



MALTA

**QORTI TA' L-APPELL**

**ONOR. IMHALLEF**

**EDWINA GRIMA**

Seduta tas-27 ta' Mejju, 2015

Appell Civili Numru. 47/2011

**AURELIA ENFORCEMENT LIMITED**

**Vs**

**DIPARTIMENT TAL-GVERN LOKALI U REGJUN TRAMUNTANA**

Il-Qorti,

Rat id-decizjoni moghtija mill-Bord ta' Revizjoni Dwar il-Kuntratti Pubblici fit-23 ta' Novembru 2011, fejn giet ipprounzjata is-segwent i decizjoni fl-ismijiet premissi:-

*“This Board*

- *having noted that the appellant’s company, in terms of the reasoned letter of objection dated 30<sup>th</sup> July 2011 and through their verbal submissions*

*made during the hearing held on the 11<sup>th</sup> November 2011, had objected against the decision taken by the Regjun Tramuntana that its offer was administratively non-compliant since it did not have the experience required as per clause 12 (page 9) of the tender document;*

- *having noted that the appellant firm's representatives claims and observations, particularly, the references made to the fact that (a) the appellant company was informed by Regjun Tramuntana through a letter dated 22<sup>nd</sup> June 2011, that its offer was found to be administratively not compliant as the firm did not have the required experience specified in clause 12 of the tender document, (b) although the Public Contracts Review Board would recall, other appeals had been lodged with regard to similar tenders issued by other regions, yet this case was a bit different in the sense that the only reason for disqualification was the 5 years experience as per clause 12, (c) the content of clause 12 was not mandatory so much so that the term 'having regard' was used, (d) the 5 year minimum was tied to the track record whereas the reason for exclusion referred to 'experience' and not to 'track record', (e) by way of track record the appellant company presented a list of current projects (f) the tender document was not clear as to whether the minimum 5 year experience was cumulative or not and whether the track record was meant to be substantive or merely a period of time rendering whatever service e.g. providing warden service with, say, two, wardens for the previous five year period was deemed better in terms of capacity than providing warden service with, say 50, wardens for the previous 4 years, (g) the tender did not call for the provision of local wardens only but it included such other services as traffic management, CCTV cameras, speed cameras and attendance at tribunals, (h) the appellant company possessed the required experience in all the areas specified in the tender document and that was demonstrated in the company's tender submission, (i) the appellant company had submitted the licence for a local warden agency issued by the Police on 2 November 2004 to Aurelia Asset Protection Ltd and, as a result, from that date since, according to the Police it had "effective control" (L.N. XIII of 1996 Art. 10) of the services provided, (j) contrary to what the contracting authority was claiming, the appellant company did possess the required 5 years minimum experience, (k)(1) in the case of the Malta Drydocks, Aurelia Enforcement Ltd used to invoice Alberta Ltd which, in turn, invoiced the Malta Drydocks for CCTV monitors, (2) in the case of Wasteserv (Malta) Ltd Aurelia Enforcement Ltd used to invoice J.F. Security Ltd which, in turn, invoiced Wasteserv (Malta) Ltd for the installation of cameras and related services and, (3) in the case of Motherwell Bridge Malta Ltd Aurelia Enforcement Ltd used to issue*

