



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

EDWINA GRIMA

Seduta tas-27 ta' Mejju, 2015

Appell Civili Numru. 50/2012

KARTA CONVERTERS LTD.

Vs

DIPARTIMENT TAL-KUNTRATTI

Il-Qorti,

Rat id-decizjoni moghtija mill-Bord ta' Revizjoni Dwar il-Kuntratti Pubblici fil-11 ta' Lulju 2012, fejn giet ipprounzjata is-segwenti decizjoni fl-ismijiet premissi:-

“This Board,

- *having noted that the appellants, in terms of their ‘reasoned letter of objection’ filed on the 9th March 2012 and also through their verbal*

submissions presented during the hearing held on the 4th July, 2012, had objected to the decision taken by the pertinent authorities;

- *having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) the appellant company was objecting with both the way it presented its bid and also the way the recommended bidder submitted its bid, (b) a correction was required with regard to para. 1 and 4 of the letter of objection dated 9th March 2012 to the effect that the price quoted by the appellant company in its electronic tender submission available to the contracting authority should have read "- "and not Euro 0.00", (c) Mr Mark Micallef had filled in the electronic tender submission after having attended a training session at the Contracts Department for the purpose – clause 6.1 of the tender document invited prospective bidders to attend this information workshop, (d) the appellant company had inputted the information as had been instructed during the training course and, following the submission of the electronic tender document, it was informed by email that the tender package has been uploaded, (e) albeit the appellant company had inserted the price of "0.145", yet, given that the electronic system allowed numbers up to two decimal places, the price on the company's screen read "€0.15", (f) eventually, it resulted that the screen at the contracting authority's end displayed the price as " _ "instead of the amount "€0.145", keyed in by the appellant company or the "€0.15" allowed by the electronic system, (g) whilst the electronic tender submission made by the appellant company was not printable, yet an electronic version was available on its computer, (h) since Karta Converters Ltd had filled in the tender document and that it had received an acknowledgement that it was uploaded at the Contracts Department's end, the it was up to the Contracts Department to explain what went wrong that led to his client's offer being discarded, (i) the system should have indicated to the user that he did not upload the appropriate document and not simply issue a receipt that the document had been uploaded which, according to the instructions given at the workshop, should have meant that the tender document was acceptable to the system arguing that, in this way, the appellant company was misled, (j) although the tender document stated that only electronic tender submissions were permissible, still, the recommended tenderer made its tender submission by using also PDF files and (k) in the tender under reference the decimal point restriction in quoting the price had a considerable bearing on the outcome of the tendering process given that the price of a toilet paper roll amounted to about 15 euro cents.*
- *having considered the contracting authority's representatives' references to the fact that (a) the electronic tendering system was launched in October*

2011 and it should replace the present system entirely by the beginning of 2013 and that during the transition period everyone involved was going through a learning curve, (b) the receipt ID00000018 was system generated and it referred to the appellant company having submitted a document, (c) that receipt simply meant that a document sent by the appellant company had been uploaded by the contracting authority but that receipt did not mean that the sender had submitted the right document or that the contents of the submission were complete and correct, (d) on receipt the electronic tender submissions were store in an encrypted form and it was only at tender opening stage that the officer in charge of the system would unlock the encryption so that the tender submission would be displayed in their proper format, (e) the Contracts Department has investigated this matter thoroughly, even through its overseas partner Euro Dynamics, and what evidently happened was that when the appellant company's representative uploaded the package onto his computer, instead of uploading the tender document, he, effectively, uploaded the software of the tender preparation tool, (f) the appellant company's representative uploaded the 'tender preparation tool.zip' instead of the 'tender document' itself and that was verifiable from the identification numbers generated by the system, (g) the appellant company did not compile its electronic submission online but its representative first created the document on his computer but it was up to the user to create the correct document, (g/l) the system generated a receipt indicating that a document had been uploaded but that did not mean that the bidder had submitted the appropriate document or that it was correctly filled in because that came to light at tender opening stage, namely it was similar to the present system whereby, albeit a receipt was given to the tenderer on depositing a tender submission in the tender box, yet whether the envelope contained the prescribed tender document or whether the document was properly filled in remained to be established at tender opening and tender evaluation stages, (i) although, ideally, one should fill in the tender document online, there might be cases when that would not be practical such as in the case of complex tender submissions, (j) the electronic tendering system was functioning relatively well so much so that even in this tendering process the recommended tenderer presented a compliant electronic tender submission, (k) the electronic tendering procedure provided the facility to use PDF files and that facility was available to all tenderers , including the appellant company, (l) in fact the system provided, among others, a PDF file which was accessible from the field where the price had to be entered, namely, the PDF file was purposely provided for one to enter the price offered and was accessible from the price field of the electronic system itself, (m) the recommended tenderer quoted a price to two decimal places in the electronic tendering system, namely €0.15, since it only accepted figures up to two decimal places and

