



MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF

SILVIO CAMILLERI

ONOR. IMHALLEF

TONIO MALLIA

ONOR. IMHALLEF

JOSEPH AZZOPARDI

Seduta tas-6 ta' Frar, 2015

Appell Civili Numru. 363/2014/1

Bart Enterprises Limited

v.

Il-Kap Ezekuttiv, Sptar Generali ta' Ghawdex

Id-Direttur [Generali] Kuntratti

Cherubino Limited (C-3677)

Il-Qorti:

Dan hu appell imressaq fid-29 ta' Settembru, 2014, mis-socjeta` Bart Enterprises Ltd. wara decizjoni datata 18 ta' Settembru, 2014, moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'l quddiem, imsejjah "il-Bord") fil-kaz referenza CT3021/2014 (kaz numru 739).

Dan il-kaz huwa marbut ma' sejha ghall-offerti li saret mid-dipartiment tal-kuntratti f'isem l-isptar generali ta' Ghawdex "*for the supply, delivery, installation and commissioning of general and imaging medical equipment*". Is-sejha kienet maqsuma f'partijiet differenti illi kellhom jigu aggodikati separatament. Is-socjeta` appellanti, flimkien ma' tnejn ohra, ressqet offerta ghal *Lot 15 – Dental Units*. Wahda mill-offerenti, is-socjeta` Cherubino Ltd., giet eskluza bhala *technically non-compliant*, u l-kuntratt gie rakkomandat li jinghata lis-socjeta` appellanti. Is-socjeta` Cherubino Ltd. appellat mill-iskwalifikazzjoni taghha ghal quddiem il-Bord li, b'decizjoni tat-18 ta' Settembru, 2014, laqa' l-appell u ordna li s-socjeta` Cherubino Ltd. tigi reintegrata fil-process u ssir l-aggodikazzjoni mill-gdid. Id-decizjoni tal-Bord hi s-segwent:

"Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 1st September 2014 and also through Appellant's verbal

submissions during the hearing on 12th September 2014, had objected to the decision taken by the pertinent Authority, in that:

- “a) Appellant contends that his offer was unjustly discarded by the Contracting Authority as it was considered by the latter, to be technically non compliant. Appellant Company claims that its offer was fully compliant and the Contracting Authority’s decision should be declared null and void.

- “b) Appellant also contends that due to the reasons given by same, in a) above, his offer should be reintegrated in the evaluation process.

“Having considered the Contracting Authority’s verbal submissions during the hearing held on 12th September 2014, in that:

- “a) The Contracting Authority maintained that the literature submitted by the Appellant Company did not indicate that the ‘Air Supply Plant’ could cope with the necessary requirement as stipulated in the technical specifications of the tender document.

- “b) The Evaluation Board, from the literature submitted by Appellant, understood or rather assumed, that the ‘Air supply system’ offered by the Appellant could not carry out the functions as dictated in the tender document, to supply enough air supply through compressors, for the functioning of five dental chairs at the same time, any instance.

“Reached the following conclusions:

- “1. From the verbal submissions during the hearing, this Board noted that it was vividly clear that the only factor why Appellant’s bid was discarded, on technical grounds, was due to the fact that the Evaluation Board, on the basis of the literature submitted by the Appellant Company, could not assess the

'technical compliance' of the same bid. In this regard, the Appellant did not indicate the number of compressors to provide for the 'Plant air system' to be utilized in this tendered requirement. However, this Board opines that:

- "i) The tender specification, under item 19 to of the financial bid schedule, of the tender document calls for a quote as "Air plant" and not number of compressors to be utilised for the proper function of the same 'Plant'. This Board also notes that all tenderers were made aware through the clarification made by the Contracts Department, it was clearly and vividly explained that, through Clarification Note Number 6, with particular reference to question and answer 3, quite rightly, the Contracts Department explicitly stated that, 'The Air Plant shall be offered to drive all Qty 5 Dental Chairs' and not the number of compressors to be utilized to assume the tendered function.
- "ii) In view of the credible submissions made by the Appellant Company during the hearing of this Appeal, this Board opines that the Appellant's offer deserves to be re-adjudicated on its technical merit, due to the fact that a proper technical assessment of the offered bid is solicited by this Board to ensure full transparency and technical compliance of the tendered bids.
- "iii) This Board also opines that the Contracting Authority could have sought clarifications on the documentation submitted by the Appellant Company.

"In view of the above, this Board recommends the following:

- "a) The Appellant Company's offer should be reintegrated and re-appraised technically.

