

QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF SILVIO CAMILLERI
ONOR. IMHALLEF GIANNINO CARUANA DEMAJO
ONOR. IMHALLEF NOEL CUSCHIERI**

Seduta ta' nhar il-Gimgha 30 ta' Ottubru 2015

Numru 15

Rikors numru 205/15

Dimbros Limited

v.

Alfred Galea u Kunsill Lokali Msida

Il-Qorti:

1. Dan huwa appell ta' Alfred Galea ["Galea"] minn deċiżjoni tal-15 ta' Mejju 2015 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti tal-2010 dwar il-Kuntratti Pubbliċi [L.S. 174.04], illi kienet laqgħet oġġezzjoni tas-socjeta *Dimbros Limited* ["*Dimbros*"] kontra deċiżjoni tal-Kunsill Lokali tal-Imsida ["il-Kunsill"] illi kuntratt għall-ġbir ta' skart goff jingħata lill-istess Galea.

2. Il-fatti rilevanti seħnew hekk: fl-14 ta' Diċembru 2014 saret sejha mill-Kunsill għal offerti għall-kuntratt "*for the collection of bulky refuse from Msida in an environmentally friendly manner*" ["il-Kuntratt"]. Fid-dokument tas-sejha jingħad illi:

"It is the intent of the Local Council to award Contracts on the basis of the most favourable Tenders, provided that the Tender has been submitted in accordance with the requirements of the Tender documents."

3. Saru offerti minn *Dimbros* u minn Galea. L-orħos offerta kienet ta' *Dimbros*, bil-prezz ta' żewġ euro u tmintax-il ċenteżmu (€2.18) kull ġabra, waqt illi l-prezz ta' Galea kien ta' ħames euro (€5.00) kull ġabra. Madankollu, il-kumitat maħtur mill-Kunsill biex iqis l-offerti irrakomanda illi l-Kuntratt jingħata lil Galea għal raġunijiet li fissirhom hekk:

"Il-Kumitat qabel li jintgħażel Alfred Galea u tiġi rifjutata l-offerta ta' *Dimbros* minħabba li l-offerta hija baxxa wisq. *Inoltre* jidher li *Dimbros Ltd* għandu żewġ *Default Notices* maħruġa minn Kunsilli Lokali dwar nuqqas fis-servizz. Dawn il-punti meħudin flimkien, il-Kumitat mhux konvint li jista' joffri servizz adekwat."

4. Il-Kunsill qabel mar-rakomandazzjoni għax:

"... .. ma qabilx li jista' jingħata servizz tajjeb b'dan il-prezz u għalhekk għażel lil Alfred Galea. Il-Kunsill approva. Intqal li l-*EU* ser tneħhi l-għażla tal-irħas offerta u l-Viċi Sindku qal li hemm Direttiva tal-*EU* li tgħid li jekk l-offera tidher baxxa wisq il-*contracting authority* jista' jirrifjutaha. Intqal li anke kien hemm xi *default notices*."

5. B'ittra tat-28 ta' Jannar 2014 il-Kunsill għarraf b'dan lil *Dimbros*.

6. *Dimbros* rressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta' Revizjoni b'ittra tal-5 ta' Frar 2015¹. Ir-raġunijiet għall-oġġezzjoni ġew imfissra hekk:

“The objection being raised by appellants lies in the fact that the decision taken by the Msida Local Council is unfounded in fact and at law.

“It is not in the remit of the Msida Local Council to decide the profit margin a tenderer ought to make. As has been repeatedly established by the Public Contracts Review Board and by the Maltese Courts, a tenderer may have a variety of reasons to even operate a tender at a loss. The important and most relevant consideration is that the tenderer who signs the final contract with the contracting authority honours the terms and conditions of the contract signed between the parties.

“The real reason for the Msida Local Council's decision to award the contract to Mr Alfred Galea is that Mr Alfred Galea has for a considerable number of years been the sole provider of the service in question within the locality of Msida.

“Moreover, the declaration that appellant's offer was too low to provide the requested service is disproved from the fact that other local councils are paying a cheaper price than that tendered by the recommended tenderer (*recte*, by the appellant) as for example: San Pawl €1.55; Mgarr €1.55; Naxxar €1.69; San Gwann €1.87; Mtarfa €1.80; Zurrieq €1.89.

“What the Msida Local Council seems to ignore is that, in the public procurement process, one is dealing with public funds which necessitates a higher level of transparency and compliance. This assertion is even more relevant when one considers that the contract is not a one year contract but a three year contract.