then the same company quoted the exact price to three decimal places, namely €0.145, in the PDF file, accompanied by an explanatory note, which PDF file allowed prices to be quoted up to three decimal place, (n) the two prices, the electronic and the PDF, were submitted simultaneously in the original tender submission and it was not the case that the recommended tenderer submitted two different prices for the same tender but, effectively, the company submitted one price, namely €0.145 which in the electronic system translated itself into €0.15 (o) on the other hand the appellant company did not even submit the appropriate tender document but submitted the tender preparation software which indicated no prices whatsoever and (p) the system generated correspondence with bidders such as the recommended award to Zamco Caterware Ltd for the price of €0.145 per roll or €1.15 per 10 rolls.

- *having considered the recommended tenderer's representatives' reference to the fact that although when filing in the electronic tender document he was also faced with the problem that the system registered prices up to two decimal places, yet, once the unit price of the product in question was rather low and it was very relevant for him to quote the price up to three decimal places he made an enquiry with the contracting authority and he was informed that the system provided a PDF file which allowed prices to be quoted up to three decimal places which was attached to the file in the electronic system where the bidder had to insert price,*

reached the following conclusions, namely:

1. *The Public Contracts Review Board opines that it would be better if the system allowed a user to upload only the tender document template and to block the uploading of other documents so as to eliminate such human errors such as picking up and uploading the wrong document.*
2. *This Board acknowledges that (a) the recommended tenderer quoted a price rounded to two decimal places in the electronic tendering system, namely €0.15, since it only accepted figures up to two decimal places and then the same company quoted the exact price to three decimal places, namely €0.145, in the PDF file, accompanied by an explanatory note, which PDF file allowed prices to be quoted up to three decimal place and (b) the two prices, the electronic and the PDF, were submitted simultaneously in the original tender submission and it was not the case that the recommended tenderer submitted two different prices for the same tender but, effectively, the company submitted one price, namely €0.145 which in electronic system translated itself into €0.15.*

3. *The Public Contracts Review Board, albeit, in principle, it does not agree with the option allowed, yet it cannot but acknowledge the fact that, since the system provided the facility for the tenderer to use also PDF files and that such facility was available to all tenderers including the appellant company, it was only fair to retain that a tendering company which exercised this option should not be penalised for having done so, acted according to tender specifications.*
4. *On the other hand, this Board also acknowledges the fact that the appellant company did not even submit the appropriate tender document but submitted the tender preparation software which indicated no prices whatsoever. Undoubtedly, this Board has deliberated upon the fact that the system could be, somehow, vitiated but it transpired that, albeit it may still need some fine tuning – such as when a document is first created on a personal computer and then data is transferred and submitted electronically to the contracting authority – yet it was also a fact that (a) the appellant company did not even submit the appropriate tender document but, erroneously, when appellant company's representative uploaded the package onto his computer, the appellant company's representative uploaded the 'tender preparation tool.zip' instead of the 'tender document' itself and (b) the electronic tendering procedure provided the facility for one to use also PDF files and that facility was available to all tenderers, including the appellant company.*
5. *The Public Contracts Review Board agrees with the contracting authority's line of reasoning wherein it was argued that the system generated a receipt indicating that a document had been uploaded but that did not mean that the bidder had submitted the appropriate document or that it was correctly filled in because that came to light at tender opening stage, namely it was similar to the present system whereby, albeit a receipt was given to the tenderer on depositing a tender submission in the tender box, yet whether the envelope contained the prescribed tender document or whether the document was properly filled in remained to be established at tender opening and tender evaluation stages.*

In view of the above this Board finds against the appellant company but recommends that the latter should be reimbursed with the deposit paid for the appeal to be lodged as this Board considers the appeal not to have been filed in a frivolous manner.”

