

Qorti tal-Appell (Kompetenza Inferjuri)

Imhalled Anthony Ellul

Appell numru 49/2012AE

**Clentec Limited**

**Vs**

**Id-Direttur tal-Kuntratti u d-Direttur (Servizzi Korporattivi) bhala l-Kap tad-Direttorat ghas-Servizzi Korporattivi fi hdan l-Ufficcju tal-Prim'Ministru, ghal kull interess li jista' jkollu**

It-Tlieta, 27 ta' Ottubru, 2015.

Clentec Limited appellat minn decizjoni tal-Public Contracts Review Board (kaz numru: 456) wara sejha ghal tenders *For the provision of environmentally friendly cleaning services at the Office of the Prime Minister*. Sejha li giet pubblikata fil-Gazzetta tal-Gvern tat-18 ta' Mejju 2012. L-appellanti kienet wahda mit-tenderers. It-tender inghatat lil Gafa Safeway Limited. Il-Bord iddecieda:

*"1. Once again, the Public Contracts Review Borad reiterates a suggestion it had made in the past on may another occasion wherein it had highlighted the one way of dealing with abnormally low offers in response to a call for tenders like the one under review was for the contracting authority to establish a rate, for instance, the minimum wage, below which offers would be considered abnormally low and rejected outright.*

*2. The Public Contracts Review Board argues that it is not its role to review the commercial decisions taken by bidders and that it was up to bidders to decide if they wanted to undertake a contract (a) at a profit and, in that case, to establish the profit margin, or (b) at breakeven or (c) perhaps even at a loss.*

*3. The Board agrees wit the contracting authority's argument wherein the latter claimed that, whilst retaining the right to terminate the contract if the contractor would breach the contract conditions, including the employment legislation, yet it was not within its remit to consider if a bidder was going to abide by labour laws or not beause that fell within the remit of the Industrial and Employment Relations Department.*

*In view of the above, this Board finds against the appellant company and recommends that the deposit paid by the same appellant for the appeal be lodged should not be reimbursed".*

L-aggravji tal-appell huma:-

1. L-Awtorita' naqset milli titlob bil-miktub lil Gafa Saveway Limited dettalji dwar l-offerta li kienet abnormalment baxxa.
2. Id-detergenti li gew indikati fl-offerta ta' Gafa Saveway Limited ma ssodisfawx il-paragrafu numru 5.3.4 tat-*Terms of Reference* tat-tender.

L-appellanti talbet lill-qorti sabiex:

1. Thassar id-decizjoni tal-Bord ta' Revizjoni dwar Kuntratti Pubblici tat-28 ta' Settembru 2012 (kaz. Numru 456) in kwantu cahdet it-talba taghha sabiex tinghata lura d-depozitu li hallset ghall-appell;
2. Thassar id-decizjoni tal-awtorita kontraenti li taghti l-kuntratt lil Gafa Safeway limited;
3. Tordna lid-Direttur tal-Kuntratti sabiex jikkonforma ruhu mad-decizjoni tal-qorti u jordna mill-gdid is-sejha tal-offerti ghall-ghoti ta' servizzi ta' tindif fl-ufficcju tal-Prim'Ministru;
4. Tordna r-rifuzjoni tas-somma mhallsa minnha sabiex tkun tista' tappella quddiem il-Bord ta' Revizjoni dwar Kuntratti Pubblici.

L-appellati ipprezentaw twegiba (10 ta' Dicembru 2012) fejn taw ir-ragunijiet ghalfejn l-aggravji huma nfondati. Min-naha tad-Direttur tal-Kuntratti qal li gie mharrek bla bzonn "... *Ladarba l-kuntratt pubbliku mertu ta' dawn il-proceduri ma nharigx u ma giex immexxi mid-Direttur tal-Kuntratti....*" (fol. 101).

Il-qorti rat it-trattazzjoni li tinkludi traskrizzjoni tat-trattazzjoni li saret fit-8 ta' Ottubru 2013 (fol. 112 *et seq.*).

### 1. **L-ewwel aggravju.**

- 1.1 L-appellanti bbazat dan l-ilment fuq l-Artikolu 55 tad-Direttiva 2004/18/KE<sup>1</sup> li jitratta dwar *Abnormally Low Tenders*<sup>2</sup>. L-appellanti ssostni li l-offerta ta' Gafa Safeway Limited hi baxxa wisq ghaliex iddikjarat rata ta' €5.83 kull siegha (inkluz Taxxa Fuq il-Valur Mizjud), meta fil-qasam tat-tindif il-paga minima nazzjonali hi ta' €6.10. L-appellanti ghamlet ukoll riferenza ghal sentenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea fil-kaz **SAG ELV Slovensko a.s. et vs Urad pre verejne obstaravanie** (29 ta' Marzu 2012).
- 1.2 L-appellati jsostnu li r-regolament ma japplikax ghall-kaz in ezami. Jidher li l-valur stmat tat-tender kien inqas minn €120,000 (ara d-decizjoni tal-Public Contracts Review Board u tabella Financial Compliance Grid<sup>3</sup>) u jirrizulta wkoll li kien ghall-perjodu ta' sena<sup>4</sup>. L-appellanti ghamlet riferenza ghal regolament 29(1) tal-Avviz Legali 296

<sup>1</sup> *On the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.*

<sup>2</sup> "1. *If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant*". Jidher li skond id-direttiva l-awtorita kontraenti ghandha diskrezzjoni tirrifjutax tenders li jidhru *abnormally low*.