*invoices direct to client, (l) the track record was meant to provide comfort to the contracting authority that the bidder could carry out the contract successfully and, in this regard, the appellant company further argued that, once the wardens that were already on its books, together with the other wardens that it would have engaged following the award of the contract, would have five years experience, then what had to be ascertained was whether the bidding company was capable in the management of personnel, which it certainly was as the group had about 600 employees on its books mostly engage on security duties, (m) the tender document did not specify that the bidder had to have 5 years minimum experience in all the 8 services requested in the tender, which included, local wardens (12 in number), CCTV, towing and clamping, traffic management, etc., (n) once Mr Guillaumier had indicated that the adjudicating board was conditioned to a certain extent by what had taken place in the tendering processes of the other regions, the Public Contracts Review Board ought to annul the award decision of the adjudicating board, (o) Mr. Grima, one of the evaluators, had a conflict of interest or a potential conflict of interest since, in the course of his duties, he supervised the performance of Guard and Warden House which was one of the bidders in this tendering process, (p) clause 12 was an 'award' criteria, namely it should only be considered once the 'selection' criteria/process had been concluded during which a bidder would be disqualified if found not compliant, (q) the adjudicating board could not exclude the appellant company's submission outright at award stage but, according to clause 12, the board had to 'have regard' to all circumstances as to whether the appellant company had the capability to execute the tender which primarily concerned the management of personnel and the said company formed part of a group that managed about 600 personnel, most of whom were engaged on security services, not to mention that one of the companies of the group offered training to local wardens and (r) the contracting authority had to evaluate the appellant company's bid and not exclude it at administrative stage in terms of clause 12 which referred to the 'Award';*

- *having considered the contracting authority's representative's submissions namely that (a) one had to note that, although the tender document was identical to all regions, the only reason for disqualification brought up in this particular case was the minimum 5 years experience, (b) a per clause 12 of the tender document the 5 year minimum experience applied to both experience and track record and one had to make a clear distinction between having a warrant to practice a profession and, actually, practising that profession (c) the appellant company might have had the local warden agency licence since 2004 but*

*it only operated in the sector since July 2007 as per own tender submission, (d) the adjudicating board had made a checklist of the tender requirements and two recurring issues that arose during the evaluation concerned the number of local wardens employed by the bidder and the 5 year experience, (e) the adjudicating board had conceded that a bidder did not need to have on his books at the closing date of the tender the number of wardens requested in the tender but the number of wardens required could be engaged after the award of the contract, (f) confirmed that the tender document for the provision of warden services was identical to all regions and the Regjun Tramuntana was the last region to conclude the adjudication of the tender, (g) during the adjudication process the Regjun Tramuntana did take into consideration the decisions that had already been taken with regard to the tendering process of the other four regions, even with regard to the issue of the 5 year experience, (h) experience related to the number of years that the firm operated in the sector whereas the track record referred to the type of work carried out in the sector and, for the purposes of clause 12 in the tender document, the minimum of 5 years applied to both experience and track record, (i) the appellant company was quiet experienced in the various service requested in the tender but it did not have the minimum 5 years experience and track record in the provision of local warden service, (j) the tender document demanded 5 years minimum experience and the adjudicating board had interpreted that as 5 years since the bidder started rendering local warden services, (k) although the Police licence issued to Aurelia was dated November 2004, according to the company's tender submission, the appellant company started rendering local warden services in July 2007 and the closing date of the tender was 21 January 2011, (l) the list of current projects submitted by tendering company (the appellant company) covering the period 2006 to 2010 included various services, e.g. in 2006 referred to services given to Malta Drydocks (by Alberta), Motherwell Bridge Malta Ltd and Wasteserv (Malta) Ltd (by J.F. Security Ltd) which services did not include local warden services, (m) there was no evidence of any conflict of interest on the part of Mr Raymond Grima, a member of the adjudicating board and (n) the tender document was specific in its request for a 5 years minimum experience both by way of experience – possession of licence – and track record with regard not solely to personnel but to the whole organisational set-up;*

- *having also given due consideration to Mr. Grima's testimony, in particular the fact that (a) he was the authorised officer of the Regjun (previously known as 'Kumitat') Tramuntana and a member of the adjudicating board, (b) the Regjun Tramuntana had awarded a contract for the supervision of all the services contracted by the same region and*

