

QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar il-Ġimgħa 29 ta' Marzu 2019

Numru 20

Rikors numru 289/18

Kunsill Lokali Marsa

v.

- 1. Id-Direttur Ġenerali tad-Dipartiment tal-Kuntratti għan-nom u in rappreżentanza tad-Dipartiment tal-Kuntratti;**
- 2. WM Environmental Limited**

Il-Qorti:

Dan hu appell imressaq fl-14 ta' Settembru, 2018, mill-Kunsill Lokali Marsa wara deċiżjoni datata 28 ta' Awwissu, 2018, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-każ li għandu referenza KLM 01/2018 (każ numru 1201).

Dan il-każ huwa marbut ma' sejha għall-offerti li ħareġ il-Kunsill Lokali tal-Marsa "*for the Collection of Manure from the Marsa Racecourse Area*". Għal dan il-kuntratt intefgħu żewġ offerți, bl-awtorita` kontraenti tirrifjuta tagħti l-offerta lis-soċjeta` WM Environmental Ltd. peress li kellha "*negative reports*" dwar l-operat tagħha mingħand Kunsilli Lokali oħra, u dana avolja tefgħet l-orħos offerți. Din is-soċjeta` ressqet appell quddiem il-Bord li b'deċiżjoni tat-28 ta' Awwissu, 2018, ħassar id-deċiżjoni tal-awtorita` kontraenti (il-Kunsill Lokali tal-Marsa), b'ordni li l-kunsill jerġa' jagħmel evalwazzjoni tal-offerti kollha li rċieva.

Id-deċiżjoni tal-Bord hija s-segwent:

"having noted this Objection filed by WM Environmental Limited, (hereinafter referred to as the Appellants) on 1 August 2018, refers to the contentions made by the latter with regards to the award of Tender of Reference KLM 01/2018 awarded by Kunsill Lokali Marsa, (hereinafter referred to as the Contracting Authority), and listed as Case 1201 in the records of the Public Contracts Review Board.

"Appearing for the Appellants: Dr John Bonello.

"Appearing for the Contracting Authority: Mr Edward Spiteri Audibert.

"Whereby, the Appellants contend that:

"a) Although their offer was fully compliant and the cheaper, it was discharged by the Contracting Authority simply due to the fact that other Local Councils were not satisfied with the services carried out by the Appellants. In this regard, the latter insist that such information from other Local Councils cannot be used to justify the award to another Bidder at a much higher price.

"This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 10 August 2018 and its verbal submissions during the Public Hearing held on 23 August 2018, in that:

“a) Kunsill Lokali Marsa maintains that the Objection submitted by WM Environmental Limited in front of the Public Contracts Review Board should be dismissed on the grounds that the latter can only hear appeals on Tender of value of € 12,000. In this regard, the Local Council insists that such an Objection is regulated by the Local Councils (Tendering) Regulations, (Subsidiary Legislation 363.03) with particular reference to Article 10 (2);

“b) The Contracting Authority contends that although, on paper, the Appellants’ offer appeared to be the more advantageous, upon establishing feedback from other Local Councils regarding the Appellants’ working performance, the Authority decided to award the Tender to the next compliant Bidder.

“This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, opines that the issues worth of consideration are twofold, namely, this Board’s jurisdiction and the Evaluation Report prepared by the Kunsill Lokali Marsa.

“Prior to the commencement of the Hearing, the Local Council requested this Board to defer this appeal to a later date due to the unexpected availability of the Mayor who also acted as the Chairman of the Evaluation Committee. This Board also noted the Legal Representative of the Local Council was also absent. After hearing WM Environmental Limited’s credible request not to defer the Hearing, this Board decided to carry on with the proceedings of the Public Hearing for the treatment of the issues raised by the Appellants, whilst taking into account the fact that this Board was only informed of the unavailability of the mayor, one hour prior to the Public Hearing.

