MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF -- AGENT PRESIDENT

NOEL CUSCHIERI

ONOR. IMHALLEF

JOSEPH AZZOPARDI

ONOR. IMHALLEF

MARK CHETCUTI

Seduta ta' l-24 ta' Lulju, 2015

Appell Civili Numru. 158/2015/1

Wara d-decizjoni tal-Bord ta' Revizjoni Dwar Kuntratti Pubblici numru 2043/2014

Grange Security [Malta] Ltd. (C63720)

v.

1. **Direttur Generali Tad-Dipartiment tal-Kuntratti;**
2. **Signal 8 Security Services Malta Ltd.**

Preliminari

1. Dawn huma: provvediment fuq talba maghmula mis-socjeta` Grange Security [Malta] Ltd. ["l-Appellanti"] fl-udjenza tal-14 ta' Lulju 2015 ghan-nomina minn din il-Qorti ta' espert tekniku, kif ukoll appell tal-istess socjeta` minn decizjoni tat-23 ta' April 2015 tal-Bord ta' Revizjoni dwar Kuntratti Pubblici ["il-Bord ta' Revizjoni"] imwaqqaf taht ir-Regolamenti tal-2010 dwar il-Kuntratti Pubblici, illi cahad appell tal-istess Appellanti minn decizjoni illi l-kuntratt ghall-provvista ta' *Security Service on the Campus of the University of Malta and other University Designated Sites* jinghata lis-socjeta` appellata *Signal 8 Security Services Malta Ltd ["Signal"]*.

Fatti

2. Il-fatti relevanti huma dawn. Saret sejha mid-Dipartiment tal-Kuntratti ["id-Dipartiment"] f'isem l-Universita` ta' Malta ["l-Universita`"] ghal offerti ghall-provvista ta' servizz ta' sikurta`. Fost il-kundizzjonijet tas-sejha hemm dik intestata *"Criteria for Award"* li taqra hekk:

> "The sole award criterion will be the price. The contract will be awarded to the cheapest priced tender satisfying the administrative and technical criteria" [9.1].

3. Ghal din is-sejha dahlu ghaxar offerti fosthom l-Appellanti li giet s-sitt wahda fl-ghazla, filwaqt li s-socjeta` appellata *Signal* rebhet it-tender peress li l-offerta taghha kienet l-irhas wahda.

4. B'ittra datata 12 ta' Marzu 2015 l-Appellanti ressqet oggezzjoni quddiem il-Bord ta' Revizjoni u talbet li "l-awarded tender tkun kancellata u l-process tal-istess tender jinfetah mill-gdid bis-salvagwardji kollha kontra prezzijiet ta' natura prekarja" Ir-raguni principali tal-oggezzjoni taghha giet imfissra hekk mill-istess Appellanti:

> "L-awarded tender hija materjalment below cost ghaliex il-prezz sottomess ikopri **biss** il-Labour [workers] Costs; dan naturalment ifisser illi l-ispejjez operational u fixed kollha [eg. Communication; Transport; Fuel; Maintenance; Uniforms; Depreciation] ma humiex factored in u konsekwenzjalment l-awarded tender hija ***Below Cost*** u allura ghandha l-*badges* kollha ta' *tender* prekarja."

Id-Decizjoni tal-Board

5. Il-Bord ta' Revizjoni, wara li sema' is-sottomissjonijiet verbali wasal ghad-decizjoni li qed tigi hawn riprodotta fl-intier taghha:

> "This Board
>
> "Having noted the Appellant's objection in terms of the "Reasoned letter of objection" dated 12th March 2015 and also through the appellant's verbal submissions during the public hearing held on the 21st April 2015 had objected to the decision taken by the pertinent authority, in that:
>
> "a) The appellant company contends that althought the cheapest compliant bidder determined the award criteria of this tender, the preferred bidder's quoted rate could lead to precarious working conditions, as the same quoted rates (by the legal basic labour costs.
>
> "Having considered the contracting authority's "Reasoned letter of reply" dated 1 April 2015, in that:
>
> "a) The Contracting Authority contends that the Evaluation Committee had abided by the Court of Appeal's decision, in that since the tenderer was fully compliant as it was the cheapest, yet at the same time conformed with the parameters of the minimum hourly labour rate as dictated by the Government

at the time of the evaluation process, the same evaluation committee had acted correctly.

