

QORTI TAL-APPELL

IMĦALLFIN

**S.T.O. PRIM IMĦALLEF SILVIO CAMILLERI
ONOR. IMĦALLEF TONIO MALLIA
ONOR. IMĦALLEF JOSEPH AZZOPARDI**

Seduta ta' nhar il-Ġimgħa 13 ta' April 2018

Numru 5

Citazzjoni numru 543/17

**Quattro Labs Limited (C-62642) f'isimha proprju u f'isem
OpenCampus GmbH (soċjeta` estera reġistrata
l-Ġermanja), it-tnejn formanti l-konsorzju Pixel Inx Consortium**

v.

- [i] Malta College of Art, Science and Technology [MCAST]**
- [ii] Id-Direttur tal-Kuntratti**
- [iii] Vertitech SA**

Dan hu appell imressaq fis-6 ta' Diċembru, 2017, mis-soċjeta` rikorrenti Quattro Labs Ltd. proprio et nomine wara deċiżjoni datata 16 ta' Novembru, 2017, mogħtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubbliċi (min hawn 'l quddiem imsejjaħ "il-Bord") fil-każ li għandu referenza CT 3036/2016 (każ numru 1100).

relating to the particular Tender and which could be enforced by the same, should the need arises;

- “b) The Appellant also insists that since the date of the award recommendation was after the expiry date of the Bid Bond, all offers were on equal footing in respect of expired guarantees and in this regard, the Appellant feels that he was discriminated by having his offer rejected on the grounds of alleged incorrect Bank Guarantee;
- “c) From information gathered by Pixel Inx Consortium, the latter maintains that there exist doubts as to whether Vertitech SA’s offer meets the “Experience” criteria as stipulated in the Tender Document.

“This Board also noted the “*Letters of Reply*” dated 19 October 2017, by the Department of Contracts and dated 20 October 2017 by the Malta College of Arts, Science and Technology and their verbal submissions during the Public Hearing held on 7 November 2017, in that:

- “a) The Contracting Authority maintains that the Appellant’s Bid Bond was not issued by the Bidder namely, Pixel Inx Consortium, but by one of the members forming the Consortium and in this respect, the Evaluation Board had no other option but to reject the Appellant’s offer;
- “b) The Malta College of Arts, Science and Technology also maintains that the relevant date on which the valid Bid Bond, complying with the Tender Specifications, was 20 June 2017 and the Evaluation Board assessed the Appellant’s Bid Bond validity prior to the date of award stage;
- “c) The Contracting Authority insist that if the Appellant has any doubts or suspicions as to whether the Recommended Bidder’s offer meets the “*Experience*” criteria, Pixel Inx Consortium, should produce the evidence to prove his alleged doubts.

“This same Board also noted the Testimonies of the witness namely:

- “1. Mr Matthew Castillo, duly summoned by pixel Inx Consortium;

“2. Mr Ronald Curmi, duly summoned by this same Board.

“This Board has also taken note of the documents submitted by Dr Joseph Camilleri which consisted of:

“1. The Financial Statements by Vertitech SA as at 31 December 2015;

“2. Screenshots from the Vertitech SA Website.

“This Board, after having examined the relative documentation and heard submissions made by the parties concerned, including the testimonies of the witnesses, opines that the Three Grievances raised by Pixel Inx Consortium should be considered in the following order:

“i) Bid Bond

“This Board refers to Clause 8.1 of the “*Instructions to Tenderers*”, wherein it was stated that:

“The Tender Guarantee must be an original and valid guarantee presented in the format available to peruse from mwww.etenders.gov.mt”

“From the specimen guarantee form, it is clearly denoted that the form itself requested the name of the actual Bidder to be given on the Bond and in this regard, this Board notes that such important information on the Bid bond was not made available by the Appellant.

“On the other hand, it must be pointed out that the actual Bidder is the Consortium which is not referred to in the guarantee. As had been decided in similar cases, this Board acknowledges the fact that Banks, in general, do not issue a guarantee unless the issues of such guarantee is well known to the Banking Institution.

