



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tlieta, 6 ta' Ottubru, 2020.

Numru 9

Rikors numru 265/20

Owen Borg

v.

**Kunsill Lokali San Gwann (bhala "Contracting Authority") u Galea
Cleaning Solutions JV (bhala "preferred bidder")**

Il-Qorti:

Dan hu appell imressaq fit-3 ta' Awwissu, 2020, mir-rikorrent Owen Borg wara deċiżjoni datata 20 ta' Lulju, 2020, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-każ riferenza SGN-SSCS 01/20 (każ numru 1458).

Dan il-każ huwa marbut ma' sejha għall-offerti li ħareg il-Kunsill Lokali ta' San Gwann "*for the street sweeping and cleaning services in the locality of San Gwann using environmentally friendly practices*". Għal dan il-kuntratt intefgħu diversi offerti, fosthom waħda mir-rikorrent Owen Borg u oħra mis-soċjeta` intimata Galea Cleaning Solutions JV. Il-kumitat ta' evalwazzjoni ddecieda li jaċċetta l-offerta ta' din is-soċjeta` intimata. Ir-rikorrent appella minn din id-deċiżjoni għall-quddiem il-Bord li b'deċiżjoni tal-20 ta' Lulju, 2020, ma laqax l-appell tar-rikorrent u kkonferma rakkomandazzjoni tal-kumitat ta' evalwazzjoni. Id-deċiżjoni tal-Bord hija s-segwenti:

"This Board,

"having noted this objection filed by Mr Owen Borg (hereinafter referred to as the Appellant) on 5th June 2020, refers to the claims made by the same Appellant with regard to the tender of reference SGN-SSCS 01/2020 listed as case No. 1458 in the records of the Public Contracts Review Board awarded by San Gwann Local Council (hereinafter referred to as the Contracting Authority).

"Appearing for the Appellant: Dr Franco Galea

"Appearing for the Contracting Authority: Dr Ramona Attard

"Appearing for the preferred bidder: Dr Adrian Mallia

"Whereby, the Appellant contends that:

"a) The Insurance Policy provided by the preferred bidder is not compliant with article 13.3 which clearly states that, the policy must cover damages to third parties, injury to personnel and Insurance on Plant and machinery. In this regard, Appellant maintains that, the policy presented by the preferred bidder covered insurance only on injury to employees by one of the parties to the joint venture.

"b) The tender document requested a global price and the Authority allowed the preferred bidder to alter the price after a clarification was sent to them. In this respect, Appellant insists that, their offer should have been disqualified.

“c) With regard to equality mark his offer was unfairly penalised for not submitting the relative certificate however, due to circumstances beyond his control, the Authority concerned did not process his application in time for submission of the requested certificate.

“This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 5th June 2020 and its verbal submissions during the virtual hearing held on 9th July 2020, in that:

“a) The Authority contends that, the Insurance Policy submitted by the preferred bidder did satisfy the requirements as per article C 2.5 which stated that, the bidder had to provide proof of insurance cover of its employees in case of injury and such a policy cover has been submitted to the satisfaction of the Evaluation Committee.

“b) The Authority maintains that, it was clearly evident from the bid form submitted by the preferred bidder that the price tendered was per annum. In this regard, since there were divergent submissions, bidders were requested to confirm their annual price for the period of the tender, so as to assess all bids on a level playing field and, in this regard, after having examined the relative correspondence, this Board confirms that there were no changes in the price of the bids.

“c) The tender dossier requested the submission of the ‘Equal Opportunities Certification’ and Appellants failed to submit such documentation. At the same instance, the Authority was not made aware of any difficulties which Appellant encountered in obtaining such certification so that the principle of self-limitation was appropriately applied by the Evaluation Committee.

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

“Mr Chris Falzon, Chairman Evaluation Committee duly summoned by the Public Contracts Review Board.

“This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witness duly summoned establishes that, the issues that merit consideration are threefold namely:

- “• Insurance Policy submitted by the preferred bidder
- “• Alleged alteration of the global price of the preferred bidder
- “• Non-submission of ‘Equal Opportunities Certification’ by Appellant

“1. Insurance Policy

“1.1. First and foremost, this Board notes that, the Insurance

“Policy submitted by the preferred bidder related to one of the partners of the joint venture namely, Mr Christian Galea who is also responsible for the provision of the working force for the tendered works.

