



MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF

SILVIO CAMILLERI

ONOR. IMHALLEF

GIANNINO CARUANA DEMAJO

ONOR. IMHALLEF

NOEL CUSCHIERI

Seduta tas-27 ta' Frar, 2015

Appell Civili Numru. 424/2014/1

Bugeja Bros [Gozo Ltd] (C-6105)

v.

**Id-Direttur, Fergha tax-Xoghlijiet, Dipartiment tal-Progetti u Zvilupp fi
Hdan il-Ministeru ghal Ghawdex, u Joseph Attard.**

Il-Qorti

Preliminari,

1. Dan hu appell magħmul minn Bugeja Bros. [Gozo] Ltd. [is-socjeta` appellanti] minn decizjoni [id-Decizjoni Appellata] mogħtija fit-22 ta' Lulju 2014 mill-Bord ta' Revizjoni dwar Kuntratti Pubblici [il-Bord], imwaqqaf taht ir-Regolamenti tal-2010 dwar il-Kuntratti Pubblici¹ fil-kawza nru.707 [Tender nru. WBG 10/2014], li permezz tagħha dak il-Bord caħad l-appell tas-socjeta` appellanti minn decizjoni tad-Dipartiment tal-Kuntratti [id-Dipartiment] illi l-offerta tagħhom għall-provvista ta' "*Franka Stone*" tigi mwarrba.

2. Permezz tad-Decizjoni Appellata, il-Bord wasal għas-segħenti konkluzjonijiet:

"1. From the various submissions made during the hearing of this Appeal, this Board notes that the Preferred Bidder [l-appellat Joseph Attard] does, in fact, own a quarry with the necessary permit to operate such quarry.

"2. The Appellant's claim that there exists 'enforcement notices' on the 'extension' of the quarry does not necessarily imply that the licensed quarry cannot operate.

"3. With regards to the Appellant's claim that the 'licensed quarry' is exhausted, this Board considers this contention as debatable and does not fall within the scope and jurisdiction of this Board. It is the duty of the Contracting Authority [id-Direttur] to ensure, that the supply of 'Franka Stone' is being obtained by the Preferred Bidder from a licensed quarry.

"4. This Board rejects the request made by the Appellant to this Board to appoint an 'Expert' to verify whether the licensed quarry is exhausted or not. The jurisdiction of this Board is to verify:

¹ L.S.174.04]

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- i) Whether the adjudication process was carried out in a just and transparent manner;
- ii) Whether the award process was in accordance with the 'Public Procurement Regulations'

"5. After taking into account all the facts and submissions made by both the Appellant Company and the Contracting Authority, this Board is satisfied that the adjudication process was carried out in a diligent and appropriate manner.

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

Fatti

3. Il-fatti rilevanti huma dawn. Fit-28 ta' Jannar 2014 saret sejha mid-Dipartiment ghas-*"Supply and Delivery of Franka Stone as directed by the Directorate of Projects and Development Ministry for Gozo ["Period Contract]"*. Fost il-kundizzjonijiet stipulati fil-*quotation document* hemm dik indikata fil-klawsola 6.1.2 li tgħid li *"Bidder must produce evidence that the quarry from which the franka stone is supplied is operating with all the necessary permits/licences"*.

4. Għal din is-sejha kien hemm zewg offerenti: is-socjeta` appellanti u l-appellat Joseph Attard. Peress li l-Bord tal-Aggudikazzjoni sab li z-zewg offerenti kienu jissodisfaw ir-rekwizit indikat fil-klawzola precitata, allura giet magħzula l-offerta ta' Joseph Attard peress li din kienet l-orhos wahda.

5. B'ittra datata 4 ta' Marzu 2014 is-socjeta` appellanti wara li prezentat *"Reasoned Letter of Objection"*, ressqet appell quddiem il-Bord ta' Revizjoni.

6. Skont l-imsemmija ittra tas-socjeta` appellanti l-ilment li fuqhom ibbazat l-appell taghha huma tnejn: [1] li l-barriera tal-offerent rakkomandat ma kienitx koperta bil-permessi tal-MEPA, tant li kien hemm avviz ta' infurzar fuqha; u [2] *"moreover, Recommended Bidder is not in a position to execute the contract in terms of the law"*.

7. Mill-provi mismugha mill-Bord jirrizulta li l-appellat Joseph Attard, l-offerent rakkomandat, ghandu izjed minn barriera wahda. Ghandu l-barriera QSG-4 imsejjha l-barriera antika u li hi munita mil-licenzja necessarja mahruga mill-awtorita` kompetenti, il-Malta Resources Authority [MRA], u liema licenzja hi rikonoxxuta mill-MEPA, kif ukoll ghandu estensjoni tal-istess barriera, u barriera ohra, li huwa jopera bla permess, u li fuqhom hemm avvizi ta' infurzar mahruga mill-MEPA.

