

# 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 15 ta' Lulju 2019

Numru 14

Appell numru 84/2019

***Servizi Malta Limited (C-45511)***

v.

**Direttur tal-Kuntratti;**

***Central Procurement and Supplies Unit; u  
Ozo Malta Limited (C-9023), Specialist  
Group Cleaners Limited (C-65296), Diemme  
s.c.a.r.l., u L'Operosa s.c.r.l., kumpannija  
estera reġistrata l-Italja, fil-kapaċità  
tagħhom bħala membri tal-joint venture bl-  
isem *Mediclean JV* għal kull interess li jista'  
jkollu f'dawn il-proċeduri***

1. Dan huwa appell ta' *Servizi Malta Limited* [*Servizi*] minn deċiżjoni tat-12 ta' Marzu 2019 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi [il-Bord ta' Reviżjoni], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [L.S. 174.04]. Il-każ quddiem il-Bord ta' Reviżjoni kien dwar oġġezzjoni ta' *Servizi* kontra deċiżjoni tas-*Central Procure-*

*ment and Supplies Unit* tal-Ministeru tas-Saħħa [il-Ministeru] illi jwarrab offerta ta' *Servizi* għal kuntratt dwar tindif fi sptarjiet pubbliċi skola tal-gvern għax deherlu li kienet "*financially non-compliant*" u li l-kuntratt jingħata lil *Mediclean JV [Mediclean]*. Il-fatti rilevanti huma dawn:

2. Kienet saret sejħa mid-Direttur tal-Kuntratti f'isem il-Ministeru għal offerti għal "*provision of cleaning services to Mater Dei Hospital and Sir Anthony Mamo Oncology Centre*". Fost il-kondizzjonijiet tas-sejħa hemm dik li tgħid hekk:

»The price offered must include all of the works/services/supplies to be provided. Unless otherwise provided in the procurement documents, the prices quoted by the tenderer are fixed and not subject to revision or escalation in costs.«<sup>1</sup>

3. Saret offerta minn *Servizi*, fost oħrajn, u din l-offerta kienet bil-prezz ta' sitt miljuni, tliet mija u tmienja u sittin elf, erba' mija u tmienja u tletin euro u sitta u disgħin ċenteżmu (€6,368,438.96) qabel it-taxxa fuq il-valur miżjud. L-offerta ta' *Servizi*, iżda, kienet tgħid ukoll illi:

»16. The principal component of our operating cost structure relates to personnel wages and therefore the annual cost of living adjustment announced by Government will have a material impact on our cost base. We are therefore proposing that the rate we are quoting is to be reviewed each year as follows:

»- 91% of our proposed rate, representing payroll costs, would be revised in line with the Government's cost of living adjustment;

»- the remaining 9% would be revised in line with changes in the Retail Price index.

»17. The first review would therefore be due in November-December 2018 to discuss the revisions to the rate to be applied from January 2019.

»18. We would expect the eventual contract to cater for exceptional cost impacts which may be beyond the control both of the Hospital

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<sup>1</sup> *General rules governing tenders*, para. 7.4.

and *Servizzi Malta*. No such impacts have been factored into our calculations at this stage.

»19. Exceptional cost impacts could arise from new regulations. For instance, while we have placed quality at the forefront throughout this proposal, new health and safety, hygiene or environmental regulations, and/or additional taxes relating thereto, may be promulgated during the term of the contract. Such changes will have a material and immediate impact on our costs.

»20. As provided for in the Tender Document we would expect that any changes in the VAT rate applicable to the contract would result in an immediate change, upwards or downwards as appropriate, in our prices. Similar adjustments would be needed in the event of other fiscal changes which may impact on the performance of the contract, e.g. changes in employer NIS contributions.«

4. B'ittra tal-11 ta' Jannar 2019 id-Direttur tal-Kuntratti għarraf lil *Servizi*

illi:

»Your submission was financially non-compliant for the following reasons:

»*Servizzi Malta Ltd* uploaded a proposal for the revision of the rates submitted in the financial offer. This was considered as a reservation by the evaluation committee and it was agreed that this offer should not be considered further.«

5. Għarrafha wkoll illi l-kuntratt kellu jingħata lil *Mediclean*.

6. B'ittra tal-21 ta' Jannar 2019 *Servizi* ressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta' Revizjoni. Il-Bord ta' Revizjoni, b'deciżjoni tat-12 ta' Marzu 2019, għalkemm laqa' l-oġġezzjoni ta' *Servizi* safejn din kienet tgħid illi l-ittra tad-Direttur tal-Kuntratti tal-11 ta' Jannar 2019 ma kienx fiha tagħrif biżżejjed tar-raġuni għala l-offerta kienet twarrbet, ċaħad l-oġġezzjoni fil-meritu.

