



MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF

SILVIO CAMILLERI

ONOR. IMHALLEF

TONIO MALLIA

ONOR. IMHALLEF

JOSEPH AZZOPARDI

Seduta ta' l-14 ta' Lulju, 2015

Appell Civili Numru. 95/2015/1

Dimbros Ltd (C32506)

v.

Is-Segretarju Permanenti fi hdan il-Ministeru ghall-Affarijiet Ewropej u t-Twettiq tal-Manifest Elettorali

Il-Qorti:

Dan hu appell imressaq fit-18 ta' Marzu, 2015, mis-socjeta` Dimbros Limited wara decizjoni datata 26 ta' Frar, 2015, moghtija mill-Bord ta' Revizjoni dwar kuntratti Pubblici (minn hawn 'l quddiem imsejjah "il-Bord") fil-kaz referenza MEAIM/012/2014 (kaz numru 781).

Dan il-kaz huwa marbut mas-sejha ghall-offerti li hareg il-Ministeru ghall-Affarijiet Ewropej u t-Twettiq tal-Manifest Elettorali "*for the provision of cleaning services at the premises pertaining to the Ministry for European Affairs and Implimentation of the Electoral Manifesto, using Environmentally Friendly Cleaning Products and Equipment*". Ghal dan it-tender applikaw diversi entitajiet, fosthom is-socjeta` Dimbros Ltd. u s-socjeta` TF Services Limited, liema socjeta` giet maghzula bhala l-offerent preferut; l-offerta tas-socjeta` Dimbros Ltd. giet imwarrba ghax ma tissodisfax il-kriterji teknnici tas-sejha. Is-socjeta` Dimbros Ltd. ma qablitx ma' din id-decizjoni u ressqet appell quddiem l-imsemmi Bord li b'decizjoni tas-26 ta' Frar, 2015, cahad l-appell u kkonferma d-decizjoni tal-Ministeru koncernat. Id-decizjoni tal-Bord hija s-segwenti:

"Having noted the Appellant's objection, in terms of the 'reasoned letter of objection' dated 18th December 2014, and also through Appellant's verbal

submissions during the hearing held on 12th February 2015, had objection to the decision taken by the pertinent authority, in that:

- a) "Appellant contends that his offer was in fact technically compliant and wished to point out that the Evaluation Board could have been inadvertently misled by the literature submitted by Appellant. However, same listed the actual products which were to be applied in the tender service.
- b) "Appellant claims that, his offer was also the cheapest and the Evaluation Committee could have asked for clarifications.

"Having considered the Contracting Authority's verbal submission during the hearing held on 12th February 2015, in that:

- a) "The Contracting Authority, although accepting the clarifications given by Appellant with regards to the acceptable use of 'Robo' bleach, Appellant still failed with regards to the technical specifications of 'WC Net Extra White'.
- b) "Appellant failed to submit the list of risk phrases for the furniture cleaner, as was requested in the tender document.
- c) "The Evaluation Board were in duty bound to follow the technical requirements as specified in the tender document and in this regard the Contracting Authority could not ask for a clarification on technical details which should have been submitted by Appellant.

"Reached the following conclusions:

- "1. This Board, after hearing credible submissions from the technical aspect, from the Contracting Authority, justifiably opines that since this was a green tender, the Evaluation Board were obliged to adhere strictly to the technical specifications as dictated in the tender document and as required in accordance with European Union Regulations. Although this Board notes that Appellant did in fact list and identify the products to be applied by same in 'Appendix 1', he did not submit the list of 'risk phrases of the

furniture cleaner'. This Board does not uphold Appellant's first contention.

- “2. With regards to Appellant's second contention, this Board opines that Appellant was well aware of the required technical ingredients of the products to be utilised. In this regard, the Evaluation Committee could not ask for missing information/documentation which was dictated in the tender document and not submitted by Appellant. This would have resulted in a 'rectification'. In this regard this Board does not uphold Appellant's second contention.

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

Is-socjeta` rikorrenti Dimbers Ltd. appellat mid-decizjoni tal-Bord ghax issostni li l-prodotti li indikat ghall-uzu minnha waqt it-twettiq tas-servizz, kienu fil-fatt jilhqu ir-rekwiziti teknici kif mitluba.