8. Il-bazi tal-appell tas-socjeta` appellanti quddiem il-Bord, hu fis-sens li, ghalkemm l-barriera antika hi koperta bil-licenzja necessarja u allura legalment ghadha tista' topera, l-offerent rakkomandat ma jistax jissupplixxi gebel minn din il-barriera peress li din hi "exhausted", tant li fil-prezent qed jopera illegalment minn estensjoni tal-barriera l-antika u barriera ohra mhux koperti bil-permessi necessarji

L-Appell

9. Is-socjeta` appellanti hassitha aggravata bid-decizjoni tal-Bord, u interponiet dan l-appell li permezz tieghu, ghar-ragunijiet minnhom indikati fir-rikors tal-appell, talbet li din il-Qorti tirrevoka id-Decizjoni Appellata, u li, konsegwentement, previa dikjarazzjoni ta' skwalifika tal-offerta tal-appellat Joseph Attard in kwantu mhux konformi, tiddikjara u tiddeciedi illi l-istess kuntratt ghandu jinghata lis-socjeta` esponenti, jew alternattivament, joghghobha tirimanda l-atti lill-Bord, diversament kompost, sabiex jikkonferma l-hatra ta' espert tekniku u jiddeciedi l-ilment biss wara li dan l-espert tekniku jkun investa minnufih il-lanjanza ta' non-konformita` tal-offerta tal-appellat Joseph Attard; ukoll, li f'kull kaz, din il-Qorti tordna r-rimbors tad-depozitu minnha mhallas sabiex setghet tressaq l-oggezzjoni taghha quddiem il-Bord.

10. Id-Direttur appellat ipprezenta risposta li permezz taghha talab li, ghar-ragunijiet hemm indikati, din il-Qorti tichad l-appell, bl-ispejjez kontra s-socjeta` appellanti.

11. L-appellat l-iehor, Joseph Attard, ukoll ipprezenta risposta fejn talab li, ghar-ragunijiet hemm indikati, din il-Qorti tichad l-appell, bl-ispejjez kontra s-socjeta` appellanti.

Id-Decizjoni Appellata

12. Il-Bord wasal ghall-konkluzjoni tieghu wara li ghamel is-segwenti konsiderazzjonijiet:

“Having noted the Appellant’s objection, in terms of the ‘Reasoned Letter of Objection’ dated 4th March 2014 and also through Appellant’s verbal submissions during the hearing held on 3rd June 2014 had objected to the decision taken by the pertinent Authority, in that:

a) Appellant contends that in accordance with clause 6.1.2 of the tender document, bidders had to provide evidence that the quarry from which the ‘Franka Stone’ would be supplied, had the necessary permits required by Law to operate such quarry. The source from where the Preferred Bidder would be supplying the ‘Franka Stone’ did not have the necessary permits.

b) Appellant also claims that the Preferred Bidder’s quarry which has an operating licence, is fully exhausted, so that the supply of ‘Franka Stone’ will be obtained by same from an unlicensed quarry.

“Having considered the Contracting Authority’s verbal submissions during the hearing held on 3rd June 2014 in that:

a)The Preferred Bidder’s offer was cheaper than the Appellant’s bid.

b)The Preferred Bidder produced a valid licence for the operation of the quarry from where he will supply ‘Franka Stone’ to carry out the tendered works.”

L-Aggravji

13. Is-socjeta` appellanti qed tibbaza l-appell taghha fuq zewg aggravji: [1] li r-rijassunt kontenut fid-Decizjoni Appellata ta’ dak li sehh fis-seduta mizmuma mill-Bord ma jikkorrispondix fedelment ma’ dak li effettivament intqal u sar f’dik is-seduta, b’mod partikolari dwar in-nomina ta’ espert; u [2] li d-decizjoni hija hazina in kwantu ghall-osservazzjonijiet maghmula mill-Bord dwar l-iskop u l-gurisdizzjoni tieghu.

14. Tenut kont tal-bazi tal-ewwel aggravju huwa opportun li jigi riprodott fl-intier tieghu r-rijassunt maghmul mill-Bord fid-Decizjoni Appellata:

“Dr John L. Gauci on behalf of the appellant said that appellant's offer had been rejected since it was not the cheapest. Appellant's objection was based on the main point that the preferred bidder's quotation was not compliant. He contended that while Clause 6.1.2 of the quotation document stated that *"Bidder must produce evidence that the quarry from which the franka stone is supplied is operating with all the necessary permits/licences"*, the quarry owned by the preferred bidder is not covered by a valid permit. In fact an enforcement notice has been issued on this quarry. There is enough proof from official sources that the extension of the quarry used by the preferred bidder has an enforcement notice. Here he requested to hear the evidence of MEPA employees who would testify on the facts.

