



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar l-Erbgħa, 27 ta' Ottubru, 2021.

Numru 1

Rikors numru 178/21/1

Alistair Bezzina

v.

**(1) Kunsill Lokali San Pawl il-Baħar; (2) Galea Cleaning Solutions
JV; (3) Proofreading.com.mt/Robert Louis Fenech & Matthew
Camilleri; (4) Redeemer/Redeemer Mifsud**

Il-Qorti:

1. Dan huwa appell minn deċiżjoni li ħa l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ il-"Bord") fit-3 ta' Ġunju, 2021, fil-każ b'referenza SPB T 02/2020 (każ numru 1571).

2. Dan il-każ jirreferi għas-sejħa għall-offerti li saret mill-Kunsill Lokali ta' San Pawl il-Baħar "*for the provision of non-urban grass cutting using low emission vehicles and environmentally friendly equipment for St.Paul's Bay Local Council*". Għal din is-sejħa kien hemm erba' offerenti li huma r-rikorrent, Saviour Galea et kif ukoll Redeemer Mifsud u Proofreading.com.mt. Il-kumitat ta' evalwazzjoni ddeċieda li jirrakkomanda li l-kuntratt jingħata lil "*Mr. Redeemer Mifsud for Proofreading.com.Ltd.*" Kemm ir-rikorrent kif ukoll Galea Cleaning Solutions JV ressqu appell quddiem il-Bord li lmentaw li mhux leċitu li operatur ekonomiku jitfa' offerta kemm f'ismu kif ukoll bħala sieheb f'*joint venture*; ilmentaw ukoll li l-offerent magħżul ma kellux l-apparat konsistenti fi *steam cleaning machine* mandatarjament meħtieġ sabiex jipprovdi s-servizz mitlub mis-sejħa. Il-Bord laqa' l-ilmenti bid-deċiżjoni tat-3 ta' Ġunju, 2021 u ddeċieda li jħassar is-sejħa fl-interita` tagħha. Id-deċiżjoni tal-Bord hija s-segwent:

"The Board refers to the minutes of the Board sitting of the 1st June 2021.

Having noted the objection filed by Galea Cleaning Solutions JV (hereinafter referred to as the Appellant) on 6th November 2020, refers to the claims made by the same Appellant with regard to the tender of reference SPB T 02/2020 listed as case No. 1571 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Adrian Mallia

Appearing for the Contracting Authority: Dr David Bonello

Appearing for Interested Party: Dr Jonathan Mintoff

Whereby, the Appellant contends that:

a) *The letter of award states that the tender is being awarded to “Mr Redeemer Mifsud for Proofreading.com. Ltd”. As a fact, there is no entity registered with the Malta Business Registry with the name ‘Proofreading.com. Ltd’.*

b) *The notification sent to the Appellant by the Contracting Authority provides a table which appears to contradict the letter of award in so far as the award is stated to have been made to ‘Proofreading.com.mt rather than ‘Proofreading.com. Ltd’. Therefore was the tender awarded to a website? Furthermore, it appears that the Contracting Authority considered two bids in its final ranking, namely that of Redeemer Mifsud and that of Proofreading.com.mt. The letter of award clarifies that the tender is being awarded to “Mr Redeemer Mifsud for Proofreading.com. Ltd”. It appears that Mr Redeemer Mifsud in effect submitted two bids for the same tender, one directly and one through what appears to be a website or a non-existent entity.*

c) *The recommended bidder did not meet the explicit conditions set forth by the Tender Document as a result of the fact that the recommended bidder does not have the equipment required pursuant to the Tender document.*

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 16th November 2020 and its verbal submission during the virtual hearing held on 1st June 2021, in that:

a) *Tendering process was done online on the EPPS system. In order to be able to submit a tender one would need to go through an exhaustive due diligence process with various checks and balances, including the checking of VAT registration. This however does not preclude anyone from choosing its own username id on the same etenders.gov.mt system. It must be stated that there are no restrictions in the choice of the username of the said entity or person. The recommended bidder chose a username that is unrelated to the name of the entity. When quoting the recommended bidder the council mentioned the username instead of the name of the entity. However as clearly evidenced by the information sheet submitted by the Council the tender was awarded to JX Landscaping Joint Venture.*

b) *The two bids were separate and submitted by two separate legal persons.*

c) *From the documentation submitted by the recommended bidder one can easily ascertain that the recommended bidder does meet the selection criteria.*

This Board also noted the Interested Party’s Reasoned Letter of Reply filed on 12th November 2020. This also as per Court of Appeal

(377/2020/1) whereby it was decreed that the Letter as presented by Alistair Bezzina is valid and needs to remain in the documentation pertaining to this case by the PCRB. This with the premise that it needs to be considered as a Letter of Reply and not as an Objection Letter "ladarba hija risposta mhux oggezzjoni ghandha tinghata biss l-effetti ta risposta, fis sens li tiswa safejn rressqet ragunijiet favur l-aggravji ga mressqa fl-oggezzjoni ta Galea izda mhux ukoll safejn rressqet aggravji godda".

