



MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF

SILVIO CAMILLERI

ONOR. IMHALLEF

GIANNINO CARUANA DEMAJO

ONOR. IMHALLEF

NOEL CUSCHIERI

Seduta tat-28 ta' Marzu, 2014

Appell Civili Numru. 506/2013/1

Joseph Caruana

v.

L-Awtorità tad-Djar u

B. Grima and Sons Limited

1. Dan huwa appell ta' Joseph Caruana [“l-Appellant”] minn deċiżjoni tas-6 ta' Diċembru 2013 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi [“il-Bord ta' Revizjoni”], imwaqqaf taħt ir-Regolamenti tal-2010 dwar il-Kuntratti Pubbliċi [L.S. 174.04], illi ċaħdet appell tal-istess Joseph Caruana minn deċiżjoni tal-Awtorità tad-Djar [“l-Awtorità”] li kuntratt għal xogħol ta' tiswijiet f'immobbli jingħata lis-soċjetà *B. Grima and Sons Limited* [“*Grima and Sons*”].
2. Il-fatti rilevanti seħnew hekk: fl-10 ta' Settembru 2013 saret sejħa mill-Awtorità għal offerti għal xogħol ta' tiswijiet f'immobbli. Saru żewġ offerti. L-oħros waħda kienet tal-Appellant u t-tieni waħda kienet ta' *Grima and Sons*. L-Awtorità għażlet l-offerta ta' *Grima and Sons*, għalkemm ma kinitx l-oħros waħda, u skwalifikat l-offerta tal-Appellant għax “*technically non-compliant*”. Fost il-kondizzjonijiet tas-sejħa kien hemm illi l-oblaturi kellhom jipprovdu “*literature for concrete repair products*” u lill-Awtorità dehrilha illi, fil-każ tal-Appellant, “*products provided in literature are not adequate for use as concrete repair as requested in the tender*”.
3. Is-sejħa għal offerti, fit-taqsimha “*H - Concrete Repair and Restoration Work*”, kienet tgħid hekk:

“The procedure to be used for the repair of spalled concrete is as follows”

“All loose and friable concrete in the vicinity of rusted reinforcement bars should be removed to expose only sound concrete. All rusted

reinforcement bars should be exposed on all sides along their length until at least 2cm of sound, rust free metal is showing on either end of the rusted section. All scale and rust is then removed manually and the metal thoroughly cleaned by wire brush. Once the reinforcement is derusted, an *appropriate coating* is then applied to the exposed metal to give immediate protection against renewed corrosion.

“The concrete surfaces should be thoroughly wetted and a *bonding coat* is applied. The bonding coat should be worked well into the substrate with a stiff brush. Then an appropriate *freshly mixed repair mortar* is ... applied over the wet bonding, compacting firmly into the damaged area, and trowelled smooth. After the repair mortar is set, two unthinned coats of *appropriate protective finishing* are applied, leaving minimum of 6 hours between application of each coat.”

4. Kien għalhekk meħtieġ li jingħata tagħrif tekniku (*literature*) dwar l-erba' prodotti murija bil-kursiv (miżjud mill-qorti), viz. i. *coating* għal fuq il-metall tax-xibka; ii. *bonding coat*; iii. *freshly mixed repair mortar*; u iv. *protective finishing*. L-Awtorità skwalifikat l-offerta tal-Appellant għax qalet illi ma kienx ipprova *literature* dwar il-prodotti kollha meħtieġa u illi daww il-prodotti li offra l-Appellant ma kinux tajbin biżżejjed.
5. L-Appellant ressaq oġġezzjoni quddiem il-Bord ta' Reviżjoni b'ittra tas-27 ta' Novembru 2013. Bid-deċiżjoni tas-6 ta' Diċembru 2013, li minnha sar dan l-appell, il-Bord ta' Reviżjoni iddeċieda hekk:

“The Board,

“Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 27th November 2013 and also through the Appellant's verbal submissions during the hearing held on 4th December 2013, had objected (*sic*) to the decision taken by the pertinent Authority, in that:

- “a) The Appellant had submitted the cheapest tender and the principal award criteria (*sc.* criterion) was the price.
- “b) The Appellant's offer was discarded by the Evaluation Board due to the alleged fact that the literature which the Appellant submitted regarding the product to be used in the

tender works did not meet the technical specifications as required in the tender document.