“Mr Charles Gafa' Id. No 243669M under oath said that he has produced file number PA 5043/07 which refers to quarry number 4 San Lawrenz Gozo and the applicant is Joseph Attard Id. No 519530. The file refers to a request to regularise extension of soft stone quarry number 4. The application was still pending. He also referred to file PA 5212/08 which refers to an application by Joseph and Randu Zammit Id. Nos 93044G and 51949G to sanction the extension of an existing quarry and this application was still pending. He also referred to enforcement notice ECF 454/98. The contravener in this case was Joseph Attard of Xaghra and was in respect of quarry S04 where an extension was made without permit. MEPA in this case had prosecuted because in spite of the enforcement notice the quarrying had continued. There had been a decision by the court of first instance and another by the court of appeal. The decision was that the quarry had to be restored within three months with a €60 daily penalty in default. The case is still open.

“Replying to questions by Dr John L Gauci, witness said that presently no stone quarrying could be carried out because the area is scheduled. The Malta Resources Authority receives the yearly fees from quarry operators while MEPA is the regulatory body. Since the minerals subject plan had been suspended in 2011, MEPA relies on police licences to see if quarrying can be done. But the police licence regulated the operators not the site. If the land is scheduled MEPA is authorised to stop further quarrying even though the payment of the licence was in order.

“Replying to questions by Dr Tatianne Scicluna Cassar, Mr Gafa' stated that Joseph Attard had two notices issued. One regards the extension already mentioned before number 454/98 and the other 1309/98 is about the opening of a new quarry without permit. The new quarry is not linked to the old quarry but is in the same area. The new quarry is scheduled. He confirmed that quarrying can be carried out in that part of the quarry that is not scheduled. Replying to a question by the Chairman Mr Gafa' stated that the court judgement mentioned earlier was about the new quarry. He could not state whether the old quarry was exhausted or not, but he did not see any problem if it was used to quarry stones. At this point he indicated on the aerial photo shown quarry SG4 and reiterated that quarrying could be done here. Quarrying on the other quarry 1309/98 cannot be carried out and goes against the court decision. The quantification of the amount of stone left in quarries is done by the MRA.

“Dr Tatianne Scicluna Cassar on behalf of the contracting authority contended that both bidders had submitted only the MRA licence with their bids and neither of them, appellant and preferred bidder had produced the MEPA permit and the evaluation board had no remit to investigate whether the quarries were exhausted or not since they were covered by a valid permit. After all the MRA licence is renewed each year and the preferred bidder submitted a valid licence.

“Ms Miriam Micallef Sultana Id. No 122362M from the Malta Resources Authority said that there is no relation between the licence issued by the MRA which is a commercial licence and the MEPA permit. Unless objections are raised, the quarrying licences are renewed each year without verifying whether the resources have been exhausted. The Authority has no resources to check if a quarry has been exhausted. The Land Use is the competence of MEPA and the permits issued by MEPA and MRA are not interchangeable. Regarding appellant Joseph Attard, she confirmed that he has a valid licence on QSG4, valid up to March 2014.

“Ms Aimee Brincat Id. No 29181M, Unit Manager Enforcement Directorate under oath said that she could not testify about whether a quarry was exhausted or not. Quarry SG4 was covered by a police licence. It was up to the operators to restore and fill in a quarry once it was exhausted. From the photo shown to her she said that she could not tell whether the quarry in question was filled in or not.

“Dr Tatianne Scicluna Cassar intervened and submitted that the evaluation board had to see whether the bidders' quarries were covered by a permit and did not have to investigate whether a particular quarry was exhausted or not.

“Ms Aimee Brincat continued that she could not identify the quarry in question from the photo. MEPA relied on the GIS layer for identification, and this was not available here. Before granting permits MEPA requires the submission of quantification surveys of the minerals remaining in the quarry. She could only state whether the quarry was filled in or not following a site inspection. Enforcement notices are only issued following infringements of planning regulations. If the quarry is covered by a valid licence then quarrying may take place; however a depth to which quarrying is permitted is noted in the licence. QSG4's licence is still valid. There are certain permits for development that require restoration of quarries when these are exhausted; other permits do not require this. In the file there is no indication if the quarry QSG4 has been restored/filled-in.

“The Chairman remarked that some time should be allowed to enable witness to verify whether any part of the old quarry was restored and to establish the amount of material is left in the same quarry.

