



MALTA

**QORTI TA' L-APPELL**

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

**SILVIO CAMILLERI**

**ONOR. IMHALLEF**

**TONIO MALLIA**

**ONOR. IMHALLEF**

**JOSEPH AZZOPARDI**

Seduta tal-31 ta' Ottubru, 2014

Appell Civili Numru. 278/2014/1

**Cherubino Limited (C-3677)**

**v.**

**Dipartiment tal-Kuntratti u Central Procurement & Supplies Unit**

**Il-Qorti:**

Dan hu appell imressaq fl-1 ta' Lulju 2014, mis-socjeta`Cherubino Limited wara decizjoni datata 11 ta' Gunju 2014, moghtija mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (min hawn 'il quddiem imsejjah 'Il-Bord') fil-kaz referenza CT/2001/2014 (kaz numru 698).

Dan il-kaz huwa marbut mas-sejha ghall-offerti li harget ic-Central Procurement & Supplies Unit *“for the supply of oxygen concentrators”*. Ghal dan it-*tender* applikaw diversi entitajiet, fosthom is-socjeta` Cherubino Limited, li pero`, giet skwalifikata mill-process peress li, mal-offerta, ma gietx ipprezentata l-original tal-garanzija (*bid-bond*) kif rikjest fil-kundizzjonijiet mahruga mal-hrug ghas-sejha ghall-offerti. Is-socjeta` Cherubino Limited ma qablitx ma' din id-decizjoni u resqet appell quddiem l-imsemmi Bord li b'decizjoni tal-11 ta' Gunju 2014, cahad l-appell u kkonferma d-decizjoni tal-Awtorita` koncernata. Id-decizjoni tal-Bord hija s-segwent:

*“Having noted the Appellant’s objection, in terms of the ‘Reasoned Letter of Objection’ dated 2<sup>nd</sup> April 2014 and also through Appellant’s verbal submissions during the hearing held on 19<sup>th</sup> May 2014, had objected to the decision taken by the pertinent Authority, in that:*

*“a) Appellant claims that his offer was rejected by the Contracting Authority since the submission of his original bid bond was submitted after the closing time of the closing time of the tender, i.e 9.30am on the 27<sup>th</sup> March 2014.*

*“b) In accordance with clause 2 of the ‘Instructions to Tenderers’, this schedule stipulated the time frames for the submissions of tender documents including the original bank guarantee document as was dictated in the same clause of the tender document. This same clause was in fault as it did not indicate the time by which the original bid bond had to be submitted as in the appropriate column, the tender document stated {Time} instead of the exact time.*

*“c) Appellant also contends that a scanned copy was submitted through the ePPs system. So that the Contracting Authority were well aware that the Appellant had provided the Bid Bond as was required in the tender document, however, the original document was submitted at 10.00am on 27<sup>th</sup> March 2014.*

*“d) Appellant claims that since there was no indication of the closing time for the submission of the original bid bond in Clause 2 of Section 1 of the ‘Instructions to tenderers’, the submission of the original bid bond at 10.00am on the closing date of the tender, was in conformity with the tender conditions and regulations.*

*“Having considered the Contracting Authority’s verbal submissions during the hearing held on 19<sup>th</sup> May 2014, in that:*

*“a) The Contracting Authority reaffirmed that the closing time and date of the tender was at 9.30am on the 27<sup>th</sup> March 2014 and that the original bid bond was not included in the first package of his bid.*

*“b) The Contracting Authority also pointed out that since this tender was a ‘Three envelope package’, the opening of the envelopes/package is carried out by the Department of Contracts and when this process was carried out it was found that Appellant’s original bid bond was missing.*

*“Reached the following conclusions:*

*“1. This Board opines that, after having examined the submissions made by both the Appellant Company and the Contracting Authority, the latter did fail to denote ‘the time’ of the deadline for the submission of the Original Bank Guarantee as should have been included in the ‘Date and Time’ matrix under clause 2 on page three of the ‘Instructions to tenderers’.*

*“2. This Board noted that, although a ‘scanned copy’ of the original Bid Bond was submitted by Appellant through ePPs system, at the same time cannot establish a valid reason why the original Bid Bond was not submitted by the closing date of the Tender.*

