



QORTI TA' L-APPELL

**S.T.O. PRIM IMHALLEF
SILVIO CAMILLERI**

**ONOR. IMHALLEF
TONIO MALLIA**

**ONOR. IMHALLEF
JOSEPH AZZOPARDI**

Seduta tas-7 ta' Awwissu, 2013

Appell Civili Numru. 175/2013/1

Steelshape Limited

v.

- 1) Direttur tal-Kuntratti, 2) l-agenzija Heritage Malta,
3) Divizjoni ghall-Ippjanar u Koordinazzjoni tal-
Prijoritajiet
fl-ufficju tal-Prim Ministru illum fil-Ministeru ghall-
Affarijiet Ewropej u t-Twettiq tal-Manifest Elettorali;
4) il-konsorzju Malta Restoration JV
u 5) Pillow Space Frame Ltd ghal kull interess li jista'
jkollha;**

Dan hu appell imressaq fl-10 ta' Gunju, 2013, mis-socjeta` Steelshape Ltd. wara decizjoni datata 22 ta' Mejju, 2013, moghtija mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (minn hawn 'l quddiem imsejjah "il-Bord") fil-kaz numru 551 (CT/3004/2012).

Dan il-kaz huwa marbut ma' sejha ghall-offerti li harget l-agenzija Heritage Malta ghal manufattura u kostruzzjoni ta' "protective shelter" fuq it-tempji megalitici ta' Hal-Tarxien. Ghall-ewwel is-sejha saret bil-procedura miftuha u kien hemm sitt operatori ekonomici li ppartecipaw f'din is-sejha. F'din il-procedura, ma ntghazel l-ebda operatur ekonomiku sabiex jiehu l-kuntratt. Il-Kumitat Generali tal-kuntratti ddecieda li jhassar din is-sejha ghall-offerti, izda peress illi l-agenzija Heritage Malta riedet tkompli bil-progett, talbet u ottjeniet il-kunsens tal-istess Direttur sabiex a tenur tar-regolament 39(3) tal-legislazzjoni sussidjarja, Avviz Legali 296/10, kif emendat, tkompli bl-ghoti ta' dan il-kuntratt pubbliku permezz tal-procedura negozjata. L-operaturi ekonomici kollha li kienu hadu sehem fis-sejha ghall-offerti bil-procedura miftuha gew mistiedna sabiex jippartecipaw fil-proceduri negozjati, izda kienu biss erbgha illi wrew l-interess li jippartecipaw. Matul l-istadju ta' evalwazzjoni, kienu biss tnejn mill-erba' konkorrenti illi kienu konformi mar-rekwiziti teknici u amministrattivi tas-sejha ghall-offerti bi procedura negozjata, li kienu Pillow Space Frame Ltd. u l-konsorzju Malta Restoration Joint Venture. Is-socjeta` appellanti giet skwalifikata permezz ta' ittra datata 22 ta' Frar, 2013, u dan peress illi l-offerta taghha ma kienetx tissodisfa r-rekwiziti teknici mitluba. Is-socjeta` appellanti ressqet oggezzjoni quddiem il-Bord, li b'decizjoni tat-22 ta' Mejju, 2013, ma laqax l-oggezzjoni tas-socjeta` appellanti u rrakkomanda t-telf tad-depozitu. Il-Bord wasal ghad-decizjoni tieghu fid-dawl tas-segweni konsiderazzjonijiet:

"This Board,

- "having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 4th March 2013 and also through its representatives verbal submissions presented during the hearing held on the 15th

May 2013, had objected to the decision taken by the pertinent authorities;

- “having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 22nd February 2013 the Contracts Department informed the appellant company that its offer had been adjudicated to be technically non-compliant, (b) in the same letter of disqualification it was stated that the tender was recommended for award to Malta Restoration JV for the price of €2,239,435, including VAT, which happened to be the same price quoted by the appellant company, (c) on seeking a clarification, the Department of Contracts, by email dated 27th February 2013, confirmed that the tender was being awarded at the price of €2,239,435 but to Malta Restoration JV and the appellant company was therefore requesting the contracting authority to state how did the recommended tenderer scale down its quoted price of €2,587,978 to the awarded price of €2,239,435, which was quite substantial and it, therefore, followed that there must have been some kind of negotiation entailing a reduction in the works/specifications originally requested, (d) the three shortcomings listed in the letter of disqualification could have easily been settled through a clarification all the more when the contracting authority had already sought clarifications from the appellant company on similar issues. In fact, on the 11th July 2012 the appellant company had received a request for more information on 9 points which it had complied with on the 17th July 2012, (e) in the same clarification letter dated 11th July 2012, the contracting authority referred to 6 other issues, which included issues cited for disqualification, in respect of which the appellant company was simply asked to 'indicate' where the contracting authority could find the relevant information and the appellant company complied without, however, submitting any additional information since none was requested, (f) consequently, it was considered not fair to exclude the appellant company due to alleged lack of information on issues in respect of which the contracting authority did not ask it for any additional information but was simply asked to indicate where one

