

QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF JOSEPH AZZOPARDI
ONOR. IMHALLEF JOSEPH R. MICALLEF
ONOR. IMHALLEF TONIO MALLIA**

Seduta ta' nhar it-Tlieta 12 ta' Marzu 2019

Numru 1

Rikors numru 358/18

Al-Nibras for Science & Technology Limited (C37110)

v.

**Onorevoli Ministru tal-Edukazzjoni in rappresentanza tal-Ministeru
ghall-Edukazzjoni u x-Xoghol u d-Direttur tal-Kuntratti**

Il-Qorti:

Dan hu appell imressaq fit-12 ta' Novembru, 2018 mis-socjeta` Al-Nibras for Science & Technology Limited wara decizjoni datata 23 ta' Ottubru, 2018 moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz li ghandu referenza CT 3070/2018 (kaz numru 1220).

Dan il-kaz huwa marbut ma' sejha ghall-offerti li hareg il-Ministeru ghall-Edukazzjoni u x-Xoghol "for the supply, installation and commissioning of IT equipment for VET laboratories in Malta and Gozo". Ghal dan il-kuntratt intefghu zewg offerti, u l-offerta tas-socjeta` rikorrenti giet imwarba peress li gie deciz li kienet "technically non-compliant"; it-tender gie eventwalment kancellat. Is-socjeta` rikorrenti ressqet appell ghal quddiem il-Bord. Dan il-Bord b'decizjoni tat-23 ta' Ottubru, 2018, cahad fil-meritu l-appell u kkonferma d-decizjoni tal-awtorita` kontraenti.

Id-decizjoni tal-Bord hija s-segwenti:

"This Board,

"having noted this Objection filed by Al Nibras for Science & Technology, (hereinafter referred to as the Appellants), on 24 September 2018 refers to the contentions made by the same with regards to the Cancellation of Lot No 1 in Tender of Reference CT 3070/2018 issued by the Ministry for Education and Employment and listed as Case No 1220 in the records of the Public Contracts Review Board.

**"Appearing for the Appellants: Dr Marco A Ciliberti
Appearing for the Contracting Authority Ms Daniela
Zerafa**

"Whereby the Appellants:

a) "insist that the reason given by the Contracting Authority for the rejection of their offer, was that they did not submit the "energy efficiency report". In this regard, the Appellants maintain that, in this particular lot of the Tender, such a report was not required and this was duly confirmed by the Authority itself, in its "Reasoned Letter of Reply" dated 4 October 2018;

b) "contend that they had replied to the clarification request dated 25 July 2018, submitting all the requested information on 27 July 2018 through the digital file bearing the name

“*rectifications.zip*”, for which a receipt was received by the same Appellants on the same date.

“This Board has also noted the Contracting Authority’s “*Letter of Reply*” dated 4 October 2018 and its verbal submissions during the Public Hearing held on 16 October 2018, in that:

a) “The Ministry for Education and Employment confirms that it erroneously requested the “*Energy Efficiency Form*”, as in this particular Lot of the Tender, such a report was not required;

b) “The Contracting Authority however insists that the Appellants failed to submit a reply to the clarification request dated 25 July 2018.

“This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, opines that this Appeal should be treated only on the documentation submitted and not on other issues which were neither mentioned in the “*Letter of Rejection*” as the reasons for the discarding of the Appellants’ Bid, nor in the “*Letter of Objection*” submitted by Al-Nibras for Science and Technology. This Board would like to also respectfully refer to the “*Letter of Rejection*” dated 11 September 2018 wherein the reasons given by the Contracting Authority for rejecting the Appellants’ offer were twofold namely,

i) “The non-submission of the “*Energy Efficiency Form*” as duly requested in Section 7 (a) (vi) for Lot No 1;

ii) “The fact that no reply was received by the Ministry for Education and Employment to the Clarification request dated 25 July 2018.

i) “The non-submission of the “*Energy Efficiency Form*” as duly requested in Section 7 (a) (vi) for Lot No 1

“Regarding this issue, this Board refers to the third paragraph of the Ministry’s “*Reasoned Letter of Reply*” dated 4 October 2018 which states that,

“Regarding the request for the Energy Efficiency Form, MEDE contends that it did erroneously ask for the Energy Efficiency Form therefore the Bidder is right in stating that the Energy Efficiency Form was not required.”