“... ..”

7. Fil-15 ta' Mejju 2015 il-Bord ta' Revizjoni iddeċieda hekk dwar l-oġġezzjoni ta' *Dimbros*:

“The Board,

¹ L-ittra oġġib id-data tal-5 ta' Jannar 2015 iżda din id-data hija żbaljata għax *Dimbros* ma setgħetx toġġezzjona kontra d-deċiżjoni qabel ma kienet mgħarrfa biha bl-ittra tat-28 ta' Jannar 2015. Fil-fatt l-ittra ta' oġġezzjoni waslet quddiem il-Bord ta' Revizjoni fil-5 ta' Frar 2015.

“Having noted the appellant’s objection, in terms of the “Reasoned Letter of Objection” dated 5th February 2015 and also through the appellant’s verbal submissions during the public hearing held on 7th May 2015, had objected [*sic*] to the decision taken by the pertinent authority, in that:

- “a) The appellant company maintains that although its offer was the cheapest, it had been discarded as the contracting authority considered the same to be too low;
- “b) The appellant maintains that the tender asked for a rate per collection of bulky refuse. Since the appellant has other contracts and the tender does not entail additional workforce, the appellant could quote a competitive rate;

“Having considered the contracting authority’s verbal submissions during the public hearing held on 7th May 2015, in that:

- “a) The contracting authority contends that under the new EU directive it is not necessary for the contracting authority to choose the cheapest tendered price but rather the most economical and advantageous bid. The evaluation committee, in this regard, considered the appellant’s bid too low to carry out efficiently the tendered works;
- “b) The contracting authority maintains that in order to provide the tendered service which approximately amounts to eight hours per week, the appellant had to increase the work force, so that there will be additional costs to the appellant; hence the reason why the evaluation committee considered the appellant’s rate as “too low”;

“Reached the following conclusions:

- “1. This board would refer to the Court of Appeal decision and subsequent decisions taken in similar cases by this same board, wherein it was clearly stated that it is not the competence of the evaluation committee of the contracting authority nor is it the jurisdiction of the Public Contracts Review Board to delve into the issue whether the appellant’s quoted rate will result in a loss or profit to the appellant. This board opines that it is the duty of the contracting authority to ensure that the service is provided to the satisfaction of the authority once the tender is awarded. In this regard, this board upholds the appellant’s first grievance;
- “2. With regards to the appellant’s second contention, this board, having heard credible submissions by the appellant, is justifiably convinced that the limited

number of hours which have to be allotted for the tendered service does not entail additional work force and this board also justifiably contends that, since the appellant company has other contracts, the limited number of hours to be allocated can surely be absorbed through the appellant's present work force. In this regard, this board upholds the appellant's second contention;

"3. This board would like to point out that it is true that, under the new EU Directive, the contracting authority is not obliged to select the cheapest offer; however, one has to take into consideration the type and frequency of service being tendered for. In this regard, this board does not uphold the contracting authority's first contention;

"4. With regards to the contracting authority's second contention, this board in this regard, this Board opines that no credible evidence was submitted which indicates that the appellant company will have to increase its workforce to enable the latter to carry out the service efficiently. In this regard, this board does not uphold the contracting authority's second contention

"In view of the above, this board finds in favour of the appellant company and recommends that:

"i) the appellant offer is to be reintegrated in the evaluation process;

"ii) the deposit paid by the appellant is to be reimbursed."

8. Galea ressaq appell mid-deċiżjoni tal-Bord ta' Revizjoni b'rikors tad-9 ta' Ġunju 2015 quddiem din il-qorti. L-aggravji huma (1) illi "l-Bord ta' Revizjoni iddeċieda, b'mod ħażin, illi awtorità kontraenti m'għandhiex ikollha d-diskrezzjoni li tevalwa jekk offerta hijiex waħda baxxa żżejjed"; u illi, f'kull każ, "id-diskrezzjoni użata mill-Kunsill Lokali Msida giet eserċitata b'mod korrett u skond il-liġi".

9. L-ewwel aggravju ġie mfisher hekk:

“Illi f’dan il-każ, l-awtortita kontraenti, u senjatement il-Kunsill Lokali Msida, wettaq u eserċita d-diskrezzjoni li tispetta lil bil-liġi f’dan il-qasam. Dan mhuwiex każ fejn wieħed joqgħod jispekula fuq tibdil ta’ Direttiva Ewropea u dwar kif semmaj din ser tkun trasposta fil-liġijiet ta’ Malta. Li jgħodd huwa l-liġi sostantiva (li naturalment tirispekkja d-direttivi applikabbli u l-insenjament tal-Qorti tal-Ġustizzja Ewropea) li tagħti l-jedd lill-awtoritajiet kontraenti li jeskludu offerti li jkunu baxxi wisq.