*he was employed by that contractor to carry out that supervision, (c) his role as an authorised officer was to supervise the execution of the contracts, to report shortcomings in the region and to, eventually, issue default notices acting on instructions by the region, (d) one of the services contracted by the Regjun Tramuntana and which he supervised was that for the provision of local wardens by Guard and Warden House, which was a bidder in the tender under review and (e) his employer had no connection with any of the bidders participating in the tender under review,*

*reached the following conclusions:*

- 1. The Public Contracts Review Board is fully cognizant of the fact that, whilst it is true that other appeals had been lodged in the past with regard to similar tenders issued by other regions, yet, this case was different in the sense that the only reason for disqualification was the 5 years experience/track record as per clause 12.*
- 2. The Public Contracts Review Board opines that the Regjun Tramuntana should have refrained from taking into consideration the decisions that had already been taken with regard to the tendering process of the other four regions, even with regard to the issue of the 5 year experience.*
- 3. The Public Contracts Review Board thoroughly deliberated upon the question fo the perceived/potential conflict of interest of Mr Grima, one fo the evaluators, wherein it was alleged that, in the course of his duties, he supervised the performance of Guard and Warden House which was one of the bidders in this tendering process. This Board does not agree with the claim made by the appellant company's representatives. The justification given by Mr. Grima under oath was uncontested, as well as, deemed as justifiable and pertinent by this Board.*
- 4. The Public Contracts Review Board agrees with the interpretation given by the contracting authority and the evaluation board in so far as the fact that 'experience' related to the number of years that the firm operated in the sector whereas the 'track record' referred to the type of work carried out in the sector and, for the purposes of clause 12 in the tender document, the minimum of 5 years applied to both 'experience' and 'track record'.*
- 5. From evidence submitted, the Public Contracts Review Board opines that albeit, seemingly, the appellant company was quiet experienced in the various services requested in the tender, yet, it did not have the minimum*

*5 years experience and track record in the provision of local warden service. This Board, whilst agreeing with the appellant company in so far as the fact that the tender document did not specify that the bidder had to have 5 years minimum experience in all of the eight (8) services requested in the tender, yet if fails to comprehend how an evaluation board, evaluating a submission in connection with the award of a tender for the provision of local warden services, could have been expected to, positively, assess such submission – as filed by the appellant company – which, predominantly, included the supply/installation/supervision of CCTV monitors and related services. All this when all is considered within a context where such services would have, largely, been carried out outside the scope of the requirements as contemplated in the tender in question, namely, the provision of local warden service.*

- 6. This Board acknowledges the fact that, whilst the appellant company might have had the local warden agency licence since 2004, yet it only operated in the sector since July 2007 - as per own tender submission – and that the closing date fo the tender was 21 January 2011.*

*In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.”*

Illi s-socjeta appellanti aggravata b'din id-decizjoni ressqet l-appell taghha fit-termini ta' aggravvju wiehed u cioe' :

1. Illi l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici naqas milli jaghmel dak li huwa mitlub minnu u cioe' illi jonera l-obbligu impost fuqu bil-ligi li jaghmel re-ezami dettaljat tar-ragunijiet li wasslu lill-awtorita kontraenti sabiex teskludi lis-socjeta appellanti mit-tellieqa tal-aggudikazzjoni u dana kif impost fuqu fl-artikolu 86(6) tal-Avviz Legali 296 tal-2010.
2. Illi l-Bord naqas mill-japplika il-principji legali moghtija mill-Qorti tal-Gustizzja Ewropeja fil-kaz *Lianakis vs Alexandrouplolis* u f'kazijiet ohra fejn saret distinzjoni bejn 'l hekk imsejjha *Selection Criteria* u *Award Criteria* bhala bazi biex jigi aggudikat kuntratt pubbliku.

