



QORTI TA' L-APPELL

**ONOR. IMHALLEF
RAYMOND C. PACE**

Seduta tas-17 ta' Mejju, 2012

Appell Civili Numru. 36/2011

Koperattiva Ghawdxija Indafa Pubblika

vs

Kunsill Lokali Nadur

Il-Qorti,

I. PRELIMINARI.

Illi fit-30 ta' Settembru 2011 il-Public Contracts Review Board ippronunzja s-segwenti decizjoni fl-ismijiet premessi:-

"After the Chairman's brief introduction, the appellant co-operative was invited to explain the motives of his objection.

Dr Carmelo Galea, legal representative of the appellant co-operative - Koperattiva Ghawdxija Indafa Pubblika (KIP

Gozo) - declared that the objection was based on two aspects (i) that the bid had to be disqualified ab initio as it was considered to be administratively not compliant and (ii) the technical evaluation was defective such that extra points were awarded to the recommended tenderer while points had been deducted in respect of his client's offer.

With regard to the Tender Guarantee /Bid Bond Dr Galea submitted that:-

i. Clause 4 of the Instructions to Tenderers laid down the mandatory documents that the tenderer had to include in the bid, among them, the tender guarantee (bid bond) and any other document specifically required by the Local Council;

ii. Clause 8 then specified that the tender guarantee had to be valid for a period of one hundred and fifty (150) calendar days from the final closing date of the tender, which requirement was reproduced at Article 14 of the Local Councils (Tendering) Procedures 1996, which indicated that the tender "guarantee had to be valid up to the 30th April 2011;

iii. the administrative compliance grid indicated that the Bid Bond had to remain valid up to 28th April 2011 - slightly different from the 30th April - nevertheless the bid bond presented by the recommended tenderer was valid up to 27th February 2011 which meant that, by the time the board carried out the tender evaluation, namely the 11th March 2011, the bid bond had already expired; and

iv. failure to include the mandatory bid bond led to the offer being automatically disqualified (Art. 14 of the Local Councils procedures) and the evaluation board had no discretion in that regard but it should have disqualified the recommended tenderer's offer. The evaluation board did not have the discretion to request the recommended tenderer to replace the tenderer's bid bond after the offers had been opened since that was irregular.

Dr Andrew Borg Cardona, legal representative of the contracting authority, namely the Nadur Local Council, declared that all that the Local Council had to do in such cases was to demonstrate that it had carried out the tender evaluation in a transparent and fair manner. He did not contest the issue as a matter of fact so much so that his client was aware of the issue with the bid bond and, in fact, sought the advice of the Local Government Department, whose reply dated 12th December 2010 read as follows:-

I refer to your questions below. You are stating that the "The council has no problem with the bid bond being for less duration than stipulated in the document since once '- awarded the tenderer is obliged to bring a performance bond in its place." You are asking about whether the Council can proceed with this tender award, notwithstanding the bid bond being for a shorter duration.

The tendering procedures are not stringent in this matter and in fact, Item 11 leaves the decision in the hands of the Local Council, by stating that: -

"The Local Council shall have the right to reject any or all Tenders and to reject a tender not accompanied by any required Tender Guarantee (Bid Bond) or other data required by the Tender documents or to reject a Tender which is in any way incomplete or irregular. The Local Council is not bound to accept any Tender"

Therefore the procedures clearly stipulate that the LC has the 'right' and not the obligation to reject a tender on the basis of insufficiency of the bid bond. Under these circumstances, the Nadur Local Council may opt to accept the cheaper offer, and regularise the performance bond prior to the actual commencement of the tendering period.'

Dr Borg Cardona argued that, generally speaking, the purpose of the bid bond was to keep the tender alive until the contract was awarded, yet, in this instance, the adjudication took a matter of days or weeks after which

the recommended tenderer was in a position to present the performance bond. The Council did not consider the bid bond issue as material to the adjudication and award process of this tender and, moreover, it had acted on the directions given by the Local Government Department and, as a result, it could not be alleged that it abused its discretion because it exercised its discretion judiciously. Dr Borg Cardona argued that if one had the right to reject a tender then one also had the right not to reject it. He added that this specific rule gained precedence over the general provisions cited by the appellant.

Dr Galea reiterated that according to Art. 14 of the Local Councils (Tendering) Procedures 1996 (LCP 3/96) (page 8) a reference to the bid bond provided that

'It must remain valid up to and including the 30th April 2011 and Offers that are not accompanied with the mandatory Tender Guarantee (Bid Bond) by the Closing Date and Time of the tender will be automatically disqualified whereas Art. 2.3 (page 3) stated that only those tenders that fulfill all the above administrative criteria will proceed for the evaluation criteria.'

At this point Dr Joseph Grech, legal representative of Mr Anthony Mercieca, the recommended tenderer, insisted that the evaluation process was fair and that his client provided information and documents as instructed by the contracting authority.