7. Ir-raġunijiet li wasslu lill-Bord ta' Revizjoni għad-deċiżjoni tat-12 ta' Marzu 2019, safejn relevanti għal dan l-appell, ġew imfissra hekk:

»This board,

»having noted this objection filed by *Servizi Malta Limited*, (hereinafter also referred to as the Appellants) on 21 January 2019, refers to the

claims made by the same Appellants with regards to the tender ... ..  
 ... in the records of the Public Contracts Review Board, awarded by  
 the Central Procurement and Supplies Unit, (hereinafter also referred  
 to as the Contracting Authority).

»... ..

»Whereby the Appellants contend that:

- »a) ... ..;
- »b) their second contention refers to the fact that, together with  
 their total quoted price as duly requested, they submitted a  
 proposal, which was construed incorrectly to imply a  
 “reservation” of the price, by the Contracting Authority. In  
 this respect the Appellants maintain that the evaluation  
 committee should have applied the principle of  
 proportionality by either seeking clarification or disregard-  
 ing the proposal.

»This board has also noted the Contracting Authority’s reasoned letter  
 of reply dated 25 January 2019 and its verbal submissions during the  
 public hearing held on 27 February 2019, in that:

- »a) ... ..;
- »b) the Contracting Authority also maintains that there was no  
 justifiable cause for the evaluation committee to apply the  
 principle of proportionality. At the same time, the  
 Committee could not ignore or rectify the Appellants’  
 offered price, as otherwise, it would have breachcd the  
 principle of level playing field and equal treatment with  
 other competing bids.

»... ..

»This board, after having examined the relevant documentation to this  
 appeal and heard submissions made all interested parties, including  
 the testimony of the witnesses duly summoned, opines that the issues  
 which are to be considered on their merits are twofold, namely:

- »A ... ..;
- »B. the adjudication process on *Servizi Malta Limited’s* offer;

»1. ... ..

»2. The adjudication process on *Servizi Malta Limited’s* offer

»The main alleged reason for the rejection of the Appellants’ offer was  
 that, apart from submitting the total bid price, they also included a  
 proposal relating to a desired revision of the quoted price in  
 accordance with changes in the retail price index, so that the  
 Contracting Authority deemed such a proposal to reflect a reservation  
 of the quoted price. At this stage of consideration, this board would  
 refer to an extract from the financial offer submitted by *Servizi Malta  
 Limited*, as follows:

- »“Pricing
- »“16. ... ..

»“17. ... ..”<sup>2</sup>

»The above two clauses forming part of the Appellants’ financial offer are stipulating a reservation to the quoted fixed price in that the cost of labour included in the price will be adjusted by the cost of living adjustment increases during the duration of the contract and 9% of the quoted price will be revised in accordance with any changes in the retail price index. In this respect, this board opines that reference is always being made to the quoted price submitted by the Appellants and, in the same offer, the latter are qualifying their quote by the above mentioned conditions.

»Clause 17 above confirms even more: an additional condition in that the first review of the quoted price is to take effect in November-December 2018 and to discuss future revisions to be applied from January 2019.

»This board is also concerned about the contents of “Exceptional cost impacts” as described in the Appellants’ financial offer, which reads as follows:

»“Exceptional cost impacts

»“18. ... ..

»“19. ... ..”<sup>3</sup>

»This board would point out that the conditions laid out in the tender dossier must be respected and adhered to at all times and, in this respect, this same board would refer to Clause 1.1 of the “Instructions to Tenderers” wherein it is clearly stated that:

»“No account can be taken of any reservation in the tender as regards the tender document; any disagreement, contradiction, alteration or deviation shall lead to the tender offer not being considered any further.”

»In this regard, this board opines that the financial offer as submitted by *Servizi Malta Limited* contained certain reservations which conditioned directly the quoted price of their offer and this board is credibly convinced that the conditions laid down by the Appellants in their financial offer did not constitute a proposal but rather a qualification to the price quoted in their financial bid form.

