



QORTI TA' L-APPELL

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

**ONOR. IMHALLEF
TONIO MALLIA**

**ONOR. IMHALLEF
JOSEPH AZZOPARDI**

Seduta tat-12 ta' Dicembru, 2013

Appell Civili Numru. 296/2013

Aurelia Enforcement Limited

v.

Kumitat Regjonali Xlokk u Regjun Xlokk

Dan huwa appell imressaq fit-13 ta' Settembru 2013, mis-socjeta` Aurelia Enforcement Ltd wara decizjoni datata 26 ta' Awwissu 2013, moghtija mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz numru 566.

Dan il-kaz huwa marbut mas-sejha għall-offerti *“for the provision of local warden services”* bil-hsieb li eventwalment jigi provdut servizz ta' gwardjani lokali għewwa r-Regjun Xlokk. Għal dan il-kuntratt applikaw diversi entitajiet, fosthom is-socjeta` rikorrenti. Din is-socjeta`, tul il-process tal-evalwazzjoni, ressqet diversi ilmenti li gew determinati mill-Bord imsemmi u anke minn din il-Qorti Sede Inferjuri. Fl-14 ta' Awwissu 2012, is-socjeta` rikorrenti giet infurmata li l-kuntratt kien sejjer jingħata lis-socjeta` Sterling Security Co Ltd u s-socjeta` rikorrenti ressqet oggezzjoni ulterjuri għal quddiem il-Bord. Dan il-Bord iddecieda l-appell fis-26 ta' Awwissu 2013. Is-sentenza li ta l-Bord sejra issa tigi riprodotta:

“This Board,

“Having noted the Appellant’s objection, in terms of the ‘Reasoned Letter of Objection’ dated 20th August 2012 and also through the Appellant’s verbal submissions during the hearing held on the 18th July 2013, had objected to the decision taken by the pertinent Authority, in that:

“a) The Appellant confirmed that if after hearing his case, the same situation arises as that already arisen in the decision taken by PCRB on 4th July 2011 and upheld by the Court of Appeal as per the latter’s decision taken on 30th October 2012, then the PCRB could not overturn this decision;

“b) The Appellant had raised a pre contractual objection to the Contracting Authority in that ‘There existed no clear cut distinction between a selection criteria and an award criteria during the evaluation stage of the tender’;

“c) The ‘Minimum five year experience’ requirement should have been treated as an award criteria and not as a selection criteria;

“d) When evaluating the tender; the Contracting Authority decided to add an administrative compliance

column to the evaluation grid. In this regard, the Appellant was administratively non compliant as he did not have 5 years of experience in the field requested in the tender.

“Having considered the Preferred Bidder’s ‘Letter of Reply’ dated 5th March 2013 and also the verbal submissions during the hearing held on the 18th July 2013, in that:

“a) The Appellant did not mention the ‘Administrative Compliance Grievance’ in his letter of objection;

“b) The PCRB had already decided upon the ‘Five year experience’ condition;

“c) It was made clear in the tender requisites that the number of employees was to be taken into account during the evaluation process.

“Reached the following conclusions:

“1. The ‘5 year experience’ clause was mandatory and if this clause is not satisfied by any bidder, then he is administratively not compliant. The Appellant did not satisfy this condition and the Evaluation Board of the Contracting Authority, justifiably, disqualified the Appellant’s bid;

“2. Although the Appellant was aware of the fact that he did not satisfy the ‘5 year experience’ condition from the very beginning, he submitted his offer for adjudication which in actual fact represented an acceptance to all the conditions laid out in the tender document, including the ‘5 year experience’ clause;

“3. The ‘Five year experience’ clause should have been satisfied by the Appellant at the time of the closing date of the tender and not at the evaluation process date.

“In view of the above, this Board finds against the Appellant Company and recommends that the deposit

paid by the Appellant should not be reimbursed. Furthermore, this Board upholds the previous decision taken by PCRB dated 4th July and the decision taken by the Court of Appeal dated 30th October 2012.”

Wara din id-decizjoni, is-socjeta` rikorrenti ressqet dan l-appell fejn ressqet erba' aggravji: (i) is-sejha nharget minn entita` mhux legalment kostitwita; (ii) il-kumitati regionali twaqqfu wara li harget is-sejha; (iii) is-sejha harget minn entita` mhux kompetenti, u (iv) il-Bord naqas li jaghmel dak li huwa legalment mistenni minnu.

Fir-risposta tieghu, il-kumitat Regionali Xlokk u Regjun Xlokk eccepew, in linea preliminari, in-nullita` tal-appell peress illi zgur l-ewwel tliet aggravji ma jolqtux materja li giet issollewata quddiem u trattata mill-Bord.

Hu principju li fl-istadju tal-appell ma jistghux jigu sollevati punti godda li ma gewx trattati fil-prim istanza (ara **Tabone v. Tabone** deciza minn din il-Qorti, Sede Inferjuri fil-31 ta' Jannar 2003). Din il-Qorti hija qorti ta' revizjoni u ma ghandiex tigi mitluba tindaga dwar, u tindirizza, elementi godda li ma jirrizultawx fil-prim istanza u li konsegwentement ma hemm ebda decizjoni dwarhom.

Fil-fatt, ghalkemm quddiem il-Bord, is-socjeta` rikorrenti ssollewat punt li *“Regjun Xlokk is not a juridical entity and thus would not be in a position to sign any eventual tender agreement”*, dan il-punt ma giex diskuss mill-Bord peress illi ma kienx indikat fir-*“Reasoned Letter of Objection”* li ta lok ghall-appell quddiem il-Bord, u huwa biss issa quddiem din il-Qorti li s-socjeta` appellanti ssollewat aggravji marbuta mal-kompetenza tal-Kumitat u Regjun appellati.