When referring to the Banker's Reference Dr Galea remarked that:-

i. the Administrative Compliance Grid required each bidder to present a minimum of one bank reference attesting the bidder's financial stability which reference had to be dated earlier than three months from the date of submission of the tender, and

ii. as recorded in the minutes of Council Meeting held on the 6th December 2010, the KIP representative, Mr Lorry Zammit, had requested the Local Council to issue

him with the list of the documents submitted by the recommended erer with its original offer and from that list, signed by the mayor and the secretary, it resulted that no such bank reference had been submitted.

Dr Borg Cardona remarked that what he said with regard to the bid bond applied equally to the issue of the bank reference in the sense that the local council had the right to reject a tender which was in any way incomplete or irregular but the local council was not obliged to reject the tender. He added that, even in this respect, the local council had acted correctly.

When discussing the Employment & Training Corporation Certificate Dr Galea submitted that:

a. the Employment & Training Corporation certificate required in the administrative compliance grid did not refer to the recommended tenderer but was in the name of Mr Nicholas Zammit who was neither a partner nor a sub-contractor and, as a consequence, not a party to the tender;

b. the purpose of this certificate was to put the mind of the contracting authority at rest that the tenderer possessed the required human resources to execute the contract and that they were legally employed by the tenderer concerned;

c. the evaluation board had to accept an Employment & Training Corporation certificate in the name of the recommended tenderer itself or from a third party as provided for in Regulation 51 (2) of L.N. 296/2010:-

'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. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.'

d. *in this case the recommended tenderer did not provide any such undertaking and, as a consequence, the certificate he presented in the name of Mr Nicholas Zammit had to be disregarded as it could not accept such a certificate from any third party; and*

e. *the Public Contracts Appeals Board / Public Contracts Review Board had expressed itself on various occasions that mandatory documentation had to be submitted without fail otherwise the bid had to be rejected.*

Dr Borg Cardona pointed out that the operators in the waste collection sector were not professionally organised and, therefore, one could not expect a standard joint venture agreement or some other formal undertaking. He added that, in this case, it seemed that the agreement between the recommended tenderer and Mr Nichols Zammit was sufficient proof to the evaluation board that the former would have the necessary human resources to carry out this contract, especially considering that this was a manual job that required no particular skill.

Dr Grech remarked that Mr Nicholas Zammit had a working relationship with his client and that he was an interested party in this tender submission so much so that he was present at the hearing.

At this point the Technical Evaluation was discussed with particular emphasis placed on the:

A) *Points Awarded According To Euro Engine Model*

Dr. Galea made the following submission:

a. *the technical and financial evaluation criteria of the Local Council Tendering Procedures laid down that, with regard to refuse collection vehicles, the points had to be awarded according to the engine model in the following manner:-*

<u>Engine Type</u>	<u>No. of Points</u>
Euro 1	1

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<i>Euro 2</i>	<i>5</i>
<i>Euro 3</i>	<i>10</i>
<i>Euro 4</i>	<i>20</i>

b. all the three members of the evaluation board awarded 10 points each in respect of the recommended tenderer's vehicles as if they were all Euro 3 engine models when his client had obtained confirmation from Transport Malta, Licensing and Testing Section (Gozo), by way of a hand written note that these vehicles' engine model was as follows:

		<i>Max. Points for Euro II</i>
<i>5</i>		
<i>GBB 834</i>	<i>Euro I & II</i>	<i>5</i>
<i>DAH 807</i>	<i>Euro I & II</i>	<i>5</i>
<i>FBX 876</i>	<i>Euro I & II</i>	<i>5</i>

c. on the other hand, the three evaluators awarded 6, 5 and 5 points in respect of KIP's vehicles as if they were all Euro 2 engines when, according to the same document referred to earlier, KIP had 4 Euro I & II, 1 (LCP 683) Euro III and 1 (CBT 761) Euro 4 & 5 trucks, which, according to his client, should have been awarded 20 points by each evaluator for a total of 60 points arguing that he had 1 Euro 4 vehicle (CBT 671) and only one vehicle was required to carry out this service; and

d. the Euro classification reflected the date of manufacture of the vehicle and it was therefore contradictory how his client obtained less points than the recommended tenderer with regard to the Euro engines classification but performed better when it came to the date of manufacture of the vehicles where, rightly so, his client was awarded an aggregate of 23 points and the recommended tenderer 17 points because two of the three vehicles presented by the recommended tenderer were manufactured prior to all six vehicles presented by his client.

Dr Borg Cardona presented three emails dated 22nd February 2011 whereby the Nadur Local Council was informed by Transport Malta that the appellant had five Euro 2 trucks and one Euro 4 truck whereas the recommended tenderer had three Euro 3 trucks and hence the evaluators were correct in awarding $10 \times 3 = 30$ points to the recommended tenderer in this regard. He acknowledged a slight mistake in the sense that one of the evaluators had awarded 6 instead of 5 points to the appellant otherwise the evaluation board had acted on the official information available.

