



MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF

SILVIO CAMILLERI

ONOR. IMHALLEF

GIANNINO CARUANA DEMAJO

ONOR. IMHALLEF

NOEL CUSCHIERI

Seduta tat-12 ta' Jannar, 2015

Appell Civili Numru. 362/2014/1

Cassar Petroleum Services Limited

v.

***Gozo Channel Company Limited* u d-Direttur
Ġenerali tad-Dipartiment tal-Kuntratti**

Kopja Informali ta' Sentenza

1. Dan huwa appell ta' *Cassar Petroleum Services Limited* ["Cassar"] minn deċiżjoni (mingħajr data) tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti tal-2010 dwar il-Kuntratti Pubbliċi [L.S. 174.04], illi ċaħdet appell tal-istess *Cassar* minn deċiżjoni tad-Direttur tal-Kuntratti ["id-Direttur"] illi l-offerta ta' *Cassar* għall-provvista ta' nafta lis-soċjetà *Gozo Channel Company Limited* ["*Gozo Channel*"] tiġi mwarrba billi mal-offerta ma kienx hemm id-dokumenti kollha meħtieġa.
2. Il-fatti rilevanti seħnew hekk: fl-1 ta' April 2014 saret sejha mid-Direttur għal offerti għall-provvista ta' nafta lil *Gozo Channel*. Il-para. 7.1(C)(ii) tal-*Instructions to Tenderers* mehmuża mas-sejha għal offerti jgħid hekk:

"List of Literature/Samples as per Form marked Literature/Samples to be submitted (Note 3)"
3. *Note 3* tgħid hekk:

"No rectification shall be allowed. Only clarifications on the submitted information may be requested."
4. Imbagħad fost id-dokumenti msemmiha fil-*List of literature/documents to be submitted with the tender* hemm *item 1.2* li tgħid hekk:

"True Copy of licence that Tenderer is authorised to carry out bunkering operations and storage for bunkering purposes (Licence from Malta Resources Authority)."
5. Mal-offerta tagħha *Cassar* ipprezentat kopja tal-liċenza "*to carry out the activity of an importer (and/or wholesaler) of petroleum*", flok dik

mitluba “*to carry out bunkering operations and storage for bunkering purposes*”.

6. B'ittra tad-29 ta' Lulju 2014 id-Direttur għarraf lil *Cassar* illi l-offerta tagħha:

“... .. was considered non compliant because ... true copy of licence that bidder is authorised to carry out bunkering operations and storage for bunkering purposes was not submitted. Wrong document has been submitted. Document submitted relates to authorisation to carry out the activity of an import[er] and/or wholesaler of Petroleum.”

7. B'ittra li fuqha tidher id-data tal-1 ta' Lulju 2014¹ *Cassar* ressqet oġġezzjoni minn din id-deċiżjoni quddiem il-Bord ta' Revizjoni. Ir-raġuni għall-oġġezzjoni giet infissra hekk:

“The reason why this arbitrary and unjust decision should be revoked and withdrawn is based on the fact that in terms of Notes to Clause 7.1 of the Tender document regulations, the Evaluating Committee was bound “to request the tenderer to clarify/rectify within two (2) working days” (Clause 7.1.2). The tender conditions clearly bind the Evaluation Committee to rectify any incorrect or incomplete documentation and allow tenderer to submit any missing documents within two (2) working days of notification.

“Our client humbly draws your attention to the fact that the evaluation committee was bound to allow him to present the relative documentation whether incomplete or missing.

“Our client *Cassar Group* has all the licences to execute all operations under the tender. In fact presently *Cassar Group* is the supplier to *Gozo Channel Limited*. The company is experiencing a 24 hour excellent unrivalled service as *Cassar Group* is the most equipped supplier to effectively meet the demands of the Company requiring the service.

“This is being said as *Cassar Group* should have been called to submit the relative licenses it certainly holds and the disqualification on this ground is with respect unfounded and arbitrary.”

¹ Din id-data hija evidentement żbaljata għax ma setgħetx fl-1 ta' Lulju 2014 saret oġġezzjoni mid-deċiżjoni tad-Direttur komunikata b'ittra tad-29 ta' Lulju 2014. Fir-rikors tal-appell ta' *Cassar* jingħad illi l-oġġezzjoni saret b'ittra tas-7 ta' Awissu 2014 waqt li fid-deċiżjoni tal-Bord ta' Revizjoni jingħad illi saret b'ittra tal-5 ta' Awissu 2014.