Il-premess hu bizejjed biex l-ewwel tliet aggravji tas-socjeta` rikorrenti jigu michuda. Din il-Qorti tqis ukoll illi, f'kull kaz, ma jirrizultax li dik is-socjeta` ghandha ragun f'dawn l-aggravji. Ma hemm xejn hazin li sejha ghall-offerti tohrog biex eventwalment jigi ffirmat kuntratt bejn l-ahjar offerent u entita` li jkun fil-hsieb li tinholoq. Sejha ghall-offerti tista' tinhareg ghax ikun fil-hsieb tal-awtoritajiet

kompetenti li jholqu entita` biex tamministra l-kuntratt inkwistjoni, u mhux mehtieg li, bil-fors, il-holqien tal-entita` jipprecedi l-hrug tas-sejha. Il-Kumitati Regjonali bis-sahha tal-Avviz Legali 320 tal-2011, inghataw is-setgha li jipprovdu servizz ta' gwardjani lokali ghal-lokalitajiet kollha li taghhom il-Kumitat partikolari huwa responsabbli, u fil-fatt, sar arrangament intern biex il-kuntratti relatati direttament mas-sistema ta' infurzar lokali jigu assenjati lill-Kumitati Regjonali, liema kuntratti kellhom jibqghu validi sakemm eventwalment jidhlu fis-sehh kuntratti godda. Kwindi peress li l-Kumitati Regjonali ghandhom is-setgha jipprovdu servizzi ta' infurzar lokali, inghataw il-poter li johorgu *bye-laws* u jiffirmaw kuntratti ghal dan l-ghan, li juri li huma kompetenti jqisu din l-offerta u ghandhom il-personalita` guridika mehtiega biex jaghmlu dan. Fil-fatt, skont l-Artikolu 4(a) tal-Att dwar l-Interpretazzjoni (Kap. 249 tal-Ligijiet ta' Malta), kull korp jew ghaqda ohra ta' persuni hija "persuna" fis-sens tal-ligi, bil-fakolta`, allura, li tiffirma kuntratti. Il-funzjoni tal-Kumitati Regjonali li jipprovdu infurzar lokali, inghatat lilhom b'effett mill-1 ta' Settembru 2011, izda dan ma jzommx lill-awtoritajiet maghzula milli jiehdusieb din is-sistema billi jaghmlu attijiet preparatorji, bhall-iffirmar ta' kuntratti, biex tkun tista' tithaddem is-sistema.

Anke jekk jista' jigi argumentat li kollox sar minn entita` li ma kinitx tezisti, din mhux materja li jista' jissolleva l-kontraparti jekk dik l-entita`, wara li tkun kostitwita, tirratifika kull ma jkun sar qabel u toqghod ghall-ftehim li tkun dahlet fihom qabel il-kostituzzjoni taghha. Hadd ma jista' jqajjem oggezzjoni marbuta ma' xi nuqqas ta' rapprezentanza f'parti ohra, jekk dik il-parti l-ohra taccetta kulma jkun sar f'isimha. L-aggravji tas-socjeta` appellanti f'dan il-kuntest ma jidhlux biex f'kull kaz, jivvizjaw il-process ta' aggudikazzjoni, aktar u aktar meta tqis illi s-socjeta` appellanti qatt ma kienet accennat ghan-nuqqas ta' siwi tas-sejha ghall-offerti jew xi nuqqas ta' rapprezentanza f'ma' min kienet behsiebha tikkuntratta.

Il-fatt li l-Kumitati Regjonali mhux awtorizzati skont il-ligi (skeda 3 tal-Avviz Legali 296/10) biex jamministraw "l-akkwist pubbliku taghhom infushom" ma jfissirx li l-

Kumitati mhux kompetenti jmexxu proceduri ta' sejha ghall-offerti, izda li l-process irid jitmexxa taht is-supervizjoni diretta tad-Dipartiment tal-Kuntratti, li ma jirrizultax li hi nieqsa f'dan il-kaz. Jekk hemm xi difett, din hija ta' natura interna li ma tidhirx li ghandha taffettwa l-process kollu la darba ma jirrizultax, u ma giex ippruvat, li d-dipartiment tal-kuntratti kien kompletament estraneu ghall-process.

Fil-kuntest tar-raba' aggravju, is-socjeta` appellanti qed tipprova terga' tiftah materja, li titratta r-rekwizit ta' hames snin esperjenza, li kienet diga` deciza mill-Bord fi proceduri precedenti. Fil-fatt, fis-sentenza li tat din il-Qorti, Sede Inferjuri, fit-30 ta' Ottubru 2012, saret referenza specifika ghal din il-kwistjoni, u giet konfirmata d-decizjoni li kien ha l-Bord fid-decizjoni allura appellata. Fid-decizjoni jinghad hekk fuq din il-materja:

"Illi dwar l-ewwel aggravju din il-Qorti thoss li fid-decizjoni tieghu l-istess Bord ikkonsidra effettivament l-aggravji kollha tas-socjeta` appellanti u fejn jidher car mill-istess decizjoni li hija kkunsidrat li skont is-Sejha ghall-Offerti kienet mandatarji 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."

Kulma ghamel il-Bord f'dan il-kaz kien li kkonferma d-decizjonijiet precedenti, u t-tentattiv tas-socjeta` appellanti li terga' tiftah din il-kwistjoni ma hu xejn hlief tentattiv fjakk sabiex tipprova tistultifika dan il-process.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell tas-socjeta` Aurelia Enforcement Limited billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord ta' Revizjoni dwar Kuntratti Pubblici fis-26 ta' Awwissu 2013, bl-ispejjez jithallsu mis-socjeta` appellanti, Aurelia Enforcement Ltd.

Kopja Informali ta' Sentenza

< Sentenza Finali >

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