Dr Grech intervened and drew the attention of the Public Contracts Review Board that he could not help noting that it was becoming a practice whereby at tendering stage a bidder would present a Euro 4 truck so as to obtain full points in that respect but once awarded the contract the same bidder would then provide the service using a Euro 1 or 2 vehicle. The recommended tenderer's legal representative considered this to be both as (a) unfair competition and (b) in contravention of contract conditions because the contractor was obliged to use the truck in respect of which he had been allocated points during tender adjudication.

B) Reference(s) of Successfully Completed Contracts & Number of Default Notices

Dr Galea submitted that:

i. the evaluation board awarded maximum points to the recommended tenderer when he did not submit any references that he had successfully completed any contracts of a similar nature but it was simply assumed that once the council had not received any evidence that the recommended tenderer had defaulted on previous contracts then it followed that he must have successfully completed his contracts;

ii. this line of reasoning on the part of the evaluation board was incorrect oft because the onus was on the tenderer to demonstrate that he had in fact successfully

completed contracts of similar nature and that the evaluation board had no right to assume anything in that regard; and

iii. his client could demonstrate that the recommended tenderer had, in fact, defaulted in the execution of a contract awarded to him by the Sannat Local Council and, as a consequence, he had lost his appeal to be awarded the same contract again even if he had quoted the cheapest price - General Contracts Committee meeting dated 12th December 2007 CT/12/07 referred.

Dr Borg Cardona informed those present that the Nadur Local Council had issued a request to all local councils whether they had issued any default notices against the recommended tenderer and none of the 17 councils who answered from Malta and Gozo - Sannat council included - had indicated any such default notices.

Dr. Grech argued that in the case involving the Local Council of Sannat there was no default on the part of his client but what happened was that some persons were caught scattering waste around and when his client drew the attention of the council these resulted in a series of misunderstandings between the two parties. He added that his client was aware that the Local Council of Victoria had issued a default notice against the appellant.

C) Human Resources

Dr. Galea stated that the recommended tenderer was also awarded 13 out of 15 points for human resources that he was supposed to deploy on the contracted service when, in fact, the recommended tenderer did not provide any evidence that he had such human resources at his disposal because, once again, the employees indicated were attached to Mr Nicholas Zammit, who had no contractual relationship with Mr Anthony Mercieca.

He added that, albeit it was true, yet it was also quite regular that one of the employees indicated worked on a

part-time basis both with the KIP (Gozo) and with Mr Nicholas Zammit.

D) Emptying of Bins

Dr. Galea rejected the recommended tenderer's claim in his letter of reply that in its tender submission KIP (Gozo) did not fill in the space reserved for the quote in respect of the emptying of litter bins as his client had duly filled it in as per Table A item 1.1 (page 22).

E) Price

Dr Borg Cardona remarked that the recommended tenderer quoted the rate of €164.50 whereas the average rate offered by the appellant was €205.00. He added that, if one were to reduce the days on which waste was collected, a penalty would be inflicted on the council and that was another aspect that worked against the appellant.

It was agreed by the parties concerned that on the basis of these rates the offers amounted to €171,000 by Mr Mercieca and €213,000 by KIP (Gozo) as against the council's estimate of €125,000 (figures rounded up).

Dr. Borg Cardona informed those present that, should the appellant's appeal be upheld, then the Council would have to reissue the tender as the price quoted by the appellant was considered excessively high when compared to its estimate even if his client did concede that the estimate was rather on the low side.

F) Points Allocation

Dr. Galea stated that if one were to deduct the 50 extra points awarded to the recommended tenderer (5 for vehicles; 20 for references and 25 for defaults) from the average mark of 83 and one would add the 15 points (20 instead 5 for vehicles) that should have been awarded to his client's average score of 82 points with regard to the technical evaluation while maintaining the same financial

score, the end result would have read as follows (figures rounded up):-

	<u>KIP</u>	<u>Mr A Mercieca</u>	<u>Max. Points</u>
Technical (60%)	97	33	100
Financial (40%)	<u>32</u>	<u>40</u>	<u>40</u>
Total	129	73	140

Dr. Grech remarked that (i) his client had acted correctly and on the instructions issued by the contracting authority and (ii) the appeal was a delaying tactic on the part of the appellant because until such time that this tender was awarded, the current contractor (the appellant) was having his contract extended.

