



QORTI TAL-APPELL

IMHALLFIN

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

Seduta ta' nhar it-Tnejn, 13 ta' Lulju, 2020.

Numru 3

Rikors numru 5/20

Cassar Fuel Limited

v.

Gozo Channel (Operations) Limited (C 76704); Id-Direttur tal-Kuntratti ghad-Dipartiment tal-Kuntratti u b'digriet tat-18 ta' Frar 2020 gew kjamati fil-kawza Falzon Fuels & Services Ltd

Il-Qorti:

Dan hu appell imressaq fit-22 ta' Jannar, 2020, mis-socjeta` rikorrenti Cassar Fuel Ltd. wara decizjoni datata 7 ta' Jannar, 2020, moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz referenza CT2196/2019 (kaz numru 1406).

Dan il-kaz hu marbut ma' sejha ghall-offerti li harget il-Gozo Channel (Operations) Ltd *"for the supply and provision of Marine Gas Oil DMA according ISO8217"*. Ghal dan il-kuntratt intefghu zgur zewg offerti, wahda mis-socjeta` rikorrenti u ohra mis-socjeta` Falzon Fuel Services Ltd., li lilha gie rrakomandat li jinghata l-kuntratt. Is-socjeta` rikorrenti giet skwalifikata peress illi *"original time stamped bid-bond was not received at the Department of Contracts within the stipulated 5 days allowed for the submission of this guarantee"*. Peress illi s-socjeta` rikorrenti insistiet li hi baghtet din il-garanzija, ressqet oggezzjoni quddiem il-Bord, izda dan cahad l-appell u kkonferma d-decizjoni tal-kumitat ta' evalwazzjoni.

Id-decizjoni tal-Bord hija s-segwenti:

"Decision

"This Board,

"having noted this objection filed by Cassar Fuel Ltd (herein after referred to as the Appellants) on 11 November 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2196/2019 listed as case No. 1406 in the records of the Public Contracts Review Board awarded by Gozo Channel (Operations) Ltd (herein after referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Matthew Brincat

Appearing for the Contracting Authority: Dr Georgine Schembri

"Whereby, the Appellants contend that:

- a) They had submitted the original Bid Bond by post and the Authority is alleging that such a document was not received at their end. In this regard, Appellants maintain that the Authority is fully aware that the bid bond exists and is operative, so that

disqualification of their offer due to the alleged non-receipt of the original document is not proportionately justifiable.

“This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 17 November 2019 and its verbal submissions during the hearing held on 18 December 2019, in that:

- a) The Authority insists that Appellants’ original Bid Bond which was remitted by post, was never received at the Department of Contracts. In this regard, same Authority maintains that it was the responsibility of Appellants to ensure that such an important mandatory document arrives at the Department of Contracts, so that the Authority had no other option but to deem Appellants’ offer not compliant.

“This same Board also noted the testimony of the witnesses namely:

Mr Charlot Caruana duly summoned by Cassar Fuel Ltd

Mr Philip Attard duly summoned by Cassar Fuel Ltd

Mr Mark Cassar duly summoned by Cassar Fuel Ltd

Mr Mark Mizzi duly summoned by the Public Contracts Review Board

Ms Yvonne Psaila duly summoned by the Public Contracts Review Board

Mr Joe Caruana duly summoned by the Public Contracts Review Board

Mr John Muscat duly summoned by the Public Contracts Review Board

“This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the various witnesses duly summoned opines that, the issue that merits consideration is the non-receipt of Appellants’ Bid Bond at the Department of Contracts.

- “1. This Board would respectfully refer to the article 8 of ‘Instructions to Tenderers’ wherein it is clearly stated that:

“A scanned copy will be submitted through the ePPS as indicated in the Tender Response Format, followed by the submission of the original copy within five (5) working day from the closing date of tender, by post or by hand, to the Department of Contracts, Notre Dame Ravelin, Floriana, FRN 1600. In this case of a tenderer submitting an offer for one or more lots the tender guarantee, which is made out for the whole amount of the lots being tendered for, is to be uploaded in the space provided under each lot being tendered for in the Tender Response Format.

