



QORTI TA' L-APPELL

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

**ONOR. IMHALLEF
TONIO MALLIA**

**ONOR. IMHALLEF
JOSEPH AZZOPARDI**

Seduta tat-28 ta' Frar, 2014

Appell Civili Numru. 439/2013/1

Vivendo Projects Limited (C 46406)

v.

**L-Universita` ta' Malta (bhala "Contracting Authority")
u FXB Limited (bhala "recommended bidder")**

Dan hu appell li tressaq fil-25 ta' Novembru 2013, mis-socjeta` Vivendo Projects Ltd wara decizjoni datata l-4 ta' Novembru 2013 moghtija mill-Bord ta' Revizjoni Dwar Kuntratti Pubblici (minn hawn 'il quddiem, imsejjah il-"Bord") fil-kaz numru 607 (UM1716).

Dan il-kaz huwa marbut ma' sejha ghall-offerti mahruga mill-Universita` ta' Malta intitolata "Tender for the Supply, Delivery and Installation of Office Furniture Produced with Environmental Friendly Materials and Processes, for the Institute of Digital Games Offices of the University of Malta". Is-socjeta` appellanti tefghet offerta, izda giet skwalifikata mill-Universita` ta' Malta ghar-raguni li l-offerta giet meqjusa "*as technically non conforming*" peress li l-injam propost ghall-ghamara gie deskritt bhala *melamine*, filwaqt li kellu jkun '*high pressure laminate*' kif specificat fid-dokumenti tat-tender. Is-socjeta` Vivendo Projects Ltd appellat mid-decizjoni ghal quddiem il-Bord li pero` cahad l-appell bis-sentenza tal-4 ta' Novembru 2013. Dak il-Bord, wara li sema' s-sottomissjonijiet tal-partijiet, ippronunzja s-segwenti decizjoni:

"Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 20th the hearing held on 8th October had objected to the decision taken by the pertinent Authority, in that:

"a) The Appellant stated that his bid was wrongly disqualified as same was deemed to be technically non compliant by the Evaluation Board.

"b) The Appellant insisted that the material quoted in his bid had indeed the required material components as specified in the tender document.

"c) The Appellant's bid remained the cheapest among the remaining "fully compliant" bidders.

"Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 8th October 2013, in that:

"a) The material presented in the Appellant's bid consisted of a "low pressure" laminate. The requirement in the tender documents specifications necessitated a material component consisting of a "high pressure" laminate.

“b) There is a great difference between a “Low Pressure” laminate and a “High Pressure” one.

“c) The material offered by the Appellant was described by same as being “melamine” which in technical terms classifies the material components as “Low Pressure” laminates.

“Reached the following conclusions:

“Needless to mention, the Board has to rely on the logical explanation of the technical experts when it comes to technicality. From the submissions made by the technical expert in the field of the product in question, the Board heard a clear and vivid explanation of the type of material components that were madatorily requested to conform with the technical specifications in the tender document. In the regard, this Board finds that the Appellant’s material components were not of the required specifications.

“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.”

Is-socjeta` Vivendo Projects Ltd appellat minn din id-decizjoni ghal quddiem din il-Qorti u rressqet zewg aggravji li, fil-qosor, huma s-segwenti: (i) id-decizjoni tal-Bord ghandha tigi mhassra peress illi hija unikament u esklussivament imsejsa fuq xhieda *ex parte* allegatament esperta tal-perit arkitett tal-Universita` ta' Malta; u (ii) id-decizjoni tal-Bord ghandha tigi mhassra peress illi fil-meritu wasal ghal konkluzjoni zbaljata illi *melamine* tekwivali ghal '*low pressure laminate*' u ma tistax tkun '*high pressure laminate*'.

Wara li rat ir-risposti li pprezentaw iz-zewg appellati u semghet lid-difensuri tal-partijiet u wara li rat l-atti kollha tal-kawza u d-dokumenti esebiti, sejra issa tghaddi biex tqis u tiddeciedi dan l-appell.

