



MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF

SILVIO CAMILLERI

ONOR. IMHALLEF

TONIO MALLIA

ONOR. IMHALLEF

JOSEPH AZZOPARDI

Seduta ta' l-24 ta' April, 2015

Appell Civili Numru. 35/2015/1

Strand Electronics Limited C 8393

v.

**Direttur tal-Corporate Services fil-Ministeru tal-Gustizzja, Djalogu u
Familja; u Office Group Limited C 39197**

Dan hu appell imressaq fid-9 ta' Frar 2015, mis-socjeta` Strand Electronics Limited wara decizjoni datata 22 ta' Jannar 2015, moghtija mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz numru 722 (Tender Nru. T1/2013).

Dan il-kaz huwa marbut ma' sejha ghall-offerti li harget id-Direttorat tal-Corporate Services fi hdan il-Ministeru tal-Gustizzja, Djalogu u Familja *"for the leasing of thirty seven (37) A4 energy efficient black & white multifunction printing devices including full service and maintenance agreement (FSMS) over a period of three years"*. Dan it-tender kien originarjament gie rakkomandat li jinghata lis-socjeta` Strand Electronics Limited.

Is-socjeta` kompetittrici Office Group Limited oggezzjonat quddiem il-Bord, li cahad l-oggezzjoni. Tressaq appell quddiem din il-Qorti li b'sentenza tas-16 ta' Settembru 2013, laqghet l-appell ta' Office Group Limited u baghtet l-attui lura lid-Direttur *"sabiex dan jiehu decizjoni fuq l-offerti b'dan illi ghandu jqis biss dawk l-offerti li jilhqu l-ispecifikazzjonijiet tas-sejha ghall-offerti."*

Kopja Informali ta' Sentenza

Wara din is-sentenza, id-Direttur ipproceda biex jgħid li l-offerti fid-dawl tad-decizjoni ta' din il-Qorti, u fil-31 ta' Ottubru 2013, is-socjeta` Strand Electronics Limited giet infurmata li l-kuntratt kien rakkomandat li jinghata lil Office Group Limited.

Is-socjeta` Strand Electronics Limited appellat minn din id-decizjoni tad-Direttur għal quddiem il-Bord, li permezz ta' decizjoni mogħtija fis-27 ta' Jannar, 2014, caħad l-appell.

Tressaq appell għal quddiem din il-Qorti mis-socjeta` Strand Electronics Limited u din il-Qorti, b'sentenza tat-30 ta' Mejju, 2014, laqgħet in parte l-appell, hassret id-decizjoni tal-Bord *"biex dan jiddeciedi l-lanjanza tas-socjeta` appellanti fis-sens illi 'the product offered by the preferred bidder does not meet the required technical specifications as laid out in the tender document'."*

Il-Bord ta s-sentenza tiegħu fit-22 ta' Jannar 2015, billi rega' caħad l-aggravji tas-socjeta` Strand Electronics Limited, u ddecieda li l-prodott tal-offerent preferut (Office Group Limited) *"does meet the required technical specifications"*. Il-Bord iddecieda l-materja hekk:

"Having adhered to the Court of Appeal's Decision through which this Board was directed to determine whether appellant's contention that the Preferred

Bidder's offer was technically non-compliant, in that the 'product offered by preferred bidder does not meet the required technical specifications as laid out in the tender document' was correct or not;

"Reached the following conclusions:

"1. This Board, after having appointed a technical expert to determine this long outstanding issue, was still not satisfied as to the conclusion reached by the appointed expert, in that the requested conclusion by the Honourable Court of Appeal was not, in this Board's opinion, reached or concluded. In this regard, this Board decided to appoint another expert to establish a clear technical opinion. This Board appointed associate Professor Joseph Cilia to deliberate the technical compliancy of the Preferred Bidder's offer.

"2. From the technical report drawn up by the second appointed technical expert, and from the explanations he gave during the third hearing, it transpired that the Preferred Bidder's product was technically compliant.

"3. This Board also emphasised the fact that although the tender document was not drawn up to the required standard, adequate technical specifications were dictated in the same document to permit the Evaluation Committee to reach to the award of same. This Board established, through the third hearing appointed expert's submissions that the 'two drawers' of the product offered by the Preferred Bidder was in line with the technical specifications dictated in the tender document.

"In view of the above, this Board opines that it has honoured the Honourable Court of Appeal's decision and in this regard, it decides that the preferred bidder's product does meet the required technical specifications. For this reason finds against the appellant company and recommends that the deposit paid by the appellant should not be reimbursed."

Kopja Informali ta' Sentenza

Is-socjeta` Strand Electronics Limited ressqet issa dan l-appell quddiem din il-Qorti, bl-aggravju jkun li l-konkluzjoni li wasal ghalha l-Bord hija zbaljata u tmur kontra d-dokumenti u konkluzjonijiet tal-esperti.

Dan il-kaz kellu iter pjuttost twil, pero`, jidher li lanqas issa ma l-materja sejra tigi determinata definittivament. Il-kwistjoni hija jekk l-offerti li saru jirrispettawx l-ispecificazzjonijiet teknici kif mitluba fis-sejha tal-offerti. Jekk dik is-sejha tirrikjedi certa kapacita` tal-oggett, dik il-htiega ma tistax titqies *'rather irrelevant'* (ara rapport tal-perit tekniku David Abela); darba li l-awtorita` kontraenti tinsisti, fost affarijiet ohra, li trid zewg *trays* tal-magna (*photocopier*) b'certa kapacita`, il-magna offruta trid tkun moghnija b'dik il-kapacita` u dan ma ghandux jitqies *'a minor point'*.