“The above quoted paragraph confirms without any reasonable doubt that Al-Nibras for Science and Technology was not required to submit such information and in the regard, this Board upholds the Appellants’ First Contention.

ii) **“The fact that no reply was received by the Ministry for Education and Employment to the Clarification request dated 25 July 2018.”**

“With regards to the Appellants’ second contention, this Board would, again, refer to the above mentioned clarification request, wherein the following items were requested:

“Moreover, kindly forward the missing literature for all technical specifications pertaining to the following items:

- *Item 1.01 – Workbench for teachers*
- *Item 1.02 – Workbench for technicians*
- *Item 1.03 – Workbench for students*
- *Item 1.04 – Workbench for wheelchair users*
- *Item 1.06 – Anti-static static wrist band*
- *Item 1.07 – Screwdriver holder*
- *Item 1.08 – Plier holder*
- *Item 1.09 – A4 sleeve*
- *Item 1.11 – Dolly”*

“The above information was contained in the same clarification request mentioned in the Ministry for Education and Employment’s “*Letter of Rejection*” dated 11 September 2018, and since the Contracting Authority claims that it did not receive a reply from the Appellants, the latter’s offer was deemed to be administratively non compliant, so that the real reasons for the discarding of the Appellant’s offer were given in substance, although the inclusion of specific missing documentation referred to in the clarification request, would have presented a wider spectrum of the reasons.

“In this regard, the Appellants contend that they have submitted the requested information through the digital file bearing the name “*rectifications.zip*”, for which a receipt was given.

“From the documentation available, this Board would refer to a reply from the service provider of the system, addressed to the authority as follows:

“Dear Jason,

“further to our technical investigation, the user “0385269M1615” uploaded a document (with zero length file) as an attachment in his evaluation clarification response. Zero length files cannot be used by the system, as it is the case by almost all applications and thus it cannot be properly processed so that it is made available to the end-users. Zero-byte files may arise in cases when during the creation of the file by a program/application, the process is aborted or is interrupted prematurely while writing to it (i.e. the application crashes).”

“From the above communication dated 4 October 2018, this Board notes that, as declared by Al-Nibras for Science and Technology , a receipt to the response to the clarification request was effected on 25 July 2018, so that, it can be established that, in some form or other, the Appellants did reply, however, they uploaded a “zero length file” which, according to the technical operators, cannot be properly processed.

“This Board notes that the Appellants uploaded a file which cannot be used in the system, so that although they replied to the communications received from the Contracting Authority, the system itself could not process such communication to the end user. In this respect, the Evaluation Committee had no other option but to deem such a circumstance as a non reply to the clarification request.

“In this regard, this Board would emphasize that it is the responsibility of the Bidder to ensure that he submits the reply to clarification requests in the correct form and through the proper procedure of the system. It is a fact that the Appellants submitted an attachment to the clarification request, however, the same communication, was not accessible to the Authority.

“In view of the above, this Board,

- i) “upholds the Ministry for Education and Employment’s decision to cancel the Tender for Lot No 1;**
- ii) “upholds Al-Nibras for Science and Technology’s first contention;**
- iii) “does not uphold the Appellants’ second grievance, however, due to the circumstances pertaining to the technical nature, this same Board recommends that the deposit paid by the latter should be fully refunded”.**

Is-socjeta` rikorrenti issa qed tappella mid-decizjoni li ha l-Bord u ressqet aggravju li principalment jolqot il-fatt li hi tghid li baghtet id-dokumenti mitluba mill-Awtorita`, u ma kienx tort taghha li meta l-Awtorita` fethet il-*file* ma sabet xejn. Is-socjeta` tilmenta wkoll mill-fatt li t-*tender* gie mhassar.

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

Ikkonsidrat:

Fl-ewwel lok, is-socjeta` rikorrenti tecepixxi in linea preliminari li s-sentenza tal-Bord hija nulla peress li ddecieda *ultra petita*. Dan jinghad peress li , skont is-socjeta` appellant, l-offerta taghha giet rifjutata peress li ma gietx provduta l-*Energy Efficiency Form* fir-rigward tal-offerta ghall-*lot 1*. Jirrizulta, pero` li ghal dan il-lott ma kienx mahsub li tigi pprezentata din il-formula, u dan kif stqarr rapprezentant tal-Awtorita` kontraenti quddiem l-istess Bord. Il-Bord accetta dan, pero`, stqarr li meta l-awtorita` kontraenti warrbet l-offerta tas-socjeta` appellanti, kellha ragunijiet tajbin biex taghmel dan. Senjatament, peress illi s-socjeta` appellanti ma kinitx baghtet l-informazzjoni li talbet l-istess awtorita`.

Din il-Qorti tirrileva li, fil-verita`, l-ittra tal-iskwalifika kienet tindika zewg ragunijiet ghaliex l-offerta tas-socjeta` appellanti kienet qed tigi mwarrba u dan (i) minhabba n-nuqqas ta' sottomissjoni tal-*Energy Efficiency Form*, u (ii) minhabba li l-Awtorita` kontraenti ma rcevietx twegiba ghat-talba maghmula mill-kumitat tal-ghazla fil-25 ta' Lulju, 2018. Kwindi ma jistax

jinghad li l-Bord qies raguni gdida ta' skwalifika, u ghall-Bord it-tieni raguni kienet gustifikata.

