



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, 10 ta' Jannar, 2023.

Numru 4

Rikors numru 340/22/1

All Clean Services Limited (C 39278)

v.

**Ministeru għall-Edukazzjoni, l-iSport, iż-Żgħażaġġ, ir-Riċerka u l-
Innovazzjoni;
Dipartiment tal-Kuntratti;
General Cleaners Company Limited (C 14053)**

Il-Qorti:

1. Rat li dan hu appell ipprezentat fl-1 ta' Awwissu, 2022 mis-soċjetà All Clean Services Ltd., wara deċiżjoni li ta l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi (minn hawn 'l quddiem imsejjaħ il-"Bord") fil-11 ta' Lulju, 2022 fil-proċess li jgħib ir-referenza CT 2287/21 (każ numru 1759).

2. Dan il-każ jirreferi għas-sejha għall-offerti li ħareġ il-Ministeru intimat “*for the provision of environmentally friendly cleaning services including summer in state schools and educational facilities in Malta and Gozo*”. Din is-sejha kienet maqsuma f’diversi lottijiet. Kien hemm mas-seba’ oblaturi li ressqu l-offerti tagħhom, fosthom is-soċjetà rikorrenti All Clean Services Ltd. Din is-soċjetà ġiet skwalifikata fuq lot 2, 6, 7 u 8 peress illi l-offerta mressqa minnha ma kinitx tissodisfa l-kriterja tas-sejha. Il-kuntratt għal dawn il-lottijiet ġie rakkomandat li jingħata lis-soċjetà intimata General Cleaners Co. Ltd.

3. Is-soċjetà rikorrenti All Clean Services Ltd. appellat mill-iskwalifika għall-quddiem il-Bord li b’sentenza tal-11 ta’ Lulju, 2022 ċaħad l-ilment ta’ din is-soċjetà. Id-deċiżjoni tal-Bord hija s-segwent:

“Whereby, the Appellant contends that:

- a) Preliminary issue - The Tenderer is raising an objection in the sense that the maximum amount payable for an appeal under regulation 273 is of €50,000. Objector has, on a without prejudice, paid the sum of €64,000 in view of this appeal. The point being made here is that the subdivision of a tender in various lots, whilst permissible at law, cannot be such as to require a tenderer filing an appeal from any or all of the said lots to pay an amount in excess of the said ceiling of €50,000. In this respect one also notes that in actual fact it is clear that the Department of Contracts and all tenderers were looking at this Tender as one and this is reflected both in the pricing and in the ranking and award of each of the 12 lots.
- b) Merits -
 - i. The offer made by the Objector is indisputably and absolutely the cheapest for each lot under discussion. This results very clearly not only when you compare the offer with General Cleaners but also against all other tenderers.
 - ii. The Objector has a perfect score sheet on the technical aspect meeting all the mandatory requirements. The only requirement that is

not met is an “add-on” requirement, ie: *‘Question 28 - D1 (vi) A valid Collective Agreement in place’*

- iii. The requirement as per Question 28 – D1 (vi) is not a permissible requirement in respect of this tender and this for a number of reasons.
- iv. It is certainly laudable that the Contracting Authority seeks to award tenders to operators that abide by their social responsibility towards their employees. Thus one can understand the inclusion of mandatory provisions that require the employees to be provided (for example) with a written contract. However, the adjudicating criterion, ie the requirement (as an add-on) that there be a collective agreement in place, is not a criterion that could be validly imposed as a condition on this tender.
- v. The requirement in question ie that there be a collective agreement in place is not linked to the subject matter of the contract in that it does not relate to the services to be provided and does not comply with fundamental principles of EU law.
- vi. First of all one notes that the Tender (see question D1.iii) requires the employees to be given an employment contract. Objector has obtained full marks for this mandatory question. This means that all the employees intended to be deployed on the contract have in place a contract that regulates their employment.
- vii. One must also raise the point that the employment of cleaners is subject to a National Standard Order which according to section 5(1) of Cap.452 *“shall be the recognised conditions of employment for the employees concerned.”* The conditions of employment of cleaners in Malta are determined by the Private Cleaning Services Wages Council Wage Regulation Order (S.L452.76). SL452.74 provides for the establishment of a *“Wages Council which operates for all employees who work with establishments providing private cleaning services.”*
- viii. This apart from the fact that the Government also has minimum conditions in place applicable to those employees deployed in a public function and which conditions are proven to be adhered to by the Objector.
- ix. When there is a collective agreement in place the employee's conditions of employment are governed by the collective agreement and NOT by an individual agreement in writing with the individual employee. Effectively the collective agreement takes the place of the individual employment contract. The agreement in writing would also not be valid and any conditions different to the collective agreement would not be enforceable. What then would be the use of giving an Employee an Agreement in writing to merely re state the same conditions set out in the Collective Agreement.
- x. Secondly it will be shown that there are minimum conditions in place, required by the Government on all contracts of a similar nature, that are adhered to by the Objector.
- xi. Thirdly, it is a mandatory requirement of the tender that employees be allowed by the Employer to join unions. The existence of a collective agreement is therefore meaningless. It adds nothing relevant to the way in which the services are provided. And, if anything the question