“If the ORIGINAL Tender Guarantee (Bid Bond) is not submitted by the date and time indicated in Clause 2 above, the respective bid will be automatically disqualified.”

“The tender document stipulates that the scanned copy of the Bid Bond submitted through the ePPS must be followed by the submission of the original. Furthermore, the same article dictates that if the original is not submitted within the specified period (5 working days from the closing date of tender), the offer will be automatically disqualified and in this particular case, it is being alleged that such document was never received by the Department of Contracts whilst, at the same instance, Appellants maintain that they had submitted same through normal post.

- “2. This Board acknowledges the fact that Appellants, in their submissions, through the ePPS system, had included a scanned copy of the original Bid Bond. At the same instance, such an eventuality had to be followed by the submission of the original document by hand or by post. Appellants, in this respect, are maintaining that they had submitted the original document by normal mail. In the submissions made by the witness namely Mr Philip Attard, he stated that he recalled being instructed to post an important letter, however, he did not know the contents or to whom it was addressed.
- “3. This Board also took into consideration the testimony of the witnesses summoned by the Department of Contracts who attested that Appellants’ original Bid Bond was never received by the Department.
- “4. This Board has always insisted on the adherence to the principle of self-limitation, in that, the Evaluation Committee must always adhere to this principle as otherwise, equal treatment and transparency during evaluation process is not maintained. In this particular case, the tender document stipulated that the original Bid Bond must be submitted within 5 working days of the closing date of offers; however Appellants’ original Bid Bond was not received at the Department of Contracts.
- “5. At the same instance, this Board would respectfully point out that, it was the duty and responsibility of Appellants to ensure that, such an important mandatory document arrives at or is delivered to the Department of Contracts within the stipulated period, as duly dictated in the tender document. From the testimony of the Appellants’ witnesses, no tangible proof was presented to justify or prove that such an original Bid Bond was remitted to the Department of Contracts by ordinary mail.

“6. With regards to the importance of submission of the original Bid Bond, this Board would point out that the two main reasons as to why the tender dossier stipulated such a condition were:

- a) To confirm the veracity of the Bid Bond and
- b) For any eventual encash ability, if the need arises

“7. With regard to Appellants’ claim that, no mention of the missing original Bid Bond was made by the Authority in their clarification requests, this Board would point out that the clarification requests were made prior to the awareness of the non-receipt of Appellants’ original Bid Bond.

“8. This Board had also carried out the necessary investigation regarding the rubber stamp used by the customer care section of the Department of Contracts and can justifiably confirm that same rubber stamp has distinctly different dates denoting 4 December 2019 and 14 December 2019.

“In conclusion, this Board opines that:

- a) No tangible evidence was presented by Appellants to prove that the original Bid Bond was remitted by ordinary mail to the Department of Contracts.
- b) The submission of the original Bid Bond was a mandatory requirement and failure to remit same would render Appellants’ offer non-compliant.
- c) The responsibility to ensure that the original Bid Bond is delivered, whether by hand or by post, to the Department of Contracts, falls on the Appellants.
- d) Where the tender document involves the submissions of Bid Bonds, this Board directs that, such submissions should be clearly stipulated to be effected either by registered mail or delivery by hand.

“In view of the above, this Board,

- i. does not uphold Appellants’ contention,
- ii. upholds the Contracting Authority’s decision in the award of the tender,

- iii. directs that an amount of €40,000 from the deposit paid by Appellants be refunded.”

Is-socjeta` Cassar Fuel Ltd. issa qed tappella mid-decizjoni li ha l-Bord ghal quddiem din il-Qorti, u ressqet aggravji essenzjalment marbuta mal-fatt li l-Bord ma qiesx il-provi taghha li l-*bid-bond* originali ntbaghtet bil-posta.

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.