“Ms Aimee Brincat continued testifying saying that it was not the competence of MEPA to establish this. She would however confirm whether the original perimeters of the quarry have been enlarged. The permits used to be issued

on the operator and not on the site itself. When necessary, when lateral expansion is suspected, the authority asks the operator to submit a technical survey report to prove that he had not over-extended the original perimeter.

“Mr Gordon Grech Id. No 26777G, Compliance and Enforcement Officer at MEPA, under oath stated that he was aware of PA 5043/07 but was not involved in it. He however knew the site where it is located. On being shown a photo dated 2012 and asked to identify quarry QSG4 he confirmed. He could not state whether the old part of QSG4 is has been filled in.

“Mr Charles Gafa' recalled said that parts of the quarry SG4 may be filled in with quarrying material waste but other parts can still be used. There is no MEPA permit 011 the old part of the quarry since only a police licence was required when it started operating, and the quarry was covered. The police licence has now been transferred, and is managed by the MRA.

“Quarries operating before the Planning Authority Act in 1992 had to have a police permit. This permit was however issued on the owner of the quarry and not on the quarry itself. Today MEPA permits are issued on the quarry itself and not on its owner. Replying to a question by the Chairman, he said it was not illegal to operate a quarry having only the police permit without a MEPA permit. No police licence has been revoked and all licences have been recognized by MEPA. The general praxis, and not specific to the case in question, both police licences and MEPA permits for quarries were issued with a condition to restore the land after the exhaustion of the mineral. Presently MEPA requires the submission of a PDS showing how the restoration would be done and in certain cases an impact assessment. In the present case a PDS has been demanded on the new quarry, The old quarry is covered by an MRA permit but has no MEPA permit, but operating the quarry is legal. The depth of the quarrying is regulated by the permit. Stone from the old quarry can be delivered. Part of the old quarry has been exhausted and restored but the rest is still usable for quarrying purposes.

“Dr Tatianne Scicluna Cassar on behalf of the contracting authority submitted that both bidders had been administratively and technically compliant. To satisfy clause 6.1.2 both bidders had submitted a valid MRA licence. Hence the award criteria according to clause 32.1 remained the price factor - the cheapest offer. The preferred bidder's offer was the cheapest and thus the evaluation board rightly awarded the quotation to him.

“Dr John L Gauci on behalf of the appellant submitted that it has to be seen whether the preferred bidder was compliant or not He contended that the quarry in question was exhausted. He made a hypothetical question whether anyone who had a usable quarry would go through criminal indictment for illegally quarrying stone from another quarry if he had such a usable quarry? He contended that the PCRB should consider the probability. He insisted that the preferred bidder had been illegally obtaining stone from the new illegal quarries. He insisted that the Board appoints an expert to determine whether the quarry is usable or not.

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“Dr Tatianne Scicluna Cassar insisted that the PCRB should see whether the evaluation board had abided with the regulations when adjudicating the quotation.

“At this point the hearing was closed.”

L-ewwel aggravju

15. Is-socjeta` appellanti tispjega l-bazi ta' dan l-aggravju hekk:

“... .. huwa proceduralment inammissibbli u kontra kull sens ta' gustizzja li l-Bord ta' Revizjoni seduta stante jiddeciedi li ser iqabbad espert tekniku u mbaghad fid-decizjoni finali jiddeciedi li ma hemmx il-htiega ghal din il-hatra.”

“... .. is-smigh quddiem il-Bord ta' Revizjoni gie konkluz bid-decizjoni tal-Bord ta' Revizjoni li sejjer iqabbad espert tekniku sabiex jinvestiga jekk il-barriera l-antika ghadhiex tista' tintuza biex minnha jitqatta' gebel tal-franka (nonostante l-fatt li gie ampjament stabbilit illi l-appellat ilu jqatta' gebel tal-franka mill-estensjoni illegali, mill-inqas sa mill-1998 – b'dan illi espona ruhu ripetutament ghal sanzjonijiet amministrattivi u kriminali).”

16. Is-socjeta` appellanti tilmenta mill-fatt li d-decizjoni dwar il-hatra ta' dan l-espert ma gietx riflessa fir-rijassunt inkorporat fid-decizjoni; ghall-kuntrarju giet deskritta bhala talba maghmula mill-istess socjeta` appellanti u li giet michuda. Hija tissottometti li ghal din ir-raguni d-Decizjoni Appellata ghandha tigi dikjarata nulla. Is-socjeta` appellanti tissenjala li l-allegazzjoni taghha tista' “... .. *facilment jigi kkonstatat permezz tal-produzzjoni tal-audio-recording tas-seduta*”.