Dr Galea concluded that -

i. the case presented by the Council to the Local Government Department was misleading as it was based on the Council's considerations and not on what the mandatory provisions laid down in the single envelope tender document which dealt specifically with the bid bond, the bank reference and so forth;

ii. it was not up to the Local Council but up to the evaluation board to deliberate on whether there was any connection between Mr Anthony Mercieca and Mr Nicholas Zammit and, furthermore, the evaluation board should not have rested on the instructions issued by the Local Government Department but it should have followed the parameters set in the tender document and in Reg 51 (2) which were very clear. He contended that no documents had been presented at any stage of the tendering process to this effect and, as a result, any documents presented in the name of Mr Nicholas Zammit should have been discarded;

iii. the three vehicles presented by Mr Mercieca were manufactured in 1989, 1993 and 1998 whereas those presented by his client were manufactured in 1994, 1996, 2002 and 2006;

iv. with regard to the engine classification, if one were to concede that the recommended tenderer's trucks were Euro 3, then the evaluators were correct to allocate 10 points instead of the 5, as he had previously indicated, still if one were to add the 5 points then the totals would nonetheless read 129 for KIP and 78 for Mr Mercieca as per evaluation criteria; and

v. in view of the above, the tender should be awarded to his client who submitted the most economically advantageous offer.

Mr. Joseph Croker, a Public Contracts Review Board member, noted that it could be that Euro 2 and Euro 3 engines were manufactured concurrently e.g. that during the period 1989 and 1996 both Euro 2 and Euro 3 engines were in manufacture and hence it was possible to end up with a 1989 Euro 3 engine and with a 1996 Euro 2 engine.

The Chairman Public Contracts Review Board remarked that, whereas it seemed that the three evaluators were correct in awarding 10x3 points in respect of the recommended tenderer's Euro 3 trucks, yet it was not clear why the evaluators awarded 5x3 points to the appellant as if all latter's vehicles were Euro 2 when, in fact, Koperattiva Ghawdxija Indafa Pubblika (KIP Gozo) had 1 Euro 4 truck, which qualified for 20 points and which appeared to have been overlooked in the calculations, except for the award of an additional point by one of the evaluators (6 instead of the others 5). The Chairman also added that consideration had to be given to the difference in the prices quoted, i.e. one €46,000 and the other €88,000 in excess of the Council's estimate.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection of 23rd March 2011, and through the verbal submissions made during the hearing*

held on the 31st August 2011, had objected against the decision taken by the Nadur Local Council to award the tender to Mr Anthony Mercieca as the cheapest compliant tender;

- *having noted the appellant firm's representatives claims and observations regarding the fact that (a) (i) the bid had to be disqualified ab initio as it was considered to be administratively not compliant and (ii) the technical evaluation was defective such that extra points were awarded to the recommended tenderer while points had been deducted in respect of his client's offer, (b) the administrative compliance grid indicated that the Bid Bond had to remain valid up to 28th April 2011 - slightly different from the 30th April - nevertheless the bid bond presented by the recommended tenderer was valid up to 27th February 2011 which meant that, by the time the board carried out the tender evaluation, namely the 11th March 2011, the bid bond had already expired, (c) failure to include the mandatory bid bond led to the offer being automatically disqualified (Art. 14 of the Local Councils procedures) and the evaluation board had no discretion in that regard but it should have disqualified the recommended tenderer's offer, (d) Art. 14 of the Local Councils (Tendering) Procedures 1996 (LCP 3/96) (page 8) inter alia stated that 'only those tenders that fulfill all the above administrative criteria will proceed for the evaluation criteria.', (e) with regards to the banker's reference, as recorded in the minutes of Council Meeting held on the 6th December 2010, the KIP representative, Mr Lorry Zammit, had requested the Local Council to issue him with the list of the documents submitted by the recommended tenderer with its original offer and from that list, signed by the mayor and the secretary, it resulted that no such bank reference had been submitted, (f) the Employment & Training Corporation certificate required in the administrative compliance grid did not refer to the recommended tenderer but was in the name of Mr Nicholas Zammit who was neither a partner nor a sub-contractor and, as a consequence, not a party to the tender, (g) all the three members of the evaluation board, whilst awarding 10 points each in respect of the*

recommended tenderer's vehicles as if they were all Euro 3 engine models, erroneously awarded 6, 5 and 5 points in respect of KIP's vehicles as if they were all Euro 2 engines, (h) the Euro classification reflected the date of manufacture of the vehicle and it was therefore contradictory how the appellant company obtained less points than the recommended tenderer with regard to the Euro engines classification but performed better when it came to the date of manufacture of the vehicles - the three vehicles presented by Mr Mercieca were manufactured in 1989, 1993 and 1998 whereas those presented by the appellant were manufactured in 1994, 1996, 2002 and 2006, (i) the evaluation board awarded maximum points to the recommended tenderer when he did not submit any references that he had successfully completed any contracts of a similar nature but it was simply assumed that once the council had not received any evidence that the recommended tenderer had defaulted on previous contracts then it followed that he must have successfully completed his contracts, (j) the appellant company could demonstrate that the recommended tenderer had, in fact, defaulted in the execution of a contract awarded to him by the Sannat Local Council and, as a consequence, he had lost his appeal to be awarded the same contract again even if he had quoted the cheapest price, (k) the recommended tenderer was also awarded 13 out of 15 points for human resources that he was supposed to deploy on the contracted service when, in fact, the recommended tenderer did not provide any evidence that he had such human resources at his disposal because, once again, the employees indicated were attached to Mr Nicholas Zammit, who had no contractual relationship with Mr Anthony Mercieca, (l) changes in points given to tenderers would have turned all in the appellant's favor, (m) the case presented by the Council to the Local Government Department was misleading as it was based on the Council's considerations and not on what the mandatory provisions laid down in the single envelope tender document which dealt specifically with the bid bond, the bank reference and so forth and (n) the evaluation board should not have rested on the

instructions issued by the Local Government Department but it should have followed the parameters set in the tender document and in Reg 51 (2) which were very clear;