Illi s-socjeta appellanti aggravata b'din id-decizjoni ressqet l-appell taghha fit-termini tas-segweni aggravvji:

1. Illi fid-decizjoni tieghu il-Bord ghalkemm stqarr li ma jaqbilx mal-procedura accettata mid-Dipartiment tal-Kuntratti in konnessjoni mal-ammissjoni mall-applikazzjoni permezz tal-*e tender* ta' *pdf file* kontenenti informazzjoni ulterjuri, emfassizzat illi dak li gie sottomess mis-socjeta appellanti ma kienx dak mitlub fis-sejha ghall-offerti. Dan ghaliex ma kienx gie iccarat mal-operaturi ekonomici kollha illi seta' jigi anness dokument mat-*template* u dan f'forma ta' *pdf file*. Dan wassal ghalhekk sabiex is-socjeta appellanti giet estromessa mit-tellieqa tal-aggudikazzjoni billi ma kenitx taf illi setghet tannetti document b'referenza preciza ghall-prezz tal-offerta.
2. Illi dan in-nuqqas ta' informazzjoni ma giex lanqas moghti lir-rapprezentant tas-socjeta appellanti li ippartecipa f'*seminar* appozitu li sar mid-Dipartiment fejn gie spjegat lill-partecipanti il-mod kif ghandha tigi sottomessa l-*e tender*. Anzi tallega illi dan il-punt dwar l-ammissjoni ta' *attachments* flimkien mat-*tender* u cioe' mat-*template* kien gie eskluż. Illi s-socjeta appellanti tishaq illi kien certu Robert Grixti li kien qed jaghmel dan it-tahrig li kien kategorikament cahad mar-rapprezentant taghhom illi setghu jigi ammessi dawn l-*attachments*, meta imbaghad giet moghtija informazzjoni totalment differenti lis-socjeta konkorrenti taghha meta din ghamlet *enquiry* mad-Dipartiment qabel ma issottomettiet l-offerta taghha. Dan ghalhekk pogga lis-socjeta appellanti fi zvantagg mal-konkorrenti taghha.

Illi mill-fattispecje li sawwru dana il-kaz johrog illi fl-04 ta' Ottubru 2011, id-Dipartiment tal-Kuntratti kien habbar sejha pubblika ghall-offerti ghal-provvista ta' "*recycled toilet paper*". Illi sussegwentement ghal dan intefghu zewg offeriti mill-operaturi ekonomici f'dan is-settur u cioe' is-socjeta appellanti u is-socjeta Zamco Caterware Ltd. fejn wara li gie nominat Kunitat ta' Evalwazzjoni sabiex issir l-evalwazzjoni tal-offerti sottomessi mill-operaturi, gie stabbilit illi l-kuntratt kellu jigi aggudikat lis-socjeta Zamco Caterware Limited u dan billi fid-dokument tas-sejha is-socjeta appellanti naqset milli tindika il-prezz. Illi din is-sejha ghall-offerti saret permezz ta' procedura gdida li bdiet tigi adottata mid-Dipartiment tal-Kuntratti u cioe' il-procedura hekk imsejjah tal-*e-procurement* fejn l-offerti mill-operaturi ekonomici setghu jigu sottomessi permezz ta' *e-tender*. Illi is-socjeta appellanti kienet ippartecipat f'*seminar* appozitu li sar mid-Dipartiment tramite ir-rapprezentant taghha certu Mark Micallef fejn kien gie spjegat il-metodu ta kif kellha tigi sottomessa it-*tender*. Illi sussegwentement dan Micallef moghni bl-istruzzjonijiet lilu moghtija issottometta it-*tender* fejn isostni illi ottempera ruhu mal-kriterji kollha indikati inkluz allura l-prezz li kellu ikun ta' 0.145c ghal kull roll. Gara izda illi s-sistema elettronika ma kenitx tippermetti li jigu imdahhla numri bi tlett figuri f'centezimi, izda biss tnejn u ghalhekk is-socjeta konkorrenti Zamco Caterware ghamlet *enquiry* mad-Dipartiment tal-Kuntratti fejn gie lilha spjegat illi ghalkemm fit-*template* seta' jigi indikat prezz f'zewg figuri digitali madanakollu kien permess li jigi ipprezentat dokument spjegattiv permezz ta' *pdf file* fejn allura hemmhekk il-prezz ikun jista' jigi spjegat f'iktar dettal. Fil-fatt hija hekk ghamlet, haga li s-socjeta appellanti tallega li ma ghamlitx billi fis-*seminar* kien gie spjegat lilha minn certu Robert Grixti, li qatt ma ittella' jixhed, illi dawn l-*attachments* ma kenux accettabbli. Gara madanakollu illi s-socjeta appellanti minflok isottomettiet l-*e-tender* taghha fuq it-*template* moghtija uzat it-*tender preparation tool.zip file* minflok it-*tender document* innifsu u cioe' ipprezenta d-dokument zbaljat fejn allura il-prezz ma giex

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irregistrat u meta fil-process tal-evalwazzjoni infetah il-file, irrizulta illi dan ma kienx fih prezz u kwindi minhabba dan in-nuqqas il-kuntratt gie aggudikat lill-konkorrenti taghha, Illi s-socjeta appellanti ressqet l-oggezzjoni taghha skont il-ligi ghal din ir-rakkomandazzjoni billi dehrilha illi il-process ta' aggudikazzjoni ma kienx mexa bil-principji li isawwru kull process ta' *public procurement* tat-trasparenza u tat-trattament ugwali.