17. Is-socjeta` appellanti tissottometti li anke l-istess Bord hass il-htiega li jigi stabbilit il-punt jekk mill-barriera antika fizikament ghadux jista' jitqatta'

gebel, u fuq dan il-punt irreferiet ghar-rimarka li ghamel ic-*Chairman* fis-seduta.

18. Is-socjeta` appellanti tghid li l-Bord bhala entita` gudizzjarja jew kwazi gudizzjarja ghandha ssegwi d-dettami ta' gustizzja naturali, u *“m’huwiex lecite li wara li kien il-Bord stess, seduta stante li ddecieda li kien ser jahtar espert tekniku u kkonkluda s-smigh fuq dan il-punt, li jirrinfacca l-partijiet b’decizjoni kuntrarja fuq dan il-punt”*.

19. Hija ticcita wkoll sentenza moghtija minn din il-Qorti fl-ismijiet **B’Grima & Sons Limited v. Transport Malta et**, deciza fil-11 ta’ Awwissu 2014, li kienet tikkoncerna wkoll il-hatra ta’ espert tekniku mill-Bord ta’ Revizjoni, fejn intqal hekk:

“L-investigazzjoni hija parti mill-process tal-istruzzjoni tal-kaz, haga li ghandha ssir ‘bil-miftuh’ u li, biex tinzamm l-ugwaljanza bejn il-partijiet, ghandha tkun disponibbli ghall-partijiet qabel id-decizjoni, ghax korp gudizzjarju jew kwazi-gudizzjarju ma ghandux isejjes id-decizjoni tieghu fuq fatti li ma jkunux gew mgharrfa lill-partijiet qabel id-decizjoni, sabiex ikollhom opportunita` li jikkontrollawhom u jikkumentaw fuqhom.”

20. Is-socjeta` appellanti tghid li fil-kaz odjern mhux talli hi ma kellha ebda kontroll dwar is-sejbien tal-perit tekniku, izda talli *“addirittura spiccat rinfaccjata b’decizjoni fil-mertu li fiha l-Bord mar kontra dak li ddecieda [dwar il-hatra ta’ espert] waqt is-smigh innifsu.”*

21. Id-Direttur appellat irreagixxa ghal dan l-aggravju billi jghid li:

“... .. mhux minnu illi l-Bord ta' Revizjoni kkonkluda li se jqabba espert tekniku sabiex jibbaza d-decizjoni tiegħu. Anzi wara s-smigh tal-provi, il-Bord ta' Revizjoni kien konvint li l-Bord tal-Agudikazzjoni għamel xogħlu tajjeb u li l-intimat Joseph Attard kien qiegħed jopera b'licenzja valida.”

22. Kien fid-dawl tal-fatt premess li s-socjeta` appellanti bdiet tinsisti mal-Bord li jinhatar espert tekniku għax seta' kien hemm probabbilita` u mhux certezza li l-barriera setgħet kienet ezawrita. Min-naha tiegħu, id-Direttur appellat kien oggezzjona għat-talba għan-nomina ta' espert tekniku peress li ma kienx fil-kompetenza tal-Bord li dan jivverifika jekk il-barriera li minnha kien ser jitqatta' l-gebel biex jissuplixxi l-gebel Franka skont it-tender, kinitx ezawrita. Il-funzjoni tal-Bord kienet limitata għall-verifika jekk il-Bord ta' Agudikazzjoni mexiex skont ir-regolamenti fl-evalwazzjoni tiegħu. Jirrizulta li l-Bord qabel mas-sottomissjoni tad-Direttur.

23. Min-naha tiegħu, l-appellat Joseph Attard jgħid:

“Il-Bord fl-ebda mument ma ddecieda li ser iqabba espert tekniku, izda kif huwa d-dritt tiegħu li jagħmel, ic-*Chairman* qal li jekk ikun il-kaz jirriserva d-dritt li jqabba espert tekniku.

“Illi l-hatra ta' espert tekniku hija wahda fakultattiva u fid-diskrezzjoni tal-Bord. Kuntrarjament għal dak li argumentat, il-Bord qatt ma kellu xi obbligu specifiku illi jahtar esperti.”

24. Ikompli jgħid li:

“Anke *dato se non concesso* kieku kellu jigi accettat illi verament il-Bord jew xi membru tiegħu kien iddecieda jew ta lil wiehed x'jifhem li kien ser jinkariga espert, tali decizjoni setgħet tigi revokata u irtirata mill-istess Bord jekk dak il-Bord mill-fatti u mid-dispozzjonijiet tax-xhieda ossia provi li għandu quddiemu seta' jasal u hass li seta' jasal għall-konkluzjoni li tagħmel gustizzja.”