“b) The deposit paid by the Appellant Company should be reimbursed.”

Is-socjeta` Bart Enterprises Ltd. appellat mid-decizjoni tal-Bord ghal quddiem din il-Qorti, u ssostni, fil-qosor, li l-offerta tas-socjeta` Cherubino Ltd. ma kienetx konformi ma' rikjesti teknici, fis-sens li ma offrietx air plant “*to drive all quantity 5 dental chairs*”, kif ikkjarifika d-dipartiment fuq talba ta' Cherubino Ltd. stess. Id-dokument tal-hrug ghall-offerti ma kienx car dwar in-numru ta' kumpressuri mehtiega ghall-*air plant*, u s-socjeta` Cherubino Ltd. talbet kjarifika fuq dan, u fir-risposta l-offerenti gew infurmati li l-*air plant* kellha tkun tajba biex hi tmexxi f'daqqa il-hames siggijiet dentali li kien hemm ghad-disposizzjoni fl-isptar ta' Ghawdex; in-numru ta' kumpressuri baqa' ma giex specifikat. L-offerta li Cherubino Ltd. eventwalment tefghet kienet tindika li l-*plant* li kienet qed toffri kien jaqdi bejn tlieta u erba' *dental chairs*, u kien ghalhekk li giet eskluza mill-process ta' aggodikazzjoni. Quddiem il-Bord, din is-socjeta` Cherubino Ltd. qalet li hi kienet qed toffri l-*unit* taghha bhala li jista' jigi mghammar b'aktar minn kumpressur wiehed, b'dan li jkun jista' jhaddem hames *dental chairs* jew aktar. Il-Bord qal illi kieku l-awtorita` kontraenti talbet kjarifika, ma kienx ikun hemm ghalfejn l-offerta ta' Cherubino Ltd. tigi skwalifikata.

Wara li semghet it-trattazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawza u d-dokumenti esebiti, din il-Qorti sejra tghaddi ghas-sentenza taghha.

Meqjus fl-ewwel lok, l-aggravju marbut man-nuqqas ta' interess tas-socjeta` appellanti u l-intempestivita` tal-azzjoni, din il-Qorti tara li l-ligi stess taghti fakolta` lil min ihossu aggravat b'decizjoni tal-Bord li jressaq appell ghal quddiem din il-Qorti (regolament 85(a) tar-Regolamenti relattivi), u l-fatt li, f'kaz partikolari, jkun l-ewwel offerent preferut li jkun irid jaghmel appell minn decizjoni kuntrarja tal-Bord, u dan, ovvjament, ma jaghmilx sens li l-appellant "jinnotifika" lilu nnifsu bir-rikors tal-appell, kif titlob il-ligi, ma jfissirx li dan ma jistax jappella. Il-fatt li l-ligi tghid li rikors tal-appell irid jigi notifikat lill-offerent preferut, ma jfissirx li dan tal-ahhar ma jistax jappella jekk ihossu aggravat b'decizjoni tal-Bord; ifisser biss li ma ssirx wahda min-notifiki li trid il-ligi. Ir-regolament in kwistjoni huwa wiesa bizzzejjed biex jikkoncedi appell bhal dan, u appell hekk moghti jkun irid espressjonijiet cari biex wiehed jargumenta l-oppost.

Is-socjeta` appellanti ghandha interess attwali li tikkontesta issa d-decizjoni tal-Bord, peress illi jekk l-appell taghha jigi milqugh u tinghata ragun, tigi mhassra d-decizjoni tal-Bord u hi tigi kkonfermata bhala l-offerent preferut, li jkun ta' vantagg kbir ghaliha.

Fil-kuntest tal-aggravju marbut mal-fatt li d-Direttur (Generali) tal-Kuntratti ma kellux jaghmel sottomissjonijiet, ghandu jinghad li avolja huwa prekluz milli

jappella mid-decizjonijiet tal-Bord, mhux prekluz milli jwiegeb ghal kull appell li jsir biex jispjega l-posizzjoni tieghu.