could trace the information in its tender submission, (g) the MEPA permit was so detailed that it was not necessary to reproduce all those details all over again but the appellant company's reference that the platform would be installed as per MEPA permit was enough, (h) once the bidder submitted its tender it meant that it was going to abide by its conditions and specifications, (i) with regard to maintenance, reference was made to Doc. D, attached to the appellant company's letter of objection, para. 4 'Rules for maintenance and repair' where it was stated that the frequency of maintenance for external elements was twice a year while for interior elements it was, approximately, every ten years, (j) therefore it resulted that certain details were, in fact, given and if more information was required then the contracting authority could have asked for it, (k) complained that this process represented a negotiated procedure within a negotiated procedure and (l) One questioned the fact that the contracting authority negotiated the price with the recommended tenderer with the consequent reduction in the scope of works but, on the other hand, the contracting authority failed to seek clarifications from the appellant company who, in the first instance, offered the same price for all the works included in the tender;

- “having considered the contracting authority's representative's reference to the fact that (a) after examining the bids received through the negotiated procedure it resulted that, whilst the recommended bid was administratively and technically compliant, yet the price of €2,587,978 was too high compared to the funds available, (b) in an effort to scale down the price of the cheapest compliant tender, namely that of Malta Restoration Malta JV, Heritage Malta decided to reduce certain items in the scope of works which were not considered crucial to the project overall and that was how the offer of Malta Restoration JV was reduced from €2,587,978 to €2,239,435, (c) with regard to mandatory requirements, the evaluation board was entitled to ask only for clarifications on information already submitted by the bidder, (d) prior to resorting to exclusion, the contracting authority gave all bidders the opportunity to indicate where it could find the information in case the

evaluation board might have missed it, (e) it was correct for one to state that in its letter dated 11th July 2012, Heritage Malta had asked for more information with regard to 9 issues whereas with regard to 6 other issues it only requested directions as to where it could trace the information in the bidder's tender submission, which latter mandatory information should have already been submitted, (f) the appellant company's response dated 17th July 2012 included certain additional information as requested but it failed to lead the evaluation board to finding all the mandatory information indicated in the second part of the letter at points 1 to 6, (g) the clarification letter dated 17 July 2012 included the following reply, namely "*We confirm that a protective working platform will be installed. over the whole site required by the MEPA permit and Volume 3: Technical specifications; Constraints clause 3.2*", (h) the letter of rejection dated 22nd February 2013 conveyed the same reasons laid down in the evaluation report, (i) the information provided by the appellant company in its tender submission was not sufficient and if it were to provide it at adjudication stage it would have amounted to a rectification, (j) there were other deficiencies in the appellant company's tender submission such as those relating to the *Design Proposal (Form 7)* which information was an essential requirement considering that one was dealing with a highly sensitive archaeological site and the appellant company failed to provide what was requested of the bidder since it provided details of the micropile by itself but not of the interface between the pillar and the micropile, (k) whilst, in the open tender procedure, all bids were found to be non compliant, yet, in the negotiated procedure, all bidders had the same opportunity to submit the information which was missing in their open tender submission, (l) since this was the second attempt to award a tender to carry out this project which was crucial for the protection of this site, a request was made and accepted so that the budget of €1.2m be increased up to the value of the cheapest offer received, namely €2,239,495 which was tendered by Steel Shape Ltd, whose bid, however, was not technically compliant and so the contracting authority turned to the next

cheapest tenderer, Malta Restoration JV, and negotiated the reduction of its price from €2,587,978 to €2,239,495 by effecting a reduction in the scope of works by removing those items, such as lighting, which, though desirable, were not crucial to the main purpose which was the protection of this unique site and (m) concluded that it emerged clear that the appellant company's tender submission was technically non-compliant, especially with regard to the rock anchoring and foundation works, the detailed maintenance programme and the proposed installation method;