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

Ikkonsidrat:

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Illi mill-ezami tal-atti jidher li l-kwistjoni qamet fuq erba' prodotti offeriti mis-socjeta` rikorrenti li allegatament ma kienux kompattibbli teknikament mas-sejha. Dawn huma Rexoguard Disinfectant, Weiman Furniture Cleaner, WC Net Extra White u WC Net Intense, u Robo Bleach u WC Net Bleach Gel. Is-socjeta` rikorrenti tissottometti illi l-ahhar zewg prodotti ma gewx fil-fatt, offruti, ghalkemm il-letteratura teknika taghhom giet fil-fatt sottomessa (allegatament bi zball) mal-offerta taghha. Jigi osservat, pero`, li din is-socjeta` indikat fuq il-lista tal-prodotti li kienet behsiebha tuza WC Net minghajr ma specifikat it-tip ta' prodott partikolari. Il-Bord ra li *r-range* ta' dan il-prodott huwa vast, u whud mill-prodotti ma kienux *environmentally friendly* u b'hekk qies li dan il-prodott kif offrut ma jissodisfax il-kriterji tas-sejha. Jekk is-socjeta` rikorrenti kienet behsiebha tuza biss id-WC Net Energy-Descaler, kif qed tghid fir-rikors tal-appell taghha, dan kellha tindikah mill-ewwel u taghti informazzjoni fuq dak il-prodott biss u mhux tindika *r-range* kollha u taghti informazzjoni fuq il-prodotti kollha. Is-socjeta` rikorrenti kellha sa mill-bidu toffri prodotti kif mitluba fis-sejha, u ma tistax, issa tbiddel il-parametri tal-offerta taghha stess billi taghzel hi l-Bord x'kellu jikkonsidra mill-offerta taghha u x'kellu jwarrab. Ebda offerent ma ghandu jinghata l-fakolta` li jaghmel tibdiliet fl-offerta tieghu wara li jkun ra x'iddecieda l-Bord tal-Evalwazzjoni.

Fir-rigward tal-prodott Rexoguard, il-fatt li dan il-prodott qed jithalla jidhol Malta ghax approvat mill-awtorita` kompetenti, il-Malta Competition and Consumer Affairs Authority, (l-MCCAA), ma jfissirx li hu kompattibbli ma' dak rikjest fis-

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sejha għall-offerti. Inoltre, is-socjeta` rikorrenti kellha tressaq il-litteratura teknika relatata ma' dan il-prodott mal-offerta, u mhux tistenna li l-awtorita` kontraenti tara minn fejn se tottjeni hi l-informazzjoni dwar il-prodott. L-offerti jridu jigu evalwati biss a bazi tad-dokumentazzjoni prezentata mill-offerenti, u l-awtorita` kontraenti ma għandha ebda obbligu tfittex hi informazzjoni biex tagħmel tajjeb għan-nuqqas tal-offerenti. Kieku, anzi, tagħmel hekk, tkun qed tmur kontra l-principji ta' trasparenza u ta' ugwaljanza li jgħaddu l-evalwazzjoni tal-offerti għall-kuntratti pubblici.

Kif qalet il-Qorti tal-Gustizzja tal-Unjoni Ewropeja fil-kaz **Sc Enterprise Focused Solutions SRL v. Spitalul Judetean de Urgenta` Alba Julia** (Kawza numru C-278/14) deciza fis-16 ta' April 2015:

“L-obbligu ta' trasparenza huwa partikolarment mehtieg biex tassigura li ma jkun hemm ebda riskju ta' arbitrarjeta` min-naha tal-awtorita` kontraenti (ara, fir-rigward tal-Artikolu 2 tad-Direttiva 2004/18, is-sentenza SAG ELV Slovensko et, C-599/10, EU:C:2012:191, punt 25 kif ukoll għurispudenza ccitata).

“Madankollu, din il-mira ma tintlahaqx jekk l-awtorita` kontraenti tista' tegħleb il-kundizzjonijiet li tkun stabbiliet hija stess. Ghalekk, huwa projbit li awtorita` kontraenti timmodifika l-kriterji tal-ghoti ta' kuntratt matul il-procedura tal-ghoti. Il-principji ta' ugwaljanza fit-trattament u non-diskriminazzjoni kif ukoll l-obbligu ta' trasparenza jkollhom, f'dan ir-rigward, l-istess effett fir-rigward tal-ispecificazzjonijiet teknici.