Fil-meritu, din il-Qorti tara li ghandha taqbel mal-kumitat ta' evalwazzjoni meta qies li l-offerta mitfugha mis-socjeta` Cherubino Ltd. ma kienetx konformi mal-htigijiet teknici msemmija fis-sejha. Fid-deskrizzjoni teknika provduta minn din is-socjeta` kien jirrizulta f'item 19, bl-isem "*Dental Air Plant System for Dental Units*", li l-mudell propost minnha kien jaqdi bejn tlieta u erba' siggijiet. Mill-kjarifika li tat l-awtorita` kontraenti, qabel ma ntefghu l-offerti, kien car li l-impjant kellu jaqdi hames siggijiet dentali fl-istess waqt, u darba l-offerta ma kienetx taqdi din il-htiega ma kienx hemm htiega li l-awtorita` kontraenti titlob kjarifika jew spjegazzjoni ghaliex saret l-offerta kif saret. Imkien fl-offerta tas-socjeta` Cherubino Ltd. ma kien hemm indikat li huma kienu ha jaghmlu uzu minn tliet kumpressuri jew li bl-uzu ta' aktar minn kumpressur huma setghu jipprovdu l-arja ghal hames siggijiet dentali f'daqqa. Tabilhaqq kulma hemm indikat fl-offerta taghhom huwa li l-kumpressur taghhom jista' jaqdi bejn tlieta u erba' siggijiet dentali. Ghalhekk ladarba d-dokument tas-sejha kien jezigi li l-impjant tal-arja kellu jaqdi hames siggijiet f'daqqa u mhux anqas, allura l-offerta ta' Cherubino Ltd. ma kienetx tirrifletti dak li ried jinxtara mill-awtorita` kontraenti.

Kopja Informali ta' Sentenza

Fi kliem iehor, f'dan il-kaz, il-hrug ghall-offerti talbet li jsiru offerti ghal sistema wahda li tinhadem almenu b'zewg kumpressuri li tista' taqdi hames siggijiet dentali f'daqqa. Imkien, fl-offerta tas-socjeta` Cherubino Ltd. ma jinghad li l-mudell li kienu qed joffru kellu tlett kumpressuri, u l-unit li offrew ma kellux kapacita` ghal hames siggijiet. Ma giex spjegat u muri li dak li qed joffru kien kapaci jaqdi l-htigijiet li ried l-Isptar Generali ta' Ghawdex, u kien mehtieg spjegazzjonijiet biex dak li jkun forsi, jasal ghal dak li kienet qed tifhem is-socjeta` appellata Cherubino Ltd.

Kif qalet din il-Qorti fil-kawza **Steelshape Ltd. v. Direttur tal-Kuntratti et**, deciza fis-7 ta' Awwissu, 2013, dak li offerent ghandu jghid, ghandu jghidu mal-offerta u mhux jippretendi li jkun mistoqsi d-dettalji tal-*modus operandi* tieghu.

It-trasparenza fi process aggodikattiv jitlob li kull offerent jigi meqjus a bazi tal-offerta kif maghmula, u salv il-kaz ta' kjarifiki ta' dettal, ebda offerent ma ghandu jinghata l-opportunita` li jirranga l-offerta tieghu biex b'hekk jasal li jilhaq ir-rekwiziti mitluba. Il-kumitat ta' evalwazzjoni ma kienx qed jipprova johrog b'orhos, kif forsi riedet timplika l-parti l-ohra, izda li jpoggi lill-offerenti kollha fl-istess keffa, u dan billi jqis l-offerti kif maghmula.

Kopja Informali ta' Sentenza

Kif qalet il-Qorti Ewropea fil-kaz **Commission v. Belgium (Walloon Buses)**

deciza fl-1996, (kaz nru. C-87/94),

“When a contracting entity takes into account an amendment to the initial tenders of only one tenderer, it is clear that the tenderer enjoys an advantage over his competitors, which breaches the principle of the equal treatment of tenderers and impairs the transparency of the procure.”

L-offerta hija fil-kontroll tal-offerent u hu jaghzel x'joffri u kif jikwalifika l-istess; ghandu, ghalhekk, jerfa' r-responsabbilita` hu jekk din ma tkunx konformi ma' dak rikjest mis-sejha, u mhux jippretendi li l-awtorita` kontraenti tiggwidah jew tiftahlu ghajnejh biex jigi konformi.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell tas-socjeta` Bart Enterprises Ltd. billi tilqa' l-istess, thassar u tirrevoka d-decizjoni tal-Bord ta' Revizjoni dwar il-Kuntratti Pubblici tat-18 ta' Settembru, 2014, (u bhala konsegwenza tordna li d-depozitu li sar minn Cherubino Ltd. ghal dak l-appell jintilef), u tikkonferma d-decizjoni li hadu l-Kumitat ta' evalwazzjoni u l-Kumitat Generali tal-Kuntratti fir-rigward.

L-ispejjez tal-kawza ghandhom jithallsu mis-socjeta` Cherubino Ltd.

< Sentenza Finali >

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