“Illi r-regolament 29 tar-Regolamenti dwar Kuntratti Pubblici (Avviż Legali 296 tal-2010 kif sussegwentement emendat jistabilixxi illi:

“29.(1)Awtorità kontraenti jkollha jedd tiċħad offerti li jkunu jidhru b’mod xejn normali bħala baxxi għar-rigward tal-ħidma li tkun ser issir:

“Izda l-awtorità kontraenti qabel ma tiċħad dawn l-offerti għandha titlob bil-miktub dettalji tal-elementi kostituttivi tal-offerta li hija tqis relevanti u għandha tivverifika dawk l-elementi kostituttivi billi tikkonsulta ruħha mal-offerent u tqis x’ikunu l-ispjegazzjonijiet li tkun irċeviet”

“Illi għalhekk ma għandu jkun hemm l-ebda dubju illi hija l-liġi stess li tagħti l-poter lill-awtoritajiet kontraenti li jeskludu offerti baxxi li jkunu jidhru mhux normali.”

10. Ir-regolament 29 tal-L.S. 174.04 ċitat minn Galea ġià huwa biżżejjed, waħdu, biex juri illi, safejn id-deċiżjoni tal-Kunsill kienet imsejsa fuq il-prezz li deherlu baxx wisq, il-Kunsill ma kellux is-setgħa li jwarrab dik l-offerta qabel ma jkun mexa kif irid il-*proviso* għal dak ir-regolament. Ukoll jekk il-Kunsill kellu s-setgħa li jwarrab l-orħos offerta, dik is-setgħa seta’ jinqeda biha biss jekk, qabel, ikun mexa kif trid il-liġi; la ma mexiex kif trid il-liġi, mela ma kellux is-setgħa li jwarrab l-orħos offerta u kien proċeduralment *ultra vires*.

11. L-ewwel aggravju huwa għalhekk miċħud.
12. Fit-tieni aggravju tiegħu Galea jgħid illi, fil-meritu, il-Kunsill inqeda sew bid-diskrezzjoni tiegħu u għalhekk il-Bord ta' Revizjoni ma kellux jissostitwixxi d-diskrezzjoni tiegħu għal dik tal-Kunsill.
13. Ġia` rajna, iżda, fil-konsiderazzjonijiet dwar l-ewwel aggravju, illi l-Kunsill kien proċeduralment *ultra vires* meta warrab l-orħos offerta bla ma mexa kif trid il-liġi fil-*proviso* għar-reg. 29 tal-L.S. 174.04. Għalhekk, ukoll li kieku fil-meritu kien minnu illi l-offerta ta' *Dimbros* kienet "b'mod xejn normali" baxxa għax-xogħol li għandu jsir, il-Kunsill ma kellux is-setgħa li jimxi kif mexa.
14. It-tieni aggravju wkoll huwa għalhekk miċħud.
15. Fl-añharnett il-qorti tosserva illi l-Bord ta' Revizjoni, korrettement, ma ddeċidiex illi l-kuntratt jingħata lil *Dimbros* iżda ordna illi l-Kunsill jerga' jqis l-offerta ta' *Dimbros* ("*the appellant offer is to be re-integrated in the evaluation process*"). Dan huwa korrett għax il-Kunsill għad irid iqis jekk ir-raġuni sekondarja mogħtija biex twarrbet l-offerta ta' *Dimbros* – li kontra din hemm xi *default notices* – hijjex biżżejjed biex, wañedha u mhux meħuda wkoll mal-prezz, titwarrab l-offerta, u, jekk le, u jekk il-Kunsill huwa tal-fehma li

I-offerta hija baxxa wisq meta mqabbla max-xogħol li jrid isir, il-Kunsill għandu jimxi kif irid il-*proviso* għar-reg. 29 tal-L.S. 174.04 qabel ma jasal għad-deċiżjoni tiegħu.

16. Il-qorti għalhekk tiċċad l-appell ta' Galea u tikkundannah iñallas l-ispejjeż relatiwi.

Silvio Camilleri
President

Giannino Caruana Demajo
Imħallef

Noel Cuschieri
Imħallef

Deputat Registratur
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