



MALTA

**QORTI TA' L-APPELL**

**S.T.O. PRIM IMHALLEF**

**SILVIO CAMILLERI**

**ONOR. IMHALLEF**

**TONIO MALLIA**

**ONOR. IMHALLEF**

**JOSEPH AZZOPARDI**

Seduta tas-7 ta' Ottubru, 2014

Appell Civili Numru. 253/2014/1

**Projekte Global Limited**

**v.**

**Kunsill Lokali Marsaskala**

**II-Qorti:**

Dan hu appell imressaq fit-18 ta' Gunju, 2014 mis-socjeta` Projekte Global Ltd. wara decizjoni datata 30 ta' Mejju 2014, moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'l quddiem, imsejjah "il-Bord") fil-kaz referenza KLM 2013/10 (kaz numru 694).

Dan il-kaz huwa marbut ma' sejha ghall-offerti li hareg il-Kunsill konvenut "*for the supply and installation of equipment of leisure park in rural San Tumas*". Ghal dan il-kuntratt intefghu hames offeri, fosthom dik tas-socjeta` Projekte Global Ltd., li, pero`, giet eskluza mill-process peress li mal-offerta taghha ma pprezentatx "*an original bid bond*" kif rikjest fid-dokumenti annessi mas-sejha ghall-offerti. L-imsemmija socjeta` appellat minn din id-decizjoni lill-Bord li b'decizjoni tat-30 ta' Mejju, 2014, cahad l-appell u kkonferma d-decizjoni tal-awtorita` kontraenti. Id-decizjoni tal-Bord hi s-segwent:

"This Board,

"Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 28<sup>th</sup> March 2014 and also through Appellant's verbal submissions during the hearing held on 6<sup>th</sup> May 2014, had objected to the decision taken by the pertinent Authority, in that:

- "a) Appellant claims that his offer was discarded due to the fact that he failed to submit the original Bid Bond as requested in the tender document. He further contends that upon request by the

Evaluation Board this requisite was complied within two working days.

- “b) Appellant also maintains that he had submitted a copy of the original bid Bond.
- “c) The non-submission of the original guarantee, in the first place was a genuine mistake.
- “d) Appellant contends that there were two conflicting clauses in the tender document, namely, clauses 12 and 16.

“Having considered the Contracting Authority’s verbal submissions during the hearing held on 6<sup>th</sup> May 2014, in that:

- “a) Appellant confirms that the original bid bond was only submitted after the Contracting Authority enquired of its absence.
- “b) The Evaluation Board were directed and advised quite rightly, that once the original guarantee was not included with the tender document, then Appellant’s bid had to be discarded.

“Reached the following conclusions:

- “1. The Board opines that, although it agrees and upholds the principle that ‘substance should always prevail over form’. At the same time, this Board strongly feels, that this ‘maxim’ should not be used as a defensive and protective excuse for not filing the mandatory requirements as specified in the tender document. All essential original documentation as dictated in the tender document has to be submitted.

## Kopja Informali ta' Sentenza

- “2. With regards to the enquiry sought by the Contracting Authority regarding the missing original guarantee, this Board notes that a clarification can only be sought by the Evaluation Board on documentation submitted and not otherwise. In this case, the original Bid Bond was not submitted by Appellant.
- “3. This Board refers to Clause 16.1 under note 1 of the tender document that quotes: “Tenderers will be requested to clarify or rectify within 2 working days the tender guarantee only in case of either validity date or incorrect value”. In this instance, this was not the case. It was only a case of non-submission of the original documents.

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

Is-socjeta` rikorrenti Projekte Global Ltd. appellat mid-decizjoni tal-Bord ghal quddiem din il-Qorti, u ssostni, fost affarijiet ohra, li hi ma kellhiex tigi eskluza mill-process ta' evalwazzjoni peress illi hi, fil-fatt, kellha garanzija kif rikjest, pero`, bi zvista ressqet kopja tad-dokument relattiv flok l-original; dan l-original gie pprezentat wara li l-Kunsill konvenut gibed l-attenzjoni tas-socjeta` appellanti ghal dan in-nuqqas.

Wara li semghet it-trattazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawza u d-dokumenti esebiti, din il-Qorti sejra tghaddi ghas-sentenza taghha.

Ikkonsidrat:

Illi f'dan il-kaz jirrizulta li meta s-segretarju ezekuttiv tal-Kunsill konvenut fetah l-offerti tas-socjeta` appellanti sab li, fost id-dokumenti pprezentati, kien hemm kopja tal-garanzija ("bid bond"), izda mhux l-original. Hu haseb li l-original seta' kien f'pakkett iehor li ma kienx awtorizzat jiftah f'dak l-istadju, u ghalhekk cempel lis-socjeta` appellanti u staqsiha x'gara mill-original. Is-socjeta` appellanti tghid li mhux veru li cemplilha s-segretarju tal-Kunsill, izda kienet hi li cemptet lill-Kunsill meta indunat li l-original kien ghadu f'idejha. Is-socjeta` appellanti, fil-fatt, tghid li wara li ndunat li l-original kien ghadu fl-ufficcju taghha staqsiet x'ghandha taghmel. Is-segretarju ezekuttiv tal-Kunsill wiegeb li hu ma jistax jiehu decizjoni, u ssuggerixxa li l-kumpanija tibghat il-garanzija originali b'ittra ta' spjegazzjoni ghall-konsiderazzjoni tal-bord ta' evalwazzjoni; is-socjeta` appellanti hekk, fil-fatt, ghamlet.