Illi l-Bord tar-Revizjoni dwar Kuntratti Pubblici, izda, cahad l-appell imressaq mis-socjeta appellanti billi sahaq illi ghalkemm is-sistema tal-*e-procurement* f'dan il-kaz kienet tiddifetta, billi gie permess l-ammissjoni ta' *pdf files* mat-tender document li fihom kien hemm inkluzi dettalji dwar ir-rekwiziti ta'l-istess, madankollu sahaq illi din is-sistema kienet disponibbli ghall-offerenti kollha u kien ghalhekk b'nuqqas tas-socjeta appellanti li ma ghamlitx uzu mill-istess u di' piu kien nuqqas taghha illi ipprezentat id-dokument zbaljat billi ipprezentat is-*software* uzat ghal-preparazzjoni tat-tender li ma kienx jindika prezzijiet.

Id-Direttur tal-Kuntratti jilqa' ghal dana l-appell billi jishaq illi huwa kien mexa b'mod ekwu ma' kull offerent billi sahasnitra offra tahrig specifiku lill-partecipanti biex ikunu jistghu jissottomettu l-*e tender* taghhom u dana billi din is-sistema elettronika kienet ghadha mhux mifhuma minn kulhadd. Illi ghalhekk in-nuqqasijiet u l-izbalji kommessi mir-rapprezentant tas-socjeta appellanti ma kellhomx iservu ta' penalizzazzjoni ghal min issottometta it-tender tieghu kif suppost.

Minn ezami allura ta'l-atti ta' dan l-appell ma hemmx dubbju illi dak rimess ghal gudizzju ta' din il-Qorti huwa il-kwezit dwar jekk il-principji ta-trattament ugwali u tat-trasparenza li jiffurmaw il-bazi tal-procedura tal-*public procurement* gewx osservati f'dan il-kaz. Naturalment biex ikun hemm dan it-trattament ugwali l-konkorrenti kollha tas-sejha jridu ikunu mqieghda fil-kundizzjoni li ikunu jistghu jitilqu mill-istess punt ta' tluq. Dan jista'

jimmatterjalizza ruhu biss jekk l-offerenti ikun moghtija l-istess informazzjoni u l-istess mezzi biex jippartecipaw fis-sejha pubblika illi issir. Illi dan il-kuncett ta' trasparenza u ugwaljanza fil-process ta' l-aggudikazzjoni huwa imfisser sahsitra fid-Direttiva 2004/18/EC tal-Unjoni Ewropeja trasportata fil-legislazzjoni taghna li ghandha bhala l-qafas taghha dawn il-principji balizari meta jinghad:

“The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency¹.

Illi huwa fatt inkontestat illi hadd mill-offerenti f'dan il-kaz ma gew avzati illi fuq is-sistema elettronika ma kienx ser ikun possibbli illi fir-rekwizit tant essenzjali ghal kull *tender*, u cioe' fil-prezz, jiddahhlu numri bi tlett figuri f'centezimi. Dan kien ta' importanza mhux minima fejn il-prodott, oggett tal-kuntratt, igorr mieghu prezz irrizorju. Fil-fatt irrizulta illi l-prezz ta' roll *toilet paper* kien ta' 0.145c. Di piu' dina l-offerta ma kellha l-ebda rekwiziti ohra jew *tender specifications*, billi l-uniku kriterju li fuqu kien ser jigi aggudikat il-kuntratt kien il-prezz. Dan allura kien ifisser illi l-offerenti kellhom jigu avzati *a priori* bil-fatt illi kien hemm din id-diffikulta fl-indikazzjoni tal-prezz fis-sistema elettronika u b'dak li kellu isir fl-eventwalita illi l-prezz ikollu tlett figuri. Dan ma sehnx, tant illi ir-*recommended bidder* kellu jiehu l-inizjattiva li jikkomunika mad-Dipartiment fejn gie avzat illi seta jindika il-prezz preciz permezz ta' *attachment* mat-*tender* f'forma ta' *pdf file*. Kwindi il-prezz li gie

¹ Recital 2 to the Council Directive

indikar minnha fuq l-*tender document* sottomess ma kienx il-prezz gust billi hemmhekk gie indikat il-prezz ta' 0.15c, imbagħad fl-*attachment* gie indikat prezz iehor ta' 0.145c. Tant hu hekk illi l-Kumitat tal-Evalwazzjoni kellha titlob kjarfika mill-istess soċjeta fir-rigward tal-prezz, qabel ma għadda għar-rakkomandazzjoni tiegħu. Dan in-nuqqas fil-fatt gie rikonoxxut mill-Bord innifsu li kien tal-fehma illi din is-sistema ma għandhiex tithaddem f'process bhal dan.

