

Qorti tal-Appell (Kompetenza Inferjuri)

Imhalef Anthony Ellul

Appell numru:- 43/2012AE

Toad Management Services Limited

Vs

Synthesis Management Services Limited u Regjun Xlokk

L-Erbgha, 7 ta' Ottubru, 2015.

Toad Management Services Limited appellat minn decizjoni li l-Bord ta' Revizjoni ta fit-8 ta' Ottubru 2012. Il-kaz jitratta dwar tender ghal provista ta' Authorised Officer Services pubblikat fl-24 ta' Jannar 2012 u ghalq fil-15 ta' Marzu 2012. Il-Bord iddecieda hekk:-

"a. finds against the appellant company as, in this particular instance, this Board considers the said company as having been ineligible due to it not meeting the pertinent tender requirements referred to in claus 12.1, Eligibility/Selection Criteria, namely

'Evidence of relevant experience in carrying out services of a similar nature over the past 3 years including the nature and value, as well as contracts in hand and contractually committed;

The minimum value of projects of a similar nature completed shall not be less than 50,000 per annum;

The minimum number of projects of a similar scope/nature completed in the last 3 years must be at least 3 in number'.

At this juncture this Board cannot but express its concern as regards the fact that the evaluation board simply proceeded with the evaluation of this tender albeit being cognizant of the fact that the appellant company was not administratively compliant. Undoubtedly, this Board opines against the decision taken by the evaluation board wherein the latter, arbitrarily and against the remit entrusted to its members, decided not to resort to disqualification but rather resorted to ensure that each individual evaluator would take this issue into account in the allocation of marks.

b. nevertheless, recommends that the entire process be annulled and a fresh call to be reissued as this Board considers such process to have been vitiated by the highly abnormal number of people and entities who had prior knowledge of the content of the tender document. The effect of the issue relating to the doubts which have been raised as to whether the same appellant company or its directors/employees had itself/themselves prior knowledge is perhaps mitigated – as much as it remains pertinent – and this considering the fact that this tender was also published in the EU Journal and, as a result, it was open to bidders from other EU member states. Indeed, this lack of manifestation of an equitable procedural treatment amongst all potential bidders – namely between those who had access and others who did not have such (a) generic access to the same content distributed in various correspondence as evidenced by Ms Lautier and (b) handpicked access to such content as evidenced by Mr Bonavia – renders this entire process as flawed.

c. feels that the purpose of evaluating a tender on a Most Economically Advantageous Tender basis was to have a number of evaluators examining the technical aspects of each bid independently from one another and then the points allocated by each evaluator would be aggregated to arrive at the final mark. As a result, the fact that all the evaluators in question awarded the same number of points to both tenderers on all the different criteria that featured in the Technical Evaluation Grid led to the evident conclusion that points were allocated by each evaluator after having been agreed to amongst themselves. This Board contends that the way the technical evaluation was carried out defeated the scope of the contracting authority resorting to the Most Economically Advantageous Tender procedure and, in the Board's opinion, as a consequence, tainted the technical evaluation process.

d. opines that the contracting authority, as well as the evaluation board, could have administered, deliberated and decided upon this particular tender in a more cautious, transparent and effective manner.

e. suggest that the evaluation board to be appointed by the contracting authority to evaluate the tenders submitted in the fresh call will consist of new members in no way connected with the tender under review.

f. also recommends that the deposit paid by the same appellant company for the appeal to be lodged should be reimbursed as, all things being equal, it became evident that the appellant company was not properly notified by the contracting authority as to the real reasons for it not being favourably considered".

L-aggravji tal-appellant huma:-

1. Il-Bord iddecieda li Synthesis Management Services Limited kienet ineligibbli biex tapplika ghat-tenders. Il-Bord ta' Revizjoni ma kellux imbaghad ihassar il-process billi jghid li l-process kien vizjat.
2. Il-Bord naqas milli jindirizza, bl-ghoti ta' ragunijiet, l-argumenti tal-appellanti dwar id-depozitu. Id-depozitu ta' €2,430 li hallset l-appellata ma jissodisfax ir-rekwiziti tal-ligi.
3. Il-Bord kien zbaljat meta ddikjara li l-process ghandu jigi annullat u sostitwit b'sejha gdida. Din id-decizjoni tidher li giet bazata fuq stat ta' fatt ipotetiku li l-Bord issollewa *ex officio*. Il-Bord jidher li ddecieda li gialadarba l-process tat-tender kien miftuh ghal kumpanniji kollha Ewropej u mhux biss ghal dawk lokali, billi d-ditti barranin ma kellhomx access ghall-istess taghrif kif kellhom ditti lokali, il-process kien vizjat.