Is-socjeta` appellanti tghid, fl-ewwel lok, li hemm kontradizzjoni bejn klawsola 12 tar-regolament, li jippermetti kjarifiki b'mod generali meta jkun hemm "*incomplete/non-submitted information*", u klawsola 16 li tippermetti kjarifika jew rettifika tal-garanzija "*only in case of either validity date or incorrect value*", bil-Bord jiddeciedi li jaghzel il-verzjoni tal-Artikolu 16 fuq il-verzjoni tal-Artikolu 12. Tghid ukoll li l-kuntatt li s-segretarju ezekuttiv tal-Kunsill konvenut ghamel mas-socjeta` attrici, u l-esebizzjoni immedjatament wara, tal-garanzija originali kellu jkun bizzzejjed biex jissodisfa l-vot tar-regolamenti.

Din il-Qorti tara li ma tistax tikkondividi l-hsieb tal-appellant. Meta r-regolamenti tas-sejha jesigu b'mod espress certu tip ta' dokument, dak id-dokument kif rikjest irid ikun ipprezentat sal-gheluq taz-zmien ghall-offerti. Ikun kontra l-principju tat-trasparenza jekk offerent jithalla jissostitwixxi dokument b'iehor wara l-gheluq taz-zmien. Is-sejha esigiet, f'dan il-kaz, il-prezentata tal-garanzija originali u din ma gietx ipprezentata fi zmien utili.

Dan mhux kaz ta' informazzjoni nieqsa, izda ta' nuqqas ta' prezentazzjoni ta' dokument essenzjali biex l-offerta tigi kkonsidrata. Kjarifiki jistghu jintalbu fuq dak sottomess, izda jekk dokument ma jigix sottomess, ma hemmx "kjarifika" x'titlob. Il-kopja tal-garanzija ma tiswa ghal xejn fir-relazzjoni li persuna jista' jkollu mal-bank koncernat, u n-nuqqas tal-original jista' jkun ta' hsara ghall-interessi tal-awtorita` kontraenti, u kwindi mhux kaz ta' semplici nuqqas ta' awtentikazzjoni, ghax biex il-garanzija tissarraf, tkun mehtiega l-original ad validitatem.

Ghalhekk meta wiehed iqis li kemm id-dokumenti tas-sejha u kemm il-ligi jridu li l-garanzija ghandha tkun wahda originali, allura l-kumpanija appellanti ma tistax tippretendi li l-awtoritajiet kontraenti kellhom jaccettaw l-offerta taghha li ma kienx fiha l-garanzija originali;

Din il-pozizzjoni tinsab ukoll imsahha fil-gurisprudenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea. Infatti f'sentenza ricenti moghtija mill-Qorti Generali (L-Ewwel Awla) fl-20 ta' Marzu 2013, fl-ismijiet **Nexans France v. European Joint Undertaking for ITER and the Development of Fusion Energy (T-415/10)** intqal hekk f'paragrafu 80:

*“It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications.”*

Kemm fil-klawsola 16.1 tad-dokumenti marbuta mas-sejha ghall-offerti u kemm fil-klawsola 20.1 tal-istess dokumenti hemm insistenza li l-garanzija pprezentata mal-offerta trid tkun dik originali, u l-istess klawsola 20.1 twissi li offerti *“not accompanied with the mandatory tender guarantee (Bid Bond) by the closing date and time of the tender will be automatically disqualified”*. Il-garanzija ma tistax tigi pprezentata xi jiem wara, u la mhux kaz ta' korrezzjonijiet fid-dettal jew zbalji fid-dokumenti, izda ta' nuqqas totali ta' dokument mandatarju, ebda kjarifika ma setghet tintalab u tinghata. Darba li l-garanzija originali ma gietx prezentata sal-jum u l-hin indikat fis-sejha ghall-offerti, l-offerta tas-socjeta` appellanti giet skwalifikata awtomatikament.

Fil-kuntest tal-ilment marbut mar-referenza ghal-ligi hazina li ghamel il-Kunsill Lokali konvenut meta informa lis-socjeta` appellanti li l-offerta taghha ma gietx accettata, jirrizulta li dan l-izball kien f'dettal mhux mehtieg li jinghata, u ma kien ta' ebda pregudizzju ghad-drittijiet tas-socjeta` appellanti.

Mill-premess isegwi li l-appell tas-socjeta` appellanti ma jistax jigi milqugh.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell tal-kumpanija Projekte Global Ltd. billi tichad l-istess u tikkonferma s-sentenza li ta l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici fit-30 ta' Mejju, 2014, bl-ispejjez ta' dawn il-proceduri jithallsu mill-kumpanija appellanti Projekte Global Ltd.

**< Sentenza Finali >**

-----TMIEM-----