- *having considered the contracting authority's representative's submissions, namely that (a) it did not contest the issue as a matter of fact so much so that it was aware of the issue with the bid bond and, in fact, sought the advice of the Local Government Department and the latter replied that ' the procedures clearly stipulate that the LC has the 'right' and not the obligation to reject a tender on the basis of insufficiency of the bid bond', (b) the Local Council did not consider the bid bond issue as material to the adjudication and award process of this tender and, moreover, it had acted on the directions given by the Local Government Department and, as a result, it could not be alleged that it abused its discretion because it exercised its discretion judiciously, (c) what was said with regard to the bid bond applied equally to the issue of the bank reference in the sense that the local council had the right to reject a tender which was in any way incomplete or irregular but the local council was not obliged to reject the tender , (d) the operators in the waste collection sector were not professionally organised and, therefore, one could not expect a standard joint venture agreement or some other formal undertaking, (e) in this case, it seemed that the agreement between the recommended tenderer and Mr Nichols Zammit was sufficient proof to the evaluation board that the former would have the necessary human resources to carry out this contract, especially considering that this was a manual job that required no particular skill, (f) the Nadur Local Council was informed by Transport Malta that the appellant had five Euro 2 trucks and one Euro 4 truck whereas the recommended tenderer had three Euro 3 trucks and hence the evaluators were correct in awarding $10 \times 3 = 30$ points to the recommended tenderer in this regard, (g) the Nadur Local Council had issued a request to all local councils whether they had issued any default notices against the recommended tenderer and none of the 17 councils who answered from Malta and Gozo - Sannat council included - had indicated any such default*

notices, (h) the recommended tenderer quoted the rate of €164.50 whereas the average rate offered by the appellant was €205.00 and (i) should the appellant's appeal be upheld, then the Council would have to reissue the tender as the price quoted by the appellant was considered excessively high when compared to its estimate even if his client did concede that the estimate was rather on the low side;

- having considered the recommended tenderer's reference to the fact that (a) Mr Nicholas Zammit had a working relationship with Mr Anthony Mercieca and that he was an interested party in this tender submission so much so that he was present at the hearing and (b) the appeal was a delaying tactic on the part of the appellant because until such time that this tender was awarded, the current contractor (the appellant) was having his contract extended,*

reached the following conclusions:

1. The Public Contracts Review Board opines that the contracting authority, namely the Nadur Local Council, acted in accordance with the specifications which, inter alia, stated that it shall have the right to reject any or all tenders and that the Local Council is not bound to accept any tender.

2. In the circumstance, this Board agrees with the contracting authority's line of reasoning which places emphasis on the fact that the purpose of a bid bond is basically to keep the tender alive until the contract is awarded. This Board observes that, in this instance, the adjudication took a matter of days or weeks after which the recommended tenderer was in a position to present the performance bond so the Nadur Local Council was quite justified not to consider the bid bond issue as material to the adjudication and award process of this tender.

3. The Public Contracts Review Board has taken cognisance of the fact that, whereas it seemed that the

three evaluators were correct in awarding 10x3 points in respect of the recommended tenderer's Euro 3 trucks, yet it was not clear why the evaluators awarded 5x3 points to the appellant as if all the latter's vehicles were Euro 2 when, in fact, Koperattiva Ghawdxija Indafa Pubblika (KIP Gozo) had 1 Euro 4 truck, which qualified for 20 points and which appeared to have been overlooked in the calculations, except for the award of an additional point by one of the evaluators (6 instead of the others 5). Nevertheless, this Board disagrees with appellant, namely that changes in points given to tenderers would have turned all in the appellant's favour and argues that, notwithstanding such fine tuning, the adjudication process could have never heavily impinged on the ultimate decision as one cannot establish how slight changes in the scoring system, regardless of the extent of the dose of objectivity, could have in any way altered earlier decisions taken / recommendations made. At this point this Board places major emphasis on the fact that, in the circumstance, one has to evaluate all within a context wherein the prices quoted are €46,000 as against €88,000 in excess of the Local Council's estimate. Needless to say that, minimal changes in the overall scoring should not end up overshadowing the moral and physical balance and obligation that one has to reach with regard to public coffers.

4. The Public Contracts Review Board also finds that, considering that the Nadur Local Council had issued a request to all local councils asking whether the latter had issued any default notices against the recommended tenderer with none of the 17 councils (who answered from Malta and Gozo - Sannat council included) indicating any such default notices, the points raised by the appellant company are unfounded.

