

# QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF JOSEPH AZZOPARDI  
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO  
ONOR. IMĦALLEF NOEL CUSCHIERI

Seduta ta' nhar it-Tnejn 16 ta' Lulju 2018

Numru 1

Appell numru 78/2018

*Projekte Global Limited (C-39978)*

v.

Ministeru għal Għawdex u  
*Urban Play Solutions (P-1741)*

1. Dan huwa appell ta' *Projekte Global Limited* ["*Projekte*"] minn deċiżjoni tat-22 ta' Frar 2018 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku ["L.S. 174.04"], li ċaħad oġġezzjoni ta' *Projekte* kontra deċiżjoni tal-Ministeru għal Għawdex ["il-Ministeru"] illi, wara sejha pubblika għal offerti, kuntratt jingħata lil *Urban Play Solutions Limited* ["*Urban Play Solutions*"].
2. Il-fatti rilevanti seħnew hekk: kienet saret sejha mill-Ministeru għal offerti għal kuntratt "*surfacing works of multi-purpose pitches*". Saru

tljet offerti, fosthom dawk ta' *Projekte* u ta' *Urban Play Solutions*. Lill-kumitat tal-għażla deherlu li, minn dawn l-offerti, l-offerta ta' *Urban Play Solutions* biss kienet "compliant with technical requirements" u li għalhekk iż-żewġ offerti l-oħra, fosthom dik ta' *Projekte*, kellhom jitwarrbu. Inbagħad, b'ittra tat- 8 ta' Jannar 2018, il-Ministeru għarraff lil *Projekte* illi l-kuntratt kien sejjer jingħata lil *Urban Play Solutions* u illi l-offerta tagħha kienet twarrbet għax:

»... .. as per literature submitted as part of your offer:

- »• bulk density of the base course is 435 g/l while the tender's technical specifications requested  $510 \pm 5$  g/l;
- »• the thickness of wear course is 6-8 mm while the tender's technical specifications requested  $10 \pm 1$  mm.«

3. *Projekte* ressqet oġġezzjoni quddiem il-Bord ta' Revizjoni b'ittra tal-11 ta' Jannar 2018. Il-Bord ta' Revizjoni b'deċiżjoni tat-22 ta' Frar 2018 ikkonferma d-deċiżjoni tal-Ministeru u warrab l-oġġezzjoni ta' *Projekte* għal raġunijiet li fissirhom hekk:

»This board,

»Having noted this objection filed by *Projekte Global Limited* (hereinafter referred to as the Appellant) on 15 January 2018<sup>1</sup>, refers to the contention made by the same Appellant with regards to the award of Tender ... .. awarded by the Ministry for Gozo (hereinafter referred to as the Contracting Authority).

»... ..

»Whereby the Appellant contends that:

- »a) their offer was rejected on the alleged grounds that their product did not meet the technical specifications with regards to "bulk density" and "thickness of wear course". In this regard, *Projekte Global Limited* refer to the documentation and declaration whereby they bound themselves to offer the product in accordance with all the technical specifications and to abide by all the conditions laid out in the tender dossier;

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<sup>1</sup> L-ittra għandha d-data tal-11 ta' Jannar 2018 iżda giet preżentata quddiem il-Bord ta' Revizjoni fil-15 ta' Jannar 2018.

- »b) the Appellants also maintain that if the Contracting Authority had any particular doubts on the information so submitted, the evaluation board should have sought clarifications.

»The board also noted the Contracting Authority's letter of reply dated 23 February 2018 and its verbal submissions during the public hearing held on the 13 February 2018, in that:

- »a) the Ministry for Gozo insist that the Appellants' offer failed to abide by the dictated technical specifications with regards to "bulk density" and "thickness of wear course" so that the Evaluation Board had no other option but to deem the Appellants' bid as being technically non-compliant.

»... ..

»This board ... .. opines that the main issue of this appeal is to establish whether the offer submitted by *Projekte Global Limited*, with regards to "bulk density" and "thickness of wear course" of the product, meets the technical specifications as stipulated in the tender dossier.

»1. This board would, first and foremost, refer to the directive issued by the European Union with regards to the drafting of the technical conditions in a tender document. In brief, technical specifications should define the characteristics of the product or supply of works that the public authority intends to procure. At the same instance the technical specifications should be regarded as a major important section of the tender dossier and in this respect should describe the product to be provided, and the levels and standards of the output that is required.

