MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF
SILVIO CAMILLERI

ONOR. IMHALLEF
TONIO MALLIA

ONOR. IMHALLEF
JOSEPH AZZOPARDI

Seduta tat-28 ta' Frar, 2014

Appell Civili Numru. 441/2013/1

Vivendo Projects Limited (C 46406)

v.

L-Universita` ta' Malta (bhala "Contracting Authority") u FXB Limited (bhala "recommended bidder")

Dan hu appell li tressaq fil-25 ta' Novembru 2013, mis-socjeta` Vivendo Projects Ltd wara decizjoni datata l-4 ta' Novembru 2013 moghtija mill-Bord ta' Revizjoni Dwar Kuntratti Pubblici (minn hawn 'il quddiem, imsejjah il-"Bord") fil-kaz numru 606 (UM1721).

Dan il-kaz huwa marbut ma' sejha ghall-offerti mahruga mill-Universita` ta' Malta intitolata "Tender for the Supply, Delivery and Installation of Lecture Rooms Furniture and Office Furniture Produced with Environmental Friendly Materials and Processes, for the Corporate Research and Innovations Building, University of Malta". Is-socjeta` appellanti tefghet offerta, izda giet skwalifikata mill-Universita` ta' Malta ghar-raguni li l-offerta giet meqjusa *"as technically non conforming"* peress li l-injam propost ghall-ghamara gie deskritt bhala *melamine*, filwaqt li kellu jkun *'high pressure laminate'* kif specifikat fid-dokumenti tat-*tender,* u ghax il-lockers gew offruti fi stainless steel u aluminium flok injam kif mitlub. Is-socjeta` Vivendo Projects Ltd appellat mid-decizjoni ghal quddiem il-Bord li pero` cahad l-appell bis-sentenza tal-4 ta' Novembru 2013. Dak il-Bord, wara li sema' s-sottomissjonijiet tal-partijiet, ippronunzja s-segwenti decizjoni:

"Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 9th September 2013 and also through the appellant's verbal submissions presented by same during the hearing held on 8th October 2013, had objected to the decision taken by the pertinent Authority, in that:

"a) The Preferred Bidder' Offer was cheaper. That is a fact.

"b) The Appellant's Bid was disqualified due to the fact that the Appellant' product was of an inferior quality to that requested in the technical specifications in the tender document.

"c) The Appellant exhibited samples of the product for which it tendered.

"d) The Evaluation Board of the Contracting Authority were mislead regarding the quality of the material being tendered for by the Appellant.

"Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 8th October 2013, in that:

"a) There are two types of laminate, the low pressured laminate and the high pressured laminate.

"b) The Appellant's Bid's material consisted of a low pressured laminate.

"c) The Samples of the material were different from those described in the tender documents.

"Reached the following conclusions:

"1. This Board noted that the wood material that had to be included the tender specification had to be of a durable nature and had to last for as many years as possible.

"2. Although the Appellant's bid was the cheapest, it did not meet the required specifications for the purpose the tender was issued.

"3. From information acquired from technical experts, during the hearing held on 8th October 2013, this Board has been made aware that the Appellant' Bid was not compliant with the technical requirements of the tender in question.

"In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed."

Is-socjeta` Vivendo Projects Ltd appellat minn din id-decizjoni ghal quddiem din il-Qorti u ressqet tliet aggravji li, fil-qosor, huma s-segwenti: (i) id-decizjoni tal-Bord ghandha tigi mhassra peress illi hija unikament u esklussivament imsejsa fuq xhieda *ex parte* allegatament esperta tal-perit arkitett tal-Universita` ta' Malta; u (ii) id-decizjoni tal-Bord ghandha tigi mhassra peress illi fil-meritu wasal ghal konkluzjoni zbaljata illi *melamine*

tekwivali ghal *'low pressure laminate'* u ma tistax tkun *'high pressure laminate'* u (iii) id-decizjoni tal-Bord ghandha tigi revokata peress illi wasal ghal konkluzjoni zbaljata peress illi l-*fittings* u l-istruttura tal-*lockers* biss kienu tal-i*stainless steel*, u ghal bqija kienu konformi ma' dak mitlub.

Wara li rat ir-risposti li pprezentaw iz-zewg appellati u semghet lid-difensuri tal-partijiet u wara li rat l-atti kollha tal-kawza u d-dokumenti esebiti, sejra issa tghaddi biex tqis u tiddeciedi dan l-appell.

Trattat l-ewwel aggravju, din il-Qorti tirrileva li ma hemm xejn hazin jew kontra l-ligi li kaz jigi deciz a bazi ta' xhud, espert jew mhuwiex, ta' parti wahda fil-kawza. Tribunal aditt u b'poteri *quasi* gudizzjarji jrid jiddeciedi fuq il-provi li jitressqu ghal quddiemu, u jekk ghat-Tribunal xhud wiehed hu kredibbli u ta' min joqghod fuqu, jista' jiddeciedi l-kaz a bazi ta' dik ix-xhieda specjalment meta ma jkunx kontradett. Huwa possibbli f'kawza li parti tressaq bhala xhud espert *ex parte*, u sta ghall-parti l-ohra, jekk trid tikkontesta x-xhieda ta' dan ix-xhud, li tressaq hi wkoll espert imqabbad minnha jew tinsisti mat-Tribunal sabiex dan jahtar perit tekniku indipendenti sabiex jassistih fl-indagini tieghu. Bord jew Tribunal jista' anke, sua sponte, jahtar espert tekniku, pero`, jekk ihoss ruhu sodisfatt bil-provi li jkollu quddiemu, jista' jiddeciedi fuq il-kaz u jekk jorbot id-decizjoni tieghu max-xhieda ta' xhud espert *ex parte*, ikun qed jagixxi skont id-dettami tal-ligi.