“c) The Appellant contends that the tender document did not specify the technical specifications required for the process to be carried out in the works of the tender.

“d) The Appellant also contends that since the Contracting Authority did not specify the technical specifications in the tender document, in the first place, it could not dictate during the evaluation stage specifications which were not stipulated in the tender document.

“Having considered the Contracting Authority’s verbal submissions during the hearing held on 4th December 2013, in that:

“a) The Evaluation Board of the Contracting Authority discarded the Appellant’s offer on technical grounds.

“b) The Appellant’s product being offered is not suitable for the project being contemplated in this tender.

“e) The Contracting Authority had to ensure that the preferred tenderer would carry out the required tender works with the requisite technical products so that the works, when completed, would last for a long period of time.

“d) The details as specified in section H in the tender document did in fact state the technical requirements and procedures to be adhered to by the Appellant.

“Reached the following conclusions:

“1. This Board opines that the Contracting Authority could have specified in more details the requirements regarding the technical specifications that should have been laid out in the tender document. However, after having heard the technical experts regarding the quality of the Appellant's products to be utilised in the execution of the tender works, it was evidently clear that the Appellant’s construction products were not up to the technical standards as laid out in the tender requirements.

“2. The Contracting Authority was in duty bound to ensure that the works specified in the tender document had to be executed with the proper methodology and technical construction products as dictated in the tender document. This Board feels that the Contracting Authority acted diligently in the evaluation process.

“3. The Evaluation Board took all the necessary safeguards to ensure that the works and materials to be adopted by the tenderer had to cater for the natural elements where the works are to be carried out.

“In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.”

6. L-Appellant appella minn din id-deċiżjoni b'rikors tat-23 ta' Diċembru 2013. L-aggravju tiegħu essenzjalment huwa illi ma jistax jingħad illi l-prodotti tiegħu ma kinux jilħqu l-ispeċifikazzjonijiet meħtieġa meta s-sejha għal offerti ma qalitx x'kellhom ikunu dawk l-ispeċifikazzjonijiet.

Kompla jfisser dan l-aggravju hekk:

“Illi dak li kien jitlob it-*tender*, u senjatament li l-offerenti jagħtu kopja tal-letteratura rigward il-*concrete repair products*, ingħata mill-esponenti u għalhekk din qatt ma setgħet tintuża bħala bażi ta' esklużjoni. Illi, birrispett kollu, l-argument li qajjmet il-konsulent legal tal-Awtorità appellata quddiem il-Bord ta' Reviżjoni, fis-sens li l-offerenti kellhom jiddeduċu u/jew jassumu illi apparti l-*concrete repair products* kellhom joffru wkoll letteratura dwar *1. coating for the mesh; 2. a bonding coat for concrete surfaces; 3. freshly mixed repair mortar and 4. a coat of protective finish*, huwa argument li ma jsegwix. Huwa prinċipju ben assodat li fil-kamp tal-kuntratti pubblii (*public procurement*) illi dawk l-ispeċifikazzjonijiet u l-kundizzjonijiet iridu ikunu ben stabbiliti u iddikjarati fis-sejha għall-offerti u għalhekk f'każ li dawn ma jkunux hekk iddikjarati l-offerenti ma jistgħux jiġu esklużi għaliex ma jkunux “assumew” dak li l-awtorità kontraenti ma tkunx espressament talbet fis-sejha *de quo*.”