8. Il-Bord ta' Revizjoni iddeċieda hekk:

"The Board,

"Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 5th August 2014 and also through the Appellant's verbal submissions during the hearing held on 20th August 2014, had objected [*sic*] to the decision taken by the pertinent Authority, in that:

- "a) Appellant contends that his offer was discarded due to the fact that he did not submit the 'Bunkering' licence. In this regard, Appellant claims that in accordance with clause 7.1 of the tender document, the Contracting Authority had at its disposal two working days to clarify or rectify any missing documentation. The Contracting Authority did not apply remedial action.
- "b) Appellant also contends that since the 'award criteria' of this tender was the price, it was in the best interests of the Authority to seek clarifications/rectifications as per clause 7.1 of the tender document.
- "c) Appellant requests this Board to be given the opportunity to submit the 'Bunkering' licence and be reintegrated in the evaluation process.

"Having Considered the Contracting Authority's verbal submissions during the hearing held on the 20th August 2014, in that:

- "a) The Contracting Authority maintains that the submission of the 'Bunkering' licence was a mandatory requirement as dictated in the tender document. In this respect, Appellant did not abide by this requirement.
- "b) The contracting Authority contends that the submission of the 'Bunkering' licence fell under section (C) Technical Specifications sub-paragraph (ii) which is regulated by clause 7.3 and not clause 7.1 of the same tender document.

"Reached the following conclusions:

- "1. With regards to the Appellant's first contention, that the Contracting Authority should have acted in accordance with clause 7.1 of the tender document, this Board opines that the requested 'Bunkering' licence in question falls under the literature that had to be submitted with the tender as per Section (C) Technical Specifications sub-paragraph (ii) and hence is regulated by clause 7.3 and not 7.1. Clause 7.3 clearly states that 'no rectification is allowed'. It was credibly established that Appellant did not submit the mandatory 'Bunkering' licence so that since this requirement is regulated by clause 7.3 this Board upholds the Contracting Authority's contention that the same Authority could not ask for clarifications/rectification on missing documentation.

- “2. This Board is aware that the ‘award criteria’ was [sic] the price; however, the Appellant company was also aware from the very beginning and prior to the actual submission of the tender document that tenderers had to submit a ‘Bunkering’ licence. This Board also took into account the very fact that the ‘price criteria’ could not be considered by the Contracting Authority due to the simple fact that the price offered by the Appellant in his bid could not be known, as this is revealed in the last stage of the Evaluation process. In this regard, this Board opines that the process of evaluation of tenders had to be respected at all levels and thus this same Board does not uphold the Appellant’s contention that since the ‘award criteria’ was the price, Appellant’s offer should be reintegrated. This Board notes that Appellant failed to comply with a mandatory requirement of the tender document and, hence, the ‘price’ element cannot justify the non-submission of the requested ‘Bunkering’ licence.
- “3. This Board would also like to stress the fact that mandatory requirements dictated in a tender document are not capriciously included; on the contrary, they are stipulated by the contracting authority to ensure that the successful bidder is fully compliant in all respects, possesses the necessary licences to execute the tendered works and operates according to the local regulations.

“In view of the above, this Board finds against the Appellant Company; however, in the circumstances, this same Board recommends that the deposit paid by Appellant should be reimbursed.”

9. *Cassar* ressqet appell minn din id-deċiżjoni b’rikors tad-19 ta’ Settembru 2014. Id-Direttur wieġeb fit-8 ta’ Ottubru 2014 u *Gozo Channel* wieġbet fis-17 ta’ Ottubru 2014.
10. L-aggravji ta’ *Cassar* jidher li huma dawn: (i) illi, jekk kien hemm dokument nieqes, min kien responsabbli għall-evalwazzjoni tal-offerti kellu jgħarrafha b’dan u jagħti żmien biex jinġieb id-dokument nieqes; (ii) illi s-sejha għal offerti ma kinitx ċara dwar liema liċenza kienet meħtieġa; (iii) illi l-liċenza meħtieġa ma kinitx il-*bunkering licence* imsemmija mill-Bord ta’ Reviżjoni għax il-konsenja tan-nafta kellha ssir

minn *road tankers* u mhux minn barkuni fuq il-baħar; u (iv) f'kull każ *Cassar* għandha l-liċenza meħtieġa.