*“3. This Board also opines that, although there was an omission of the ‘Time’ for the submission of the Original Bid Bond, under Clause 2 (Timetable) on page three of the ‘Instructions to Tenderers’, the same document clearly stated under clause 8.1, that “A scanned copy will be submitted through the ePPs, ACCOMPANIED by the submission of the original copy BY THE CLOSING DATE OF THE TENDER”, i.e by 9.30am on the 27<sup>th</sup> March 2014.*

*“This Board opines that the word ‘accompanied by’ clearly means ‘together with’. In this regard, Appellant failed to abide by this mandatory requirement.*

*“In view of the above, this Board finds against the Appellant Company, however, it recommends that the deposit paid by Appellant should be reimbursed.”*

Is-socjeta` rikorrenti appellat mid-decizjoni tal-Bord ghax issostni li d-dokument inkwistjoni kien gie pprezentat sal-jum li kellha tigi pprezentata, u la ma kienx hemm hin stabbilit sa meta kellha tigi pprezentata, bil-prezentazzjoni tal-garanzija sal-hin normali tax-xoghol tal-awtorita` koncernata, hi ghandha

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titqies li ottemperat ruhha ma' dak rikjest fid-dokumenti annessi mal-hrug tas-sejha ghall-offerti.

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

Ikkunsidrat:

Illi din il-kawza tolqot it-tifsira li ghandha tinghata lir-regolamenti annessi mal-hrug tas-sejha. Il-process kollu kien marbut biz-zmien u kien hemm *'time-table'* ghal kull stadju tal-process. Ghal dak li jirreferi ghal prezentata tad-dokumenti tal-offerta u tal-original tal-garanzija, din l-iskeda kienet hekk tipprovdi:

<i>Deadline for submission of tenders (unless otherwise modified in terms of Clause 10.1 of the General rules government Tendering)</i>	<i>[27<sup>th</sup> March 2014]</i>	<i>[09:30am]</i>
<i>Deadline for submission of ORIGINAL bank guarantee (bid bond) – Refer to Clause 8.1 of the Instructions to Tenderers. A scanned copy will be submitted through the ePPs, accompanied by the submission of the original copy by the closing date and time of the tender at the Department of Contracts,</i>	<i>[27<sup>th</sup> March 2014]</i>	<b><i>[Time]</i></b>

<i>Notre Dame Raveline, Floriana, FRN 1600, Malta.</i>		
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Is-socjeta` rikorrenti targumenta illi la darba l-hin ghall-prezentata tal-garanzija ma giex stabbilit, allura l-istess seta' jigi pprezentat fil-hin tax-xoghol fis-27 ta' Marzu 2014. Fil-fatt il-garanzija giet ipprezentata fil-jum tas-27 ta' Marzu 2014, pero`, wara d-disgha u nofs ta' filghodu, hin indikat ghas-sottomissjoni tal-offerta.

Din il-Qorti tara li ghalkemm huwa veru li fit-tielet kolonna tas-seba' ringiela tat-tabella aktar qabel riprodotta, il-hin ma tnizzilx, pero`, fl-ewwel kolonna biswit il-kolonna fejn hemm imnizzel [Time], fil-hames linja wiehed isib miktub b'mod car, bhala *'deadline for submission of original bank guarantee'*, referenza ghall-Artikolu 8.1 tal-istruzzjonijiet tal-offerenti. Din il-klawsola tghid li filwaqt li trid tintbaghat kopja tal-garanzija b'mezz elettroniku, l-original trid tigi pprezentata *'by the closing date and time of the tender'*. Dan it-test, riprodott ukoll fit-tabella nfisha, jghid bl-aktar mod car li l-garanzija originali kellha tigi pprezentata sad-data u l-hin tal-gheluq ghat-tfiegh tal-offerti, u dan it-terminu kien iffissat ghad-9.30am tas-27 ta' Marzu 2014. Darba li kien stabbilit u specificat dan, ma kienx hemm ghalfejn jigi ripetut il-hin fit-tielet kolonna tal-iskeda, ghax fl-ewwel kolonna gie specificat li l-garanzija originali trid tigi pprezentata sal-hin stabbilit aktar qabel. Ic-cirkostanza li, skont kif stabbilit fid-dokumenti ufficjali tas-sejha, l-offerti kellhom jinfethu fl-10.00am, ikomplu juru li kull offerent kellu indikazzjoni cara li d-dokumenti kollha mitluba kellhom jigu pprezentata sad-9.30am tas-27 ta' Marzu 2014. Fl-ewwel pagna

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tat-tender ukoll jinghad b'ittri kbar li kollox kellu jigi sottomess sas-27 ta' Marzu 2014 fid-9.30am.

