipazzjoni jew esklużjoni fil-procedura negozjata a tenur tar-regolament 73(a). Dan ir-regolament ma jeskludix mill-partecipazzjoni fil-procedura negozjata, min ikun gie skwalifikat fil-procedura miftuha. Da parti tal-konsorzju, veru li kien hemm difett fundamentali fl-offerta originali tieghu, pero` dan ma jeskludihix milli tippartecipa fi process gdid, li sar fuq struttura negozjata, la darba l-ligi ma teskludix dan. La l-ligi ma taghmilx differenza u tippermetti lil kull min kien gie eskluż, jippartecipa fil-procedura negozjata, mhux lecit u ghal Qorti tipprova taghmel differenza hi. Wiehed ikun jista', anzi, jargumenta li kien ikun hemm irregolarita` fil-process li kieku saret esklużjoni a priori ta' dan il-konsorzju.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell ta' Pillow Space Frame Ltd billi tichad l-istess u tikkonferma s-sentenza li ta l-Bord ta' Revizjoni dwar Kuntratti Pubblici fit-22 ta' Mejju 2013, fil-kaz inkwistjoni.

L-ispejjez tal-kawza jithallsu mis-socjeta appellanti.

**< Sentenza Finali >**

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