## Kopja Informali ta' Sentenza

Illi l-appellati Direttur tal-Gvern Lokali u tal-Kumitat Regjonali tat-Tramuntana jissollevaw numru ta' pregudizzjali u cioe' illi l-appell gie intavolat barra it-terminu statutorju impost fl-Avviz Legali 296 tal-2010, illi l-appell sar kontra persuna illegittima u dana b'referenza ghal-appellat Regjun Tramuntana, illi d-Direttur tal-Gvern Lokali ma huwiex il-legittimu kontradittur f'dawn il-proceduri u finalment illi l-appell ma sarx fil-forma preskritta fil-ligi.

Illi il-pregudizzjali li jikkoncerna iz-zmien statutorju ghall-prezentata ta'l-appell gie irtirat u dana fis-seduti tas-27 ta' Novembru 2012 u tal-05 ta' Frar 2013 u kwindi l-Qorti fid-dawl ta'l-istess ser tastjeni milli tiehu konjizzjoni ulterjuri ta' dan il-pregudizzjali.

Illi l-appellat Dipartiment tal-Gvern Lokali jishaq illi huwa mhuwiex il-legittimu kontradittur f'dana l-kaz. Illi l-appellat ghandu ragun u dana billi ir-regolament 3(2) tal-Avviz Legali 320 tal-2011 jaghti hajja guridika b'personalita distinta lill-Kumitat Regjonali bis-setgha li jaghmel kuntratti u li iharrek u jkun imharrek u dana in konnessjoni mal-qadi tal-funzjonijiet tieghu li fost affarijiet ohra jinkludu il-provvedimenti ta' servizz ta' gwardjani lokali fil-lokalitajiet kollha u dana ai termini tar-regolament 19(1)(b) tal-istess Avviz Legali. Fil-fatt l-istess appellat ma kienx parti fil-proceduri quddiem il-Bord ta' Revizjoni dwar il-Kuntratti Pubblici u ghalhekk lanqas kien rapprezentat u lanqas semma lehn u fl-istess proceduri. Ghaldaqstant dan il-pregudizzjali qed jigi milqugh u id-Dipartiment tal-Gvern Lokali qed jigi illiberat mill-osservanza tal-gudizzju.

Illi fid-dawl ta' dak hawn fuq deciz allura, il-pregudizzjali sollevata mill-Kumitat Regjonali tat-Tramuntana, illi f'dawn il-proceduri il-Kumitat Regjonali kellu ikun rapprezentat mill-Direttur tal-Gvern Lokali ma ghandhiex bazi legali u qed tigi michuda. Fl-istess nifs izda l-Kumitat appellat isostni illi is-socjeta appellanti ressqet il-kaz taghha fil-konfront ta' persuna illegittima u dana billi

ma tezisti l-ebda personalita guridika bl-isem ta' Regjun Tramuntana, izda biss bl-intestatura Kunitat Regjonali tat-Tramuntana. Illi ir-regolament 14 tal-Avviz Legali 320 tal-2011 imbaghad jistipula illi:

**“Ir-rapprezentanza legali u guridika tal-Kunitat tkun vestita fil-President flimkien mas-Segretarju Ezekuttiv li jistghu jharrku u jkunu mharrka f’isem l-Kunitat wkoll meta l-kaz jirreferi ghal atti maghmula qabel iz-zmien tal-kariga jew hatra taghhom skont il-kaz.”**

Dan ifisser allura illi ir-Regjun Tramuntana kif imharrek ma ghandu l-ebda personalita guridika billi huwa il-Kunitat Regjonali tat-Tramuntana li huwa munit b’din il-personalita u dana fil-vesti tal-President tieghu u tas-Segretarju Ezekuttiv. Kwindi anke dan il-pregudizzjali ser jigi akkolt b’dan ghalhekk illi l-appell intavolat mis-socjeta appellanti huwa proceduralment irritwali u ser jigi michud.