Il-Bord donnu fehem li l-opinjoni ta' dan l-espert kienet inkonkluziva, tant li ddikjara ruhu mhux sodisfatt bir-rapport ta' dan it-tekniku, u hatar espert tekniku iehor biex jghid jekk l-offerta tas-socjeta` preferuta tissodisfax l-ispecificazzjonijiet mitluba. Wara dan ir-rapport, il-Bord ikkonkluda li l-offerta ta' Office Group Limited tissodisfa *'the required technical specifications'*.

Din il-Qorti ma tifhimx kif il-Bord wasal ghal din il-konkluzjoni meta t-tieni espert, il-Prof. Joseph Cilia, jghid car u tond li l-ispecificazzjonijiet tal-magna

Kopja Informali ta' Sentenza

tal-offerent preferut “*do not all comply with those stipulated by the tender document*”, tant li elenka hames items fil-magna li ma humiex konformi ma' dak rikjest. Hu veru li f'kaz ta' punt wiehed qal li ebda magna ma tista' twassal ghar-*resolution* kif mitlub, u f'zewg *items* ohra qal li kellu nuqqas ta' dettalji dwar jekk il-magna tissodisfax jew le r-rekwiziti, pero`, apparti l-ewwel kaz (meta jghid li “*that there is no fax machine that can meet this specification*”), fil-kazijiet l'ohra jirrizulta li, ab bazi tal-offerta kif saret, dak offerut mis-socjeta` Office Group Limited ma jissodisfax dak rikjest.

Din is-socjeta` tghid illi kieku inghatat l-opportunita` tispjega, kienet turi li fil-fatt il-magni li offriet huma kompatibbli ma' dawk rikjesti. Offerent, pero`, irrid jikkonferma ruhu mal-ispecificazzjonijiet mitluba mal-offerta, u mhux jispera li jiccara l-offerta jew jaghti informazzjoni ulterjuri skont x'jigi mitlub mill-awtorita` kontraenti. 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. Il-principji ta' trasparenza u ugwaljanza jitlobu 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-privilegg jew l-opportunita` li jirringa jew izid mal-offerta tieghu biex b'hekk jasal li jilhaq ir-rekwiziti mitluba. L-awtorita` kontraenti trid timxi mal-kriterji stabbiliti fis-sejha, u tagixxi b'mod li l-offerenti jitqieghdu fl-istess pozizzjoni “*to preclude any risk of favouritism or*

arbitrariness” – ara l-kaz C-42/13 Cartiera dell’Adda deciz mill-Qorti Ewropeja tal-Gustizzja. Kif qalet l-istess Qorti fil-kaz C-87/94 Walloon Buses:

“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.”

Ghalhekk, ma hijiex valida s-sottomissjoni tal-offerent preferut fis-sens illi kieku staqsewha domandi fuq l-ispecificazzjonijiet kif jidhru fl-offerta, kienet twiegeb billi tghid illi l-magna offruta kienet *compliant*.

Il-Bord, f’dan il-kaz, ma kellux jiddeciedi biss fuq il-kxaxen jew *trays* tal-magni offruti. Kif qaltlu din il-Qorti fis-sentenza tas-16 ta’ Settembru 2013, hu kellu jqis dawk l-offerti *“li jilhqu l-ispecificazzjonijiet tas-sejha ghall-offerti”*. Xogholu kien li jezamina l-offerti kif saru fid-dawl tal-ispecificazzjonijiet kollha kif mitluba fis-sejha ghall-offerti. Hu ghalhekk li l-Bord hu kompost minn membri teknici, ghax hu mistenni li dan jezamina fid-dettall kull offerta li ssir. Jekk il-materja ma tkunx tidhol fl-esperjenza teknika tal-membri, il-Bord jista’ jahtar espert fil-materja biex jassistiha. Hekk sar f’dan il-kaz, izda wara li l-espert jghid li l-offerta preferuta ma tissodisfax l-ispecificazzjonijiet teknici kif stabbilit fis-sejha, ma kellux imur kontra din il-veduta minghajr ma qies l-ilmenti kollha tal-espert. Il-Bord ra li *“the two drawers of the product offered by the preferred*

Kopja Informali ta' Sentenza

bidder was in line with the technical specifications dictated in the tender document”, pero` ma qal xejn fuq in-nuqqasijiet l-oħra li sab il-Prof. Cilia.

Lanqas ma jirrizulta b`mod car jekk, bhala fatt, iz-zewgt ikxaxen tal-magna jieħdux l-piz tal-karta (u mhux biss id-daqs) li talbet l-awtorita` kontraenti. L-ewwel espert qal li mhux car jekk hux hekk, u t-tieni espert qal li assuma li hu hekk. Kwindi, il-Bord ma kellux direzzjoni cara u teknika lejn il-konkluzjoni li wasal għaliha.

Kwindi d-decizjoni tal-Bord trid tigi mhassra. Fid-dawl tal-opinjoniġiet espressi miz-zewg esperti, fis-sens li minn meta inharget is-sejha saru avvanzi teknologici b`mod li ebda magna offruta ma tista`, issa, tissodisfa l-bzonnijiet tal-Ministeru involut, ikun inutili li l-process ta` verifikazzjoni jibqa` għaddej biex jinxtraw magni *‘out of date’*, u s-suggeriment li għandu jkun hemm *‘a fresh call for tender’* għandu jigi meqjus bis-serjeta`.

Għaldaqstant, għar-ragunijiet premeffi, tiddisponi mill-appell ta` Strand Electronics Limited billi tilqa` l-istess u thassar d-decizjoni li ha l-Bord ta` Revizjoni dwar Kuntratti Pubblici tat-22 ta` Jannar 2015, u d-decizjoni relattiva li ha d-Direttur tal-Corporate Services.

L-ispejjez tal-kawza jibqghu bla taxxa bejn il-partijiet.

< Sentenza Finali >

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