»3. With regards to *Servizi Malta Limited’s* contention that the Central Procurement and Supplies Unit should have applied the proportionality principle, by either seeking clarification or by ignoring the submitted proposal, this board would have considered the resultant outcome if any of the claimed actions were taken by the evaluation committee, as follows:

»3.1 Clarification

»It is a known maxim to all interested parties that clarifications can only be made, by the Contracting Authority, on submissions made. In this particular case the Appellants’ submissions included a proposal which was not requested in the first place and, secondly, there was no justifiable need, on the part of the evaluation committee, to seek

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<sup>2</sup> Ara para. 3, *supra*.

<sup>3</sup> *Ibid*.

clarifications, as the text and contents of the proposal were clear and direct. In such instances, there was no room for a clarification. Had the evaluation committee sought a clarification, it would have breached the principles of equal treatment, transparency and self limitation. Clarifications relating to the financial offer should only be made to correct arithmetical mistakes and not to determine which offer the bidder intends to adopt, should his offer be successful. This board would respectfully point out that clarifications should not be used as a tool to alter or choose which offer the bidder intends to apply whilst, at the same instance, the evaluation committee is bound by the principle of self-limitation and equal treatment. In this regard, this board opines that in such circumstances the evaluation committee could not ask for clarifications, as there was no justifiable cause to do so.

### »3.2 Ignoring the Proposal

»With regards to the Appellants' claim that the Central Procurement and Supplies Unit, if in doubt, should have ignored the Appellants' proposal, this board would respectfully point out that, by ignoring a financial proposal, the evaluation committee would have also effected a change in the Appellants' financial offer, as the latter offered two possible financial options.

»The conditions in a tender document must be respected and adhered to at all times and the tender conditions did not request a proposal but a fixed price for the period of the contract. At the same instance, by ignoring the Appellants' proposal, the evaluation committee would have shifted the goal posts and breached the principle of self-limitation during the evaluation process.

»This board opines that, after considering the facts of this case, *Servizi Malta Limited*, by submitting a proposal which was not asked for, had, in effect, made a reservation to the quoted price in the financial bid form.

### »4. The testimony of Dr Mario Aquilina<sup>4</sup>

»On a concluding note, this board would respectfully point out that the testimony of one of the witnesses, namely, Dr Mario Aquilina, had no bearing at all on the merits of this case but was rather an interpretation of linguistic words used by the Appellants in their financial offer, which, in the opinion of this board, do not relate to the real issue of this appeal.

»In conclusion, this board opines that:

»a) ... ..

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<sup>4</sup> » On the basis of the linguistic analysis of the two paragraphs above, I am of the view that:

- »i. the two paragraphs formulate a proposal;
- »ii. there is nothing which indicates that should this proposal not be met then the offer would be withdrawn;
- »iii. there is nothing that excludes the possibility that should the proposal not be accepted, the service provider would bear the costs of changes himself;
- »iv. whichever way the two paragraphs are read, they do not express an obligation.«

- »b) the proposal submitted by the Appellants represented a reservation to the quoted fixed price in their financial bid form;
- »c) no clarifications could be sought by the evaluation board as this would have constituted a rectification, which is in breach of the Public Procurement Regulations, in this particular instance;
- »d) the evaluation committee could not ignore the Appellants' financial proposal, as this would have breached the principles of equal treatment, transparency and self-limitation.

»In view of the above, this board

- »i) ... ..,
- »ii) does not uphold the Appellants' second contention;
- »iii) upholds the Contracting Authority's decision in the award of the tender;
- »iv) directs that an amount of twenty thousand euro (€20,000) is to be retained from the deposit paid by *Servizi Malta Limited*.«

8. *Servizi* ressqet appell minn din id-deċiżjoni quddiem din il-qorti b'rikors tal-1 ta' April 2019. Id-Direttur tal-Kuntratti u l-Ministeru wieġbu fis-16 ta' April 2019 u *Mediclean* wieġbu fit-23 ta' April 2019.

9. L-ewwel żewġ aggravji huma marbuta flimkien u għalhekk il-qorti sejra tqishom flimkien. Essenzjalment *Servizi* f'dawn iż-żewġ aggravji qiegħda tgħid illi l-bord fehem ħażin dak li riedet tgħid fis-silta li wasslet biex titwarrab l-offerta tagħha. Komplet tisser dawn l-aggravji hekk:

»L-ewwel aggravju: il-bord skorrettemkent interpreta l-kliem in kwistjoni bħala 'riżerva'

»... ..