25. Inoltre dan l-appellat jissenjala l-fatt li “fil-minuti” tas-seduta tat-3 ta’ Gunju 2014 imkien ma hemm indikat illi ttiehdet decizjoni li gie mahtur espert. Ghall-kuntrarju fl-ahhar tas-seduta hemm notat illi “*at this point the hearing was closed*”. Imkien ma hemm indikat li s-seduta kienet qed tigi differita ghall-hatra ta’ espert tekniku jew ghal xi ezami jew relazzjoni tal-istess. Dan jikkombaccja mal-osservazzjoni maghmula mill-istess Bord fid-decizjoni tieghu dwar il-parametri tal-kompetenza tieghu.

It-tieni aggravju

26. Is-socjeta` appellanti esprimiet hekk dan l-aggravju:

“Fil-meritu d-decizjoni hija hazina in kwantu – kuntrarjament ghal dak li iddecieda l-Bord – il-Bord huwa kompetenti biex jiddeciedi jekk offerta hijiex teknikament konformi jew le u, inoltre, bil-preponderanza tax-xhieda imressqa quddiem il-Bord, il-Bord kellu jasal sabiex jiddeciedi illi l-offerta tal-appellat Joseph Attard m’hijjex konformi.”

27. Hija tkompli tghid li l-appell –

“... .. kien wiehed preciz u fattwali, fis-sens li minkejja kull dikjarazzjoni li seta’ ghamel, l-appellat [Joseph Attard] ma seta’ qatt jikkonforma ruhu ma’ klawnsola 6.1.2 tad-Dokument tal-Offerta stante li l-barriera minn fejn kien ser jissupplixxi l-gebel tal-franka mhux talli m’ghandhiex permess, talli ilha mill-1998 sal-lum kolpita b’avviz ta’ infurzar.

“Illi, ghalkemmm jista’ jkun minnu li fi stadju ta’ aggudikazzjon, il-Bord ta’ Aggudikazzjoni ma kienx a konoxxenza ta’ dan l-istat ta’ fatt, dan ma jfissirx li l-Bord ta’ Revizjoni m’ghandux il-poter (u l-obbligu) jiddikjara li l-offerent rakkomandat mhuwiex teknikament konformi.

“... .. altrimenti, il-Bord ta’ Revizjoni ikun qed jirriduci lilu innifsu ghal ezercizju superficiali ta’ *rubber stamping*, bir-riskju li min ikun qed ifittex rimedju effettiv dan jibqa’ ma jottjenihx, u dan bi ksur lampanti tal-ligijiet u direttivi applikabbli.”

28. F'dan ir-rigward huwa jaghmel referenza ghall-osservazzjoni maghmula minn din il-Qorti fil-kawza deciza minn din il-Qorti fit-30 ta' Mejju 2014, fl-ismijiet **Strand Electronics Limited v. Direttur tal-Corporate Services** li: *“kien id-dover tal-Bord li hu stess janalizza l-offerta ta' Office Group Ltd. u jiddeciedi b'decizjoni motivata, jekk l-offerta kienetx jew le technically compliant”*.

29. Tghid li fil-kaz odjern hi “ressqet evidenza bizzejjed li l-appellat Joseph Attard qed jopera minn estensjoni ta' barriera minghajr permess kolpita minn avviz ta' infurzar li ghadu effettiv sallum stante li l-operazzjoni illegali ghadha ghaddejja sallum il-gurnata”. Ghal din ir-raguni l-Bord kellu jiskwalifika l-offerta tal-istess Joseph Attard.

30. Min-naha tieghu d-Direttur appellat jirrispondi ghal dan l-aggravju billi jissenjala l-fatt li fil-proceduri quddiem il-Bord l-appellanti ressqet diversi impjegati tal-Malta Resources Authority [MRA] u tal-MEPA biex jixhdu dwar l-allegazzjoni taghha li l-barriera tal-appellat Joseph Attard kienet ezawrita, izda din l-allegazzjoni ma gietx provata u kien ghalhekk li l-Bord cahad l-appell.

31. Fil-fatt l-istess appellat ghandu aktar minn barriera wahda, fosthom dik imsejjha l-barriera l-antika [QS-G4] li hi munita b'licenzja valida, u ohra gdida li, ghalkemm hija fl-istess area tal-barriera antika, ma tifformax parti mill-

barriera l-antika. Hija din il-barriera l-gdida li hi skedata u li ghalhekk hija milquta minn avviz ta' infurzar mahrug mill-MEPA.