11. L-ewwel aggravju ta' *Cassar* huwa msejjes fuq *note 2* għal para. 7.1 tal-*Instructions to Tenderers* li tgħid hekk:

“Tenderers will be requested to either clarify/rectify any incorrect and /or incomplete documentation, and/or submit any missing documents within two working days from notification.”

12. Id-Direttur iżda jwieġeb illi n-nota li tgħodd għall-para. 7.1(C)(ii) – il-paragrafu li jrid illi jkun hemm kopja tal-liċenza li turi “*that Tenderer is authorised to carry out bunkering operations and storage for bunkering purposes*” – ma hijiex *note 2* iżda *note 3* li, kif rajna², ma tħallix li ssir *rectification*.
13. Interpretazzjoni stretta tal-kondizzjonijiet tas-sejħa għal offerti tagħti raġun lid-Direttur, għax tassew illi n-nota li għaliha hemm referenza fil-para. 7.1 tal-*Instructions to Tenderers* hija *note 3* u mhux *note 2*. Il-qorti tagħraf is-siwi tas-sottomissjonijiet tad-Direttur fis-sens illi ħarsien kostanti, uniformi u skrupluż tal-kondizzjonijiet tas-sejħa għal offerti iwassal għal trasparenza, ċertezza u prevedibilità tad-deċizzjonijiet kif ukoll inaqqas il-margini ta' arbitrarjetà. Madankollu, hija rilevanti wkoll id-Direttiva 2004/18/KE tal-Parlament Ewropew u tal-Kunsill tal-31 ta' Marzu 2004 fuq kordinazzjoni ta' proċeduri għall-għoti ta' kuntratti għal

² Para. 3, *supra*.

xogħlijiet pubbliċi, kuntratti għal provvisti pubbliċi u kuntratti għal servizzi pubbliċi, li fit-tieni preambolu trid illi:

“L-għoti tal-kuntratti ffinalizzati fl-Istati Membri f'isem l-Istat, l-awtoritajiet reġjonali u lokali u korpi oħra mmexxija minn entitajiet legali pubbliċi, huwa soġġett li josserva l-prinċipji tat-Trattat u in partikolari għall-prinċipji tal-moviment ħieles tal-prodotti, il-prinċipju tal-istabbiliment ħieles u l-prinċipju tal-libertà li tipprovdi servizzi u l-prinċipji li jitnisflu minn dawn, bħal ma huwa il-prinċipju tat-trattament ugwali, il-prinċipju ta' bla diskriminazzjoni, il-prinċipju ta' għarfien reċiproku, il-prinċipju tal-proporzjonalità u l-prinċipju tat-trasparenza. ...”

14. Il-Qorti tal-Ġustizzja tal-Unjoni Ewropea interpretat il-prinċipju tal-proporzjonalità bħala prinċipju generali tad-Dritt Ewropew, illi jrid illi miżura meħuda minn awtorità tkun xierqa biex tikseb il-għan mixtieq u ma tmurx lil hemm minn dak li hu meħtieġ biex jinkiseb dak il-għan:

“As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.³”

15. Għalkemm din is-silta hija dwar leġislazzjoni, tgħodd ukoll għal miżuri ta' implimentazzjoni u deċiżjonijiet meħuda taħthom⁴. Din il-qorti għalhekk tagħraf illi għandha qabel xejn tara x'inhu l-għan ewlieni tas-sejha għal offerti għax ma' dan għandha tkejjel il-proporzjonalità tal-miżuri meħuda biex jinkiseb. Fil-każ tallum l-għan ewlieni kien illi *Gozo Channel* tixtri n-nafta bl-orħos prezz.

³ Q.Ġ.U.E. Renju Unit v. il-Kunsill tal-Unjoni Ewropea, C-84/94, 12 ta' Novembru 1996, para. 57.

⁴ “Proportionality can ... be used to challenge Community action itself, and also to challenge the legality of state action which falls within the sphere of application of Community law.” *EU Law, Text, Cases and Materials*, Craig & De Búrca, 4th ed. p. 544.