»Illi s-soċjetà appellanti, bħala punt preliminari, tissottometti li kemm l-appellati awtoritajiet kontraenti kif ukoll il-bord waslu għal interpretazzjoni ħażina ta' paragrafi 16, 17, 18 u 20 u kkunsidrawhom bħala "*qualification to the price quoted in their financial bid form.*"

»Fl-ewwel lok, u kif ser jiġi spjegat fit-tieni aggravju, il-kliem in kwistjoni huwa "proposta" minħabba il-lingwa konvenzjonali [*sic*] użata u ċertament mhuwiex riżerva jew offerta kundizzjonali – li mhuwiex permess mit-*tender*.

»Fit-tieni lok, paragrafi 17 sa 20 ta' dan id-dokument separat bit-titlu "*financial offer*" għandhom ikunu interpretati fil-kuntest tal-*bid*

kompluta. Dak id-dokument kien separat mill-*financial bid form* li giet mimlija mis-soċjetà appellanti u li indikat b'mod ċar u mingħajr kundizzjonijiet il-prezz ta' €6,368,438.96 (*exc. VAT per annum*) li kien il-prezz sħiħ. Dik l-offerta tal-prezz, f'dik il-formula, hija konsegwentement *self-standing*. Il-*financial bid form* giet kompluta b'mod awtonomu u separat minn dan id-dokument l-ieħor, u, il-prezz kwotat fiha seta' jintuża għall-finijiet ta' evalwazzjoni indipendentement mill-imsemmi dokument separat hawn fuq imsemmi.

»It-tieni aggravju: il-bord ma kkunsidrax ix-xhieda tal-espert Dr Mario Aquilina

»Illi s-soċjetà appellanti pproduċiet lil Dr Mario Aquilina, *senior lecturer* fid-dipartiment tal-Ingliš, il-Fakultà tal-Arti, l-Università ta' Malta, li għandu PhD fl-Ingliš mill-Università ta' Durham. Dan gie prodott bħala xhud espert tas-soċjetà appellanti in konnessjoni mal-interpretazzjoni tal-kliem indikati hawn fuq. ... ..

»... ..

»Illi l-bord kien żbaljat meta ma kkunsidrax ix-xiehda ta' Dr Aquilina kif ukoll meta kompletament ċaħad din ix-xiehda mingħajr l-analiżi xierqa tagħha.

»... ..

»... .. Dr Aquilina ... .. spjega kif l-għażla tal-kelma '*propose*', "fil-fehma tiegħi hija indikazzjoni ċara li dak li ġej wara hija proposta". Hu kompla jispjega illi l-użu tal-kliem "*be reviewed*", "*would arise*" u "*could arise*" jissustanzjaw il-konklużjoni tiegħu li l-kliem huma indikattivi ta' "proposta":

»"Issa l-użu ta' *would* importanti hawnhekk. Fl-Ingliš għandna dawk li nsejñulhom *conditionals* jew *if then clauses*. Hemm 4 tipi. *If then clauses* huma l-modi differenti kif aħna nistgħu nagħmlu kundizzjoni. Issa l-*conditionals* differenti però għandhom livelli differenti ta' *probability*, *certainty*, xi ftit minnhom huma *hypothetical* u xi ftit minnhom huma *unreal*. Il-*would* hawnhekk fiż-żewġ każijiet hija dik li nsejñulha *type 2 conditional*. Din tintuża biex tiddekrivi jew sitazzjonijiet mhux reali – *if I were a woman, I am not. So I would do that* – jew inkella *hypothetical situation* – *if it was raining I would not be happy. But it is not raining. Or if I were to win the lottery, I would buy a new house*. Din it-tip ta' lingwa tintuża f'sitwazzjoni ipotetika. Mela f'dawn l-użu ta' *would* hawnhekk f'dan il-paragrafu jikkonferma l-interpretazzjoni tiegħi li dak huwa proposta għax hija xi ħaġa li tista' tiġi jew aċċettata jew rifjutata. Jiġifieri hawnhekk seta' minflok uża l-kelma *will*. Li huwa *conditional* differenti.