32. Mal-offerta tieghu lid-Direttorat l-appellat Joseph Attard indika l-barriera antika bhala l-barriera li minnha kien ser jiehu l-gebel tal-franka sabiex jonora l-obbligi tieghu skont is-sejha. Ix-xhieda li ssejju mill-appellanti xehedu li l-barriera antika hi koperta minn licenzja valida u ghalhekk jista' jitqatta' l-gebel minnha. Id-Direttur appellat jirreferi ghax-xhieda li ta Charles Gafa`, impjegat tal-MEPA, ix-xhieda li tat Miriam Micallef, impjegata mal-MRA u x-xhieda li tat Aimee Brincat, Unit Manager Enforcement Directorate mal-MEPA li kkonfermaw li l-licenzja fuq il-barriera l-antika hija valida. Kien abbazi ta' dawn il-provi li l-Bord wasal ghall-konkluzjoni li l-offerent rakkomandat kellu barriera li kienet munita bil-permess u li setghet topera, filwaqt li l-avvizi tal-infurzar mahruga mill-MEPA ma kienux jirrigwardjaw din il-barriera.

33. L-appellat jispjega li tant kemm l-appellanti hasset li l-licenzja tal-MRA kien l-aktar dokument importanti fl-offerti li kemm hi, kif ukoll l-appellat Joseph Attard, mal-offerta taghom ipprezentaw il-licenzja tal-MRA biss u mhux il-permess tal-MEPA, u dan sabiex jissodisfaw ir-rekwizit fl-Artikolu 6.1.1 tal-quotation document.

34. L-appellat Joseph Attard b'risposta ghal dan l-aggravju tal-appellanti, jghid li l-fatt li hemm avviz ta' enforzar fuq barriera ohra tieghu ma jfissirx li hu

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ma jistax jahdem legalment mill-barriera l-antika li hi munita bil-permess necessarju. Hu jkompli jargumenta hekk:

“... .. l-esponenti wera illi hu kien debitament munit bil-permessi u awtorizzazzjonijiet kollha necessarji biex legalment iqatta' l-blat. Dawn il-permessi huma validi u legali u ghadhom qed jigu uzati presenzjalment u l-inviti illi ghamlet il-kumpanija appellanti sabiex jigi investigat jekk ghadux qed jitqatta' blat mill-estensjoni illegali tmur lil hinn mill-kompetenza tal-Bord u oltre hekk tmur lil hinn mill-ispirtu u r-rekwiziti ta' dak l-*advert* partikolari. Il-Bord hassu konvint li r-rekwiziti kollha gew debitament sodisfatti u dan b'dokumentazzjoni minn entitajiet pubblici u kompetenti ga la darba dan il-kuntratt jigi fis-sehh.”

Konsiderazzjonijiet tal-Qorti

35. Mir-rijassunt maghmul fid-decizjoni appellata ta' x'intqal fis-seduta tat-3 ta' Gunju 2014, jirrizulta li s-socjeta` appellanti ressqet diversi xhieda li kkonfermaw il-fatt minnha allegat li l-offerent rakkomandat kien qed jopera estensjoni illegali tal-barriera antika [SG4], u barriera ohra illegalment.

36. Minn dan il-fatt, is-socjeta` appellanti tnissel l-argument li, ladarba dan l-appellat qed jopera barriera ohra illegalment, u li dwar dan kien diga` gie kkunndant mill-Qorti tal-Appell Kriminali, allura hija logika l-inferenza fattwali li l-barriera l-antika hija ezawrita, u ghalhekk l-offerent rakkomandat ma jistax jezegwixxi l-obbligu tieghu li jissupplixxi gebel tal-franka jekk mhux mill-estensjoni tal-barriera SG4, liema estensjoni mhix koperta minn permess, jew mill-barriera l-ohra li m'ghandhiex permess stante li hi f'zona skedata. Dan ifisser li l-offerent rakkomandat, ghalkemm ghandu barriera licenzjata, xorta wahda ma jistax ikun *administratively u technically compliant*, kemm ghax

m'ghandux permess li jopera l-barrieri illegali, kif ukoll ghax mill-barriera l-antika ma jistax jaqta' gebel izjed.

37. Dwar dan il-fattur ix-xhud Charles Gafa`, rapprezentant tal-MEPA, hu rappurtat li qal li *“Stone from the old quarry can be delivered. Part of the old quarry has been exhausted and restored, but the rest is still usable for quarrying purposes”*.