Ikkunsidrat;

F'dan il-kaz jirrizulta illi fost il-kundizzjonijiet impost fuq min jiffa' offerta kien hemm li jibghat *scanned copy* tal-*bid-bond* mal-offerta, u jibghat l-original taghha fiz-zmien hamest ijiem, b'mod li jinghad car li jekk l-original ma tintbaghatx fi zmien imsemmi "*the respective bid will be automatically disqualified*". Is-socjeta` rikorrenti tattakka l-apprezzament tal-provi li ghamel il-Bord meta dan iddecieda li ma saretx il-prova li l-garanzija intbaghtet lill-awtorita` kontraenti. Hi tghid li ressqet xhieda li kkonfermaw li tefghu fil-posta xi haga importanti, izda zewg ufficjali tas-socjeta` intimata xehdu li l-garanzija bankarja qatt ma waslet ghand id-

Dipartiment tal-Kuntratti. Is-socjeta` rikorrenti tilmenta mill-fatt li l-Bord accetta l-verzjoni tal-Awtorita` tal-Evalwazzjoni u injora l-provi taghha. Dan pero` jaqa' fid-diskrezzjoni tal-Bord gudikant. Hekk osservat din il-Qorti, sede inferjuri, fil-kawza “**Abdilla v. Water Services Corporation**” deciza fl-14 ta' Dicembru, 2006:

“Gja gie osservat diversi drabi minn din il-Qorti illi l-valutazzjoni tal-provi hi fondata fuq il-principju tal-konvinciment liberu, dejjem, pero`, prudenzjali, tal-gudikant adit mill-mertu. Dan necessarjament u logikament ifisser illi l-gudikant ghandu poter diskrezzjonali ampju li mir-rizultanzi probatorji huwa jqis dawk il-provi li, ghall-formazzjoni tal-konvinciment tieghu, iqis l-aktar attendibbli u idoneji. Fl-ezercizzju ta' dan l-process huwa fakoltizzat li jaccetta x-xhieda ta' whud u jwarrab jew jiskarta ohrajn u jqieghead a fundament tad-decizjoni tieghu fonti ta' prova ad eskluzjoni ta' ohra. Kif inhu ben konsolidat f'gurisprudenza konkordi dik il-valutazzjoni tal-gudikant ta' l-ewwel grad hi nsindakabbli minn Qorti ta' revizjoni jekk tirrizulta logika u koerenti ma' l-elementi tal-provi utilizzati, u kif ulterjorment sostenuta minn motivazzjoni adegwata li tikkonsenti l-kontroll tal-kriterju logiku segwit.”

Fuq ri-ezami taghha tal-provi processwali din il-Qorti tistqarr illi d-decizjoni appellata toffri sintesi meqjus ta' dawk l-elementi probatorji li fuqhom il-bord ibbaza l-konvinciment tieghu u l-iter segwit minnu fil-valutazzjoni tal-provi biex wasal ghall-konkluzjoni tieghu. Bhall-Bord qabilha, din il-Qorti tara li hu xieraq li tinghata kredibilita` lix-xhieda prodotta mill-intimat, u jirrizulta pruvat li din il-garanzija qatt ma tressqet lid-dipartiment tal-kuntratti. Kienet responsabbilta` tas-socjeta` rikorrenti li tassigura li d-dokument originali tal-*bid-bond* jasal ghand id-dipartiment koncernat. Jekk taf li l-posta normali ma hijiex dejjem affidabbli, kellha tassigura li dokument hekk importanti jintbaghat jew bil-posta registrata

jew titwassal bl-idejn. Darba hija hadet ir-riskju li tibghat tali dokument bil-posta mhux registrata, allura ghandha tkun hi li trid tbatl l-konsegwenzi tal-fatt li dan id-dokument ma wasalx fil-post fejn kellu jasal. Huwa ghall-kwantu fieragh li targumenta li l-awtorita` kien messha avzat li l-garanzija tintbaghat b'posta registrata; hu obligu ta' kull offerent li jara li jinqeda b'dawk il-mezzi li jizguraw konformita` ma dak mitlub minnu fis-sejha.

Lanqas jirrizulta li l-garanzija giet fil-fatt impustata. Li jinghad hu biss li xi "haga importanti" intefghet fil-posta, pero`, ezatt x'kienet din il-haga ma jirrizultax ippruvat. Wiehed ma jistax allura japplika l-presunzjoni, jekk tezisti, li l-prova tal-impustar tfisser ricevuta ta' dak impustat. Il-prova rilevanti f'dan il-kaz ma saritx mis-socjeta` rikorrenti.