- “having also considered the department of contract's representative's testimony, particularly the references made to the fact that Heritage Malta had requested permission from the General Contracts Committee with a view to entering into negotiations with the cheapest compliant bidder and that request was acceded to provided that the tender specifications would not be fundamentally altered,

reached the following conclusions, namely:

1. The Public Contracts Review Board observes that there must have been something wrong with the department's estimate which was put at €1,230,000, excluding VAT, whereas the only compliant bid amounted to €3,499,811.63 and the recommended bid amounted to €2,239,435, after evidently reviewing the scope of works.

2. “The Public Contracts Review Board takes full cognisance of the fact that, during the hearing it asked the appellant company to trace the relative 'Method Statement' in its tender submission but the appellant company's representatives' efforts proved fruitless.

3. “This Board has also favourably acknowledged the point made by the contracting authority that after examining the bids received through the negotiated procedure it resulted [hat, whilst the recommended bid was administratively and technically compliant, yet the price of €2,587,978 was too high compared to the funds available.

4. “The Public Contracts Review Board argues that, besides the bidder's undertaking to abide by tender conditions and specifications, one had also to submit all the information requested so as to demonstrate to the contracting authority that one had the capacity and the

know-how to execute the works otherwise what would be the purpose of submitting a tender?

5.“The Public Contracts Review Board opines that when dealing with highly sensitive archaeological sites as the one in question one would expect a certain amount of detail in the tender submission because the contracting authority had to take all the foreseeable precautions to protect the site.

6.“This Board contends that generic submissions as those made by the appellant company in its bid should not be considered compliant - them being based solely on the premise that (1) once the bidder would have submitted its tender this would have automatically meant that it was going to abide by the terms, conditions and specifications and (2) with regard to 'maintenance', reference was uniquely made to Doe. D attached to the appellant company's letter of objection, para. 4 'Rules for maintenance and repair' where it was stated that the frequency of maintenance for external elements was twice a year while for interior elements it was, approximately, every ten years.

7.“This Board also argues that mandatory requests listed in tender document should be submitted and not be considered as an arbitrary choice. As a consequence, it is unacceptable for the appellant company to claim that the MEPA permit was so detailed that it was not necessary to reproduce all those details all over again and that its reference that the platform would be installed as per MEPA permit was enough.

8.“The Public Contracts Review Board has favourably considered the fact that, during the hearing it was claimed that prior to resorting to exclusion the contracting authority gave all bidders the opportunity to indicate where it could find the information in case the evaluation board might have missed it. '

9.“This Board agrees with the contracting authority's viewpoint, namely that, in this particular instance, the information provided by the appellant company in its tender submission was not sufficient and if it were to provide it at adjudication stage it would have amounted to a rectification.

10. "The Public Contracts Review Board concurs with the contracting authority's remarks in connection with the fact that whilst, in the open tender procedure, all bids were found to be non-compliant, yet, in the negotiated procedure, all bidders had the same opportunity to submit the information which was missing in their open tender submission.

11. "This Board also acknowledges the fact that the contracting authority turned to the next cheapest tenderer, Malta Restoration IV, and negotiated the reduction of its price from €2,587,978 to €2,239,495 by effecting a reduction in the scope of works by removing those items, such as lighting, which, though desirable, were not crucial to the main purpose which was the protection of this unique site.

12. "In conclusion, this Board reiterates the arguments raised during the hearing in relation to the fact that the appellant company's tender submission was technically non-compliant, especially with regard to the rock anchoring and foundation works, the detailed maintenance programme and the proposed installation method.

"In view of the above this Board finds against the appellant company. Furthermore, this Board recommends that the appellant company shall forfeit the deposit paid to lodge the appeal."

Is-socjeta` Steelshape Ltd. rressqet issa dan l-appell quddiem din il-Qorti u rressqet zewg aggravji, u cioe`, li kellha tintalab kjarifika f`dawk il-kazijiet fejn ma nhassx li nghatat informazzjoni bizzzejjed min-naha tas-socjeta` appellanti, u illi n-negozjati li saru ma' offerent wiehed huma "inaccettabbli" u ghandhom iwasslu ghat-thassir tal-process ta' aggudikazzjoni.