38. Din il-Qorti hi tal-fehema li dan l-argument sollevat mis-socjeta` appellanti kellu jigi investigat *pro funditus* mill-Bord, fis-sens li l-Bord kellu jistabbilixxi jekk mill-barriera l-antika kienx hemm gebel bizzejjed sabiex l-offerent rakkomandat jezegwixxi l-obbligu tieghu skont it-tender. Anke l-istess Bord, permezz tac-Chairman tieghu, hass li kellu jirrimarka fir-rigward li *“... ..
... some time should be allowed to enable witness to verify whether any part of the old quarry was restored and to establish the amount of material is left in the same quarry.”*² Din l-Qorti tosserva li fic-cirkostanzi tal-kaz dan kien kumment floku u kellu jigi segwit mill-Bord, ghax ghandu jirrizulta car li l-hsieb wara l-klawsola numru 6.1.2. m'huwiex biss li jezigi li l-offerent rakkomandat ikollu barriera munita bil-permessi necessarji, izda li dik l-istess barriera tkun teknikament vijabbli fis-sens li minnha jkun jista' jinqata' gebel sufficjenti sabiex l-offerent rakkomandat ikun fil-pozizzjoni li jezegwixxi bis-shih l-obbligu assunt minnu. Zgur li m'huwiex l-ispirtu wara l-imsemmja klawsola li

² Sottolinear ta' din il-Qorti

tippermetti sitwazzjoni fejn l-offerent rakkomandat, ghalkemm ikollu barriera licenzjata, jissupplixxi l-gebel minn barriera ohra li hu qed jopera illegalment u li fuqhom hemm avvizi ta' infurzar.

39. Ghalhekk fic-cirkostanzi li kellu quddiemu l-Bord kien fl-obbligu li jassigura li din is-sitwazzjoni ma tavverax ruhha, u dan seta' jsir billi, kif osserva l-istess *Chairman*, jinghata zmien lix-xhieda biex jaghmlu din il-verifika dwar il-barriera numru SG4, jew jinnomina espert kif ghandu dritt li jaghmel skont il-ligi, u precizament skont ir-regolament 85 [7] li fil-parti rilevanti tieghu jghid:

“(i) The Review Board shall be empowered to call witnesses, to administer oaths and to engage any government official or non-governmental expert to assist in its investigation”³

40. Il-Bord stess fid-decizjoni tieghu jirrikonoxxi li l-punt sollevat mis-socjeta` appellanti ghandu certu validita`, tant li fid-decizjoni appellata jghid li “... .. *this Board considers this contention as debatable*” izda imbaghad ikompli jghid li “[it] does not fall within the scope and jurisdiction of this Board. It is the duty of the Contracting Authority to ensure, that the supply of Franka Stone is being obtained by the Preferred Bidder from a licensed quarry”.

41. Il-Qorti tosserva li ghandu jirrizulta car mil-ligi li l-funzjoni tal-Bord, m'hijjex limitata semplicement biex jara “*whether the adjudication process was carried out in a just and transparent manner*” jew “*whether the award was in accordance with the Public Procurement Regulations*”. Il-funzjoni tal-Bord hija

³ Sottolinear ta' din il-Qorti

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aktar wiesa minn hekk fis-sens li hu ghandu d-dmir li jinvestiga hu l-ilmenti li jittressqu quddiemu. Huwa ghalhekk li l-ligi taghti lill-Bord poteri wesghin, inkluza l-fakolta` li jinnomina espert, biex jikkonduci l-investigazzjoni tieghu.

42. Ferm il-premess, din il-Qorti hi tal-fehma li fil-kaz odjern il-Bord kellu jinvestiga l-ilment tal-appellant *pro funditus* bil-poteri moghtija lilu mil-ligi, *multo magis* fid-dawl tad-depozizzjonijiet tax-xhieda mismugha minnu.

43. Ghaldaqstant it-tieni aggravju tas-socjeta` appellanti huwa fondat u ser jigi milqugh. Tenut kont ta' dan, m'huwiex il-kaz li din il-Qorti tkompli tiehu konjizzjoni tal-ewwel aggravju.

Decide

Ghar-ragunijiet fuq indikati, tilqa' l-appell tas-socjeta` Bugeja Bros. [Gozo] Ltd. u, filwaqt li tirrevoka d-decizjoni appellata, tordna li l-atti odjerni jintbaghtu lura quddiem il-Bord sabiex dan ikompli jinvestiga l-allegazzjoni tas-socjeta` appellanti li l-barriera l-antika nru. SG4 hija ezawrita u, fil-kaz negattiv, jinvestiga jekk ghandhiex bizzzejjed gebel biex l-offerent rakkomandat ikun jista' jissodisfa l-obbligi tieghu skont it-*tender document*. Imbaghad il-Bord, ghandu jghaddi biex jiddeciedi l-appell fil-meritu.

L-ispejjez ta' dan l-appell ghandhom jigu sopportati miz-zewg appellati in solidum u fi kwoti ugwali bejniethom.

< Sentenza Finali >

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