»In general, one must acknowledge and appreciate that the technical specifications so dictated in a tender document have a direct influence on the price. Technical specifications should be drafted in accordance with the following basic guidelines:

- »• be precise in the way that describes the requirements;
- »• be easily understood by the prospective bidders;
- »• have clearly defined, achievable and measurable objectives;
- »• not mention any brand or requirements which might limit competition or, if brands are mentioned, include the term "or equivalent";
- »• provide sufficient detailed information that allows bidders to submit realistic offers.

»In this particular case, this board would respectfully refer to section 4 of the technical specifications, with particular reference to item 2 (e), which specifically states that:

»"Base Course: Mixture of SBR shredded rubber

»"i) bulk density: 510 +/- 5 g/l;.

»"ii) thickness 10 +/- 1 mm"

»The above mentioned section of the technical specifications clearly dictates that the product to be offered must have the above technical

features. In this regard, this board credibly established that the Appellants' product contained technical features which were not within these specified parameters so that such a deficiency was the determining factor as to why the Ministry for Gozo rejected the Appellants' product.

»At the same instance, this board justifiably notes that the dictated specifications were precise and easily understood by the bidders, so much so that other bidders conformed to all the standards which stipulated together the particular section 2 (e).

»From the testimony of Architect Mario Galea it was also established that the dictated range of "bulk density" and "thickness of wear course" were so dictated in order not to limit the scope of competition. In this respect, this board credibly notes that the specifications were clearly defined and enabled the bidders to submit realistic offers, with full knowledge of what was required.

»2. With regards to the Appellants' claim that the documentation submitted, namely the certificates of conformity with EN 14877:2013 and DN 18035-6:2014-12, justified the fact that their product was compliant with what was requested in Clause 5.1 a, b and c, this board would also take into consideration that nowhere, in the certificates of conformity, was there mention of the "bulk density" and "thickness of wear course". At the same instance, the technical literature so submitted by the Appellants confirmed that the "bulk density" of the product was 435 g/l and not 510 +/- 5 g/l and the "thickness of the wearing layer" was 6-8 mm and not 10 +/- 1 mm.

»This board would also refer to the testimony of the witness, namely Mr Dane Zammit who confirmed that the evaluation board was well aware that the certifications of conformity submitted by the Appellants confirmed only that *Projekte Global Limited's* product conformed with the standards so tested for and not to the "bulk density" and "thickness of wear layer as duly dictated in the tender document. In this respect this board took notice of this testimony which stated:

»"Allura meta ġejna fil-bord, aħna meta tlabna l-*literature*, il-*literature* irid jagħmel it-*technical specifications* kollha. U meta tħares fit-*technical specifications*, sezzjoni 2 fejn hemm "*Product*" f'pagna 22, 2.1 "*Poured-In-Place Playground Surfacing - Material Characteristics*" il-*literature* irid jaqbel mal-*ispecifications* kollha."

»Further on, the same witness stated,

»"Qabel mat-*test report*, ma' dawk l-*standards* iva. Aħna mhux fuq hekk ma kienx *compliant*: id-*data* fuq il-*bulk density* u l-ħxuna."

»This Board would also refer to page 24, item 5, which states that:

»"The below information/datasheet must be submitted, if and when requested, highlighted in order and according to the technical specifications above."

»In other words, the data sheet in the technical literature should agree with the specifications as mentioned in clause 5.1 (e) wherein the manufacturer data sheet is being referred.

»This board, as [it] had on many occasions, would respectfully emphasise that the technical literature forms part of the technical offer and it should also be acknowledged that, whenever such document-

ation is requested, the latter must conform with what has been declared to be offered technically including what was dictated with regards to “bulk density” and “thickness”. In this regard, this board opines that *Projekte Global Limited's* offer failed to meet the requested density and thickness of the product so that the latter’s first contention is not upheld.

»3. With regards to the Appellants’ second contention, this board would justifiably point out that the evaluation committee could not ask for rectifications on the documents submitted by *Projekte Global Limited* but had to evaluate on the data and information which the Appellant duly submitted. In this regard, this Board would point out that it was the responsibility of the Appellants to ensure that their submission conform to the technical requirements of the Ministry for Gozo and not for the evaluation committee to seek further information on a non-compliant submission.