Illi maghdud dan madanakollu, l-Qorti ser taghmel is-segweni riljev in konnessjoni mal-mertu ta’l-appell. Fl-ewwel lok tqis illi l-Bord fid-decizjoni tieghu ha in konsiderazzjoni is-sottomissjonijiet kollha maghmula mill-partijiet involuti kif ukoll tal-fatt ewlieni li sawwar l-appell maghmul lilha in konnessjoni mal-uniku kriterju li abbazi tieghu is-socjeta appellanti giet eskluza mill-aggudikazzjoni u cioe’ illi kien mandatorju illi hija tkun munita b’hames snin ta’ esperjenza fil-qasam tas-servizz tal-gwardajni lokali, haga li *ex admissis* ma giex ippruvat illi kellha.

Illi ma hemmx dubbju illi l-klawsola numru 12 fit-titolu *Instructions to Tenderers* kien mandatorju u cioe’ illi l-offerent ikollu minn ta’l-inqas hames snin esperjenza fil-qasam tas-servizzi tal-wardens. Illi f’din il-klawsola jinghad:

*“It is the intention of the Region to award the contract on the basis of the cheapest technical and administratively compliant tender, having regard to the extent of compliance with the conditions specified in the tender document and*



*also the level of the prices quoted; **provided that** the Tender has been submitted in accordance with the requirements of the Tender documents. Quality standards, **experience and track record (minimum 5 years)**, work plan proposed, company set up and conditions of work employees, organizational capabilities and professionalism will be taken very much into consideration and **will be the basis of the award**".*

Illi minn qari ta' dina l-klawsola johorgu diversi punti determinanti fl-aggudikazzjoni tal-kuntratt pubbliku:

1. Illi il-kriterju ewlieni tal-ghazla kellu ikun dak tal-prezz, billi l-kuntratt kien ser jigi aggudikat lill-irhas offerta li kienet tilhaq l-ispecifikazzjonijiet teknici u amministrattivi.
2. Illi dan huwa soggett madanakollu ghal kriterju mandatorju li l-offerent irid jippossjedi hames snin esperjenza fil-qasam fost kundizzjonijiet ohra li kienet ser tkun determinanti fl-assenjazzjoni tal-kuntratt.

Illi s-socjeta appellanti madanakollu targumenta illi in-nuqqas ta' adezzjoni ma' dan il-kriterju wahdu ma setax iwassal sabiex hija tigix eskluza mit-tellieqa ghall-aggudikazzjoni u dan billi kemm id-direttivi tal-Unjoni Ewropeja rezi applikabbli fil-ligi domestika u kif ukoll diversi sentenzi moghtija mill-Qorti tal-Gustizzja tal-Unjoni Ewropeja, jaghmlu distinzjoni bejn l-kriterja tal-ghazla u tal-aggudikazzjoni (*Selection u/jew Award Criteria*) f'kull process ta' *public procurement*.

Illi id-Direttiva 92/50, kif ukoll id-direttiva 2004/18EC li hija ekwivalenti ghall-ligi taghna dwar il-kuntratti pubblici jaghmlu distinzjoni bejn dawk li huma *Selection Criteria* li jirreferu ghal kapacitajiet teknici, finanzjarji u ekonomici tal-offerenti, u li jittiehdu in konsiderazzjoni qabel ma l-process jimxi ghat-tieni stadju tal-aggudikazzjoni fejn hemmhekk imbaghad jitqiesu dawk li jissejhu *Award Criteria* li jimxu fuq zewg binarji u cioe' jew li l-aggudikazzjoni issir