Trattat l-ewwel aggravju, din il-Qorti tirrileva li ma hemm xejn hazin jew kontra l-ligi li kaz jigi deciz a bazi ta' xhud,

espert jew mhuwiex, ta' parti wahda fil-kawza. Tribunal aditt u b'poteri *quasi* gudizzjarji jrid jiddeciedi fuq il-provi li jitressqu ghal quddiemu, u jekk ghat-Tribunal xhud wiehed hu kredibbli u ta' min joqghod fuqu, jista' jiddeciedi l-kaz a bazi ta' dik ix-xhieda speċjalment meta ma jkunx kontradett. Huwa possibbli f'kawza li parti tressaq bhala xhud espert *ex parte*, u sta ghall-parti l-oħra, jekk trid tikkontesta x-xhieda ta' dan ix-xhud, li tressaq hi wkoll espert imqabbad minnha jew tinsisti mat-Tribunal sabiex dan jahtar perit tekniku indipendenti sabiex jassistih fl-indagini tieghu. Bord jew Tribunal jista' anke, sua sponte, jahtar espert tekniku, pero`, jekk ihoss ruhu sodisfatt bil-provi li jkollu quddiemu, jista' jiddeciedi fuq il-kaz u jekk jorbot id-decizjoni tieghu max-xhieda ta' xhud espert *ex parte*, ikun qed jagixxi skont id-dettami tal-ligi.

Kif qalet din il-Qorti, Sede Inferjuri fil-kawza **Middlesea Insurance plc v. Zaffarese** deciza fid-29 ta' Mejju 2009:

“L-ewwel osservazzjoni li trid taghmel din il-Qorti hi din. Ibda biex, ma kien hemm xejn fil-ligi illi jzomm lill-Qorti milli tadotta rapport ta' perit ex parte. Anzi, il-kuntrarju hu l-kaz, kif johrog car mid-dispost tal-Artikolu 563A tal-Kodici ritwali (Kapitolu 12). Dik l-opinjoni kienet ammissibbli u wkoll accettabbli bhala fonti oggettiva ta' prova una volta l-Qorti ma jkunx dehrilha li ghandha tiskartaha bhala li tmur kontra l-konvinzjonijiet taghha (Artikolu 681, Kapitolu 12). Huwa veru illi dik l-opinjoni spiss drabi tkun bazata fuq konsiderazzjoni ta' diskrezzjonalita` teknika izda dan ma jfissirx illi m'ghandhiex ukoll titqies rilevanti meta c-cirkostanzi jissuggerixxu illi l-istess tikkostitwixxi accertament ta' fatt rilevabbli in bazi ghall-konnoxxenza teknika determinanti. Dan aktar u aktar fejn, bhal f'dan il-kaz, il-Qorti tkun tal-fehma illi d-deduzzjonijiet kontrarji tal-konvenut ma jkunux tali li jikkontrastaw ruhhom ghal dik l-istess opinjoni.”

(Sottolinear ta' din il-Qorti)

Dwar it-tieni aggravju, din il-Qorti tara li jista' jkun li *melamine* tkun kemm '*low pressure laminate*' kif ukoll '*high pressure laminate*' u dan peress illi jidher li

“technically, melamine is a chemical used in both high pressure laminate and low pressure laminate” u kollox jiddependi kif il-*melamine* jigi *infused*, cioe` il-process ta' kif *“laminate paper is attached to the substrate”*, pero`, is-sejha ghall-offerti kienet specifika li l-ghamara kellha tkun *‘high pressure laminate’*, u offerta tal-kimika biss (*melamine*) kienet generali wisq biex tissodisfa l-kriterji kif mitluba. Jekk xi hadd irid bicca ghamara tal-*oak*, offerta tal-istess bicca tal-*“injam”* ma hijjex sodisfacenti. L-ispecificazzjonijiet tat-*tender* kienu jindikaw car *‘high pressure laminate’*, filwaqt li s-socjeta` appellanti offriet biss il-*malamine* u ma ghamlet ebda riferenza ghall-*‘high pressure laminate’*.

Mill-atti jidher ukoll li l-kelma *malamine* gieli tintuza flok u ghal *‘low pressure laminate’*, u s-socjeta` kellha allura tkun aktar preciza fl-offerta taghha. Ma kellhiex toffri prodott tal-*melamine* biss, izda kellha toffri prodott ezatt kif riedet l-Universita`, u mhux tassumi li l-awtorita` aggudikanti tifhem dak li riedet tghid bl-offerta. Meta dak mitlub huwa specifiku, offerta skont il-genus tal-haga, ma hijjex konformi ma' dak li jkun mitlub.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell tas-socjeta` Vivendo Projects Ltd billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord ta' Revizjoni dwar Kuntratti Pubblici tal-4 ta' Novembru 2013, bl-ispejjez jithallsu mill-istess socjeta` appellanti Vivendo Projects Ltd.

< Sentenza Finali >

-----TMIEM-----