<sup>3</sup> Il-valur hu ta' €56,000 li tinkludi t-Taxxa Fuq il-Valur Mizjud.

<sup>4</sup> Ara klawzola 4.2 *Commencement Date & Period of Execution* tal-abbozz tal-kuntratt li jiffirma parti mid-dokumenti tat-tender.

tal-2010 sabiex issahhah l-ewwel aggravju<sup>5</sup>. Pero' kif qalu l-appellati dan ir-regolament japplika ghall-kuntratti b'valur ta' iktar minn €120,000.

1.3 Skond regolament 18 ta' dan l-Avviz Legali:-

*Meta l-valur stmat ta' kuntratt pubbliku ma jeccedix mija u ghoxrin elf euro (€120,000) ghandhom japplikaw biss id-dispozizzjonijiet rilevanti tat-Taqsima I u t-Taqsima II kollha kemm hi.*

Regolament 29 m'huwiex f'dawk it-taqsimiet.

1.4 Fir-rigward tad-Direttiva 2004/18/KE<sup>6</sup>, hawn ukoll l-appellati ghandhom ragun, fis-sens li l-kuntratt oggett ta' dawn il-proceduri ghandu valur inqas minn dak dikjarat f'Artikolu 7 tad-Direttiva. Dak il-provvediment jistabbilixxi l-valur minimu li jrid ikollu kuntratt pubbliku sabiex tapplika d-Direttiva. Valur li hu iktar minn dak tal-kuntratt in ezami.

1.5 Meqjus dak li nghad hawn fuq, l-ewwel aggravju kif impostat mill-appellanti m'ghandux bazi legali.

**2. Tieni Aggravju.**

2.1 Paragrafu 5.3.4 tat-*Terms of Reference* tat-tender tghid: "*All products carrying the EU Ecolabel will be deemed to comply. If the product does not carry the EU Ecolabel the following information must be clearly provided.....*" (fol. 44).

2.2 Hu evidenti li skond paragrafu 5.3.4, il-prodott jista' ma jkollux EU Ecolabel.

2.3 Jirrizulta li l-awtorita kompetenti nghatat dikjarazzjoni mahruqa mill-Malta Competition and Consumer Affairs Authority li ccertifikat li: "*... The detergent products listed above are manufactured in accordance with the requirements of Regulation No. 648 of 2004 of the European Parliament and of the Council of 31 March 2004 on Detergents. These products are currently freely sold as detergent products in Malta, a Member State of the European Community as from 1<sup>st</sup> May 2004*" (fol. 97).

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<sup>5</sup> Ir-regolament jipprovdi: "(1) Awtorita' kontraenti ikollha jedd tichad offerti li jkunu jidhru b'mod xejn normali bhala baxxi ghar-rigward tal-hidma li tkun ser issir:

*Izda l-awtorita kontraenti qabel ma tichad dawn l-offerti ghandha titlob bil-miktub dettalji tal-elementi kostituttivi tal-offerta li hija tqis relevanti u ghandha tivverifika dawk l-elementi kostituttivi billi tikkonsulta ruhha mal-offerent u tqis x'ikunu l-ispjegazzjonijiet li tkun irceviet".*

<sup>6</sup> Direttiva li llum hadet postha d-Direttiva 2014/24 u addottata mill-Kunsill tal-Unjoni Ewropea fil-11 ta' Frar 2014.

- 2.4 Gialadarba hemm certifikat li nhareg minn Awtorita mwaqqfa b'ligi li ccertifikat li l-prodotti huma konformi mal-ligi tal-Unjoni Ewropea, il-qorti ma tarax kif jista' jinghad li Gafa Saveway Limited ma ssodisfatx ir-rekwiziti tat-*tender document*.
3. Fit-twegiba l-appellat Direttur tal-Kuntratti argumenta li qatt ma kellu jitharrek. Skond regolament 19 tar-Regolamenti dwar il-Kuntratti Pubblici (Ligi Sussidjarja 174.04):

*"(1) Mingħajr preġudizzju għas-subregolamenti (2) u (3), il-kuntratti pubbliċi kollha, li l-valur stmat tagħhom ma jeċċedix mija u għoxrin elf euro (€120,000), għandhom ikunu regolati u amministrati mill-awtorità kontraenti, li għandha madankollu tiżgura li jitharsu d-dispożizzjonijiet kollha applikabbli li jinsabu fit-Taqsima I u fit-Taqsima II".*

F'dan il-kaz l-awtorita' kontraenti kien id-Dipartiment tas-Servizzi Korporattivi fl-Ufficcju tal-Prim'Ministru. Mill-atti lanqas ma jidher li d-Direttur tal-Kuntratti ha xi sehem fil-process. Jidher għalhekk li dan l-appellat għandu ragun li ma kellux jigi mharrek.

**Għal dawn il-motivi tiddeciedi l-appell billi:-**

- 1. Tiddikjara li d-Direttur tal-Kuntratturi m'huwiex il-legittimu kontradittur u tilliberah mill-osservanza tal-gudizzju.**
- 2. Tichad l-aggravji tal-appellanti u għaldaqstant tichad it-talbiet.**

**Spejjez kontra s-socjeta appellanti.**

Anthony Ellul.