"Reached the following conclusions:

"1. This Board, after taking into consideration the Hon. Court of Appeal's decision and also this same Board's subsequent decisions maintains that, it is not the competence of either the evaluation committee of the contracting authority nor the competence of the Public Contracts' Review Board to delve into the fact whether the rate quoted by the preferred bidder will result in a breakeven or loss situation. If the rate quoted by the preferred bidder represented an hourly quoted rate for a service to the contracting authority and falls within the parameters of the stipulated minimum hourly labour rate, the cheapest rate is quite rightly chosen. In this regard, this Board does not uphold the appellant's contention;

"2. This Board would pertinently point out that although the preferred bidder's quoted rate, which is within the parameters of the stipulated minimum hourly rate to be paid to the employees of the said preferred bidder, might not seem to considered as commercially viable, the preferred bidder has indulged himself to abide by the local stipulated rules with regards to precarious emplyment conditions. In this regard, it is the onus of the contracting authority to ensure and monitor that once the awarded tendered services are carried on, these stipulations are strictly adhered to.

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

<u>L-Appell</u>

6. L-Appellanti tghid li "il-bazi tal-appell taghha huwa wiehed semplici bbazat fuq il-fatti ossia illi r-rati li gew kwotati minn min rebah it-tender kienu baxxi wisq u kienu ghalhekk tali li jwasslu ghall-provvizjoni ta' servizz bi prekarju". Dwar il-fatt li skont it-*tender document* l-uniku kriterju ghall-ghoti tat-tender kien l-irhas prezz, tghid li "bhala prassi wiehed irid ihares dejjem lejn it-totalita` tat-tender u apparti l-prezz kwotat wiehed irid jaghmel analizi dwar jekk il-prezz kwotat huwa [huwiex] reali". Hija tirreferi ghar-regolament 21.4

tar-Regolamenti Dwar il-Kuntratti Pubblici fejn jghid li l-Bord ta’ Revizjoni *“ghandu jezamina l-kwistjoni b’mod gust u ekwu”.*

7. Tissottometti wkoll li:

> “… huwa fallaci l-argument li l-contracting authority kellha ‘sole award criterion was te cheapest price tendered’ ghaliex jekk dan huwa minnu, dan imur djametrikament oppost ghan-necessita` li jinghata piz lejn il-kwalita` tas-servizz li l-appellanti kien ta tul medda ta’ tnax-il sena bejn kumpanija u ohra.”

8. In bazi ghall-premess l-Appellanti qed titlob li din il-Qorti tirrevoka d-decizjoni appellata u tordna li t-tender in meritu jerga’ jinhareg bid-dovuti kawteli u ordnijiet ai finijiet ta’ xoghol prekarju; ukoll u subordinatament u bla pregudizzju ghall-ewwel talba l-Appellanti titlob li tithassar ukoll ir-rakkomandazzjoni maghmula mill-Bord ta’ Revizjoni dwar id-depozitu mhallas b’mod li dan ghandu jigi rifuz lill-istess Appellanti.

9. Fis-seduta tal-14 ta’ Lulju 2015 l-Appellanti talbet li din il-Qorti tahtar espert tekniku sabiex jezamina d-dokument tas-sejha u jistabbilixxi jekk bir-rati hemm indikati is-servizz mitlub ikunx jista’ jinghata minghajr il-prekarjat.

10. Fil-qosor l-appellat Direttur jissenjala li skont id-dokument tas-sejha l-kriterju li fuqu kellha ssir l-ghazla fost l-offerenti kien il-prezz. Dan kien l-uniku kriterju impost u ghalhekk, peress li s-socjeta` appellata tefghet l-irhas offerta, il-kuntratt inghata lilha.