L-argument l-iehor li l-awtorita` kompetenti kienet irceviet kopja tal-garanzija huwa wkoll bla bazi. Dan ma hux bizzejjed. Din il-Qorti tirreferi ghas-sentenza taghha fl-ismijiet "**Projekte Global Ltd v. Kunsill Lokali Marsaskala**" li inghatat fis-7 ta' Ottubru, 2014 fejn intqal hekk fuq dan il-punt:

"Din il-Qorti tara li ma tistax tikkondividi l-hsieb tal-appellant. 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 ghall-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 kkonsiderata.

Kjarifiki jistghu jintalbu fuq dak sottomess, izda jekk dokument ma jigix sottomess, ma hemmx "kjarifika" x'titlob. Il-kopja tal-garanzija ma tiswa ghal xejn fir-relazzjoni li persuna jista' jkollu mal-bank koncernat, u n-nuqqas tal-original jista' jkun ta' hsara ghall-interessi tal-awtorita` kontraenti, u kwindi mhux kaz ta' semplici nuqqas ta' awtentikazzjoni, ghax biex il-garanzija tissarraf, tkun mehtiega l-original ad validitatem.

"Ghalhekk meta wiehed iqis li kemm id-dokumenti tas-sejha u kemm il-ligi jridu li l-garanzija ghandha tkun wahda originali, allura l-kumpanija appellanti ma tistax tippretendi li l-awtoritajiet kontraenti kellhom jaccettaw l-offerta taghha li ma kienx fiha l-garanzija originali;

"Din il-pozizzjoni tinsab ukoll imsahha fil-gurisprudenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea. Infatti f'sentenza ricenti moghtija mill-Qorti Generali (L-Ewwel Awla) fl-20 ta' Marzu 2013, fl-ismijiet **Nexans France v. European Joint Undertaking for ITER and the Development of Fusion Energy (T-415/10)** intqal hekk f'paragrafu 80:

'It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications.'

"Kemm fil-klawsola 16.1 tad-dokumenti marbuta mas-sejha ghall-offerti u kemm fil-klawsola 20.1 tal-istess dokumenti hemm insistenza li l-garanzija pprezentata mal-offerta trid tkun dik originali, u l-istess klawsola 20.1 twissi li offerti "*not accompanied with the mandatory tender guarantee (Bid Bond) by the closing date and time of the tender will be automatically disqualified*". Il-garanzija ma tistax tigi pprezentata xi jiem wara, u la mhux kaz ta' korrezzjonijiet fid-dettal jew zbalji fid-dokumenti, izda ta' nuqqas totali ta' dokument mandatarju, ebda kjarifika ma setghet tintalab u tinghata. Darba li l-garanzija originali ma gietx prezentata sal-jum u l-hin indikat fis-sejha ghall-offerti, l-offerta tas-socjeta` appellanti giet skwalifikata awtomatikament."

Fl-istess sens hija sentenza ohra li tat din il-Qorti fil-31 ta' Ottubru, 2014, fil-kawza fl-ismjiet "**Cherubino Ltd. v. Dipartiment tal-Kuntratti**".

Kwindi, mill-premess, jidher car li l-kumitat tal-ghazla ma messux talab kjarifika jew ratifika. Dak mitlub kien jidher car fid-dokumenti tas-sejha, u dak mitlub espressament kellu jigi pprezentat kif u sal-jum mitlub.

Lanqas ma jirrizulta li l-garanzija ta' Falzon Fuel Services Ltd. waslet tard. Kif tispjega l-awtorita` kontraenti, jirrizultalha li din waslet ghandha fl-4 ta' Ottubru, 2019, entro t-terminu rikjest, u mhux kif allegat mis-socjeta` rikorrenti.

Ghaldaqstant, ghar-ragunijiet premessi tidisponi mill-appell ta' Cassar Fuel Ltd. billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord fis-7 ta' Jannar, 2020, bl-ispejjez relatati ma' dan l-appell jithallsu mis-socjeta` appellanti Cassar Fuel Ltd.

Mark Chetcuti
Prim Imhalled

Joseph R. Micallef
Imhalled

Tonio Mallia
Imhalled

Deputat Registratur
gr