Apparti dan, din il-Qorti gja esprimiet ruhha fis-sens li quddiem il-Bord, ir-raguni tal-iskwalifika tista' tinbidel, basta li l-parti skwalifikata tinghata opportunita`, jekk hemm bzonn, wara differiment, li tirregola l-posizzjoni taghha (ara **Krypton Chemists Ltd. v. Dipartiment tal-Kuntratti** deciza minn din il-Qorti fis-27 ta' Ottubru, 2017). F'dan il-kaz, it-tieni punt aktar qabel imsemmi, gie mqajjem b'mod espress fit-twegiba mitluba tal-awtorita` kontraenti u ghalhekk, is-socjeta` appellant kellha zmien bizzejjed biex thejji ruhha fuq dik il-kwistjoni qabel ma gie appuntat is-smigh orali quddiem il-Bord. Inoltre dan il-punt sar acenn ghalih mis-socjeta` appellant stess fl-ittra ta' oggezzjoni taghha, u jekk il-Bord sab li l-offerta taghha ma kinitx konformi, ma tistax issa tilmenta li l-Bord mar *ultra/extra petita*. Kull ma ghamel il-Bord kien li vverifika jekk l-offerta taghha kinitx tabilhaqq konformi mal-htigijiet tas-sejha jew le. Din il-Qorti osservat ukoll li l-Bord jista' jqajjem nuqqasijiet huwa stess, li jintebah bihom waqt li jkun qieghed jezamina l-offerta ta' xi oblator ekonomiku. Intqal fil-kawza **Bonnici Bros. Projects Limited v. Onor. Ministru ghas-Sahha** deciza fit-30 ta' Lulju, 2018, illi:

“8. Il-process ta' ghazla ta' offerti ghal kuntratt pubbliku, ladarba jolqot flus pubblici, huwa haga ta' interess pubbliku u huwa wkoll fost id-dmirijiet tal-Bord ta' Revizjoni li jara li jithares dak l-interess. Jekk lill-bord deherlu li kien hemm irregolarita` fl-offerta rebbieha kellu mhux biss is-setgha izda wkoll id-dmir li jqanqal il-kwistjoni; kien jonqos mid-dmir tieghu li kieku ma ghamilx hekk”.

Trattat issa t-tieni punt innifsu, is-socjeta` appellanti tibda biex tilmenta li hi kienet surpriza meta l-Bord hareg b'sentenza dwar dak il-punt, peress li l-Bord kellu jiddeciedi biss fuq l-iskwalifika marbuta mal-*Energy Efficiency Form*. Ma jirrizultax, pero`, xi verbal jew digriet interlokutorju f'dan is-sens. Lanqas ma jirrizulta li l-Bord iddiferixxa l-kawza biex jigi maqtugh xi punt wiehed biss, u lanqas ma jirrizulta li l-Bord kien illimita lill-partijiet biex jaghmlu sottomissjonijiet u jressqu provi dwar punt wiehed biss. L-allegazzjoni tas-socjeta` appellanti li l-Bord intrabat li jaghti sentenza fuq xi punt wiehed biss ma tregix.

Jista' jkun li waqt is-smigh orali quddiem il-Bord, l-avukat tas-socjeta` appellant semma biss il-kwistjoni tal-*Energy Efficiency Form*, pero`, dan ghamlu ghax hekk ghazel mhux ghax gie limitat jew kostrett biex jaghmel hekk mill-Bord. Joqghod ghal dan l-argument, dak li osservat din il-Qorti fis-sentenza **Pharma-Cos Ltd. v. Central Procurement and Supplies Ltd.**, deciza fid-29 ta' April, 2016, fis-sens illi:

“Fil-kuntest tal-aggravju marbut mal-allegazzjoni li s-socjeta` appellanti ma kellhiex opportunita`, quddiem il-Bord, li tiddiskuti l-meritu, peress li, skont hi, it-trattazzjoni kienet limitata fuq id-data tal-ittra, jigi rilevat li, mill-atti ma jirrizultax li t-trattazzjoni quddiem il-Bord giet limitata b'xi mod. Kien id-difensur tas-socjeta` appellanti li unilateralment stqarr li, fi stadju preliminarji, ried jenfasizza fuq in-nuqqas ta' ittra datata 8 ta' Gunju, 2015 mibghuta mill-awtorita` kontraenti. Ma jirrizultax, pero`, mill-atti, li t-trattazzjoni giet hekk limitata, tant li l-Bord ma iddefirixxiex is-smigh ghall-data ohra ghall-kontinwazzjoni. Lanqas ma jirrizulta li inghata xi digriet mill-Bord li kellu jaghti decizjoni preliminari, u lanqas xi verbal fejn il-partijiet qablu li kellha tinghata biss decizjoni dwar l-izball fid-data. Fil-fatt, da parti tal-awtorita` kontraenti saret

sottomissjoni fil-meritu (marbuta man-nuqqas ta' konsenja tal-kampjuni kif mitlub), u wara dan il-Bord qies is-smigh maghluq, u ma giet registrata ebda opposizzjoni ghall-fatt li l-kaz thalla ghas-sentenza”.