Qabel ma jigi ttrattat il-meritu tal-appell tajjeb illi din il-Qorti, qabel xejn, tirribadixxi li bhala Qorti tat-"tiolet istanza" f`dawn it-tip ta' kazijiet, ma hux mistenni li din tidhol biex tezamina d-dettalji teknici ta' kull offerta biex tara jekk offerta partikolari tissodisfax jew le r-rekwiziti teknici mitluba fis-sejha ghall-offerti. Din il-Qorti, kif

kostitwita, la tista' u lanqas ghandha x-xjenza teknika mehtiega biex tevalwa materji li jmorru lil hinn mill-kompetenza taghha. Kif qalet il-Qorti Ewropea ta' Gustizzja (ECJ), f'kaz numru T-300/07 fl-ismijiet **Evropaiki Dynamiki v. Commission**, deciza fid-9 ta' Settembru, 2010:

“As a preliminary point, it should be recalled that the Commission enjoys a broad margin of discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (see, to that effect, Case T-145/98 ADT Projekt v Commission [2000] ECR II-387, paragraph 147; Case T-148/04 TQ3 Travel Solutions Belgium v. Commission [2005] ECR II-2627, paragraph 47; and Case T-437/05 Brink’s Security Luxembourg v. Commission [2009] ECR II-0000, paragraph 193.”

Dak il-kaz, hu veru, kien jolqot kaz mistharreg minn kummissjoni ewropeja, pero`, il-principju jibqa' li, bhala qorti ta' revizjoni, il-kompetenza ta' din il-Qorti hija necessarjament cirkoskritta.

Trattat l-ewwel aggravju tas-socjeta` appellanti, din il-Qorti ma tarax li dan hu misthoqq. Kjarifika, kif inhi d-dicitura tal-istess terminu, ma tistax tintuza sabiex tippermetti xi offerent jissottometti informazzjoni gdida li kien mitlub jissottometti sa l-gheluq tas-sejha tal-offerti u li ma tkunx giet sottomessa. F'dan il-kaz, l-informazzjoni li kellha tinghata jidher li ma kienetx “readily available”, ghax il-kumitat ta' evalwazzjoni talab diversi drabi li jigi indikat lilu fejn kienet tinsab l-informazzjoni mitluba. Is-socjeta` appellanti indikat fejn, skont hi, kienet tinsab dik l-informazzjoni. Il-kumitat, wara li ezamina l-informazzjoni kif u fejn kienet indikata lilu, sab, f'diversi okkazonijiet, li s-suppost informazzjoni kienet skarna u mhux sufficcjenti ghall-iskop indikat. Din hi mansjoni li tidhol fid-diskrezzjoni tal-kumitat, u s-socjeta` appellanti ma tistax

tippretendi li terga' tigi mitluba taghti d-dettalji necessarji. Kien dmir taghha li, mal-offerta, taghti dawk id-dettalji kollha opportuni sabiex ikun jista' jsir ezami xieraq tal-istess offerta, u ebda offerent ma ghandu dritt jippretendi li jaghti d-dettalji biss jekk u kif jigi mitlub. Il-Kumitat evalwattiv ma jistax u huwa prekluz legalment illi jitlob lill-offerent informazzjoni illi ma kienetx inkluza fl-offerta. Informazzjoni mandatorja ghandha tigi sottomessa mill-offerenti mal-offerta, u ma ghandhiex tithalla ghall-arbitru decizjoni tal-offerent jekk tinghatax jew le. Meta informazzjoni ma tinghatax din tammonta ghall-offerta li ma tissodisfax ir-rekwiziti teknici mitluba, u ebda kjarifika ma tista' ssewwi dan in-nuqqas.

Insibu, per eżempju, li tissemma' l-materja dwar kif se tigi kostruwita t-tinda. Il-Qorti tara li fejn se jsir it-thaffir fl-art, kif se tehel it-tinda mal-pedament tieghu, u kif se jsir l-irbit tal-kannen intizi ghall-istruttura, huma fundamentali ghall-kaz, mehud in konsiderazzjoni l-fatt li hawn si tratta minn sit storiku. Dawn id-dettalji kellhom jigu indikati b'mod car mal-offerta. Dan ukoll ghax f'dak li huma materji ta' natura teknika, it-tender jippermetti "clarification" izda mhux "rectification", ghax offerent ma jistax ibiddel in-natura tal-offerta tieghu.