L-appellata Synthesis Management Services Limited wiegbet billi:-

1. Ipproponiet eccezzjoni preliminari li r-rikors tal-appell hu null ghaliex prezentat *fuori termine* (Regolament 85(5) tal-Avviz Legali 296 tal-2010).
2. Tat ir-ragunijiet ghalfejn l-aggravji tal-appellanti ghandhom jigu michuda.

Inoltre, pproponiet ukoll appell incidentali fir-rigward ta' dik il-parti tad-decizjoni fejn il-Bord ikkonkluda li Synthesis Management Services Limited kienet "*ineligible due to it not meeting the pertinent tender requirements referred to in clause 12.1, Eligibility/Selection Criteria.....*". Argumentat li fil-

process quddiem il-Bord kienet biss l-appellanti li ssollevat dak il-punt u li din il-materja kellha semmai tigi sollevata fl-istadju tat-*tendering process* meta kien quddiem il-bord ta' valutazzjoni u mhux fl-istadju tal-appell quddiem il-Bord.

Ghall-appell incidental, l-appellanti ma wegbitx.

Ir-Regjun Xlokk wiegeb ghall-appell (26 ta' Novembru 2012) u appell incidental (14 ta' Dicembru 2012)¹.

Il-qorti rat l-atti kollha. Waqt is-seduta tal-4 ta' Marzu 2014 id-difensuri tal-partijiet rispettivi ddikjaraw:-

"[...] li qed jistrieħu fuq dak li ssottomettew kemm fir-rikors tal-appell, kif ukoll fir-risposti tal-appell" (fol. 106).

Ghalhekk il-qorti qeghda taghti sentenza.

1. **Nullita tar-rikors tal-appell peress li gie pprezentat tardivament.**

- 1.1 Id-decizjoni tal-Bord ta' Revizjoni nghatat fit-8 ta' Ottubru 2012. Fl-1 ta' Novembru 2012 l-appellanti pprezentat ir-rikors tal-appell.
- 1.2 Skond regolament 85(5) tar-Regolamenti tal-2010 dwar il-Kuntratti Pubblici (Avviz Legali 296 tal-2010), kif kien jaqra fiz-zmien li l-appellanti pprezentat l-appell:-

*"Kull min ikollu interess u jhoss ruħu aggravat b'xi decizjoni li tittieħed mill-Bord skond dan ir-regolament jista' jirreferi l-kwistjoni quddiem il-Qorti ta' l-Appell (Gurisdizzjoni Inferjuri) kif imwaqqfa skond l-artikolu 41(6) tal-Kodici ta' Organizazzjoni u Procedura Civili **fi zmien ghoxrin gurnata kurrenti mid-decizjoni finali tal-Bord ta' Revizjoni**."*

Il-qorti trid tapplika l-ligi. Regolament li hu car u ma jhalli l-ebda lok ta' dubju. Ghalhekk m'hemmx lok ta' interpretazzjoni².

¹ Preliminarjament ecepixxa n-nullita' tal-appell incidental fl-eventwali li l-appell ta' Toad jigi ddikjarat null.

² Il-qorti tara kontradizzjoni bejn dan ir-regolament u r-regolament 21(5) tal-istess Avviz Legali, li jitratta kuntratti fejn il-valur ma jaqbizx €120,000, li kien jipprovdi li appell quddiem il-Qorti tal-Appell (Kompetenza Inferjuri) ghandu jsir fi zmien **sittin (60) gurnata**. Dan apparti li mill-atti ma jirrizultax jekk il-partijiet interessati gewx infurmati bid-data meta ser tinghata d-decizjoni mill-Bord ta' Revizjoni ghalkemm ir-regolamenti ma jipprovdux li ghandu jinghata xi avviz simili.

Kien biss bl-Avviz Legali 65 tal-2013 li r-regolament 85(5) gie emendat fis-sens li l-ghoxrin gurnata ghandhom jiddekorru minn meta d-decizjoni **ssir pubblika**. Il-qorti trid tibbaza d-decizjoni tal-eccezzjoni preliminari fuq kif kienet il-ligi fiz-zmien li gie propost l-appell gialadarba l-Avviz Legali 65 tal-2013 m'ghandux effett retroattiv.

- 1.3 Il-Qorti tal-Appell³ fil-kaz **Dr Kenneth Grima nomine vs Direttur tal-Kuntratti**, deciz fit-28 ta' Gunju 2013, osservat hekk dwar ir-regolament 85(5):-