In view of the above this Board finds against the appellant and also recommends that the deposit paid by the latter should not be reimbursed."

Rat ir-rikors tal-appell tal-istess Koperattiva Ghawdxija Indafa Pubblika datat 20 ta' Ottubru 2011 fejn talbet lill-

Kopja Informali ta' Sentenza

Qorti sabiex *in vista* tal-aggravji minnha mressqa tilqa' l-appell taghha u dan billi tirrevoka u thassar is-sentenza appellata bl-ispejjez kollha kontra l-Kunsill intimat.

Rat ir-risposta tal-appellati datata 18 ta' Novembru 2011 a fol 17 tal-process fejn sostna ghar-ragunji hemm indikati id-decizjoni tal- "Public Contracts Review Board" hija gusta u timmerita konferma u ghalhekk l-appell interpost ghandu jigi michud.

Rat li dan l-appell gie appuntat ghas-smigh ghas-seduta tat-23 ta' Frar 2012.

Rat il-verbal tas-seduta mizmuma fit-23 ta' Frar 2012 fejn meta ssejjah l-appell deher Dr. l-Avukat Carmelo Galea ghall-Koperattiva appellanti. Deher l-Avukat Andrew Borg Cardona ghall-Kunsill appellat rapprezentat minn Miriam Portelli u Rita Mifsud Attard. Il-Qorti nnotat li l-process tal-Public Contracts Review Board ghadu mhux ghad-dispizzjoni tal-Qorti u ordnat li dan isir minnufih. L-avukat Carmelo Galea irtira l-ewwel aggravju tieghu. L-Avukati trattaw il-kaz. Il-kawza giet differit ghas-sentenza in difett ta' ostakolu ghas-17 ta' Mejju 2012.

Rat l-atti kollha tal-istess kawza inkluz id-decizjoni tal-Public Contracts Review Board fl-ismijiet premissi datata 30 ta' Settembru 2011.

Rat id-dokumenti esebiti.

Rat l-atti kollha l-ohra tal-kawza.

II. KONSIDERAZZJONIJIET.

Illi l-appell odjern huwa fis-sens li (a) li d-decizjoni hija nulla u bla effett ghaliex is-Sejha ghall-Offerti kellha tkun imsejsa fuq il-**Public Procurement Regulations** u mhux il-**Public Contracts Regulations** li kienet applikabbli f'dak iz-zmien; (b) l-offerta' ta' Anthony Mercieca kellha tigi skalifikata mill-ewwel ghaliex ma kienitx konformi mad-Sejha ghall-Offerti; (c) miz-zewgt offerti li l-Kunsill kellhu quddiem bhala fatt l-offerta tal-appellant kienet aktar

vantagguza u kellha ghalhekk tintlaqa. Ghal dan saret risposta mal-appellati li fil-verita' kull ma tghid huwa biss li d-decizjoni tal-Bord hija sufficjentement motivata u jirreferi ghall-istess, izda din il-Qorti thoss li fil-verita' l-merti tal-aggravvji ma gewx direttament riskontrati mill-istess att sottomess quddiem din il-Qorti. Dan ma jfissirx li l-aggravvji mhux ser jigi konsidrati, anzi din il-Qorti ser tikkunsidra l-istess aggravvji fid-dawl tad-decizjoni applikabbli, is-Sejha tal-Offerti, l-Ligi applikabbli, u l-fattispecie kollha tal-kaz fid-dawl tal-poteri li din il-Qorti ghandha bhala Qorti tat-Tieni Istanza.

Illi dwar l-ewwel aggravvju dan l-aggravvju jirrizulta li gie rtirat mill-appellanti fis-seduta tat-23 ta' Frar 2012, ghalkemm jinghad li kieku kellu jigi kkunsidrat din il-Qorti thoss li dan huwa kompletament bla bazi u dan ghaliex ma hemm ebda prova ta' xejn fl-atti processwali li s-Sejha ghall-Offerti (S0) kienet ibbazata fuq **Public Contracts Regulations**; fuq kollox izda din is-sottomissjoni qatt ma tressqet mill-appellanti quddiem il-Public Contracts Review Board (Bord) u allura ma tistax issa titqajjem f'dan l-istadju fl-appell, ghaliex din hija Qorti tas-Sekond Istanza u l-kompitu taghha huwa bhala Qorti ta' Revizjoni u allura li tirrevedi dak li normalment gja sar u gie sottomess fl-ewwel stadju. F'dan il-kaz ma inghatat ebda spejgazzjoni ghaliex l-appellant ma qajjimx dan il-punt quddiem il-Bord meta dan seta` ghamlu facilment, u ghalhekk dan l-aggravvju kieku sostnut u mhux irtirat kien jigi michud. Madankollu teknikament din il-Qorti tastjeni milli tiehu konjizzjoni tal-istess.