»On the other hand, the Appellants had all the remedies, prior to their submission of their offer, to clarify any doubts or misunderstandings on the technical specifications as stipulated in the tender document; however such remedies were not availed of by the Appellants and, in this regard, this board does not uphold the latter’s second contention. At the same instance, the Appellants could have also highlighted the equivalency factor in their original submission; however no such declaration was made by the same.

»In view of the above, this board:

- »i) upholds the decision of the Ministry for Gozo in the award of the tender;
- »ii) does not uphold the Appellants’ contention;
- »iii) recommends that the deposit paid by *Projekte Global Limited* should not be refunded.«

4. *Projekte* ressqet appell minn din id-deċiżjoni b’rikors tal-14 ta’ Marzu 2018 li għalih il-Ministeru wieġeb fl-4 ta’ April 2018.

5. Fl-ewwel aggravju *Projekte* tgħid illi flimkien mal-offerta tagħha hija kienet ippreżentat id-dokumenti kolha meħtieġa:

»Illi ... .. wiegħed sabiex jixtarr jekk id-dokumenti ġewx sottomessi jew le, għandu jqabbel biss mal-*literature list* “as per form marked ‘*literature list*’” ... ..

»Din l-istess *literature list* tant hija speċifika li komplet sabiex tagħmel referenza għal diversi partijiet mis-sejgħa originali, tant li kull dokument rikjest qiegħed ikun ampjament spjegat permezz ta’ din ir-referenza.

»Hawn għalhekk huwa faċli hafna li jiġi stabbilit li dak mitlub ingħata pjenament mingħand is-soċjetà appellant *Projekte*, u għalhekk id-deċiżjoni tal-*evaluation committee* hija mhux biss frażina, iżda wkoll ... .. abużiva.«

6. Ma jidhirx x'inhija r-relevanza ta' dan l-aggravju. L-offerta ta' *Projekte* twarrbet mhux għax naqset milli tipprezenta xi dokumenti izda għaxid-dokumenti minnha prezentati, għallinqas kif fehmuhom il-Ministeru u l-Bord ta' Revizjoni, kienu juru illi l-prodott ta' *Projekte* ma kienx jilħaq l-ispeċifikazzjonijiet li riedet is-sejħa għal offerti.
7. Billi għalhekk, ukoll jekk hu minnu li *Projekte* ipprezentat id-dokumenti kollha meħtieġa, dan ma jolqotx ir-raġunament tad-deċiżjoni tal-Bord ta' Revizjoni, dan l-ewwel aggravju hu miċħud.
8. It-tieni aggravju jgħid hekk:

»... .. irid jingħad li dak mitqal, ċjoè li l-*wearing course/layer* propost huwa ta' 6-8 mm, "*and that the bulk density is of 435 grms/l*" huwa għal kollox żbaljat u mhux veritjier u dana *stante* li l-*evaluation committee* ... .. ħawwdu s-*system data sheet* mal-*product data sheets* u per konsegwenza waslu għall-konklużjoni li "... .. *witness (Mr Dane Zammit) confirmed that a thickness of 10 mm has been offered; however this was contradicted by figures shown in the system data sheet* ... ..". Dan tal-aħħar jikkonferma li l-ewwel qabel kollox dawn id-dokumenti kollha ġew sottomessi, u jikkonferma wkoll li l-*evaluation committee* għamel żball li ħallat is-*system data sheets* mal-*product data sheets* – li juru li l-*evaluation* sar ħażin – Fil-fatt l-istess dokument bl-isem ta' *system data sheet* qiegħed igħid u jispeiga li,

»"For further information, please refer to the product data sheets. All data are approximate values."

»Tajjeb li hawn jiġi spjegat li s-*system data sheet* (qabel xein qatt ma kien mitlub mis-sejħa) filwaqt li r-rwol tas-*system data sheet* huwa li jagħti linja gwida tal-komposizzjoni u tal-karatteristiċi tal-prodott. Mill-banda l-oħra, l-*product data sheet* (li huwa d-dokument mitlub) jagħti l-ispejgja neċessarja tal-komposizzjoni, l-għamla u karatteristiċi oħra tal-prodott *per se*.

»L-istess ħaġa għandha tingħad dwar iċ-ċertifikazzjoni mitluba, liema ċertifikazzjoni huma magħmula minn laboratorji independent u jsiru meta l-prodott huwa finalizzat – bħala stat ta' fatt, it-testijiet fl-ebda ħin ma jitolbu u/jew jagħmlu referenza għal xi ħxuna u/jew densità, għajr għall-fatt li kapaċi jassorbu varjazzjoni ta' bein 6 mm to 15 mm.