“In cases where consortiums or joint ventures are specifically formed for the sole purpose of participating in a Tender, it is also acknowledged that one of the members of the Consortium or Joint Venture, issues such a guarantee. However, in such cases, the issued guarantee by whoever, must denote clearly that such a Bond is being issued on behalf of the Actual Bidder, in this case, on behalf of “*Pixel Inx Consortium*” and specifying also the Tender Reference. This is the only acceptable and justifiable way that such an issued Bond can be correlated directly to the particular

actual Bidder and Tender. In this particular case, this Board credibly notes that the specimen Bid Bond provided sufficient information to enable the submitted Guarantee to be in accordance with Clause 8.1 of the “*Instructions to Tenderers*”. This Board would emphasize that the conditions laid out in the Tender Document must be strictly adhered to and respected, so that any deviation therefore will constitute a breach of the Public Procurement Regulations.

“In this particular case, the actual Bidder who submitted the offer was the Consortium, that is, Pixel Inx Consortium and the Evaluation Board, quite appropriately, deemed that the Bond so submitted did not in any way, denote that the latter was made on behalf of the Consortium, irrespective of the fact that the same guarantee was issued in favour of the Malta College of Arts, Science and Technology and that it could be realised by the latter, should the need arises. The role and duty of the Evaluation Board is to ensure that all the conditions dictated in the Tender Document are strictly adhered to and not to make compromises.

“One must also point out that if the Appellant’s Bid was successful, the award agreement would have been drawn up between Pixel Inx Consortium and the Malta College of Arts, Science and Technology and this Board justifiably opines that the real and actual Bidder is Pixel Inx Consortium, so that the submitted Bid Bond should have been issued “*on behalf of Pixel Inx Consortium*” and not otherwise. In this regard, this Board does not uphold the Appellant’s First Contention.

“ii) Date of Award

“With regards to the Appellant’s Second Grievance, this Board notes that the Bidders had to submit their Bid Bond by the 20th June 2017 and by that date the submitted Bid Bonds had to be valid and in adherence with Clauses 7(a) and 8.1 of the instructions to Tenderers. In this respect, this Board notes that although the Appellant submitted the Bid Bond within the dictated time frame, he failed to submit the same in the dictated format whereby the name of the actual Bidder was not referred to in the same Bond.

“It is a known established fact that the Evaluation Board can only assess the offers on the information submitted by the Bidders, so that during the adjudicating process it was correctly noted by the Evaluation Board that Pixel Inx Consortium’s Bid Bond was not compliant. At this stage of the Tendering Process, at adjudication

stage, the Appellant's offer was already deemed not eligible for further consideration.

"The fact that on the date of the Award, all Bid Bonds had expired, does not, in any credible way, justify a change in the decision taken, during the Evaluation Process. It should be reminded that the non-renewal of Bid Bonds is a concessionary measure to ease financial burden on Bidders and not to exonerate the Bidder from his obligations.

"In this regard, this Board opines that the date of award, in this context, and the fact that as at that date all Bid Bonds had expired, does not provide a credible and justifiable reason why the decision taken at Evaluation stage should be changed at award stage. In this regard, this Board does not uphold Pixel Inx Consortium's Second Grievance.

"iii) Vertitech SA's Compliances

"With regards to the Appellant's Third Contention, this Board would refer to the conditions set out in Clause 7 (b) (vi) (c) of the Tender Document, wherein the Malta College of Arts, Science and Technology is requesting information of deliveries of similar services/advice over the years 2014 to 2016. Such information consists of minimum value of projects and other complimentary details to enable the Contracting Authority to identify each project and related value.

"This clause clearly requested information and not certifications and in this respect, this Board would like to point out that the mentioned clause, quite appropriately adopted the principle of the "*European Single Tender Document*" whereby at this stage of submission, the Bidder is only requested to declare and submit details of past experience or qualifications without the obligation to send related documentation to prove such declarations.

"In this particular case, Vertitech SA submitted the relative information as duly requested in Clause 7 (b) (vi) (v) of the Tender Document and it is up to the Contracting Authority to request further proof and certifications supporting the Recommended Bidder's declaration.

"Pixel Inx Consortium's alleged claim that it is doubtful whether the Preferred Bidder's offer does not possess the requested experience, was not credibly substantiated in this regard, this Board does not uphold the Appellant's Third Grievance.