11. Jissottometti wkoll li t-tezi tal-Appellanti kienet bazata fuq il-kongettura li s-socjeta` appellata ser thaddem lill-impjegati taghha taht kundizzjonijiet prekarji. Isostni wkoll li la darba r-rata offruta kienet teccedi dik ta’ €5.78 fis-siegha stipulata fil-kundizzjonijiet, allura dik l-offerta ma setghetx tigi mwarrba. Mizjud ma’ dan hemm il-fatt li s-socjeta` appellata intrabtet li thares il-ligijiet lokali dwar il-kundizzjonijiet tax-xoghol.

12. Id-Direttur ikompli jispjega li, minkejja l-allegazzjonijiet maghmula mill-Appellanti dwar il-prekarjat, ma gie pruvat xejn fir-rigward, u ghalhekk it-tezi tal-Appellanti tiddghajjef fid-dawl tal-principju, skolpit fl-Artikolu 562 tal-Kodici ta’ Organizzazzjoni u Procedura Civili, li min jallega fatt ghandu l-oneru tal-prova ta’ dak il-fatt. Fil-kaz odjern il-lanjanza tal-Appellanti hija bazata biss fuq kongettura.

13. Ghar-ragunijiet premessi d-Direttur qed jitlob li t-talba tal-Appellanti ghar-rifuzjoni tad-depozitu mhallas minnha quddiem il-Bord ta’ Revizjoni ghandha tigi michuda kif ghandu jigi michud ukoll l-appell maghmul minnha, bl-ispejjez a kariku tal-Appellanti.

14. Ir-risposta tas-socjeta` appellata hija f’diversi aspetti simili ghal dik prezentata mid-Direttur appellat. Tghid li, apparti mill-fatt li r-rata kwotata minnha hija skont il-ligi, ma tressqet l-ebda prova in sostenn tal-allegazzjoni

maghmula mill-Appellanti dwar il-prekarjat. Barra minn hekk l-offerenti obbligaw ruhhom li josservaw il-kundizzjonijiet fil-ligi relatati mal-impieg fil-ghoti tas-servizz relattiv u li r-rata kwotata tkun konformi mar-rata stabbilita mill-Gvern specifikatament biex jelimina l-prekarjat fil-kuntratti pubblici u li l-*iStatement on Conditions of Employment* tkun giet iffirmata u prezentata mill-offerenti.

15. Dwar il-kwalita` tas-servizz is-socjeta` appellata tghid li huwa ovvju li ghandu jinghata servizz tajjeb ghal prezz tajjeb minghajr ma jkun hemm xoghol prekarju. Inoltre, il-possibilita` ta’ profitt jew telf huwa fattur irrelevanti fl-ghazla tal-offerent, ghax dak li jorbot huma l-kundizzjonijiet stipulati fid-dokument tas-sejha u fil-kaz odjern dak li jorbot huwa li l-irhas offerta tkun tissodisfa l-kriterji teknici u amministrattivi rikjesti. M’huwiex rikjest ukoll li ssir xi analizi dwar jekk il-prezz kwotat huwiex wiehed reali.

16. Ghaldaqstant is-socjeta` appellata qed titlob li l-appell ghandu jigi michud fl-intier tieghu u d-decizjoni tal-Bord ta’ Revizjoni tigi konfermata fl-intier taghha.

Konsiderazzjonijiet tal-Qorti

17. Dwar it-talba ghall-hatra ta’ perit tekniku f’dan l-istadju, din il-Qorti taghmel is-segwenti osservazzjonijiet.

18. Fl-ewwel lok jigi senjalat li din il-Qorti bhala qorti ta' revizjoni u bhala regola m'ghandhiex tisma' provi li setghu nstemghu jew li kienu diga' mismugha mill-Bord tar-Revizjoni. Kif diga` osservat din il-Qorti fil-kawza **S.Steelshape Limited v. Direttur tal-Kuntratti** *deciza 7 ta' Awissu 2013* "..bhala qorti tat-"tielet istanza" f'dawn it-tip ta' kazijiet ma hux mistenni li din [il-Qorti] tidhol biex tezamina d-dettalji teknici ta' kull offerta biex tara jekk offerta partikolari tissodisfax jew le r-rekwiziti teknici mitluba fis-sejha ghall-offerti li jmorru lil'hinn mill-kompetenza taghha. Il-kompitu ta' din il-Qorti hi li tara jekk fil-funzjonijiet tieghu l-Bord kienx konformi mal-ligi.