»Allura kien żbaljat għall-aħħar da parti tal-*evaluation committee* li ħadu l-valuri indikati fit-testijiet prezentati, għaliex l-iskop tat-testijiet huwa li jikkonferma li effettivament il-prodott jilħaq il-kriterji stabiliti mill-istess *protocols*.

»Finalment, filwaqt li t-testijiet meħtieġa, senjatament DIN 18035-6:2014-12 u DIN EN 14877:2013-12, ġew mogħtija u għaldaqstant jagħtu serħan il-moħħ li dak mixtieq u mitlub *can be* jingħata, tajjeb li jingħad li prodott finali jvarja skont il-ħtieġa *stante* li dan huwa *cast in situ*, u għaldaqstant il-ħxuna u d-densità jistgħu biss jiġu kkonfermati fuq il-post fil-mument li dan jitlesta.«

9. Safejn tista' tifhem il-qorti mill-esposizzjoni mhux għalkollox cara magħmula fir-rikors tal-appell, li ġara hu illi l-kampjun li *Projekte* issottomettiet għal *tests*, u li dwaru nħarġu r-riżultati ta' dawk it-*tests*, ma kellux il-ħxuna u d-densità li riedet is-sejħa għal offerti. *Projekte* iżda tgħid illi l-kampjun li fuqu saru t-*tests* juri biss li l-prodott għandu l-karatteristiċi tekniċi meħtieġa, u mhux li l-prodott sejjer ikollu l-istess ħxuna u densità tal-kampjun.
  
10. Il-qorti iżda tosserva illi l-ħxuna u d-densità huma fost il-karatteristiċi tekniċi meħtieġa, u l-kampjun sottomess għal *tests* kellu jkollu hu wkoll dawk il-karatteristiċi. Ma huwiegħ kompitu u lanqas kompetenza ta' din il-qorti illi tgħid illi kampjun li jgħaddi mit-*tests* meta jkollu l-ħxuna u d-densità tal-kampjun sottomess minn *Projekte* kien sejjer igħaddi wkoll li kieku kellu l-ħxuna u d-densità li riedet is-sejħa għal offerti, kif donnha qiegħda timplika *Projekte*. Li kien imissha għamlet *Projekte* kien li toħloq u tippreżenta kampjun bl-ispeċifikazzjonijiet kollha – fosthom il-ħxuna u d-densità – li riedet is-sejħa, u mhux tagħmel *tests* fuq kampjun b'karatteristiċi differenti u tippretendi li l-kumitat tal-għażla jassumi li għax il-kampjun għadda mit-*tests* meta kellu ħxuna ta' 6-8 mm u densità ta' 435 g/l kien sejjer igħaddi wkoll li kieku kellu ħxuna ta'  $10 \pm 1$  mm u densità ta'  $510 \pm 5$  g/l. Tasew jista' jkun li hekk hu, iżda quddiem il-qorti ma tressqux elementi ta' prova

biżżejjed biex iwassluha twarrab il-konklużjoni li waslu għaliha l-kumitat tal-għażla u l-Bord ta' Revizjoni, li tidher li kienet konklużjoni loġika u raġonevoli fiċ-ċirkostanzi.

11. *Projekte* tgħid illi *t-test* jista' jsir wara li l-prodott jitqiegħed *in situ* – presumibilmment wara li tkun ingħatat il-kuntratt – iżda l-kondizzjonijiet tas-sejħa<sup>2</sup> jridu illi *t-test results* jingħataw “*at evaluation stage*” u mhux wara li jkun ingħata l-kuntratt u l-prodott jitqiegħed fil-post.

12. Dan it-tieni aggravju huwa għalhekk miċħud.

13. Fit-tielet aggravju *Projekte* tgħid hekk:

»Illi s-soċjetà *Projekte* ta' lanqas darbtejn (apparti l-*literature*) għamlet u ikkonfermat permezz tas-sejħa [*sic*] tagħha li kienet qed tissoġġetta lilha innifisha għal dak rikjest, u per konsegwenza ser tadderixxi pjenament ma' dak mitlub. Qalet dan permezz ta' dikjarazzjoni iffirmata fejn gie stabbilit li,

»“We declare that, as part of our technical offer, we confirm that the works will be carried out in accordance with the technical specifications (Section 4), as detailed in the bill of quantities and as per drawings.”