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, will consider Appellant's grievances, as follows:

a) The Appellant's first and second grievances will be dealt with together by this Board.

i. The Board opines that it is crucial for the Contracting Authority to be clear in its communications with bidders / prospective bidders during all stages of the tendering process including but not limited to, i) the writing of Notice of Award, ii) Letter of Acceptance and iii) Letters of Rejection. The Board notes that multiple names have been used to refer to the winning bid during the whole tendering process, i.e. "Proofreading.com.mt", "Mr Redeemer Mifsud for Proofreading.com. Ltd" and "JX Landscaping Joint Venture". This creates confusion and is not deemed acceptable.

ii. Moreover, the General Rules Governing Tenders, in article 3.2, state clearly "An Economic Operator may not, however, tender for a given contract both individually and as a partner in a joint venture/consortium". This is in fact what happened here. Mr Redeemer Mifsud had his own 'individual' bid, while also participating in another bid forming part of the Joint Venture called "Proofreading.com.mt", "Mr Redeemer Mifsud for Proofreading.com. Ltd" or "JX Landscaping Joint Venture". The Board opines that with this behaviour there was an undermining of free and proper competition.

After considering all the above points, the Board upholds Appellant's first and second grievances.

The Board would also like to point out that it is in the interest of the Contracting Authority to have an idea of where the bids are coming from and who did in fact bid for their respective tender. This to be well placed to follow the Public Procurement Regulations, General Rules Governing Tenders and also Circulars issued from time to time by the Department of Contracts during the evaluation stage. Such information is crucial for the Contracting Authority to follow Section 3 of the General Rules Governing Tenders.

b) With regards to the Appellant's third grievance, the Board notes the testimony of Mr Paul Bugeja whereby he confirmed that the preferred bidder did not own a steam cleaning machine, which was mandatorily required under item 2. The Board upholds Appellant's third grievance.

In conclusion this Board opines that;

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant's concerns and grievances;*
- b) To cancel the Letter of Acceptance dated 27th October 2020 sent to "Mr Redeemer Mifsud for Proofreading.com. Ltd";*
- c) To cancel all the Letters of Rejection dated 27th October 2020;*
- d) Directs the Contracting Authority to cancel the tender in its entirety;*
- e) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant".*

3. Kemm Saviour Galea, Joseph Galea u Christian Galea f'isimhom u f'isem Galea Cleaning Solutions JV, kif ukoll Alistair Bezzina appellaw mid-deċiżjoni tal-Bord u ż-żewġ appelli ġew trattati u deċiżi flimkien minn din il-Qorti (Rikorsi 180/21 u 178/21).

4. Wara li semgħet lid-difensuri tal-partijiet u rat l-atti kollha tal-kawża, din il-Qorti sejra tgħaddi għas-sentenza tagħha.

Ikkunsidrat:

5. Illi l-appellanti jaqblu mad-deċiżjoni tal-Bord safejn din osservat li l-applikant Redeemer Mifsud ħoloq konfużjoni meta tul il-proċess uża diversi ismijiet bħala l-persuna li kien qed jagħmel l-offerta. Fil-fatt, kif indika l-Bord, Redeemer Mifsud, apparti li kien qed jidher f'ismu, indika wkoll l-ismijiet "*Proofreading.com.mt*", "*Mr.Redemer Mifsud for Proofreading.com.Ltd*" u "*JX Landscaping Joint Venture*". Hu ċar li dan mhux aċċettabbli.

6. Min appella, pero` ħass li s-sejħa ma kellhiex titħassar "*in it's entirety*" kif iddeċieda l-Bord. Il-Qorti taqbel ma' dan l-argument. It-taħwid ħolqu Redeemer Mifsud u/jew sħabu u dan għandu jiġi skwalifikat għax mhux biss, bil-mod li aġixxa, kiser ir-regolamenti tas-sejħa, iżda wkoll inqeda b'diversi ismijiet b'mod li ħoloq konfużjoni. Issa hu veru li r-regolamenti ġenerali jipprojbixxu li wieħed jitfa' offerta "*both individually and as a partner in a joint venture/consortium*", u ma jsemmux kumpanija b'responsabilità limitata, pero`, f'dan il-każ, Redeemer Mifsud aġixxa b'diversi strutturi u ma jistax jiġi ammess li jipparteċipa b'dak il-mod. Għalhekk għamel sewwa l-Bord li skwalifika lill-imsemmi Mifsud u l-istrutturi li ħoloq għall-offerta, iżda mhux li jħassar is-sejħa kollha. It-taħwid ħolqu Redeemer Mifsud għalih innifsu, u ma għandhomx jiġu ppreġudikati l-offerenti l-oħra, cioè`, Galea Cleaning Solutions JV u Alistair Bezzina. Dawn iż-żewġ offerti jridu, issa, jiġu eżaminati waħedhom.

Għaldaqstant, għar-raġunijiet premissi, tiddisponi mill-appell tar-rikorrenti Alistair Bezzina billi tilqa' l-istess u tirriforma d-deċiżjoni li ta l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi fit-3 ta' Ġunju, 2021, billi tikkonfermaha kollha ħlief li tħassar u tirrevoka d-*decide* (d) tagħha, u tibgħat l-każ lura lill-kumitat ta' evalwazzjoni biex jistħarreg u jiddeċiedi fuq iż-żewġ offeriti l-oħra li saru, cioè`, waħda minn Galea Cleaning Solutions JV u l-oħra min Alistair Bezzina.

L-ispejjeż ta' dan l-appell jithallsu kollha minn Redeemer Mifsud.

Mark Chetcuti
Prim Imħallef

Joseph R. Micallef
Imħallef

Tonio Mallia
Imħallef

Deputat Registratur
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