## Kopja Informali ta' Sentenza

abbazi tal-orhos prezz jew tal-iktar offerta vantagguza mill-lat ekonomiku (*most economically advantageous tender*). Illi s-socjeta appellanti taghmel referenza ghal kaz deciz mill-Qorti tal-Gustizzja fl-ismijiet *Lianakis AE vs Alexandrouplolis* fl-24 ta' Jannar 2008 fejn gie stabbilit illi kriterji bhal l-esperjenza, numru ta' impjegati u ingeni ma kellhomx jitqiesu f'dawk li jissejjhu "*award criteria*", izda biss fis-"*selection process*". Dana b'rispett lejn il-principji legali li isawwru il-kuntratti pubblici tat-trasparenza u tat-trattament ugwali. Illi madanakollu l-principji stabbilit f'din il-kawza gew moghtija interpretazzjoni differenti billi dik il-kawza kienet titratta kaz fejn il-kriterju ghall-aggudikazzjoni kellu ikun dak tal-offerta l-iktar ekonomikament vantagguza (*Most Economically Advantageous Tender*), fejn allura l-operaturi ekonomici kellhom jigu avzati minn qabel liema kienu dawk il-kriterji li kienu ser jittiehdu in konsiderazzjoni u x'piz kellu jinghata lil kull wahda minnhom u mhux li dawn jizdiedu wara fl-istadju tal-aggudikazzjoni.

Izda fis-sentenza deciza mill-Qorti fl'Irlanda fl-ismijiet *Northern Irish Waste Services Ltd v Northern Ireland Water Ltd & Ors* (2013), id-decizjoni fil-kaz ta' *Lianakis* giet ikkritikata u dana ghaliex gie deciz illi wahda mill-ahjar kriterji sabiex jigi evalwat il-kapacita tal-offerent hija illi tigi ezaminata l-esperjenza taghha fil-qasam. Il-Qorti tqies illi l-kriterju uzat ghall-aggudikazzjoni fil-kaz in dizamina ma imurx kontra id-direttiva 2004/18EC, dana ghaliex il-kuntratt mertu tal-kaz (bhal kif kien fil-kaz irlandiz iccitat) jaqa taht id-definizzjoni ta' kuntratt ta' servizzi pubblici skont l-artikolu 1(2)(d) tad-Direttiva 2004/18/EC li jaqghu taht l-Iskeda 8 tal-Avviz Legali 296 tal-2010 li fir-regolament 55(4)(b) huwa stabbilit illi:

**“Kuntratti pubblici li jkopru s-servizzi elenkati fl-Iskeda 8 jkunni unikament soggetti ghar-regolamenti 46 u 49(4).”**

## Kopja Informali ta' Sentenza

Dan ifisser allura illi ir-regolament 28(5) tal-Avviz Legali 296 tal-2010 u allura l-artikolu 53(2) tad-Direttiva 2004/18EC ma ghandhomx japplikaw ghal dawn it-tip ta' kuntratti u cioe' ir-regolamenti li jstabilixxu x'inhuma l-kriterji ghall-aggudikazzjoni kif hawn fuq spjegat.

Inoltre jirrizulta minn dak dispost fl-artikolu 12 tat-*tender* illi l-kriterji ghall-ghazla kienu stabbiliti b'mod car tant illi l-offerenti kollha kienu jafu precizament li wahda mill-kwalitajiet rikjesti fl-aggudikazzjoni tal-kuntratt kienet illi l-offerent kellu jippossjedi hames snin ta' esperjenza. Illi dawn il-kriterji kellhom ikunu cari ghal kull participant *a priori* u mhux fl-istadju finali tal-aggudikazzjoni u dana b'rispett lejn il-principju tat-trattament ugwali u tat-trasparenza. Fil-fatt is-socjeta appellanti fi stadju pre-kontrattwali tallbet kjarifika lill-Bord, kif kellha kull dritt illi taghmel, ghar-rigward ta' dina il-klawsola numru 12 fejn allura kien gie lilha iccarat illi l-istess kriterji ma jiksrux il-principji tat-trasparenza essenzjali ghal kull ghoti ta' kuntratt pubbliku u ma humiex in kunflitt mal-*Award criteria* stabbiliti.

Ghaldaqstant ghal dawn il-motivi il-Qorti qed tichad l-appell u tikkonferma id-decizjoni appellata.

L-ispejjez ta' dina l-istanza ikunu sopportati mis-socjeta

## < Sentenza Finali >

-----TMIEM-----