»Illi kemm il-bord kif ukoll l-appellati, b'mod superfiċjali, skartaw il-portata ta' din ix-xhieda daqs li kieku l-iskwalifika tal-*bid* tal-appellanti ma kintx fuq kollox ibbażata fuq tifsira ta' kelmiet speċifiċi fil-lingwa Ingliża li huma qegħdin kompletament jiżnaturaw. L-appellati jaqdbu u jagħtu interpretazzjonijiet bl-addoċċ ta' kliem ċar bl-Ingliš, interpretazzjoni ħażina u superfiċjali li tiswa potenzjalment €2,600,000 aktar lill-appellati, u mbagħad x'ħin jiġi espert altament kwalifikat fil-lingwa Ingliża li jiġbed l-attenzjoni li l-interpretazzjoni ta' kelma sempliċi kienet manifestament ħażina, jispicċa li l-espert ikun irrilevanti u mhux



evidentement skorretti l-appellati li ma fehmux l-użu ta' kelma sempliċi bl-Ingliż. Ta' bilhaqq ta' taħt fuq.

»Illi l-bord seta' ma qabilx mal-osservazzjonijiet u mal-konklużjonijiet ta' dan ix-xhud espert *ex parte*, imma kien skorrett meta ma kkunsidrax sewwa u b'mod adegwat din ix-xieħda u ċaħadha bħala “[*having*] *no bearing at all on the merits of the case*”.

»Illi l-bord kien fuq kollox skorrett fil-konklużjoni tiegħu illi l-“*interpretation of linguistic words used by the Appellants in their financial offer [...] do not relate to the real issue of this Appeal*”. Is-soċjetà appellanti tissottometti illi l-interpretazzjoni tal-kliem użati f'dawk il-paragrafi, ankè minn perspettiva lingwistika, tolqot il-qalb ta' dawn il-proċeduri. Forsi il-bord ma ndunax li, meta ddeċieda illi dawn il-kliem kienu indikattivi ta' riżervazzjoni [*sic*], huwa kien qed jidħol mingħajr ma kien jaf f'eżerċizzju ta' interpretazzjoni ta' kliem.«

10. Dak li *Servizi* u l-espert imressaq minnha ma qisux huwa illi l-offerta kollha, sakemm għadha ma hijiex aċċettata, hija biss “proposta”, u mhux biss dik il-parti li wasslet biex titwarrab l-offerta. Kull ma jingħad fl-offerta jseñħ biss jekk tintlaqa' l-offerta. Għalhekk l-użu tal-kondizzjonali fis-silta analizzata mill-espert ma jagħmilhiex differenti mill-bqija tal-offerta.
11. L-interpretazzjoni li tagħti *Servizi* hija, fil-verità, assurda, għax imsejsa fuq premessa li saru żewġ offerti għall-istess servizz mill-istess oblatur: waħda għal prezz li jibqa' fiss u oħra għal prezz li jogħla perjodikament. Liema Direttur tal-Kuntratti b'rasu fuq għonqu sejjer meta għandu żewġ offerti għall-istess servizz – waħda ogħla mill-oħra – jagħżel l-ogħla waħda? Kif qatt tista' offerta ogħla għall-istess servizz mill-istess oblatur tagħti *price/quality ratio* aħjar minn offerta orħos? L-unika interpretazzjoni li tagħmel sens hija li *Servizi* għamlet offerta waħda kwalifikata u kondizzjonata bir-riżerva magħmula fil-paragrafi li wasslu biex l-offerta titwarrab. Ma kienx hemm żewġ offerti

alternativi, waħda oġġla mill-oħra, għall-istess servizz. L-interpretazzjoni mogħtija mill-Bord ta' Revizjoni hija dik korretta.