Illi t-tieni aggravvju hija li l-offerta ta' Anthony Mercieca (AM) ma kienitx konformi ma' dak mitlub bis-Sejha ghall-Offerti (S0) u dan *inter alia* ghaliex l-istess kienet SO kienet tipprovdi ghall *Tender Guarantee (Bid Bond)* li kellha skond paragrafu 8 pagna 3 tibqa' fis-sehh ghall "*150 calendar days from the closing date set for tenders*" u allura kellha tkun valida sat-28 ta' April 2011 meta in effetti dik proposta kien valida biss sas-27 ta' Frar 2011. Fil-fatt dan huwa minnu ghaliex li jirrizulta sahanistra li meta fil-11 ta' Marzu 2011 l-istess offeriti gew evalwati l-*bid bond* ta' AM kienet gja skadiet.

Illi dawn il-fatti lanqas biss huma fil-verita' kontestati u din il-Qorti thoss li la darba din il-kondizzjoni tat-tender ma kienitx tissodisfa para. 04 u para. 08 tas-Sejha tal-Offerti li jipprovdi testwalment li *"This Guarantee must be valid for a period of **one hundred and fifty (150) calender days from the closing date set for tenders**"* mela allura la darba l-istess offerta ta' AM ma kienitx tissodisfa din il-kondizzjoni, li hija wahda mandatorja kif jirrizulta mis-Sejha ghall-Offerti stess, u l-kliem tal-istess SO f'dan il-kontest huwa car daqs il-kristall, mela allura l-istess Kunsill appellat ma seta` qatt jibdel tali kondizzjoni, ghaliex ma kienitx fid-diskrezzjoni tieghu li jaghmel dan, u ma kellu jaghmel xejn izjed hlief josserva l-kundizzjonijiet li huwa stess stabbilixxa fis-Sejha ghall-Offerti u jiskwalifika kull offerta mhux konformi mal-istess ghaliex tali offerta kienet b'tali nuqqas resa *"not compliant"*.

Illi l-fatt li paragrafu 11 jipprovdi li l-Kunsill Lokali ghandu d-dritt li jirrifjuta kull tender anke jekk allura konformi mal-kundizzjonijiet kollha ghas-Sejha ghall-Offerti, u anke ghandu d-dritt *"to reject a Tender not accompanied by any required Tender Guarantee (Bid Bond) or other data required by the Tender documents or to reject a Tender which is any way incomplete or irregular. The Local Council is not bound to accept any tender"*, ifisser biss dak li l-istess SO tghid car fis-sens li l-Kunsill Lokali (a) ghandu d-dritt jirrifjuta l-offerta jekk ma tkunx hekk konformi mas-Sejha ghall-Offerti; (b) u mhux obligat li jaccetta ebda offerta – allura anke jekk konformi mas-Sejha ghall-Offerti.

Illi kuntrarjament ghal dak sottomess mill-Kunsill Lokali appellat u wkoll mill-Bord, tali dritt hekk espress ma jinkludix id-dritt li l-istess Kunsill Lokali jiddispensa mill-kundizzjonijiet espressament rikjesti fil-hrug tal-Offerta u allura certament li l-Kunsill Lokali ma setax ibiddel il-kundizzjonijiet mandatorjament imposti ghal kull offerta li kellha tigi sottomessa u dan kif rikjest bl-osservanza tal-principju tat-trattament ugwali tal-offerenti kollha li *"requires that all tenders comply with the tender conditions so as to ensure an objective comparison of the*

tenders submitted by the various tenderers” hekk kif ritenut mill-Qorti tal-Gustizzja Ewropea f’diversi okkazzjonijiet nkluz fil-kaz “**Commission v. Denmark**” (C – 243/89 – **Recueil de jurisprudence 1993** pagna I – 03353 u dan ovvjament sabiex l-offerenti kollha attwali jkollhom “*level playing field*”.

