

QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF SILVIO CAMILLERI
ONOR. IMHALLEF TONIO MALLIA
ONOR. IMHALLEF JOSEPH AZZOPARDI**

Seduta ta' nhar il-Gimgha 25 ta' Settembru 2015

Numru

Rikors numru 184/15

Domain Academy Ltd

v.

**Direttur tal-Kuntratti u b'digriet tal-14 ta' Lulju 2015 Transport Malta
zdiedet bhala socjeta` appellata**

Dan hu appell imressaq fl-1 ta' Gunju 2015 mis-socjeta` Domain Academy Ltd wara decizjoni datata 18 ta' Mejju 2015, moghtija mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz referenza TM 061/2014 (Kaz Numru 806).

Dan il-kaz huwa marbut mas-sejha ghall-offerti li harget Transport Malta fi hdan il-Ministeru tat-Trasport u l-Infrastruttura ghal "*Training Courses*

related to People within the Organisation". Ghal dan it-tender applikaw diversi entitajiet, fosthom is-socjeta` Domain Academy Ltd, li pero`, giet skwalifikata mill-process peress li l-offerta taghha giet meqjusa bhala teknikament mhux konformi, u intghazlet bhala l-offerent preferut is-socjeta` EMD Management Ltd. Is-socjeta` Domain Academy ma qablitz ma' din id-decizjoni u ressqet appell quddiem l-imsemmi Bord li b'decizjoni tat-18 ta' Mejju 2015, cahad l-appell u kkonferma d-decizjoni tal-awtorita` koncernata. Id-decizjoni tal-Bord hija s-segwenti:

"Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 27th March 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 7th May 2015, had objected to the decision taken by the pertinent authority, in that:

"a) The Appellant Company contends that the methodical system of allocating points by the Evaluation Committee of the Contracting Authority is highly subjective. So much so that the Appellant feels aggrieved as to how points were allocated for grades which were compatible to the Tender requirements, and yet at the same time, different grades were given by the members of the Evaluation Committee;

"b) The appellant maintains that he was fully compliant and could not foresee any logical reason why his offer was discarded. The appellant contends that he had submitted all the necessary information regarding the requested licenses and these could be confirmed in the accompanying CD which was submitted together with the Tender Document.

"Having considered the Contracting Authority's verbal submissions during the Public Hearing held on 7th May 2015 in that:

"a) The Contracting Authority maintains that although the Evaluation System does have an element of subjectivity, the allotments of points/marks are done by the Evaluators on an individual basis. At the final stage, the allotted points by the individual evaluators are then averaged to arrive at a faithful result;

"b) The Contracting Authority contends that one of the requisites in the Tender Document was that prospective bidders were to

submit, 'Licenses' with the proper certification. The Appellant failed to do so, in this regard.

“Reached the following conclusions:

“1. With regards to the Appellant’s First Contention, this Board after hearing credible submissions by the Contracting Authority and after reviewing the Evaluation Procedure adopted by the Evaluation Committee, is justifiably convinced that the formula adopted by the Evaluation Board is fair and transparent. Although there might be an element of ‘subjectivity’, this Board is satisfied that the same formulation was adopted for all the bidders so that there is a level playing field for all. The fact that each member allocated points individually does ensure that the overall net marks are as accurate as one can be. In this regard, this Board opines that the methodology applied by the Evaluation Board in assessing the tenders was fair, just and transparent. This Board does not uphold the Appellant’s first grievance;

“2. With regards to the Appellant’s second grievance, this Board, after verifying whether in the CD attached to the Tender, the requested ‘Licenses and relative certificates’, as stipulated in the Tender document were present, this Board is justifiably convinced that the Appellant did not submit the requested license and certificate. In this regard, this Board does not uphold the appellant’s second contention.

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the same should not be reimbursed.”

Is-socjeta` rikorrenti appellat mid-decizjoni tal-Bord ghax issostni li l-offerta taghha kienet teknikament konformi ghax mal-applikazzjoni kien hemm annessa *compact-disk* li kien fiha kopja tal-licenzji kollha mehtiega.

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

Ikkunsidrat:

Illi in sintezi, is-socjeta` rikorrenti qed tilmenta mill-fatt li hi inghatat anqas punti mis-socjeta` preferuta a bazi ta' kejl soggettiv u mhux oggettiv, u ghax ma gewx meqjusa c-certifikati li hi tghid li pprezentat mal-applikazzjoni, izda li l-Bord ma sabx fil-compact-disk li kienet tinsab esebita.

Trattat l-appell, tajjeb li jigi osservat, kif jissottometti l-intimat, li dan il-kuntratt hu wiehed li ma jissuperax is-somma ta' €120,000, tant li l-valur stmat tal-kuntratt kien fl-ammont ta' €35,423.73 eskluż il-VAT. Isegwi li d-Direttur tal-Kuntratti, invokat bhala l-uniku intimat f'dawn il-proceduri, ma jirregolax kuntratt simili ghax l-ghotja tieghu ma kinitx soggetta ghall-funzjonijiet regolatorji tal-imsemmi Direttur. Dan il-kuntratt hu regolat u amministrat mill-awtorita` kontraenti, li ma gietx citata biex tkun parti f'dawn il-proceduri. Inoltre, jinghad fir-rikors tal-appell li dan hu bazat fuq ir-Regolament 85(5) tar-Regolamenti dwar il-Kuntratti Pubblici. Dan, pero`, hu zbaljat, ghax meta l-valur tal-kuntratt ikun taht il-€120,000, il-procedura tal-appell hija regolata bir-Regolament 21(5), li jfisser li strettament l-appell imressaq mis-socjeta` appellanti huwa wiehed insostenibbli ghaliex dan gie msejjes fuq regolament zbaljat.