12. Fit-tielet aggravju Servizi tgħid illi l-Bord ta' Revizjoni naqas milli japplika l-prinċipju ta' proprjonalità. Kompla jfisser l-aggravju hekk:

»It-Tielet Aggravju: Il-Bord applika l-prinċipju tal-proporzjonalità fl-akkwist pubbliku b'mod ħażin

»Illi l-appellati Direttur u s-*Central Procurement and Supplies Unit*, kif ukoll il-Bord, naqsu milli jaġixxu b'mod proporzjonat kif rikjest mhux biss mill-prinċipji ġenerali kif joħorgu mit-Trattattivi [Trattati (?)], Direttiva 2014/24/EU, imma speċifikament kif rikjest minn Regolament 39(1) tar-Regolamenti, li jstipula:

»“Contracting authorities shall treat economic operators equally without discrimination and shall act in a transparent and proportionate manner.”<sup>5</sup>

»Illi dan huwa partikolament evidenti fid-dawl tal-fatt li l-bord naqas milli jagħti widen xieraq lid-deċiżjonijiet ikkwotati mis-soċjetà appellanti waqt it-trattazzjoni quddiem il-bord, deċiżi mill-Qorti Ġenerali tal-Unjoni Ewropea, u *cioè*, T-211/02 02 *Tideland Signal Limited v. European Commission* u T-195/08 *Antwerpse Bouwwerken NV v. European Commission*. ... ..

»... ..

»... ..[hemm] diversi rekwiżiti li hemm bżonn li jintlaħqu sabiex il-prinċipji użati f'*Tideland Signal* u *Antwerpse Bouwwerken* japplikaw.

»L-ewwelnett, għandu jiġi stabbilit x'inhuma il-ċirkostanzi “limitati” u “eċċezzjonali” li fihom dawn il-prinċipji japplikaw. Dawn iċ-ċirkostanzi ma ġewx determinati b'mod eżawrenti mill-Qorti Ġenerali tal-Unjoni Ewropea u s-soċjetà appellanti tissottometti illi dan sar bi ħsieb. Il-prinċipju ta' proporzjonalità min-natura tiegħu jaddatta ruħu għal kwalunkwe sitwazzjoni u joħloq triq sabiex awtorità kontraenti tkun tista' tagħzel it-triq li hija “*less onerous*” u għaldaqstant “*seek clarification from the tenderer concerned rather than opt purely and simply to reject the tender*”.

»It-tieni nett, il-Qorti Ġenerali tal-Unjoni Ewropea, sal-lum, identifikat żewġ sitwazzjonijiet li jaqgħu taħt dawn iċ-ċirkostanzi “limitati” u “eċċezzjonali”: (i) sitwazzjoni fejn it-termini tat-*tender* innifsu, u ċirkostanzi magħrufin mill-awtorità kontraenti, jindikaw illi l-ambigwiżità probabbilment għandha spjegazzjoni sempliċi u kapaċi tiġi solvuta faċilment, (ii) sitwazzjoni ta' żball klerikali. Dawn iż-żewġ sitwazzjoni ma huma bl-ebda mod l-uniku żewġ sitwazzjonijiet li jaqgħu taħt dak li nsejñulhom ċirkostanzi “limitati” u “eċċezzjonali” hekk identifikati mill-

<sup>5</sup> 39. (1) Awtoritajiet kontraenti għandhom jitrattaw operaturi ekonomiċi b'mod ugwali u mingħajr diskriminazzjoni u għandhom jaġixxu b'mod trasparenti u proporzjonali.

Qorti Ġenerali tal-Unjoni Ewropea f'Tideland Signal u Antwerpse Bouwwerken.

»Illi, għalhekk, il-ġurisprudenza tal-Qorti tal-Ġustizzja tal-Unjoni Ewropea hekk citata mill-appellati direttur, inkluż T-415/10 Nexans France; C-278/14 SC Enterprise Focused Solutions Srl; u C-523/16 MA.T.I. SUD SpA hija kompletament konsistenti ma' Tideland Signal u anke ma' Antwerpse Bouwwerken. Għalkemm dawn il-każijiet jenfasizzaw il-prinċipji ġenerali ta' trattament ugwali u trasparenza, huwa ferm aktar importanti li l-ebda wieħed minnhom ma jikkontradixxi dak li ntqal f'Tideland Signal u f'Antwerpse Bouwwerken, [u] MA.T.I. SUD SpA kien relatat ma' sistema fl-Italja fejn l-oblaturi jitħallew jikkorreġu l-offerti tagħhom wara d-data tal-għeluq tal-kompetizzjoni, soġġett għall-miżata – sitwazzjoni għalkollox differenti mill-każ odjern quddiem din l-onorabbli qorti. Fuq kollox, anke f'MA.T.I. SUD SpA, il-Qorti tal-Ġustizzja tal-Unjoni Ewropea f'paragrafu 53 qalet: "*that, in accordance with the principle of proportionality, which constitutes a general principle of EU law and with which the award of contracts concluded in the Member States must comply, as is apparent from recital 9 of Directive 2004/17 and from recital 2 of Directive 2004/18, the measures adopted by the Member States must not go beyond what is necessary in order to achieve that objective*".