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“Ghaldaqstant, il-principju ta' ugwaljanza fit-trattament u l-obbligu ta' trasparenza jipprojbixxu l-awtorita` kontraenti milli tirrifjuta offerta li tissodisfa l-ezigenzi tal-avviz ghall-offerti u li tibbaza d-decizjoni taghha fuq ragunijiet li ma humiex previsti fl-avviz (sentenza Medipac – Kazantzidis, C-6/05, EU:C:2007:337, punt 54).

“Konsegwentement, l-awtorita` kontraenti ma tistax tipprocedi wara l-pubblikazzjoni ta' avviz ghall-ghoti ta' kuntratt billi taghmel modifika fl-ispecificazzjoni teknika ta' wahda mill-elementi tal-kuntratt, bi ksur tal-principji ta' ugwaljanza fit-trattament u ta' non-diskriminazzjoni kif ukoll tal-obbligu ta' trasparenza. Huwa irrelevanti, f'dan ir-rigward, li l-element li tirreferi ghalih din l-ispecificazzjoni ma ghadux jigi manifatturat jew ma ghadux disponibbli fuq is-suq.”

Dan ifisser illi l-awtorita` kontraenti trid timxi mad-dettalji tal-prodott kif ipprezentati mill-offerent, u ma tistax tissuplixxi hi ghan-nuqqasijiet li jirrizultaw. Jekk is-sejha tesigi certi specificazzjonijiet teknici dawn iridu jirrizultaw “mill-atti”, kif jinghad f'termini gudizzjarji, u mhux minn tfittix band'ohra li jista' jaghmel il-Bord.

L-istess jista' jinghad ghall-prodott Weiman Furniture Cleaner illi fir-rigward tieghu s-socjeta` rikorrenti ma ssottomettietx il-*list of risk phrases* hekk kif kien rikjest li jaghmel skont is-sejha ghall-offerti. Ir-*risk phrases*, li jemanaw minn Regolament tal-Unjoni Ewropeja, u hemm accenn specifiku ghalihom fil-klawsola 3.2 – punt 1.2 tal-ispecificazzjonijiet teknici tas-sejha, huma lista ta' frazijiet li jindikaw in-natura tar-riskji marbuta ma' sustanzi uzati fil-prodott. Is-socjeta` rikorrenti tghid li l-prodott gej mill-Kanada u l-prodott kien igib l-lista ta'

risk phrases skont il-klassifikazzjoni Kanadiza; tghid ukoll illi l-prodott thalla jidhol Malta mill-awtorita` kompetenti. Dan, pero`, mhux rilevanti ghax il-lista kellha tkun konformi ma' dik tal-Unjoni Ewropeja.

Din il-Qorti taqbel mas-sottomissjoni tal-Ministeru koncernat li l-prodott seta' jigi offrut, pero` kien neccessarju illi mal-offerta tal-prodott tigi sottomessa l-lista ta' *risk phrases* kif mehtiega bir-Regolament 1272/08 tal-Unjoni Ewropeja u kif indikat fis-sejha ghall-offerti, biex il-Bord ikun jista' jqabbilhom mal-lista ta' *risk phrases* li ma kienux permessibbli skont is-sejha ghall-offerti. Ghall-istess ragunijiet li ssemew qabel, is-socjeta` rikorrenti kienet obligata li tissottometti l-informazzjoni kollha rikjesta mis-sejha ghall-offerti. Ma kienx obbligu tal-awtorita` kontraenti li tfittex din l-informazzjoni u lanqas kien il-kompitu tal-MCCAA illi tipprovdni din l-informazzjoni, u l-Bord ta' Evalwazzjoni kien prekluz milli jqis offerta b'informazzjoni nieqsa.

Fl-ahhar nett, ghalkemm hu veru li kellu jigi ppreferut min joffri l-orhos offerta, u tas-socjeta` rikorrenti kienet hekk l-orhos, din il-konsiderazzjoni trid titqies fost l-offerti li kienu *technically compliant*, u darba li l-offerta taghha ma kienetx lahqet l-ispecificazzjonijiet teknici kollha, l-offerta ma kellhiex tigi kkonsidrata.

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Ghaldaqstant ghar-ragunijiet premissi, tidisponi mill-appell ta' Dimbros Ltd. billi tichad l-istess u tikkonferma d-decizjoni li ta l-Bord ta' Revizjoni dwar il-kuntratti pubblici fis-26 ta' Frar 2015, bl-ispejjez jithallsu mis-socjeta` rikorrenti appellanti.

< Sentenza Finali >

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