“In view of the above, this Board:

- “a) Does not uphold Pixel Inx Consortium’s Grievances;
- “b) Confirms the decision taken by the Evaluation Board in its adjudication of Pixel Inx Consortium’s offer and at the same instance affirms that the same carried out the evaluation process in a just, fair and transparent manner;
- c) The deposit paid by Pixel Inx Consortium is not to be refunded.”

Is-soċjeta` rikorrenti issa qed tappella mid-deċiżjoni li ħa l-Bord għall-quddiem din il-Qorti u ressqet erba’ aggravji: (i) li l-*bid bond* sottomessa minnha kienet waħda tajba; (ii) li l-*bid bond* ma kienetx aktar bżonnha ladarba l-aġġudikazzjoni saret meta l-perjodu ta’ validita` tal-*bid bond* kien laħaq għadda; (iii) li l-offerta ta’ Vertitech SA, f’kull każ, ma tissodisfax il-kriterji tal-esperjenza u ta’ ħila teknika imsemmija fid-dokumenti tas-sejħa pubblika, u (iv) li kellha tingħata lura d-depożitu li għamlet biex setgħet għamlet l-appell quddiem il-Bord.

Wara li semgħet it-trattazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti, din il-Qorti sejra tgħaddi għas-sentenza tagħha.

Ikkonsidrat:

Fil-kuntest tal-ewwel aggravju din il-Qorti tinnota li l-offerta intefgħet mill-konsorzju Pixel Inx Consortium iżda l-*bid bond* maħruġ minn bank lokali

tirreferi għall-offerta tas-soċjeta` Quattro Labs Ltd. Din tal-aħħar hija parti mill-konsorzju Pixel Inx, iżda ma kenitx hi li tefgħet l-offerta. Il-garanzija trid tkopri l-offerta li tefa' it-*tenderer*, u mhux xi membru tal-istess. Il-garanzija bankarja hija ħaġa serja, u t-termini tagħha huma importanti għax il-bank ma jonorax garanzija jekk il-kundizzjonijiet u t-termini tagħha ma jġugx segwiti. F'dan il-każ, il-garanzija mogħtija mill-bank kienet kwalifikata, fis-sens li ngħatat b'referenza għall-offerta li kellha tagħmel Quattro Labs Ltd. Din tal-aħħar, pero`, qatt ma għamlet tali offerta. Hu evidenti li l-bank ma' ta' l-ebda garanzija b'riferenza għall-offerta ta' Pixel Inx Consortium. L-awtorita` pubblika ma kellha l-ebda obbligu li toqgħod titlob kjarifika mingħand is-soċjeta` appellanti dwar għaliex il-garanzija ma kenitx tkopri lill-offerent; anzi jidher li l-korrezzjoni għal dan in-nuqqas ma hux permess mid-dokumenti tas-sejħa. Hu fl-interess tal-offerent li fi proċess ta' offerta wara sejħa pubblika li l-offerta tkun tinkludi l-informazzjoni u d-dokumenti kollha mitluba. Darba li l-offerent kien konsorzju magħmul minn żewġ kumpaniji, il-garanzija kellha tinħareġ b'riferenza għall-offerta magħmula minnhom it-tnejn flimkien. Din il-Qorti ma tafx x'inhi t-tip ta' rabta li hemm bejn il-membri tal-konsorzju u ma tistax titqies valida garanzija li ma tkoprix il-membri kollha tal-konsorzju li tefa' l-offerta.

Kif osservat din il-Qorti fil-kawża fl-ismijiet **Projekte Global Ltd. v. Kunsill Lokali Marsaskala**, deċiża fis-7 ta' Ottubru, 2014.

“Meta r-regolamenti tas-sejha jesigu b’mod espress certu tip ta’ dokument, dak id-dokument kif rikjest irid ikun ipprezentat sal-gheluq taz-zmien għall-offerti. Ikun kontra l-principju tat-trasparenza jekk offerent jithalla jissostitwixxi dokument b’iehor wara l-gheluq taz-zmien. Is-sejha esigiet, f’dan il-kaz, il-prezentata tal-garanzija originali u din ma gietx ipprezentata fi zmien utili.