»... ..

»Illi, fid-dawl tas-suespost, is-soċjetà appellanti toħloq parallel mal-proċeduri odjerni, u tissottometti s-segwenti:

- »a. wieħed mill-oġġettivi dikjarati kien il-promozzjoni ta' kompetizzjoni ġenwina bil-ftuħ ta' proċess kompetittiv ta' *tender* li huwa miftuħ, trasparenti u mhux diskriminatorju, u fuq kollox li dan it-*tender* jingħata lit-"*tenderer submitting the offer with the Best Price/Best Quality (BPQR) in accordance with the below*";
- »b. il-valur finanzjarju stmat ta' dan il-kuntratt pubbliku huwa ta' €41,590,323 (eskluz VAT) ... ..;
- »ċ. l-offerta finanzjarja sottomessa mis-soċjetà appellanti kienet ta' €6,368,438.96 (eskluz VAT) *per annum* b'potenzjal totali ta' €38,210,633.76 (eskluz VAT) tul il-perjodu tal-kuntratt pubbliku ta' sitt snin – li huwa iktar minn €2,600,000 irħas minn dak li ssottometta t-tieni l-orħas offerta, li kien l-appellat *Mediclean JV* (€6,806,566 (eskluz VAT) *per annum* u €40,839,396 (eskluz VAT) tul l-istess perjodu ta' sitt snin);
- »d. fl-aġħar ipoteżi kien hemm element ta' ambigwiżà rigward x'jikkostitwixxu l-kliem użati. Dan ġie konfermat fuq ġurament miċ-*chairperson* tal-kumitat ta' evalwazzjoni, Celia Falzon, li kkonfermat bil-ġurament li: "Kien hemm mument li aħna ħassejna li forsi aħna stajna ninjorawh [...] Kellna dubju numru minnha". Tant hu hekk, illi l-kumitat ta' evalwazzjoni ħa d-deċiżjoni li jiskwalifika s-soċjetà appellanti biss wara dan il-parir tad-direttur appellat. Madankollu, ħareġ ukoll illi l-appellat direttur ma ngħatax l-informazzjoni kollha mill-kumitat ta' evalwazzjoni sabiex ikun jistgħa jagħmel evalwazzjoni xierqa skont l-oġġettivi u l-valur tat-*tender* bil-għan illi jiġi applikat il-prinċipju tal-proporzjonalità.

»Abbażi tas-suespost, il-kumitat ta' evalwazzjoni appuntat mill-appellati direttur u s-*Central Procurement and Supplies Unit* messu (i) jew

sempliciment iwarrab il-kliem fid-dokument separat bit-titlu “*Financial Offer*” mingħajr il-bżonn li jitlob kjarifikazzjoni jew rettifikazzjoni (kif ġara fil-kawża ta’ *Ballut Blocks*), jew, fl-alternattiv (ii) jitlob kjarifikazzjoni mis-soċjetà appellanti ta’ jekk il-kliem kellhom jikkostitwixxu riżervazzjoni proprja għall-prezz ikkwotat.

»L-iskwalifikazzjoni tal-offerta tas-soċjetà appellant evidentement tmur *oltre* dak li huwa neċessarju għall-kisba tal-oġġettivi identifikati hawn fuq; b’mod partikolari, il-kumitat ta’ evalwazzjoni ċaħħad lill-appellati direttur u s-*Central Procurement and Supplies Unit* mill-opportunità biex jagħtu l-kuntratt pubbliku lil offerta żgur ferm irħas u potenzjalment teknikament aħjar. Dan huwa imperattiv ukoll meta wieħed jikkunsidra l-istima tal-valur finanzjarju, kif ukoll l-iffrankar tal-flus ta’ dawk li jħallsu t-taxxa: ’il fuq minn €2,600,000.

»... ..