7. Igħid ukoll illi kien imissu ntabab “kjarifiċi” dwar l-offerta tiegħu qabel ma din tiġi skwalifikata.
8. L-Awtorità wiegħbet fil-15 ta' Jannar 2014 u *Grima and Sons* fis-16 ta' Jannar 2014, u fessru għala, fil-fehma tagħhom, l-appell għandu jiġi miċħud.
9. Din il-qorti ma tarax li tista' taqbel mal-aggravju tal-Appellant. Huwa minnu illi l-Bord ta' Reviżjoni stqarr illi “*the Contracting Authority could have specified in more details the requirements regarding the technical*

specifications that should have been laid out in the tender document".

Madankollu, kien evidenti, u ma kienx hemm għalfejn dak li jkun ikollu aktar speċifikazzjonjiet biex "jassumi", illi l-prodotti kellhom ikunu tajbin għall-għan li għalih kellhom isiru x-xogħlijiet. It-taqsima *H - Concrete Repair and Restoration Work* turi wkoll illi kienu meħtieġa erba' prodotti għal dan il-għan. Mix-xiehda mogħtija mill-konsulent tekniku tal-kumitat ta' evalwazzjoni tal-Awtorità huwa daqstant ieħor evidenti li l-prodotti li offra l-Appellant ma kinux tajbin:

"Perit Melanie Spiteri on behalf of the contracting authority under oath said that the literature for the mortar mix submitted by appellant states "a quality mixture of sand and cement for laying brick, block or stone; for building or repairing chimneys, walls, planters and out-door grills". The work required to be done in this tender involves repairing spalled concrete ceilings where the mesh had rusted. There were many products on the market to enable the repair of concrete ceilings. Thus contractor would have to remove the spalled part of the concrete, clean the metal mesh, coat the mesh with inhibitors and then apply the mortar mix and the finishing and protective coat. The main product is the mortar mix. The mortar mix offered by the appellant is suitable for repairing bricks, and is not used in Malta. As corrosion inhibitor, the appellant offered *Sicaguard*. This product while good enough for the finishing stage, does not provide corrosion inhibitors for the mesh. *Sica* also produces such corrosion inhibitors but the appellant did not submit them. The products offered by appellant are not suitable for the repair of spalled concrete ceilings."

10. Jekk l-Appellant kellu l-ħsieb li jinqeda wkoll bi prodotti oħra u naqas milli jsemmihom, in-nuqqas kien tiegħu u ma setax "jassumi" illi l-Awtorità kellha, min-naħa tagħha, "tassumi" wkoll li kien sejjer juża prodotti oħra li ma semmiex. Fil-fatt kien biss waqt is-smiġħ quddiem il-Bord ta' Revizjoni illi l-Appellant ipproduċa dokument dwar prodott għal "*long term protection for steel*" li iżda ma kienx fost id-dokumenti mal-offerta. Dan il-fatt waħdu – illi kellu l-ħsieb juża prodott ieħor li ma

semmiex fl-offerta – huwa biżżejjed biex juri illi l-prodotti li kien offra l-Appellant ma kinux biżżejjed biex ix-xogħol isir sew.

11. Dan ma kienx nuqqas li jista' jissewwa bi "kjarifiċi" dwar il-prodotti offerti: seta' jissewwa biss b'żjeda ta' prodotti oħra li, naturalment, kien jolqot il-prezz li kieku dawk il-prodotti ssem mew ukoll fl-offerta originali. Jekk l-Appellant, issa li jaf il-prezz li offra l-oblatur l-ieħor, jagħžel li ż-żjeda fil-prezz inaqqasha mill-qligħ tiegħu, ikun qiegħed jieħu vantaġġ kompetitiv ingust. Għalhekk l-Appellant ma jistax jithalla jsewwi n-nuqqas fl-offerta tiegħu billi joffri prodotti oħra, ukoll jekk iżomm l-istess prezz.

12. Għal dawn ir-raġunijiet il-qorti tiċhad l-appell u tikkundanna lill-Appellant Joseph Caruana jħallas l-ispejjeż kollha relativi.

< Sentenza Finali >

-----TMIEM-----