“Dan mhux kaz ta’ informazzjoni nieqsa, izda ta’ nuqqas ta’ prezentazzjoni ta’ dokument essenzjali biex l-offerta tigi kkonsidrata. Kjarifiki jistghu jintalbu fuq dak sottomess, izda jekk dokument ma jigix sottomess, ma hemmx “kjarifika” x’titlob.”

F’dan il-kaz, dak rikjest kien garanzija mill-offerent u mhux minn xi membru tal-istess. L-awtorita` kontraenti hija obbligata li tosseva strettament il-kriterji li hija stess tkun stabbiliet u ma tistax hi stess biex tipprova taqdi lil xi offerent, “tbengel” il-kondizzjonijiet li imponiet hi stess.

Is-sentenza **SC Enterprise Focused Solutions SRL v. Spitalul Judetean de Urgenta Alba Lulia (C-278/14)** mogħtija mill-Qorti Europea tal-Ġustizzja fis-16 ta’ April, 2015, osservat *in subjecta materia* illi filwaqt illi l-principji ta’ trattament ugwali u ta’ non-diskriminazzjoni, kif ukoll l-obbligu ta’ trasparenza, huma importanti:

“Madankollu, din il-mira ma tintlaħnaqx jekk l-awtorita` kontraenti tista’ tegħleb il-kundizzjonijiet li tkun stabbiliet hija stess. Għalhekk, huwa projbit li awtorita` kontraenti timmodifika l-kriteri tal-għoti ta’ kuntratt matul il-proċedura tal-għoti. 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-ispeċifikazzjonijiet tekniċi.”

F'dan il-każ l-iskwalifika awtomatika għal min jonqos milli jagħti garanzija tajba għall-offerta hija espressa fil-klawsola 8 tas-sejha għall-offerti, u għalhekk il-konsorzju Pixel Inx ma jistax jirrikorri fuq il-prinċipju tal-proporzjonalità biex jissanzjona l-offerta tiegħu.

X'seta' gie aċċettat bħala garanzija mill-Kumitat Evalwattiv f'każijiet oħra huwa irrilevanti, għax prattika "ħażina" tibqa' hekk "ħażina" jekk hi kontra l-liġi. F'kull każ, ma jidhirx li din l-allegata prattika hija assoluta jew universali, iżda limitata għal xi tliet każijiet. Dwar x'inhum jigri illum (fissens li qed tintuża diċitura differenti, għalkemm ukoll mhux b'mod li hi favur it-tezi tal-appellant), dan huwa wkoll mhux rilevanti għall-meritu tal-kawża odjerna.

Għalhekk it-talba li saret mill-appellant waqt l-aħħar udjenza biex jiġu eżebiti xi dokumenti relatati ma' dawn il-punti qed tiġi miċħuda.

Fil-kuntest tat-tieni aggravju, din il-Qorti tgħid illi rrispettivament ta' x'għara wara, jekk meta nxejntet l-offerta din kienet invalida għaliex ma kenitx akkompanjata minn garanzija tajba, din xorta hekk tibqa' minkejja ċ-ċirkostanzi li jkunu żviluppaw wara.

Din il-Qorti fil-kawża fl-ismijiet **BAC Ltd. v. Id-Direttur Ġenerali tal-Kuntratti et**, deċiża fil-15 ta' Diċembru, 2016, osservat fir-rigward illi:

“Għalkemm huwa minnu illi d-Direttur Ġenerali ntebaħ bin-nuqqas ta’ bid bond fl-istadju meta, ironikament, ma kienx fadal aktar ħtieġa għaliha, għax BAC kienet għa’ iffirmit l-abbozz tal-kuntratt (għalkemm kuntratt kien għad ma hemmx għax id-Direttur Ġenerali kien għadu ma iffirmax) u għalhekk ma setgħetx tmur lura mill-offerta tagħha, madankollu l-kliem tal-instructions to tenderers – li hu forma ta’ pre-kuntratt bejn id-Dipartiment tal-Kuntratti u l-oblaturi – huwa ċar u kategoriku: fin-nuqqas li jasal il-bid bond oriġinali fiż-żmien mogħti għalhekk, “the respective bid will be automatically disqualified”. L-iskwalifika seħħet minnufih – automatically – hekk kif għadda ż-żmien u kull ma sar wara b’dik l-offerta ma kienx jiswa.”