Affermat dan għandu jingħad illi li kieku l-kwistjoni kellha tieqaf hawn, allura s-soċjeta appellanti kien ikollha ragun. Izda l-izball ewlieni tagħha ma kienx il-fatt illi l-prezz ma setax jigi indikat b'mod car fuq is-sistema elettronika, izda li id-dokument minnha sottomess kien dak zbaljat *ab initio*. Fil-fatt jirrizulta illi r-rappreżentant li ha hsieb jimla id-dokument fuq is-sistema elettronika uza is-*software* għal preperazzjoni tad-dokument u cioe' *iz-zip file* minflok *it-template* tat-*tender*, f'liema dokument jidher illi l-prezz ma jigix registrat. Gara allura li dan id-dokument zbaljat indika l-prezz tal-offerta bhala 0.00c u kwindi l-offerta giet skartata għar-raguni segwenti:

“The evaluation committee is hereby recommending that Karta Converters is to be rejected as administratively not compliant, since he failed to submit any administrative, technical or financial details in his offer...”

Illi fit-test stabbilit mill-Qorti Ewropeja tal-Gustizzja l-oneru fuq konkorrent f'sejha li jottempera ruhu mar-rekwiziti ta' dik l-offerta jimporta kompetenza oghla minn dik ordinarja u dan billi jinkombi fuq l-istess konkorrent li jkun iffamiljarizza ruhu bi shih u li jkollu għarfien tajjeb mar-rekwiziti mitluba u dana bhala *a reasonably well informed and normally diligent tenderer*².

II-High Court of Justice, Queen's Bench Division, tal-Ingilterra, f'sentenza li tat fil-15 ta' April, 2011 fil-kawza flismijiet Hoole v. Legal Services Commission enfasizzat dan il-

² ara f'dan ir-rigward C-19/00 SIAC Construction [2001] ECR I-7725, para. 42; C-448/01 EVN and Wienstrom [2003] ECR I-14527 para. 57)

punt biex jigi evitat attacki ta' preferenza u biex kull offerent jithalla fl-istess posizzjoni bhal ohrajn, u cioe`, fil-pozizzjoni li hu stess ikun pogga lilu nnifsu fl-offerta tieghu. Il-Qorti Ingliza osservat li, fl-interess tal-gustizzja, certi korrezzjonijiet ta' "obvious errors" ghandhom ikunu permessi, pero`, ziedet dan il-proviso:

"However, any such duty is severely circumscribed where there is a competitive tender and an over-riding duty to treat all tenderers equally. Here for reasons that were not the responsibility of the defendant, the claimant had failed to supply the information that would have lead them to being ranked in priority where there was competition for the award of NMS. Any general duty to give an applicant an opportunity to correct errors in the absence of fault by the defendant, yields to the duty to apply the rules of the competition consistently and fairly between all applicants, and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed.³"

Kwindi minn dawn il-principji jinzel illi l-Kumitat lanqas setghet titlob kjarfika jew rettifika lis-socjeta appellanti ghall-izball fatali minnha kommess. Illi li kieku din il-Qorti kellha' tilqa l-aggravvji tas-socjeta appellanti, hija tkun qed tivvjola l-principji tat-trasparenza u tat-trattament ugwali fil-konfront tar-*recommended bidder* ghaliex tkun qed tippenalizza lill-konkorrent li ottempera ruhu bi shih mal-kriterji kollha tas-sejha ghall-offerti. Dan ghaliex dak li wassal ghar-rigett tal-offerta tas-socjeta appellanti ma kienx konsegwenza tal-fatt illi huwa gie *misinformed*, izda l-fatt illi hija dahhlet dokument ghal kollox zbaljat li lanqas kellu indikazzjoni ta' prezz fih, haga li ghaliha ghandha tahti biss s-socjeta appellanti. Illi allura ma hemmx dubbju illi l-fehma tal-Bord kienet wahda valida u il-Qorti ma tarax li ghandha tvarja tali decizjoni.

Ghal dawn il-motivi l-appell qed jigi michud u d-decizjoni appellata qed tigi ikkonfermata.

³ Steelshape Limited vs Direttur tal-Kuntratti et -07/08/2003 App.Sup.

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L-ispejjez ghandhom jithallsu mis-socjeta appellanti.

< Sentenza Finali >

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