Din il-Qorti gia` kellha okkazzjoni tesprimi ruhha fis-sens li darba li d-dokumenti marbuta mas-sejha esigiet l-orginal tal-garanzija, kopja tal-istess mhux sufficjenti – **Projekte Global Ltd v. Kunsill Lokali Marsaskala**, deciza fis-7 ta' Ottubru 2014. Il-klawsola 8.1 tad-dokument tas-sejha kienet ukoll tghid li offerta bla garanzija originali tkun skwalifikata awtomatikament. Il-jum u l-hin ghall-presentata tad-dokumenti huwa importanti f'dawn il-proceduri, u darba dawn kienu stabbiliti b'mod car, l-istess dokumenti mitluba ma jistghux jigu pprezentati tard. Kif gie mfisher mill-Qorti tal-Appell ta' Ontario fil-Kanada fil-kawza **Coco Paving (1990) Inc. v. Her Majesty the Queen in Right of Ontario** deciza fid-19 ta' Gunju 2009, *“the timing of bid delivery is not a mere formality in the tendering process. As correctly emphasized by the appellants, bid closing time is sacrosanct in the competitive public tendering process.”*;

L-istess Qorti tal-Appell ta' Ontario b'referenza ghall-gudikat precedenti taghha **Bradscot (MCL) Limited v. Hamilton-Wenworth Catholic District School Board** qalet li, *“A bid submitted after the tender deadline is invalid, and an owner that considers a late bid would breach its duty of fairness to the other tenderers”*. Dan il-principju tant kemm huwa vitali li kif komplet tghid dik il-Qorti, *“A bidder who submits its bid even a few minutes late has the potential*

*to obtain a tremendous advantage over his competitors .... The courts have therefore recognized that the timing of the bid submissions in public tendering processes is critical. Late bids can unfairly advantage the non-compliant bidder over the compliant bidder who met the bid submission requirements and erode the integrity of the bidding process.”;*

Applikant dan il-principju għall-kaz tagħna, galadarba s-socjeta` appellanti ma tatx il-garanzija originali qabel ma lahaq għalaq iz-zmien rizervat għas-sottomissjoni tal-offerti, hija ma setgħetx legittimament tippretendi li tithalla tipprezentaha mqar jekk nofs siegħa wara;

Hu veru li parti mill-Artikolu 8.1 jgħid li min jiffa' offerta jkun eskluż awtomatikament jekk l-original tal-garanzija *“is not submitted by the date indicated in clause 2”*, u ma hemmx referenza partikolari għal hin, però, din is-sentenza ma tridx tinqara *“out of context”*. Id-dokumenti annessi mal-hrug għall-offerti, juru b'mod car li l-offerta kellha ssir sas-27 ta' Marzu 2014, fid-9.30am, u mhux parti sa hin u parti ohra sa hin iehor. L-original kellha tigi pprezentata *“by the closing date and time of the tender”*, u darba li ma sarx hekk, ifisser li s-socjeta` appellanti ma segwietx il-procedura stabbilita, u l-offerta tagħha kellha tigi michuda.

Dwar l-aggravju relatat mal-motivazzjoni fid-decizjoni tal-Bord, din il-Qorti tgħid li għalkemm dik id-decizjoni setgħet giet formulata ahjar, jekk wiehed jaqra s-



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sentenza kollha bhala *quid unum*, isib li l-hsieb tal-Bord kien wiehed intelligibli u koerenti mar-rizultanzi tieghu, fis-sens li darba skont klawnsola 8.1 l-originali tal-garanzija kellha tigi sottomessa sa mhux aktar tard mid-data u l-hin rizervati ghat-tfiegh tal-offerti, u darba kien jirrizulta bhala fatt li dawn it-termini ma gewx osservati, ghamlet sew l-awtorita` koncernata li skwalifikat lis-socjeta` appellanti. Dan hu mehtieg li hekk issir ghal fini ta' trasparenza u l-htiega li tinzamm "*a level playing field*" f'dawn il-kwistjonijiet.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell ta' Cherubino Limited billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici nhar il-11 ta' Gunju 2014, f'dan il-kaz.

L-ispejjez marbuta ma' din il-procedura quddiem din il-Qorti ghandhom jithallsu mis-socjeta` appellanti, Cherubino Limited.

**< Sentenza Finali >**

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