»Illi *inoltre* però, u għal kull buon fini sabiex kollox ikun ulterjorment aċċertat, fis-seduta datata 13 ta' Frar 2018 ġew preżentati żewġ dokumenti oħra minn *Projekte* li jagħtu konferma ulterjuri (jekk qatt kien hemm il-ħtieġa) li kemm il-*bulk density* kif ukoll il-*wear course* huma tal-istess kwalità (għamla u daqs) mitluba mill-awtorità kontraenti. «

14. Il-kondizzjonijiet tas-sejħa iżda riedu illi l-konformità mal-ispeċifikazzjonijiet tintwera permezz ta' “*test reports ... .. from independent testing houses*” u mhux b'dikjarazzjoni tal-oblatur stess. Tassew illi jidher illi d-dokumenti ippreżentati quddiem il-Bord ta' Revizjoni fit-13 ta' Frar 2018 huma maħruġa minn terzi, iżda dawn id-dokumenti, bid-data tat-8 ta' Jannar 2018 – dakinhar stess li *Projekte* kienet mgħarrfa

<sup>2</sup> Section 4, Technical Specifications; para. 5.1.



li l-offerta tagħha twarrbet, u għalfejn –, ġew preżentati wara li nfetħu l-offerti u ntgħażlet l-offerta rebbieħa, meta s-sejħa għal offeriti riedet li *t-test results* jinġiebu “*at evaluation stage*”. Li kieku l-Bord tal-Għażla ammetta dawn id-dokumenti prodotti tardivament kien ikun qiegħed effettivament jippermetti li *Projekte* tbiddel it-termini tal-offerta tagħha, li ma għandux ikun, f’dak l-istadju.

15. Dan it-tielet aggravju wkoll għalhekk huwa miċċud.

16. L-añħar aggravju<sup>3</sup> ta’ *Projekte* jgħid hekk:

»Il-prinċipju *substance versus form* huwa imperattiv in kwantu għall-fatt li s-susstanza għandha dejjem terbaħ fuq il-forma, ta’ lanqas f’dak li huwa xiri pubbliku – l-għan tax-xiri pubbliku mhux li neskludi, iżda li jkun hemm trasparenza u dak li jissejjaħ bħala *level playing field*; jekk dawn jitħarsu allura l-offerta għandha tiġi aċċettata.

»Fil-każ in diżamina, is-soċjetà appellanti tgħid li dak mitlub ġie sottomess, żgur in kwantu għal dak li huwa forma – u dana għaliex id-dokumenti ġew kollha sottomessi u dak li wieħed jistenna li għandu jsib ġewwa d-dokumenti wkoll ġie sottomess; illi għalhekk ħadd ma sofra xi preġudizzju, kulħadd ingħata l-istess trattament u fl-ebda ħin ma inkiser il-prinċipju ta’ *level playing field*.

»Il-prinċipju ta’ proporzjonalità huwa daqstant ieħor imperattiv ... ..  
...«

17. Iżda fil-każ tallum ma kien hemm ebda konflitt bejn sustanza u forma, u l-insistenza ta’ *Projecte* illi hija issottomettiet id-dokumenti kollha meħtieġa ma jibdilx il-fatt illi fost dawk id-dokumenti kien hemm uħud li kienu juru illi l-prodott li offriet ma kellux l-ispeċifikazzjonijiet li riedet is-sejħa, jew, fl-añħjar ipotesi għal *Projekte*, li ma kinux jagħtu serħan il-moħħ li l-prodott kellu dawk l-ispeċifikazzjonijiet.

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<sup>3</sup> Kien hemm aggravju ieħor li iżda ġie irtirat waqt is-seduta tat-2 ta’ Lulju 2018 quddiem din il-qorti.

18. Ma hemm xejn sproorzjonat f'li twarrab offerta li, fl-añjar ipotesi, toñloq dubji serji dwar jekk il-prodott huwiex tassew kif trid is-sejña għal offerti, meta fil-fatt fl-offerta ta' *Projekte* kien hemm dokumenti li juru speċifikazzjonijiet differenti.
19. Dan l-aggravju wkoll huwa għalhekk miċħud.
20. Il-qorti għalhekk tiċhad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Reviżjoni. L-ispejjeż tħallashom l-appellanti *Projekte Global Limited*.

Joseph Azzopardi  
President

Giannino Caruana Demajo  
Imħallef

Noel Cuschieri  
Imħallef

Deputat Reġistratur  
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