19. Fit-tieni lok, jinghad li dan il-punt dwar il-prekarjat gie espressament sollevat mill-Appellanti bhala aggravju quddiem il-Bord tar-Revizjoni u gie trattat kif indikat fid-decizjoni tal-istess Bord, liema Bord hu kompost minn persuni teknici, fosthom ic-Chairman li [skont il-verbal maghmul mid-Direttur appellat] huwa komputista.

20. Fit-tielet lok, ma saret ebda talba ghall-hatra ta' espert tekniku quddiem il-Bord ta' Revizjoni.

21. Fir-raba' lok, u b'aktar enfazi jinghad li tali talba m'hijiex gustifikata stante li, kif ser jigi spjegat aktar 'il quddiem f'dan il-gudizzju, l-iskop li offerent ikun dahhal is-sejha tieghu m'huwiex necessarjament dak li jaghmel profit

imma jista’ jkun hemm ragunijiet ohra li ghalkemm mhux relatati ma’ qligh xorta wahda huma ta’ natura kummercjali. Barra minn hekk, ladarba l-offerent preferut tefa’ l-irhas offerta din ma setghetx legalment tigi skartata mill-Bord ta’ Revizjoni.

22. Ghar-ragunijiet premessi din it-talba mhux gustifikata u ser tigi michuda.

Ikkonsidrat ulterjorment

23. Rigward il-meritu tal-appell, din il-Qorti tibda billi tissenjala principji relevanti identifikati mill-gurisprudenza lokali, u cioe` li

> “…il-profitt mhux necessarjament l-uniku fattur wara l-offerti… ir-rebh tat-tender jista’ jkun ta’ beneficju ghas-socjeta` li tirbhu, mhux biss mil-lat ta’ profitt immedjat, izda anke mil-lat ta’ reputazzjoni tas-socjeta` fid-dinja kummercjali. …. [ir]-raguni ghalfejn kumpanija tidhol ghal kuntratt hija rrelevanti ghall-fini tad-decizjoni li jrid jiehu l-Bord ta’ Revizjoni.”*[ara Kerber Securities Ltd. vs Wasteserv Malta Ltd u Signal Services Malta Limited, App.S 162/2014, deciz fit-30 ta’ Lulju 2014].* [Inoltre]. “Din il-Qorti tenfasizza li ladarba s-socjeta` appellanti ssodisfat is-*‘sole award criterion’* dwar rati/prezzijiet, la l-Evaluation Board u lanqas il-Bord ta’ Revizjoni ma kellhom is-setgha li jiddipartixxu minn din il-kundizzjoni principali stipulata fit-tender” *[Ibid.]*

24. Dan il-principju gie wkoll affermat fil-kawza **SR. Environmental Solutions Limited v. Dipartiment tal-Kuntratti**, deciza 6 Frar 2015 fejn din il-Qorti osservat li “ghandu jinghad in principju li kull min huwa involut fil-process tas-sejha pubblika, inkluz ukoll dawk li huma mghobbija bl-oneru li jiggudikaw is-sejha, huma kollha marbutin bil-kundizzjonijiet li jkunu imnizzla fid-dokumentazzjoni tas-sejha.”

25. B'referenza ghal dik il-parti tal-aggravju fejn l-Appellanti issenjalat li l-Bord ta' Revizjoni *"ghandu jezamina l-kwistjoni b'mod gust u ekwu"* skont ir-regolament 21.4 fuq citat, din il-Qorti tosserva li dan ma jimmilitax kontra l-principji fuq esposti u ma jaghti ebda setgha jew jitfa' dmir fuq il-Bord biex fl-ezami tal-kaz jiddipartixxi minn dak stipulat fid-dokument tas-sejha. Il-mod gust u ekwu li ghandu jimxi bih il-Bord huwa fil-paramentri tal-*vires* tieghu delinejat mill-kundizzjonijiet stipulati fid-dokument tas-sejha.