“1. This Board’s jurisdiction

“This Board would respectfully refer to the “*Reasoned Letter of Reply*” issued by Kunsill Lokali Marsa on 10 August 2018, with particular reference to Paragraph Number 1. In this regard, the Contracting Authority is incorrect in stating that this Board can only treat Appeals on Tender of value in excess of € 12,000. This Board would point out that the limit of €12,000 has been amended to read €5,000 in 2016 and in this regard, this Board would have expected a better updated interpretation of the same Regulations by the Contracting Authority.

“At the same instance, this Board would also refer to latter’s claim that such an appeal falls under the Local Councils’ (Tendering) Regulations. Again this Board opines that such a claim is incorrect, as this Board is authorised to treat Appeals for all the

Tenders of the value of € 5,000 and in this respect, this Board would also remind Kunsill Lokali Marsa that this same Board conducts and hears Objections in accordance with the Public Procurement Regulations and in this regard, this Board does not uphold Kunsill Lokali Marsa's claim.

"2. The Evaluation Report

"It is the duty and obligation of this Board to examine the documentation, in its possession, regarding this Objection and the most important document is the Evaluation Report which shows how the offers submitted were assessed on both the technical and financial aspects.

"The reason given by the Contracting Authority for the rejection of the Appellants' offer has been established as being due to simple fact that upon enquiring with other Local Councils, the Contracting Authority received negative feedback with regards to WM Environmental Limited's working performance. In this regard, this Board would point out that the nature of the Tendered Works is totally different from works on which negative feedbacks were received by other Local Councils and although the Appellants may have had default notices from other Councils, this Board notes that the Appellants' are not back listed or debarred from participating in Public Tenders, so that, it is not equitable to discard a technically compliant and cheaper offer simply on comments or reports of different works carried out by the Appellants for other Local Councils. This Board also remind The Contracting Authority that it has all the remedies available if, after awarding the Tender, the successful candidate does not carry out the Tendered Services as requested in the Tender Dossier. In this regard, this Board does not uphold the reason given by Kunsill Lokali Marsa for the rejection of WM Environmental Limited's offer.

"3. General Note

"During the examination of the documentation, this Board noted the following deficiencies which this same Board is obliged at law, to point out, as follows:

"i) The Evaluation Report in general contains basic and unexplained errors which contradicts the Local Council's decision in the award of the Tender;

"ii) The allocation of points regarding the financial scores does not reflect the difference in the prices quoted of the Bidders;

"iii) This Board notes that the Chairman of the Evaluation Committee is also the Chairman of the entity where such

tendered services are to be provided and as duly denoted in the Evaluation Report:

““However, the Chairman of the Board, Mr Francis Debono, who is also the Chairman of the Marsa Local Council does not want to accept the offer of WM Environmental following neagative reports.””

“In this respect, this Board opines that there exists an element of *“Conflict of Interest”*”.

“In view of the above, this Board

“i) Upholds WM Environmental Limited’s grievances and recommends the re-integration of their offer in the evaluation process;

“ii) Recommends that the deposit paid by the Appellants should be fully refunded;

“iii) Does not uphold Kunsill Lokali Marsa’s decision in the award of the contract;

“iv) Opines that the Evaluation process was not carried out in a transparent and proper manner;

“v) Instructs Kunsill Lokali Marsa to carry out a re-evaluation process on all the offers by an Evaluation Board differently composed whilst taking into consideration this Board’s conclusions”.

Il-Kunsill Lokali tal-Marsa appella mid-deċiżjoni li ħa l-Bank u ressaq aggravji fis-sens li ma ngħatax l-opportunita` jressaq il-każ tiegħu u, f`kull każ, kellu raġunijiet gravi biżżejjed biex ma jagħtix il-kuntratt lis-soċjeta` WM Enviornmental Ltd.

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:

Fl-ewwel lok, din il-Qorti tirrileva li permezz ta' nota tal-4 ta' Ottubru, 2018, l-appell ġie ċedut fil-konfront tad-Direttur Ġenerali tad-Dipartiment tal-Kuntratti.

Tirrileva wkoll illi waqt l-udjenza quddiem din il-Qorti tat-23 ta' Ottubru, 2018, din l-istess Qorti ġibdet l-attenzjoni tal-partijiet għar-Regolamenti Dwar l-Akkwist Pubbliku (Leġislazzjoni Sussidjarja 174. 04) u b'mod partikolari għar-regolamenti 284 u 287.