Illi huwa ovvju f’dan il-kuntest li s-sottomissjonijiet tal-Kunsill Lokali, li gew adottati mill-Bord huma ghal kollox zbaljati f’dan il-kuntest u jmorru mhux biss kontra dan il-principju bazilari fuq indikat, izda wkoll kontra l-kliem espress tal-istess Sejha ghall-Offerti, fil-verita’ tali konsiderzzjonijiet hemm maghmula ma ghandhom ebda bazi legali, anzi jipprovdu, jekk hekk applikati, ghall-incertezza serja fis-Sejhiet ghall-Offerti u wkoll lok sabiex jsiru abbuzi ghaliex jitbiddlu r-regoli tal-loghba meta din tkun gja bdiet, bi pregudizzju ghal minn ikun konformi mal-istess regoli. Taht dan l-aspett, bir-rispett jinghad ukoll li l-parir moghti minn Martin Bugelli, Direttur Generali (Information, Local Government and Public Consultation) Il-Local Government Department fit-12 ta’ Dicembru 2010 fejn jinghad li skond il-proceduri il-Kunsill Lokali ghandu d-dritt u mhux l-obbligazzjoni li jirrifjuta Offerta (Tender) minhabba li l-bond ma tkunx dik rikjesta, b’dan li l-Kunsill lokali appellat jista’ ghalhekk jaghzel li jaccetta l-iktar offerta baxxa “*and regularise the performance bond prior to the actual commencement of the tendering period*” huwa fil-fatt xejn aktar minn eresija legali ghaliex dan ma johrogx li jista’ jsir mis-Sejha tal-Offerti stess u certament li l-paragrafu 11 ma jghidx dan ghaliex jipprovdi biss li l-Kunsill Lokali ghandu dritt jirrifjuta offeriti mhux konformi ma’ dak rikjest fis-Sejha ghall-Offerti u li l-Kunsill Lokali ghandu d-dritt jirrifjuta kull offerta anke jekk konformi mal-kondizzjonijiet kollha tal-istess Sejha Ghall Offerti, izda bl-ebda mod ma jaghti d-dritt lil Kunsill Lokali li jiddispensa mill-kondizzjonijiet imposti fis-Sejha ghal Offerti b’mod mandatorju. Dan ifisser allura li dak hekk imsejjah “parir” huwa totalment legalment zbaljat u adirittura zvjatorju u din il-Qorti thoss li fil-fattispecie tal-kaz ma jista qatt ikun validu u wisq inqas kellhu jigi segwit. Dan meta l-kliem tas-Sejha tal-Offerta huma cari li jfissru dak li jghidu u ma

hemmx lanqas bzonn ta' interpretazzjoni. B'hekk dan l-aggravju tal-appellanti qed jigi milqugh.

Illi dwar it-tielet aggravju dan ukoll jidher li huwa sostanzjat almenu sal-punt indikat fid-decizjoni tal-Bord innifsu li sahanistra tirrikonoxxi li saru dawk l-izbalji indikati fl-appell tal-appellant quddiem l-istess Bord, u din il-Qorti taqbel mas-sottomissjoni tal-appellant li f'dan il-kaz il-Bord ma setghax jinjora tali zbalji u allura anke hawn kellhu jilqa' l-appell quddiemu, u mhux jinjora tali zball ghar-ragunijiet indikati fid-decizjoni li fuq kollox bl-ebda mod ma jirrimedjaw ghall-istess. B'hekk u sa hawn biss dan it-tieni aggravju qed jigi milqugh ghaliex il-konsiderazzjonijiet tal-Bord f'dan il-kaz huma *non sequitur*.

III. KONKLUZJONI.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi**, billi filwaqt li tastjeni milli tiehu konjizzjoni tal-ewwel aggravju, u dan ghaliex l-istess gie rtirat fis-seduta tat-23 ta' Frar 2012, mill-bqija tichad ir-risposta tal-appellati datata 18 ta' Novembru 2011 biss in kwantu l-istess hija nkonsistenti ma' dak hawn deciz, u **tilqa' l-appell interpost mill-appellanti l-Koperattiva Ghawdxija Indafa Pubblika fuq l-aggravji l-ohra firrikors taghha datat 20 ta' Ottubru 2011** biss in kwantu konsistenti ma' dak hawn deciz, b'dan li tannulla ghal kull effett u bwon fini tal-Ligi d-decizjoni tal-Public Contracts Review Board datata 30 ta' Settembru 2011 fl-ismijiet "Koperattiva Ghawdxija Indafa Pubblika vs Kunsill Lokali Nadur" (Kaz Numru 319) u tiddikjara li l-Kunsill Lokali appellat kien skorrett meta naqas milli jiskwalifika l-offerta ta' Anthony Mercieca maghmula ghall-finijiet tas-Sejha ghall-Offerti bin-Numru NLC/08/2010 "Services Tender for the Collection of Mixed Household Waste", liema offerta kellha tigi skwalifikata *ab initio* u wkoll saret evalwazzjoni hazina tal-istess offerta kif indikat anke f'din id-decizjoni, evalwazzjoni li kienet tirrendi l-aggudikazzjoni maghmula favur l-imsemmi Anthony Mercieca bhala zbaljata ghaliex mhux konformi mal-Ligi, u ghalhekk

Kopja Informali ta' Sentenza

tiddikjara konsegwentement ghal dan kollu li l-aggudikazzjoni ta' l-istess Tender NLC/08/2010 "Services Tender for the Collection of Mixed Household Waste" li saret favur Anthony Mercieca fil-11 ta' Marzu 2011 u publikata fil-15 ta' Marzu 2011 ma saritx skond il-Ligi, b'dan li dan wassal sabiex tigi milqugha offerta li legalment qatt ma kellha tigi milqugha, u din il-Qorti qed tiddikjara tali aggudikazzjoni bhala nulla u bla effett ghall-finijiet u effetti kollha tal-Ligi.

Bl-ispejjez kontra l-appellat il-Kunsill Lokali Nadur.

Moqrija.

< Sentenza Finali >

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