26. It-tieni parti tal-aggravju huwa bazat fuq l-allegazzjoni tal-Appellanti li r-rata offruta mis-socjeta` appellata necessarjament twassal ghat-thaddim ta' nies bil-kundizzjonijiet tal-prekarjat, stante li r-rata offruta mis-socjeta` appellata, minkejja li tissupera r-rata stipulata fid-dokument tas-sejha, hija baxxa wisq u kif indikat fir-*reasoned letter of objection* tal-Appellanti "hija *below cost* u allura ghandha l-*badges* kollha ta' tender prekarju."

27. Fir-rigward din il-Qorti tosserva li din l-allegazzjoni hija gratuwita, kemm ghax ma giex provat li s-socjeta` appellata fil-passat hadmet bil-prekarjat, kif ukoll ghax kif fuq spjegat l-ghan li s-socjeta` appellata tiehu t-tender mhux necessarjament ikun marbut mal-profitt li jista' jsir minnu. Dan l-aspett gie ukoll trattat mill-Bord ta' Revizjoni li, fid-decizjoni tieghu osserva li, fid-dawl tal-tal-gurisprudenza ta' din il-Qorti, m'huwiex rikjest li l-offerent preferut jipprova li t-thaddim tat-tender bir-rati offruti minnu ikun *"commercially viable".* Inoltre,

dan l-offerent intrabat li josserva *"the local stipulated rules with regards to precarious employment conditions."*

28. Maghdud mal-premess, hemm il-konsiderazzjoni l-ohra li hi bazata fuq il-principju li min jallega jrid jipprova l-fatt minnu allegat. Fil-kaz odjern din il-prova ma saritx; u ghar-ragunijiet fuq indikati l-fatt li r-rata offruta hija irhisa ma jwassalx necessarjament li t-thaddim tat-tender ser ikun bil-prekarjat. Kif din il-Qorti osservat fil-kawza **Joe Micallef & Son Express Skip Services Limited v. Id-Direttur tal-Anzjani u Kura fil-Komunita` et**, deciza fis-27 ta' Gunju 2014[1]:

> "Din kwistjoni pero' li tolqot l-esekuzzjoni tal-kuntratt, u kif intqal mill-Qorti Suprema tal-Kanada fis-sentenza *Double N Earthmovers Ltd. vs Edmonton [City]* deciza fil-25 ta' Jannar 2007: 'to impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties! Whether or not the bidder is at the time of tender capable of performing as promised is irrelevant in the light of the bidder's legal obligation to do so once it's bid is accepted.' Mill-kumpless tac-cirkostanzi tal-kaz, f'kaz ta' sejha li ma tinsistix mod iehor, mhux mehtieg li offerent ikun, meta jitfa' l-offerta, f'posizzjoni li jwettaq dak li obbliga ruhu li jwettaq, basta li dak li jkun impenja ruhu li jwettaq is-servizz skont id-dettami tal-ligijiet vigenti tal-pajjiz kif fil-fatt gara f'dan il-kaz. Darba dak li jkun issodisfa dak rikjest fid-dokument tas-sejha, jibqa' *"technically compliant"* u l-offerent rebbiegh ikun marbut li fil-qadi ta' dmirijietu josserva l-ligijiet kollha tal-pajjiz."

29. Tenut kont ta' dak li gie sottomess fil-kaz odjerna dan il-bran japplika perfettament ghal kaz in dizamina.

30. Ghaldaqstant l-aggravji mressqa mill-Appellanti huma ingustifikati u ser jigu michuda.

[1] Citata mid-Direttur appellat

<u>Decide</u>

Ghar-ragunijiet premessi tiddeciedi dwar it-talba maghmula mill-Appellanti fl-udjenza tal-14 ta’ Lulju 2015 billi tichadha; tiddeciedi dwar l-appell billi tichdu, bl-ispejjez kollha a kariku tal-Appellanti.

< Sentenza Finali >

---------------------------------TMIEM---------------------------------