Dawn l-istess raġunijiet jgħoddu anke għal dan il-każ, jgħid li l-iskwalifika tal-konsorzju Pixel Inx għat minnufih malli dan naqas milli jiffa’ garanzija tajba. F’dan ix-xenarju, l-iskadenza tal-garanziji li ngħataw mal-offerti l-oħra hija irrelevanti u ma tneħħix l-iskwalifika għaliex darba l-offerta kienet ħażina, din hekk tibqa’ anke għall-futur.

Dwar it-tielet aggravju, is-soċjeta` appellanti tqajjem dubji kemm Veritech SA tissodisfa l-kriterji tal-esperjenza u ta’ ħila teknika. Mhux biżżejjed, pero`, li dak li jkun jgħid li għandu dubji dwar l-esperjenza ta’ Vertiteck SA, iżda jeħtieġ li tali dubji jkunu sostnuti. F’dan il-każ, din l-allegazzjoni ma għet sostnuta u korroborata mill-ebda prova dokumentarja jew orali. L-interpretazzjoni soġġettiva tal-appellanti dwar il-kontijiet publiċi ta’ Vertitech SA ma tikkostitwixxix prova tajba li turi n-nuqqas ta’ esperjenza. Tajjeb li jingħad ukoll illi d-dokument (Dok. QL3) imressaq mar-rikors tal-appell ma jirrappreżentax id-dikjarazzjonijiet finanzjarji ta’ Vertitech SA tal-aħħar tlett snin.

Fuq dan il-każ, pero`, ġie rilevat mid-Direttur appellat li l-offerta ta' din is-soċjeta` jista' jkun li ma hijiex *compliant*. Id-Direttur spjega illi, wara li reġa' ħares lejn l-offerta ta' din is-soċjeta`, sab li din is-soċjeta` ma tatx deskrizzjoni tal-proġetti kollha li hija ħadmet fih f'dawn l-aħħar tliet snin. Hija ma kellhiex biss tipprovdi lista tal-proġetti, iżda kellha tipprovdi wkoll deskrizzjoni ta' dawn il-proġetti. Darba li l-appellant qed jikkontesta l-mod ta' kif din is-soċjeta` ġiet ippreferuta, u darba li rriżulta li d-Direttur tal-Kuntratti ma qiesx din il-kwistjoni u ma ħa ebda deċiżjoni fir-rigward, id-deċiżjoni tal-istess Direttur li jqis bħala soċjeta` preferuta lis-soċjeta` Vertitech SA trid titħassar, u l-materja riferuta lura lilu sabiex jikkonsidra u jiddeċiedi jekk l-offerta ta' din is-soċjeta` hijiex valida fid-dawl ta' dan in-nuqqas riskonstrat.

Dwar ir-raba' aggaravju din il-Qorti ma tarax li hemm lok għal temperament fl-ordni li jintilef id-depożitu. L-ilment prinċipali tal-konsorzju kien li hi ma kellhiex tiġi skwalifikata peress li l-garanzija li pprovdiet kienet tajba. Dan l-ilment jirriżulta li ma kienx tajjeb u għalhekk hu ġust illi d-depożitu li ħallset għall-appell tagħha quddiem il-Bord jintilef.

Għaldaqstant, għar-raġunijiet premissi, tiddisponi mill-appell ta' Quattro Labs Ltd proprio et nomine billi tilqgħu biss in parte u filwaqt li tikkonferma s-sentenza li ta l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi

fis-16 ta' Novembru, 2017, tilqa' l-preġudizzjali tal-istess appellant marbuta mad-deċiżjoni li ttieħdet mill-Awtorita` kompetenti favur Vertitech SA u tħassar dik id-deċiżjoni u tibgħat l-atti lura lill-istess Awtorita` kompetenti sabiex din terġa' tirrikonsidra l-offerta ta' din is-soċjeta` fid-dawl ta' dak li ngħad aktar qabel.

L-ispejjeż ta' dan l-appell jithallsu kwantu għal-żewġ terzi ($\frac{2}{3}$) mis-soċjeta` appellant Quattro Labs Ltd. proprio et nomine u kawntu għal terz ($\frac{1}{3}$) mill-intimat Direttur tal-Kuntratti.

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