should have been couched in a way to ensure that the Tenderer has in place either (i) an individual agreement with all the employees or (in) a Collective Agreement covering the relevant employees.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 7th April 2022 and its verbal submission during the virtual hearing held on 7th July 2022, in that:

- a) Preliminary issue – In relation to the deposit paid, this is not the right forum to address such a grievance. Nonetheless, the capping of €50,000 is to be calculated on a per lot basis. This as per Regulation 273 of the Public Procurement Regulations (“PPR”)
- b) Merits –
 - i. All that the Appellant is basically stating in their letter of objection is that in their opinion it was not permissible to include question 28 – D1 (vi)
 - ii. Regulation 262 of the PPR is amply clear that such type of grievances should have been brought forward prior to the closing date of tenders. Such an appeal should have been filed within ‘two thirds’ timeframe as per Call for Remedies applications.
 - iii. Since this mechanism has not been availed of, the Appellant's did not consider such a criterion as illegal and / or discriminatory when it submitted its offer. It was only when the offers were evaluated and they were not chosen as the preferred bidder that it thought that this criterion was illegal and / or discriminatory.
 - iv. Moreover, the Contracting Authority contends that such a criterion is certainly not illegal and / or discriminatory. Initially it needs to be pointed out that this was an ‘add-on’ requirement and hence those economic operators which do not have a collective agreement in place, are not deemed as not compliant. Moreover, the regulations of public procurement do encourage the use of collective agreements as part of their requirements.

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 witnesses duly summoned, will now consider Appellant's grievances.

The points that merit attention are three-fold.

1. Preliminary issue – Deposit
2. Regulation 262
3. Question 28 – D1 (vi) – ‘A valid Collective Agreement in place’

a) Preliminary issue – Deposit – The Board notes the written representations brought forward by both parties. It also notes that during the hearing this issue was not raised, and no verbal submissions were forthcoming. Reference is made to regulation 273 of the Public Procurement Regulations (“PPR”) whereby it is stated: *“The objection shall only be valid if accompanied by a deposit equivalent to 0.50 per cent of the estimated value set by the contracting authority of the whole tender or if the tender is divided into lots according to the estimated value of the tender set by the*

contracting authority for **each** lot submitted by the tenderer, provided that in no case shall the deposit be less than four hundred euro (€400) or more than fifty thousand euro (€50,000) which may be refunded as the Public Contracts Review Board may decide in its decision.” (bold emphasis added) It is this Board’s opinion that when a tender is divided into lots, the minimum and maximum thresholds are to be taken for each specific lot individually.

b) Regulation 262 – Reference is made to regulation 262 of the PPR whereby: “262. (1) Prospective candidates and tenderers **may**, within the first two-thirds of the time period allocated in the call for competition for the submission of offers, file a reasoned application before the Public Contracts Review Board: (a) to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform; or (b) to determine issues relating to the submission of an offer through the government’s e-procurement platform; or (c) **to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure;** or (d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or (e) to cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued.” (bold emphasis added).

The Board is in agreement with the argumentation brought forward by the Appellant that the regulation uses the word “may”, and therefore an economic operator is not obliged per se, to make use of this tool / regulation. However, in this Board’s opinion, regulation 262 is the proper tool available, at the disposal of economic operators, when they feel aggrieved on ‘potential’ discriminatory technical specifications found in the tender dossier. They cannot accept, *ab initio*, all that is written in the tender dossier, present and formalise a bid, wait for the eventual award of tender, and then if not being awarded such tender, feel aggrieved about specifications which were known as from the start of the tendering procedure. The arguments brought forward, by the Appellant, about the ‘high fees’ to place a call for remedy application, are deemed immaterial since the amount to be paid as part of the deposit is commensurate to, and is based on the, estimated procurement value of the tender in question. Minimum and maximum thresholds also apply.

c) Question 28 – D1 (vi) – ‘A valid Collective Agreement in place’ – Even though, as per point above, this Board opines that the Appellant should have used regulation 262 in order to appeal against such grievances, this Board will still comment on the merits of the case. Reference is made to recital 18(2) of the European Directive 2014/24/EU whereby such use of collective agreement is in fact encouraged by EU institutions[as best practice]. Moreover, this Board

is comforted by the testimony under oath of Mr Louis Cordina whereby he confirmed that such collective agreements presented as part of the bids, by other economic operators, had the 'blessing' / approval of the specialised entity within government for such work, i.e. the Department of Industrial and Employment Relations (DIER).