Kif qalet din il-Qorti, Sede Inferjuri fil-kawza **Middlesea Insurance plc v. Zaffarese** deciza fid-29 ta' Mejju 2009:

"L-ewwel osservazzjoni li trid taghmel din il-Qorti hi din. Ibda biex, <u>ma kien hemm xejn fil-ligi illi jzomm lill-Qorti milli tadotta rapport ta' perit ex parte</u>. Anzi, il-kuntrarju hu l-kaz, kif johrog car mid-dispost tal-Artikolu 563A tal-Kodici ritwali (Kapitolu 12). Dik l-opinjoni kienet ammissibbli u wkoll accettabbli bhala fonti oggettiva ta' prova una volta l-Qorti ma jkunx dehrilha li ghandha tiskartaha bhala li tmur kontra l-konvinzjonijiet taghha (Artikolu 681, Kapitolu 12). Huwa veru illi dik l-opinjoni spiss drabi tkun bazata fuq

konsiderazzjoni ta' diskrezzjonalita` teknika izda dan ma jfissirx illi m'ghandhiex ukoll titqies rilevanti meta c-cirkostanzi jissuggerixxu illi l-istess tikkostitwixxi accertament ta' fatt rilevabbli in bazi ghall-konoxxenza teknika determinanti. Dan aktar u aktar fejn, bhal f'dan il-kaz, il-Qorti tkun tal-fehma illi d-deduzzjonijiet kontrarji tal-konvenut ma jkunux tali li jikkontrastaw ruhhom ghal dik l-istess opinjoni."

(Sottolinear ta' din il-Qorti)

Dwar it-tieni aggravju, din il-Qorti tara li jista' jkun li *melamine* tkun kemm *'low pressure laminate'* kif ukoll *'high pressure laminate'* u dan peress illi jidher li *"technically, melamine is a chemical used in both high pressure laminate and low pressure laminate"* u kollox jiddependi kif il-*melamine* jigi *infused*, cioe` il-process ta' kif *"laminate paper is attached to the substrate"*, pero`, is-sejha ghall-offerti kienet specifika li l-ghamara kellha tkun *'high pressure laminate'*, u offerta tal-kimika biss *(melamine)* kienet generali wisq biex tissodisfa l-kriterji kif mitluba. Jekk xi hadd irid bicca ghamara tal-*oak*, offerta tal-istess bicca tal-"injam" ma hijiex sodisfacenti. L-ispecifikazzjonijiet tat-*tender* kienu jindikaw car *'high pressure laminate'*, filwaqt li s-socjeta` appellanti offriet biss il-*melamine* u ma ghamlet ebda riferenza ghall-*'high pressure laminate'*.

Mill-atti jidher ukoll li l-kelma *melamine* gieli tintuza flok u ghal *'low pressure laminate'*, u s-socjeta` kellha allura tkun aktar preciza fl-offerta taghha. Ma kellhiex toffri prodott tal-*melamine* biss, izda kellha toffri prodott ezatt kif riedet l-Universita`, u mhux tassumi li l-awtorita` aggudikanti tifhem dak li riedet tghid bl-offerta. Meta dak mitlub huwa specifiku, offerta skont il-genus tal-haga, ma hijiex konformi ma' dak li jkun mitlub.

Dwar it-tielet aggravju, is-socjeta` appellanti tilmenta illi filwaqt li dawn gew offruti f'*high pressure laminate* kif mitlub mill-Universita` ta' Malta (mela, fil-kuntest tat-tieni aggravju, is-socjeta` appellanti kienet taf id-differenza bejn *melamine* u *'high pressure laminate'!)*, l-offerta taghha ma

kellhiex tigi skartata minhabba li l-*'fittings'* u l-istruttura tal-*lockers* offruti huma ta' *stainless steel*, ghax hu ovvju li hekk ikunu lockers. L-Universita`, pero`, talbet specifikament ghal *lockers* maghmulin fl-intier taghhom minn injam, hlief ghac-cappetti, u kif irrizulta lill-Bord dan it-tip ta' *lockers* jezistu, u meta s-socjeta` attrici offriet *lockers* b'saqajn tal-metall, dan kien kontra dak li talbet l-Universita`. Il-fatt li, skont is-socjeta` attrici, jkun "ahjar" jekk is-saqajn ikunu tal-metall, huwa rrilevanti, darba li l-Universita` talbet offerti ta' *lockers* maghmulin kollha minn injam hlief ghac-cappetti.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell tas-sojceta` Vivendo Projects Ltd billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord ta' Revizjoni dwar Kuntratti Pubblici tal-4 ta' Novembru 2013, bl-ispejjez jithallsu mill-istess socjeta` appellanti Vivendo Projects Ltd.

< Sentenza Finali >

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