Din il-Qorti tara li kien ikun vitali ghal prosegwiment ta' dan l-appell in-nuqqas tas-socjeta` appellanti li tharrek lill-legittimu kontradittur proprju. Dan mhux kaz fejn tista' tiddahhal fil-kawza parti ohra flimkien ma' dak imharrek ghall-integrita` tal-gudizzju, izda l-Ministeru kontraent kellu

mill-ewwel jigi citat in sostituzzjoni tad-Direttur imharrek li m'ghandu x'jaqsam xejn ma' dan il-kaz. L-appell propost mis-socjeta` appellanti huwa fil-verita` inammissibbli fil-konfront tad-Direttur tal-Kuntratti ghaliex *ope legis* din l-istess azzjoni kellha tigi proposta unikament fil-kontraditorju tal-offerent rakkomandat ghall-ghoti tal-kuntratt u tal-Awtorita` ghat-Trasport f'Malta li kienet l-entita` proprja responsabbli mill-amministrazzjoni u l-ghoti ta' dan il-kuntratt. L-interess ta' dawn kien ezistenti mill-bidu, waqt li l-intimat imharrek f'dawn il-proceduri ma kellux x'jaqsam fil-kwistjoni.

Is-socjeta` appellanti pero` talbet li 'issalva' l-appell taghha billi talbet li l-Awtorita` msemija tidahhal fil-procedura, u ghalkemm proprjament is-sostituzzjoni ta' konvenut/intimat flok iehor ma hijiex permessa fil-ligi (ara **Palm Holdings v. Fenech**, deciza mill-Prim'Awla tal-Qorti Civili fit-13 ta' Gunju 2002, u l-gurisprudenza hemm indikata), il-partijiet l-ohra fil-kawza ma opponewx it-talba u issa l-legittimu kontradittur iddahhal fil-kawza u dan l-appell jista' ghalhekk jitkompla.

Dwar il-meritu, din il-Qorti tara, fl-ewwel lok, li fi proceduri simili din il-Qorti ma tistax tissostitwixxi d-diskrezzjoni taghha ghal dak tal-Bord, u ma tistax tordna, kif intalab mill-appellant, li l-kuntratt jinghata lil xi offerent partikolari. Kieku din il-Qorti kellha taqbel mas-socjeta` appellanti illi l-evalwazzjoni ma kinitx gusta u trasparenti, ir-rimedju kien ikun li tibghat l-atti lura sabiex l-evalwazzjoni ssir skont kif tidderigi din il-

Qorti. Dan aktar u aktar fejn l-evalwazzjoni fiha element tekniku kif inhu dan il-kaz.

Fit-tieni lok, din il-Qorti tara li dan il-kaz huwa wiehed marbut mal-kuncett ta' *'most economically advantageous tender'* (MEAT) li jfisser li l-kuntratt mhux necessarjament irid jinghata lil min jaghmel l-orhos offerta. Ir-Regolament 28, fl-assjem tieghu, jqis diversi kriterji li jirrigwardaw is-suggett tal-kuntratt, li necessarjament jinvolti analizi soggettiva. Fil-fatt l-awtur Peter Trepte ("Public Procurement in the EU: A Practitioner's Guide", 2 Ediz, pagna 466) jghid hekk f'dan il-kuntest:

"Some of the permitted award criteria are, by definition, incapable of being objectively quantified (aesthetic merit), the application of others (such as quality or technical merit) may depend on the substance of the tenders submitted, the importance of others (non-economic criteria) may only become apparent in combination with the financial offers contained in tenders."

Ma jirrizultax f'dan il-kaz li ma gewx segwiti l-kriterji rilevanti, jew li l-kumitat ta' evalwazzjoni ma mexiex l-istess ma' kulhadd u b'uniformita`. Is-sejha ghal offerti kienet tistabilixxi b'mod car liema huma l-kriterji li se jintiznu waqt l-evalwazzjoni tal-offerti u ntwera wkoll kemm kienu se jitqassmu l-marki skont ir-rekwiziti differenti. Il-kumitat ta' evalwazzjoni, jirrizulta, mexa korrettament ma' dak li gie stabbilit fis-sejha u skont il-ligi, u d-decizjoni tieghu, allura qed tigi konfermata.

Dwar l-allegazzjoni li s-socjeta` appellanti ressqet *compact-disk* b'kopja tac-certifikati u tal-licenzji li tipposjedi, apparti mill-fatt li ma jirrizultax in atti li din id-diska kienet tikkontjeni dawn id-dokumenti, bil-punti massimi ghac-certifikati u l-licenzji xorta wahda s-socjeta` appellanti ma kienx ikollha bizzejjed punti biex l-offerta taghha tigi preferuta. Kwindi, anke taht dan l-aspett, l-aggravju tas-socjeta` appellanti ma jistax jigi accettat.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell ta' Domain Academy Ltd billi, fl-ewwel lok tillibera lill-appellat Direttur tal-Kuntratti mill-osservanza tal-gudizzju u fit-tieni lok billi tichad l-istess u tikkonferma d-decizjoni li ha l-Bord ta' Revizjoni dwar Kuntratti Pubblici fit-18 ta' Mejju 2015, bl-ispejjez relattivi jithallsu kollha mill-istess socjeta` appellanti.

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Prim Imhallef

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Deputat Registratur

Id