“1.2. Appellant contends that, the Insurance Policy should have been issued in the name of the joint venture itself and not on one member of the joint venture. In this regard, this Board would respectfully refer to Regulation 235 of the Public Procurement Regulations which clearly states that:

“235. (1) With regard to criteria relating to economic and financial standing as set out pursuant to regulations 218 to 221, and to criteria relating to technical and professional ability as set out pursuant to regulations 222 and 223, an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in regulation 232(f), or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or service for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.”

“So, the fact that, the Insurance Policy is in the name of Mr Christian Galea who will be responsible for recruiting the labour force and forms part of the joint venture does satisfy the requested insurance for the employees of the consortium.

“1.3. Appellants also contend that article 13.3 of the Special Conditions of the tender dossier stipulated that:

“13.3 Insurance shall cover at least the following:

- “• Damages to third parties;*
- “• Cover for personnel in case of injury during their working hours;*
- “• Insurance on Plant and Machinery.”*

“It is a fact that the above-mentioned article stipulated what the Insurance Policy should cover but at the time of signing of the contract and not at submission of offers stage.

“1.4. In this respect, this Board would refer to article C 2.5 of the evaluation grid (Page 13 of the tender dossier) wherein what is being requested mandatorily, at submission stage is:

“5) Contractor to provide proof of insurance cover to its employees in case of injury during work. (add-on) (2 points).”

“It is amply evident that what the Authority requested at submission stage was a Policy covering the employees in case of injury during work and in this respect, this Board can confirm that the Policy submitted by the preferred bidders included a public liability coverage and an employer’s liability covering manual workers, so that, there is no justifiable reason to deem preferred bidders’ submitted policy as non-compliant with the requirement of article C 2.5 of the tender dossier, the latter of which specifies what is mandatory on the submission of offers.

“2. Alteration of Preferred Bidder’s global price

“2.1. Appellant maintains that, through a reply to a clarification request, the preferred bidder confirmed a price different from their original submission and since the tender requested a global price, such a change in the bid price should have rendered the preferred bidders’ offer as non-compliant.

“2.2. This Board, after having examined the offers in detail, noted that the preferred bidders’ financial bid was denoted as €118310.49 for a period of one year. Since other bidders quoted different configurations, the Evaluation Committee, quite appropriately, had to evaluate all the bids on a level playing field and it is at this particular stage and instance that, requests for clarifications were sent to the various bidders to confirm that, in the case of those who quoted per annum, same rate applies for the duration of the tender and for those who quoted a global price, to confirm the rate per annum.

“2.3. This Board opines that, it was imperative for the Evaluation Committee to establish an annual rate so that, the global price for 4 years (the duration of the tender) can be compared on a level playing field.

“2.4. The preferred bidders also submitted their financial bid breakdown through the EPPS system, showing the annual fee for all the 4 years, which amounted to a global fee of €473241.96 for the whole tender period, so that, through clarification requests sent to the various bidders, there was no change effected in bid prices. At the same instance, this Board confirms that, the action taken by the Evaluation Committee safeguarded the application of the principle of transparency and level playing field on all the offers.

“3. Equal Opportunities Certification

“3.1. With regard to Appellant’s third contention, this Board would refer to article C 1.1 which was mandatory and which states

that:

“CI - Equal Opportunities

“1) Evidence that economic operator is an Equal Opportunities employer in line with the Equality Mark or equivalent (Add-on). A copy of the certificate / label of this Equality Mark is to be provided. (2 Points).”

“3.2. Appellant did not submit such a certification but only a declaration that he commits himself to obtain the necessary certificate. This Board also noted Appellant’s submissions in this regard, however, it points out that, he failed to inform the Authority that an application process has started and is awaiting the necessary visits for inspection by the relevant Authority, to continue their application process.

“3.3 One has to appreciate and acknowledge that, the Evaluation Committee are limited to assess offers on the submissions made by the respective bidders. At the same instance, the issue of equal opportunities falls under note 3, so that no clarification or rectification can be made.

“In conclusion, this Board opines that,

“a) With regard to the Insurance Policy submitted by Galea Cleaning Solutions JV, this Board confirms that such a policy is compliant with article C 2.5, which is the mandatory requirement upon submission of offers.

“b) There was no change in the bid prices and the Evaluation Committee, appropriately requested clarifications to abide by the principle of transparency, equal treatment and level playing field.

“c) With regard to ‘Equal Opportunities Certification’, this Board affirms that, the documentation submitted by Appellant, in this regard, did not represent the mandatory certification requested in the tender dossier. At the same instance, this Board would point out that, had the Appellant submitted proof or explanations that he had commenced the application process, his contention would have been favourable, however, the documentation submitted on this issue was simply a ‘Declaration of Compliance’, which is not what the tender document requested.

