



MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF

SILVIO CAMILLERI

ONOR. IMHALLEF

TONIO MALLIA

ONOR. IMHALLEF

JOSEPH AZZOPARDI

Seduta tas-27 ta' Gunju, 2014

Appell Civili Numru. 139/2014/1

Borg Bros

v.

1) Ministeru għall-Familja u Solidarjeta` Socjali, u

2) Dipartiment tal-Kuntratti;

Il-Qorti:

Dan hu appell imressaq fit-3 ta' April 2014, mis-socjeta` (ossija partnership '*en nom collectif*') Borg Bros wara decizjoni datata 18 ta' Marzu 2014, moghtija mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (minn hawn 'il quddiem imsejjah il-"Bord") fil-kaz numru 670 (DCS 38/2010).

Dan il-kaz hu marbut ma' sejha ghall-offerti li hareg il-Ministeru ghall-Familja u Solidarjeta` Socjali "*for the provision of carriage services using vehicles meeting Euro IV standards*". Is-socjeta` Borg Bros, tefghet l-offerta taghha, pero`, qabel ma saret aggradikazzjoni, it-tender gie mhassar. Is-socjeta` appellanta hasset ruhha aggravata b'din id-decizjoni u resqet appell lill-imsemmi Bord. Dan il-Bord, b'decizjoni tat-18 ta' Mejju 2014 ma laqax l-oggezzjoni tas-socjeta` appellanti u rrakkomanda t-telf tad-depozitu. Il-Bord ta s-segwenti decizjoni fuq il-kaz:

"Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 9th January 2014 and also through Appellant's verbal submissions during the hearing held on 20th February 2014, had objected to the decision taken by the pertinent Authority, in that:

“a) The Appellant’s bid was the cheapest and the Contracting Authority failed to give the reasons for the cancellation of the tender.

“b) Appellant contends that the tender was intended for an ‘ongoing service’, and in this regard the Contracting Authority altered the system of how the tendered service is to be provided.

“Having considered the Contracting Authority’s verbal submissions during the hearing held on 20th February 2014 in that:

“a) The Contracting Authority had all the necessary rights to cancel the tender, if policies and circumstances change between the date of the issue of the tender and the date of the award of the tender.

“b) The Contracting Authority contended that under new Governmental Policy guidelines, it has been decided to adopt a ‘Framework Agreement’ system.

“Reached the following conclusions:

“1. From the submissions made during the hearing of this appeal, it resulted the following:

i) The Contracting Authority had all the rights to cancel the tender.

ii) However, this Bord notes that the Contracting Authority was in duty bound to state the specific reasons to all bidders for the cancellation of the tender.

iii) The new Governmental directive to adopt a ‘framework agreement’ policy is a logical and valid concept.

“2. The adoption of a ‘Framework Agreement’ concept, will allow a wider range of prospective tenderers. This, in turn will create more competition and eventually will result in a ‘Value for Money’ situation.

“3. The Contracting Authority acted diligently in cancelling the tender to adopt a more competitive and selective outlay.

“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` Borg Bros, ressqet issa dan l-appell quddiem din il-Qorti u ressqet aggravji marbuta mar-ragunijiet li ta l-Gvern biex wasslu li jhassar is-sejha ghall-offerti. Din il-Qorti wara li semghet lid-difensuri tal-partijiet u rat l-atti kollha tal-kawza u d-dokumenti esebiti, tinsab f'pozizzjoni li taghti din id-decizjoni.

Ikkunsidrat:

Illi s-sejha ghall-offerti kienet intenzjonata li tkopri servizzi ta' garr ta' ghamara, magni, *stationery* u affarijiet ohra bejn diversi dipartimenti tal-Ministeru appellat, izda wara bidla fil-politika (fis-sens ta' *'policy'*) tal-Gvern, it-tender giet irtirata fit-termini tal-Artikoli 33.1 u 33.3(b) tal-istruzzjonijiet ghal min jitfa' offerta li kienu jinsabu annessi fit-tender documents. L-artikoli inkwistjoni jippermettu l-irtirar ta' hrug ghall-offerti meta *“the economic or technical parameters of the project have been fundamentally altered”*. Is-socjeta`

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appellanti tilmenta mill-fatt li hi ma nghatatx spjegazzjoni ta' effettivament x'inbidel, hlief waqt it-trattazzjoni tal-kaz quddiem il-Bord, u li, f'kull kaz, l-isjegazzjoni ma hijiex wahda li tiggustifika l-irtirar tas-sejha.

Fuq l-ewwel aggravju, din il-Qorti tara' li l-awtorita` koncernata kienet in regola meta qalet biss li irtirat is-sejha a bazi tar-regolamenti msemmija. F'dak l-istadju indikat li riedet bidla fil-politika rilevanti, u sta ghal min kien interessat li jitlob spjegazzjoni u/jew kjarifiki. Ovvjament, darba li l-awtorita` koncernata ma tatx spjegazzjoni fl-ittra tal-irtirar, min kellu interess kellu jressaq appell quddiem il-Bord biex isir jaf, kif kellu dritt, x'wassal ghall-irtirar, bil-konsegwenza li l-Bord ma kellux jordna t-telf tad-depozitu li sar biex seta' jisma l-appell. L-Awtorita` koncernata agixxiet strettament mal-ligi meta rriferiet ghar-regolamenti li jippermettula tirtira sejha ghall-offerti, pero`, min hu interessat ghandu dritt jikkontesta d-decizjoni u jitlob stharrig gudizzjarju tad-decizjoni li wasslet ghall-irtirar (ara **Hospital Ingenieure Krankenkenhaustechnik Plannings GmbH v. Stadt Wien**, deciza mill-Qorti Ewropeja tal-Gustizzja fit-18 ta' Gunju 2002), u biex dan ikun jista' jsir, trid tinghata informazzjoni dwar x'wassal ghall-irtirar. Darba dan inghata quddiem il-Bord, u s-socjeta` appellanti kienet gustifikata titlob spjegazzjoni, ma ghandhiex tbatl l-ispejjez tal-proceduri quddiem il-Bord. Dan ma jfissirx li dak li sar kien null, izda biss li s-socjeta` appellanta kienet gustifikata li tressaq ilment quddiem il-Bord. Kien f'dan il-kuntest li l-Bord hass li jirrimarka li kien