Il-High Court of Justice, Queen's Bench Division, tal-Ingilterra, f'sentenza li tat fil-15 ta' April, 2011 fil-kawza fl-ismijiet **Hoole v. Legal Services Commission** enfasizzat dan il-punt biex jigi evitat attackki ta' preferenza u biex kull offerent jithalla fl-istess posizzjoni bhal oħrajn, u cioe`, fil-pozizzjoni li hu stess ikun pogga lilu nnifsu fl-offerta tieghu. Il-Qorti Ingliza osservat li, fl-interess tal-gustizzja, certi korrezzjonijiet ta' "*obvious errors*" ghandhom ikunu permessi, pero`, ziedet dan il-proviso:

"However, any such duty is severely circumscribed where there is a competitive tender and an over-riding duty to treat all tenderers equally. Here for reasons that were not the responsibility of the defendant, the claimant had failed to supply the information that would have lead them to being ranked in priority where there was competition for the award of NMS. Any general duty to give an applicant

an opportunity to correct errors in the absence of fault by the defendant, yields to the duty to apply the rules of the competition consistently and fairly between all applicants, and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed.”

Dak li offerent ghandu jghid, ghandu jghidu mal-offerta u mhux jippretendi li jkun mistoqsi d-dettalji tal-modus operandi tieghu. Kif inghad il-kumitat ta' evalwazzjoni talab diversi kjarifiki mis-socjeta` appellanta, l-aktar sabiex din tindika fejn fl-offerta taghha kienet tinsab certa informazzjoni li originarjament kellha tigi sottomessa mal-offerta. Jekk imbaghad, mill-kjarifiki, il-kumitat ma gietx fornita bl-informazzjoni kollha mitluba, dan huwa biss nuqqas attribwibbli lis-socjeta` appellanti, ghax fl-ahhar mill-ahhar, ir-responsabbilta` li tipprovdi l-informazzjoni fuq il-prodott jew is-servizz taghha tinkombi lilha. Kif osservat l-ECJ fil-kaz numru C-599/10 fl-ismijiet **SAG ELV Slovensko a.s. and others v. _Urad pre verejne obstaràvanie**, deciza fid-29 ta' Marzu, 2012:

“38. In any event, it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject”

L-ewwel aggravju qieghed, ghalhekk, jigi michud.

It-tieni aggravju jirrigwarda l-allegazzjoni maghmula mis-socjeta` appellanti li saru xi negozjati ma' wiehed mill-offerenti. Jirrizulta, pero`, li n-negozjati saru wara li gie maghzul dak lil min kien se jinghata l-kuntratt. Issa, kif gie rilevat, skont l-Artikolu 332 tas-sejha ghall-offerti:

“... .. the Central Government Authority reserves the right to conclude the contract with the successful tenderer

Kopja Informali ta' Sentenza

*within the limits of the funds available. It can decide to reduce the scope of the works or to ask for a discount from the **cheapest compliant tenderer.***"

Ghalhekk huwa car illi bil-poter moghti lilha taht dan l-artikolu, l-awtorita` kontraenti daret fuq l-offerent illi kien issodisfa r-rekwiziti kollha tas-sejha ghall-offerti u li kien l-irhas, u wara li ddecidiet li l-kuntratt ghandu jinghata lilu, bdiet negozjati mieghu sabiex tnaqqsu certi xoghlijiet li gew kunsidrati bhala mhux necessari, bhal landscaping, u ntablab skont ta' 4.96%. Dan, fuq kollox, huwa konsentit mill-gurisprudenza tal-Qorti Ewropea (ara per ezempju l-kaz T-226/01) deciz fid-29 ta' April, 2004.

Kwindi, ma jirrizultax li saret xi haga illegali da parti tal-kumitat evalwattiv, u l-aggravju relattiv qieghed, ghalhekk, jigi wkoll michud.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell interpost mis-socjeta` Steelshape Ltd, billi tichad l-istess, u tikkonferma d-decizjoni appellata, bl-ispejjez jithallsu mis-socjeta` appellanti.

< Sentenza Finali >

-----TMIEM-----