“d) Deplores the irregular action taken by the Authority in submitting copies of the full evaluation report to certain of the bidders. Such an action will not be tolerated again and the Authority

is hereby being directed that, fines will be imposed in future for such an irresponsible and unnecessary submission by the Authority.

“In view of the above, this Board,

- “i. does not uphold Appellant's contentions,
- “ii. upholds the Contracting Authority's decision in the award of the contract,
- “iii. directs that the deposit paid by Appellant should not be refunded.”

Ir-rikorrent Owen Borg issa qed jappella mid-deċiżjoni li ħa l-Bord għal quddiem din il-Qorti u ressaq erba' aggravji: (i) li l-Bord kien żbaljat meta ċaħadlu t-talba biex tixhed xhud; (ii) li l-polza ta' assikurazzjoni pprovduta minn Galea Cleaning Solutions JV ma kinitx valida; (iii) li l-offerta tas-soċjeta` intimata kellha tigi skwalifikata għalhiex ma kinitx tinkludi offerta ta' prezz kif mitlub; u (iv) li l-offerta tiegħu giet ippregudikata b'mod mhux gust fir-rigward tal-*equality mark* billi huwa ma setax jipproduċi tali dokumentazzjoni għal ragunijiet lil'hemm mill-kontroll tiegħu.

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:

Illi din il-Qorti tara li għandha tittratta l-ewwel it-tieni aggravju tar-rikorrent peress li jidhrilha li dan l-aggravju għandu mis-sewwa u sejjer iwassal

għat-tħassir tad-deċiżjoni appellata; għalhekk, ma jkunx meħtieġ li jigu diskussi l-aggravji l-oħra.

Id-dokumenti għas-sejħa esigew kopertura tal-assikurazzjoni għall-impjegati tal-offerenti. F'dan il-każ, il-polza ta' assikurazzjoni li giet ppreżentata ma kinitx tkopri lil Galea Cleaning Solutions JV, li hija konsorzju ta' diversi persuni, iżda lil wieħed mill-membri ta' tali konsorzju. Din is-soċjeta` argumentat illi kienet dik il-persuna li kienet se timpjega l-ħaddiema u ma kienx meħtieġ li kulħadd jigi kopert b'polza ta' assikurazzjoni. Id-dokumenti tas-sejħa, pero`, riedu li l-ħaddiema kollha tal-offerent kellhom ikunu koperti b'assikurazzjoni u mhux uħud minnhom. Hu veru li skont ir-regoli ta' *Public Procurement*, offerent, fit-twettiq tal-kuntratt, ikun jista' jinqeda minn persuni esteri li jkollhom kapacitajiet partikolari, iżda fl-istadju tal-offerta, dak li hu mitlub kellu jigi offrut mill-offerent u mhux minn parti waħda. Jekk offerta saret minn diversi persuni b'*joint venture*, kienet din li kellha toffri polza tal-assikurazzjoni għall-ħaddiema kollha tagħha. Huwa ritenut mill-aktar rilevanti li ssir referenza f'dan ir-rigward għas-sentenza ta' din il-Qorti tat-13 ta' April, 2018, fil-kawża fl-ismijiet "**Quattro Labs Limited proprio et nomine v. Malta College of Art, Science and Technology (MCAST) et**" fejn jingħad hekk:

"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 jgħux 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-sejha. Hu fl-interess tal-offerent li fi proċess ta' offerta wara sejha 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 kkonsiderata. 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, “tbenġel” 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 tintlaħaqx 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.”

Dak il-każ kien jittratta l-għoti ta' garanzija mal-offerta, iżda għandu japplika l-istess prinċipju għall-dan il-każ, u jingħad li l-assikurazzjoni kellha tingħata mill-offerent u mhux minn membru tal-istess.

L-aggravju relattiv huwa, għalhekk, misthoqq u l-offerta tas-soċjeta` intimata kellha tigi skwalifikata.

Għaldaqstant, għar-ragunijiet premissi, tiddisponi mill-appell tar-rikorrent Owen Borg, billi tilqa' l-istess u tħassar u tirrevoka d-deċiżjoni li ħa l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi tal-20 ta' Lulju, 2020, u kwindi tirrevoka wkoll id-deċiżjoni li ħa l-Kunsill Lokali ta' San Gwann fir-rigward.

L-ispejjeż marbuta ma' dawn il-proċeduri jithallsu mis-soċjeta` intimata Galea Cleaning Solutions JV.

Mark Chetcuti
Prim Imħallef

Joseph R. Micallef
Imħallef

Tonio Mallia
Imħallef

Deputat Reġistratur
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