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ikun ahjar li kieku l-awtorita` koncernata tati *“the specific reasons to all bidders for the cancellation of the tender”*.

Fil-kuntest tat-tieni ilment tas-socjeta` appellanti, il-Bord kien sodisfatt bl-ispjegazzjoni li nghata ghala s-sejha giet irtirata. Gie spjegat li s-sejha ghall-offerti giet irtirata peress illi l-awtorita` koncernata riedet tibdel il-politika li l-kuntratt jinghata lil min jaghmel l-orhos offerta, izda li ma tkunx necessarjament l-ahjar wahda. L-awtorita` riedet, fi kliem ir-rapprezentant taghha, *“more competition, efficiency and distribution of services”*. L-Artikolu 26 tar-Regolamenti dwar kuntratti pubblici jippermetti li kuntratti ta' din in-natura jinghataw bi *“framework agreements”*, li jippermettu aktar flessibilita` fil-holqien tal-kuntratti. Il-kuntratt inkwistjoni, fil-fatt, minhabba l-valur tieghu, mhux wiehed li jrid jinghata bil-fors wara sejha ghall-offerti, u l-awtorita` koncernata tista' tipprovdi mod iehor kif permess mir-regolamenti. Din il-Qorti, ovvjament, ma tistax tindahal fl-ghazla li taghmel l-awtorita` koncernata dwar x'procedura tuza, izda taqbel li fil-principju, l-orhos offerta mhux necessarjament tkun l-ahjar. Kull Ministeru ghandu dritt jibdel il-politika tieghu minn zmien ghal zmien, u darba li ghad ma hemmx rabta kuntrattwali, jista' jbidel il-parametri ta' kif jikkuntratta, diment li jibqa fl-ambitu tal-ligi.

Din il-Qorti ma tarax li d-decizjoni tal-awtorita` kontraenti li tmur ghal *“framework agreement”* u tiddeciedi li tmur ghall-ftehim li jaghti l-ahjar rizultat

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hija xi wahda irragjonevoli fic-cirkostanzi. B'din il-procedura, l-awtorita` tistabilixxi minn qabel il-kundizzjonijiet ta' kuntratt b'mod li s-suppliers ikunu jafu minn qabel f'hiex deklin. Fil-fatt f'*Explanatory Note* mahruga mill-Kummissjoni Ewropeja jinghad li "*framework agreement*" huwa definit bhala "*an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged*" (ara Direttiva tal-Unjoni Ewropeja 2004/18/EC). B'dan il-mod, il-kundizzjonijiet ikunu mifthemma u stabbiliti mal-operaturi involuti u ma jkunx hemm htiega ta' negozjati godda jew hrug ta' sejha ghall-offerti kull meta jkun hemm bzonn tas-servizz, peress illi l-kundizzjonijiet jitqiesu stabbiliti b'mod obligatorju u jorbtu l-partijiet. Ftehim simili jrid isegwi l-procedura normali, partikolarment, ir-regoli ta' publicita`, limitazzjoni ta' zmien, kriterji ta' esklużjoni, xelta u rakkomandazzjoni. "*Framework agreements*" ghandhom durata ta' erba' snin, u kwindi jtendu li jwasslu ghal aktar efficjenza fl-ghoti tas-servizz.

Din il-Qorti tara', allura, li min-naha tal-awtorita` kompetenti kien hemm bidla fundamentali ta' kif jigu ffirmati dawn il-kuntratti, bidla li tolqot l-aspett ekonomiku tal-iskop tal-kuntratti u tqis bhala validu dak li sar. Dan l-appell huwa, ghalhekk, zbaljat fil-meritu.

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Fid-dawl tal-premess mhux mehtieg ghal din il-Qorti tezamina l-eccezzjonijiet tan-natura preliminari li ressq u l-appellati, anke ghaliex l-appell inkwantu dirett lejn id-Dipartiment tal-Kuntratti gie cedut b'nota tad-9 ta' April 2014.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell tas-socjeta` Borg Bros billi tilqa' l-istess in parte, fis-sens li tikkonferma s-sentenza li ta fil-meritu l-Bord ta' Revizjoni dwar Kuntratti Pubblici fit-18 ta' Marzu 2014, izda tirrevokaha fejn irrikmandat *“that the deposit paid by appellant should not be reimbursed”* u tordna minflok ir-reimbors tad-depozitu marbut mal-appell quddiem dak il-Bord lis-socjeta` appellanti.

L-ispejjez, pero`, tal-procedura tal-appell quddiem din il-Qorti ghandhom jithallsu mis-socjeta` appellanti.

< Sentenza Finali >

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