»Illi kien il-bord innifsu li qal espressament li huwa il-“*quoted price submitted on the bid form*” li huwa “*what matters*” u mhux xi haġ oħra x’imkien ieħor fl-offerta. Is-soċjetà appellanti tosserva illi, minkejja li ngħibdet tal-attenzjoni tal-bord għal dan il-każ fit-trattazzjoni verbali, ma ngħatax il-kunsiderazzjoni xierqa fid-deċiżjoni tiegħu.«

13. Il-prinċipju ta’ proporzjonalità jitlob illi offerta ma titwarrabx minħabba kull irregolarità, tkun xi tkun, meta hemm soluzzjonijiet anqas drastici li, iżda, ma jmorrux kontra prinċipji oħra bħal ma huma dak ta’ trattament indaqs u trasparenza. Dan wara kollox ma huwiex flief applikazzjoni tal-prinċipju *ut res magis valeat quam pereat*, li ma sirniex nafu bih biss meta dħalna fl-Unjoni Ewropea. Naturalment, għandu jitħares ukoll il-prinċipju li l-oblaturi kollha jkunu trattati bl-istess mod u ħadd ma jingħata vantaġġ kompetitiv, u huwa għalhekk li jingħad illi ċ-ċirkostanzi fejn il-prinċipju ta’ proporzjonalità ma jħallix li offerta titwarrb minħabba irregolarità huma “limitati” u “eċċezzjonali”. Fil-każijiet kollha fejn ġie applikat il-prinċipju ta’ proporzjonalità ittieħed qies li dan ma jservix biex jingħata vantaġġ lil oblatur billi effettivament jitħalla jvarja l-offerta tiegħu.

14. Is-soluzzjonijiet “anqas drastici” identifikati minn *Servizi* huma: (i) sejha għal kjarifika, biex *Servizi* tfisser aħjar x’riedet tgħid bil-paragrafi li wasslu biex titwarrab l-offerta; u (ii) li jitwarrbu biss dawk il-paragrafi, u mhux l-offerta kollha.
15. L-ewwel possibilità kienet il-kjarifika.
16. Kif għa rajna fit-trattazzjoni tal-ewwel żewġ aggravji, iżda, l-offerta kienet ċara – kienet offerta bi prezz li jogħla perjodikament – u ma kienet meħtieġa ebda kjarifika. Kjarifika kienet effettivament tkun okkażjoni biex *Servizi* tiddel l-offerta u hekk tieħu vantaġġ fuq dawk l-oblaturi li, għax imxew kif ried id-dokument tas-sejha għal offerti, qiesu mill-bidunett il-fatturi li dwarhom *Servizi* għamlet riżerva u hekk għamlu offerta ogħla.
17. It-tieni possibilità kienet li jitwarrbu l-paragrafi li wasslu għall-iskwalifika.
18. Li kieku għamel hekk il-bord kien mhux biss ikun qiegħed ibiddel l-offerta ta’ *Servizi* billi jagħmilha aktar vantaġġjuża, bi preġudizzju għall-oblaturi l-oħra, iżda wkoll jikser il-kondizzjoniet tas-sejha għal offerti li fil-para. 1.1 tal-*Instructions to Tenderers – General Instructions* tgħid:
- »No account can be taken of any reservation in the tender as regards the tender document; any disagreement, contradiction, alteration or deviation shall lead to the tender offer not being considered any further.«
19. Meta offriet prezz li jogħla perjodikament *Servizi* kisret kondizzjoni oħra li tgħid illi:

The price offered must include all of the works/services/supplies to be provided. Unless otherwise provided in the procurement documents, the prices quoted by the tenderer are fixed and not subject to revision or escalation in costs.«<sup>6</sup>

20. Il-konsegwenza ta' dan il-ksur kellha tkun "*the tender offer not being considered any further*" u mhux, kif tippretendi *Servizi*, "*the reservation in the tender offer not being considered any further*", li kien il-każ li kieku twarrbu biss il-paragrafi dwar iż-żjieda perjodika fil-prezz.
21. Il-bord għalhekk għamel sew li warrab l-offerta ta' *Servizi* u mhux biss il-paragrafi problematiċi.
22. Dan l-aggravju wkoll għalhekk huwa miċħud.
23. Għal dawn ir-raġunijiet il-qorti tiċħad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Revizjoni. L-ispejjeż ta' dan l-episodju tħallashom *Servizi*.

Joseph Azzopardi  
President

Giannino Caruana Demajo  
Imħallef

Noel Cuschieri  
Imħallef

Deputat Reġistratur  
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<sup>6</sup> *General rules governing tenders*, para. 7.4.