Minn dawn l-imsemmija regolamenti tal-Leġislazzjoni Sussidjarja msemmija, jirriżulta illi filwaqt, b'mod ġenerali, l-ewwel artikolu jagħti dritt lil kull parti li tħoss ruħha aggravata minn deċiżjoni meħuda mill-Bord li jappella quddiem din il-Qorti, ir-regolament 287, li hu aktar speċifiku u jipprevali fuq dak imsemmi qabel, jgħid li l-awtorita` kontraenti tista' biss tirreferi kwistjoni quddiem din il-Qorti fir-rigward ta' deċiżjoni meħuda mill-Bord li jkollha x'taqsam mal-ineffettività ta' kuntratt jew mal-għoti ta' danni. Dawn l-añhar żewġ każijiet ma japplikawx f'dan il-każ.

Huwa ċar, għalhekk, li l-Kunsill Lokali tal-Marsa, l-awtorita` kontraenti, ma setgħetx tressaq kwistjoni quddiem din il-Qorti. L-appell hu kwindi null u m'għandux jinstema'.

Jista' jingħad, pero`, li n-nuqqas tal-Kunsill li jsemma' leħnu fil-każ huwa imputabbli lilu stess. Hu ressaq rikors għal differiment quddiem il-Bord u l-Kunsill assumma li dan sejjer jiġi milqugħ, tant li għas-seduta skedata deher biss is-segretarju tal-Kunsill. Waqt is-seduta l-avukat ta' WM Environmental Ltd. oppona għad-differiment u l-Bord ordna l-prosegwiment tas-smiġħ u wara ta d-deċiżjoni tiegħu.

Għandu jingħad li wara l-appell ta' WM Environmental Ltd. quddiem il-Bord, il-Kunsill Lokali tal-Marsa kien ressaq, b'ittra tal-10 ta' Awwissu, 2018, il-pożizzjoni tiegħu fir-rigward għal quddiem l-istess Bord; dan ifisser li dan il-Bord kellu quddiemu s-sottomissjonijiet bil-miktub tal-Kunsill fir-rigward tal-pożizzjoni tiegħu u kwindi, bħala punt ta' dritt, sema' liż-żewġ naħat fuq il-każ.

Din il-Qorti tirribadixxi, kif għamlet diversi drabi, li l-fatt li sar rikors għall-differiment ma jfissirx li dan sejjer jintlaqa', u jekk ma jkunx hemm digriet preventiv, il-parti għandha xorta tidher okkorrendo bl-avukat tagħha, biex f'każ li r-rikors jiġi miċħud fl-udjenza, hi tkun tista' tittratta l-kawża. Hija l-Qorti jew il-Bord li jiddeċiedi jagħtix jew le differiment, u min jitlob differiment ma għandux jassumi li din it-talba sejra tiġi milqugħa.

Il-kunsill appellant jgħid li wara li vverifika x'għara waqt is-seduta, ippreżenta rikors fejn spjega l-pożizzjoni tiegħu u reġa' talab differiment. Din it-talba baqgħet ma ġietx degretata formalment, pero`, il-Bord jidher li impliċitament ma laqax l-istess talba, għax baqa' għaddej u ta s-sentenza kif skedat.

F'kull każ, darba li l-awtorita` kontraenti ma tistax, bi provediment espress tal-liġi, tressaq kwistjonijiet quddiem din il-Qorti, l-appell tagħha qed jitqies null.

Għaldaqstant, għar-raġunijiet premissi, tiddikjara irritu u null l-appell imressaq mill-Kunsill Lokali tal-Marsa, u tikkonferma d-deċiżjoni li ta l-Bord fit-28 ta' Awwissu, 2018.

L-ispejjeż relattivi jitħallsu mill-Kunsill Lokali tal-Marsa appellant.

Joseph Azzopardi
Prim Imħallef

Joseph R. Micallef
Imħallef

Tonio Mallia
Imħallef

Deputat Reġistratur
rm