Il-fatt li c-Chairman tal-bord irrifera ghall-materja bhala wahda ta' procedura u li kienet importanti jekk it-talba ghall-*Energy Efficiency Form* kinitx tajba jew le, ma jfissirx li d-decizjoni kienet se tkun limitata ghal dan il-punt. Ir-*rejection letter* tal-awtorita` kontraenti kienet tkopri zewg punti, inkluz in-nuqqas tal-informazzjoni mitluba, u l-Bord kellu jiddeciedi fuq dan il-punt ukoll.

Is-socjeta` appellanti tissottometti illi hija riedet tressaq il-*file* taghha bl-informazzjoni relatata mal-offerta taghha, izda l-Bord qies din il-prova irrilevanti. Il-Bord ghamel hekk, pero`, mhux ghax kien sejjer jillimita ruhu li jiddeciedi biss fuq l-ewwel punt (relatat mal-*Energy Efficiency Form*), izda ghax qies l-ezistenza tad-dokumenti immaterjali ghas-soluzzjoni tattieni punt, u cioe`, jekk l-offerta gietx ipprezentata flimkien mal-informazzjoni kollha mehtiega. Jekk l-offerta ma kinitx konformi, l-istess offerta kellha tigi mwarrba, u offerent ma jistax dak li ma ghamilx fit-terminu ghall-offerti, jaghmlu fi stadju ulterjuri bhal ma hu l-istadju quddiem il-Bord. Fl-oggezzjoni originali taghha, is-socjeta` appellanti kienet hi stess li talbet biex il-Bord isib li l-offerta taghha kienet konformi mal-kundizzjonijiet tas-sejha, u dan il-Bord kellu jaghmlu fuq il-bazi tal-offerta kif saret originarjament, u mhux tissupplixxi ghal xi nuqqas tal-

offerent billi tippermettilu jipprezenta dokumenti li kellhom jigu pprezentati mal-offerta.

Bhala fatt jirrizulta li s-socjeta` appellanti qatt ma ghaddiet il-litteratura teknika lill-kumitat tal-ghazla. Is-socjeta` appellanti giet mgharrfa b'ittra tal-25 ta' Gunju, 2018, li l-offerta taghha kienet nieqsa mil-litteratura mehtiega, u nghatat opportunita` tirrimedja ghal dan in-nuqqas; xorta wahda, pero`, il-litteratura teknika ma ntbaghtitx. Is-socjeta` appellanti ssostni li hi ssottomettiet din il-litteratura b'mod elettroniku kif mitlub. Dan, pero`, ma jirrizultax.

Jidher li darba offerta tigi registrata elettronicament, din tidhol f'dak li jissejjah *electronic vault*. Minn hemmhekk l-offerta ma tistax tintmiss, la minn min ikun tella' l-offerta u lanqas minn min ikun ircieva l-offerta. Dan il-*vault* huwa amministrat minn kumpanija barranija indipendenti mill-Gvern. Id-dokumenti li suppost baghtet is-socjeta` appellanti ma jirrizultawx, u l-*file* li suppost kien jikkontjeni l-litteratura teknika ma kien fih ebda dokument, tant li dan il-*file* gie ittimbrat bhala *zero length file*. Ma giex ippruvat li kien hemm difett fis-sistema. Ghalhekk, qal sew il-Bord li dan id-dokument ma kienx jiswa bhala risposta ghall-ittra ta' rettifika tal-kumitat tal-ghazla.

Dwar l-argument li l-awtorita` kontraenti ma kellhiex dritt thassar is-sejha, ir-regoli generali li jirregolaw il-hrug tas-sejha (ara Artikolu 18.3 (a)), jaghti dan il-poter “*where no qualitatively or financially worthwhile tender has been received*”. F’dan il-kaz, iz-zewg offeriti ma kinux tajbin (b’dik tas-socjeta` appellant titqies “*administratively non-compliant*”), u, isegwi, li l-kumitat tal-ghazla kellu kull dritt ihassar is-sejha biex ikun jista’ jirregola ruhu.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell interpost mis-socjeta` Al-Nibras for Science & Technology Limited billi tichad l-istess u tikkonferma d-decizjoni li ta l-Bord ta’ Revizjoni dwar il-Kuntratti Pubblici bis-shieh.

L-ispejjez marbuta ma’ dan l-appell jithallsu mis-socjeta` appellanti Al-Nibras for Science & Technology Limited.

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Deputat Registratur
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