Therefore, this Board does not uphold the grievances of the Appellant.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decisions in the recommendation for the award of the different lots as originally made,
- c) Directs that the deposit paid by Appellant on Lot 2, Lot 6, Lot 7 and Lot 8, not to be reimbursed."

4. Is-soċjetà All Clean Services Ltd. issa qed tappella mid-deċiżjoni tal-Bord għal quddiem din il-Qorti bl-aggravju prinċipali jkun li l-kundizzjoni mposta fis-sejħa li l-ħaddiema tal-oblatur ikollhom ftehim kollettiv li jirregola l-kondizzjonijiet tal-impjeg tagħhom, kienet biss "*add on*" u ma kellux ikollha effett determinanti fuq l-għoti tal-kuntratt.

5. Issa li semgħet dak li kellhom xi jgħidu d-difensuri tal-partijiet, u rat l-atti kollha tal-kawża u d-dokumenti esebiti, sejra tgħaddi għas-sentenza tagħha.

Ikkunsidrat:

6. Din il-Qorti ma taqbilx mal-aggravju tas-soċjetà appellanti. L-argument li meqjus ir-rekwiżiti l-oħra mitluba fis-sejħa u n-natura tax-xogħol li kellu jitwettaq, din il-kundizzjoni "*hi kompletament irrilevanti*", hija

fiergħa u bla bażi. Rilevanti jew le, dik il-kundizzjoni kienet tiffirma parti mis-sejħa, u jekk l-istess kundizzjoni ma avveratx ruħha, is-soċjetà appellanti ma tistax tilmenta fuq il-punti żejda li ħadu l-oblaturi l-oħra li wettqu dik il-kundizzjoni.

7. Din il-Qorti taqbel ma' dak li osserva l-Bord li kull min kien interessat, jekk ma kienx jaqbel ma' xi kundizzjoni fis-sejħa, skont ir-Regolamenti applikabbli, seta' aġixxa, bil-mezzi li jagħtuh l-istess Regolamenti, biex jipprova jimpunja dik jew dawk il-kundizzjonijiet. Mhux leċitu li l-oblatur iħalli l-proċess għaddej, u wara, jekk jitlef il-kuntratt, jallega li kundizzjoni fis-sejħa ma kellhiex tkun hemm għax "*kompletament irrilevanti*".

8. Hu veru li l-kundizzjonijiet tax-xogħol tal-ħaddiema huma regolati b'ligijiet oħra, u hemm regolamenti li jagħtu poter lill-awtorità kompetenti tissindika fuq dawk il-kundizzjonijiet, però, dan kien ikun argument li kellu jittressaq fl-istadju preparatorju għall-proċess tal-għażla tal-oblatur preferut. Jekk ir-rekwiżit ta' ftehim kollettiv huwa parti mill-kundizzjonijiet li kellhom jiġu sodisfatti minn kull oblatur, is-soċjetà appellanti kellha taderixxi ruħha ma' dak rikjest. Din il-Qorti osservat diversi drabi li dak rikjest fid-dokumenti tas-sejħa għall-offerti jridu jiġu kollha sodisfatti. Mhux regolari li tgħid li kundizzjoni partikolari kienet biss "*add on*" u oblatur jista' jinjoraha, għax min jipparteċipa jrid isegwi dak mitlub fid-

dokumenti. Jirriżulta wkoll illi ftehim b'hal dan ikun ta' utilità għal funzjonament tal-kuntratt.

9. Il-fatt li l-impjegati li jintbagħtu jaħdmu fl-iskejjel ser jiġu regolati mill-kundizzjonijiet stabbiliti miċ-ċirkolari tad-Dipartiment tal-Kuntratti, huwa rrilevanti. Dik il-klawsola tar-rekwiżit ta' ftehim kollettiv la hi llegali u lanqas ma ġiet ikkontestata u allura torbot lill-oblatatur, u darba li s-soċjetà appellanti ma għandhiex ftehim kollettiv fis-sehħ mal-ħaddiema tagħha, ma tistax tiegħu punti fir-rigward.

Għaldaqstant, għar-raġunijiet premissi, tiddisponi mill-appell tas-soċjetà All Clean Services Ltd. billi tiċċad l-istess u tikkonferma bis-sħiħ id-deċiżjoni tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi tal-11 ta' Lulju 2022, bl-ispejjeż anke ta' din l-istanza jithallsu kollha mis-soċjetà appellanti All Clean Services Ltd.

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