16. Ma humiex sejrin jinkisru l-prinċipju tat-trattament ugwali, il-prinċipju ta' bla diskriminazzjoni, il-prinċipju ta' għarfien reċiproku u l-prinċipju tat-trasparenza jekk, bla ma jinbidlu l-kondizzjonijiet tal-offerta nfisha, jingħata żmien biex jingiebu dokument illi, forsi bi żvista, ma tqegħidx mad-dokumenti tal-offerta, waqt li ċertament ma jkunx qiegħed jithares il-prinċipju tal-proporzjonalità jekk offerta vantaġġjuża tiġi mwarrba għax ma nġiebu dokument li għad jista' jingiebu.
17. Dan l-argument forsi jikseb aktar qawwa meta tqis illi *item 1.2 fil-List of literature/documents to be submitted with the tender* – dik li trid li tingiebu il-*bunkering licence* – setgħet kienet aktar speċifika billi jiġi indikat illi d-dokument meħtieġ kien dak li jinħareġ taħt ir-Regolamenti dwar l-Awtorizzazzjoni ta' *Bunkering* ["L.S. 423.42"].
18. Dan kien forsi jkun biżżejjed biex jintlaqa' l-appell ta' Cassar li kieku din uriet li fil-fatt kellha l-awtorizzazzjoni meħtieġa. Fil-fatt, iżda, għalkemm uriet li tassew għandha awtorizzazzjonijiet oħra barra dik mehmuża forsi bi żball mal-offerta originali, baqgħet ma wrietx li għandha dik *to carry out bunkering operations and storage for bunkering purposes* li tinħareġ taħt L.S. 423.42.
19. L-argument ta' Cassar illi l-liċenza meħtieġa ma hijiex dik taħt il-L.S. 423.42 għax taħt il-kondizzjonijiet tas-sejha għal offerti l-konsenja tan-nafta għandha ssir minn *road tankers* u mhux minn barkuni fuq il-baħar

hija msejsa fuq interpretazzjoni ħażina tat-tifsira tal-kelma *bunkering*, li tinkludi kemm konsenja minn fuq *barge* u kemm minn fuq *road tanker*⁵.

20. *Cassar* effettivament tammetti illi ma għandhiex din il-liċenza għax fir-rikors tal-appell tagħha tgħid illi liċenza bħal dik meħtieġa hija “intestata fuq kumpannija sussidjarja tagħha”, u tgħid ukoll illi “setgħet faċilment tippreżenta *sub-contractor*”. Fil-fatt fl-atti hemm kopja ta’ *authorisation to carry out the activity of loading, discharging and transferring of fuels from a road tanker to a receiving ship* maħruġa taħt L.S. 423.42 lil *Cassar Fuels Limited*. Fl-offerta tagħha iżda *Cassar* eskludiet illi tingħada b’sub-appalt. Jekk issa tqabbad b’sub-appalt lil soċjetà oħra biex tagħti s-servizz tkun qiegħda mhux biss tipprovdi dokument nieqes – ħaġa li forsi tista’ ssir – iżda tibdel il-kondizzjonijiet tal-offerta, ħaġa li, għal raġunijiet ta’ trasparenza u trattament ugwali bla diskriminazzjoni, ma tistax issir.

21. Billi għalhekk f’kull każ *Cassar* ma għandhiex l-awtorizzazzjoni meħtieġa biex tagħti s-servizz li għalih issejñu offerti, u kien ikun għalxejn illi tingħata żmien biex tipprovdi dokument li ma għandhiex, l-appell tagħha ma jistax jintlaqa’.

22. Il-qorti għalhekk tiċċad l-appell ta’ *Cassar* u tikkundannaha tħallas l-ispejjeż relattivi.

⁵ L-art. 2 tal-Att dwar Taxxa fuq *Bunkering* ta’ Żjut [Kap. 381] igħid illi:

“*“bunkering”* tfisser it-tagħbija, ħatt u trasferiment ta’ żjut bejn *bunker barge* jew *road tanker* jew terminal marittimu jew faċilità marittima jew xi tnejn jew iktar minn dawk imsemmija qabel u bastiment li jirċievi meta ż-żjut imsemmija jkunu biex iħaddmu l-istess bastiment jew il-makkinarju tiegħu;”

< Sentenza Finali >

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