*"Illum, l-appell isir lil din il-Qorti (Jurisdizzjoni Superjuri) u dan l-ahhar proviso tnehha, pero`, xorta wahda l-appell irid isir fi zmien ghoxrin gurnata kurrenti mid-decizjoni li fiha d-decizjoni finali ssir pubblika. **Hu ovvju li meta l-ligi tirreferi ghad-decizjoni finali, qed tirreferi, f'kull kaz, ghad-decizjoni li l-Bord jiehu fuq il-meritu li jkun tressaq quddiemu. Il-Bord ta' Revizjoni ma jiddecidix hu fuq l-aggudikazzjoni, izda jiddeciedi biss fuq it-thassib u l-ilmenti li jitressqu quddiemu, u meta l-Bord iddecieda fuq it-thassib tas-socjeta` appellanti fil-11 ta' Frar, 2013, il-Bord ta decizjoni finali fuq dak il-meritu, u l-kompetenza tieghu spiccat. Kieku appelli jkunu jistghu jsiru sa ghoxrin gurnata wara l-aggudikazzjoni finali mhux biss il-ligi kienet tghid dan b'mod car, u mhux biss ukoll anke dan l-appell huwa intempestiv, izda kien jistultifika l-iskop tal-"pre-contractual remedies" kif imfisser aktar qabel.***

La darba l-Bord, fuq l-ittra ta' thassib tas-socjeta` rikorrenti, ta d-decizjoni tieghu fil-11 ta' Frar, 2013, l-appell kellu jsir fi zmien ghoxrin (20) jum minn dakinhar, u la dan ma sarx, dak il-punt hu issa res judicata ghall-partijiet"(enfazi mizjuda).

Fil-kaz in ezami wkoll bid-decizjoni tal-Bord ta' Revizjoni tat-8 ta' Ottubru 2012, l-appell li tressaq quddiemu gie determinat b'mod defenittiv. Id-decizjoni tal-Bord kienet finali.

- 1.4 Hu minnu li regolament 85(4) jipprovdi li:-

"Decizjoni tal-Bord ghandha tkun bil-miktub, tkun iffirmata mill-membri kollha tal-Bord u jkollha d-data, jiggu indikati fiha l-motivazzjonijiet li dik id-decizjoni tkun imsejsa fuqhom, u tigi notifikata lill-partijiet li jkollhom interess".

³ Kompetenza Superjuri.

Madankollu l-ghoxrin (20) gurnata stipulati f'regolament 85(5) m'ghandhom x'jaqsmu xejn man-notifika tad-decizjoni. Li kieku l-intenzjoni kienet li t-terminu tal-appell jiddekorri mid-data tan-notifika tad-decizjoni, f'regolament 85(5) hekk kien jinghad u mhux "[...] fi zmien ghoxrin gurnata kurrenti **mid-decizjoni finali tal-Bord ta' Revizjoni**".

- 1.5 Id-decizjoni finali tal-Bord ta' Revizjoni kienet it-8 ta' Ottubru 2012. Ghalhekk l-appell kellu jigi pprezentat sad-29 ta' Ottubru 2012⁴. Dan ifisser li l-appellanti pproponiet l-appell wara li kienu diga' skada t-terminu tal-appell. Ghaldaqstant l-appell hu null.

2. Appell Incidentali.

- 2.1 Gialadarba ser jigi deciz li l-appell hu null ghaliex prezentat tardivament, hekk ukoll jisfuma fix-xejn l-appell incidentali tal-appellata. F'dan ir-rigward issir riferenza ghas-sentenza tal-Qorti tal-Appell fil-kawza **Francis Xavier Aquilina vs Emanuel Portughes et nomine** tal-5 ta' Ottubru 1998⁵, fejn il-qorti osservat:-

"Fejn l-appell principali hu ddikjarat null allura jigi bla bazi wkoll l-appell incidentali li jiddependi minnu tant li l-ligi taghti d-dritt lill-appellat li juzufriwixxi u jinqeda b'appell li jkun sar minn sentenza. Appell jehtieg li jkun validament intavolat ghaliex altrimenti japplika l-principju quod nullum est nullum producit effectum".

- 2.2 Skond l-Artikolu 240 tal-Kap. 12, parti tista' tinqeda bl-appell li jsir minn sentenza sabiex tipproponi appell incidentali. Gialadarba l-appell hu null ghaliex prezentat wara t-terminu perentorju kontemplat f'regolament 85(5), l-appellat ma jistax jinqeda bl-appell biex jipproponi appell incidentali ghaliex **l-appell hu null**.

Ghal dawn il-motivi:-

1. **Tilqa' l-eccezzjoni preliminari ta' Synthesis Management Services Limited u tiddikjara li l-appell ta' Toad Management Services Limited hu null ghaliex prezentat *fuori termine*.**
2. **Tiddikjara li l-appell incidentali li pprezentat Synthesis Management Services Limited hu null gialdarba l-appell ta' Toad Management Services Limited gie ddikjarat null.**

⁴ Peress li t-28 ta' Ottubru 2012 kien il-Hadd.

⁵ L-appellat Regjun ta' Xlokk ghamel riferenza ghal din is-sentenza fit-twegiba li pprezenta fl-14 ta' Dicembru 2012.

Spejjez tal-appell a karigu tal-kumpannija appellanti filwaqt li spejjez relatati mal-appell incidental li huma a karigu tal-kumpannija appellata.

Anthony Ellul.