

QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tlieta 3 ta' Settembru 2019

Numru 1
Appell numru 170/2019

European Pilot Academy

v.

Direttur tal-Kuntratti;
Il-Kap Kmandant Forzi Armati ta' Malta; u
Malta School of Flying għal kull
interess li jista' jkollha

1. Dan huwa appell ta' *European Pilot Academy* minn deċiżjoni tat-28 ta' Mejju 2019 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]. Il-każ quddiem il-Bord ta' Revizjoni kien dwar oġġezzjoni ta' *European Pilot Academy* kontra deċiżjoni tal-Forzi Armati ta' Malta [il-Forzi Armati] illi kuntratt għal taħriġ ta' bdoti jingħata lil *Malta School of Flying* taħt il-“proċedura negozjata” li

jaħsbu għaliha r-regg. 150 *et seqq.* tal-L.S.174.04. Il-fatti rilevanti huma dawn:

2. Il-Forzi Armati kisbu permess mingħand id-Direttur tal-Kuntratti taħt ir-regg. 154(1)(ċ) tal-L.S.174.04 sabiex jibdew proċedura negozjata ma' *Malta School of Flying* u ma' *European Pilot Academy* bil-ħsieb li twassal għal kuntratt dwar taħriġ ta' bdoti. Kemm *Malta School of Flying* u kemm *European Pilot Academy* wrew interess li jieħdu sehem f'negozjati u, wara li l-Forzi Armati fissanhom il-ħtiġijiet tat-taħriġ, it-tnejn għamlu offerti. Wara li talbu u ngħataw diversi kjarifiki dwar l-offerti, il-Forzi Armati iddeċidew li jkomplu n-negozjati ma' *Malta School of Flying* billi l-offerta ta' din laħqet il-kriterji u kienet l-orħos. Tkomplew in-negozjati u ntlahaq ftehim dwar abbozz ta' kuntratt. B'ittri tat-2 u tal-4 ta' April 2018 *European Pilot Academy* għiet mgħarrfa illi kien hemm il-ħsieb illi l-kuntratt jingħata lil *Malta School of Flying*.
3. B'ittra tat-8 ta' April 2018 *European Pilot Academy* ressqet oġġezzjoni quddiem il-Bord ta' Revizjoni u talbet illi titħassar id-deċiżjoni li l-kuntratt jingħata lil *Malta School of Flying* u li titħassar il-proċedura kollha billi deħrilha illi "*the whole procurement procedure is null and void*".
4. Il-Bord ta' Revizjoni, b'deċiżjoni tat-28 ta' Marzu 2019 li minnha sar dan l-appell, ċaħad l-oġġezzjoni ta' *European Pilot Academy* u ikkonferma d-deċiżjoni tal-Forzi Armati. Ir-raġunijiet li wasslu lill-Bord ta' Revizjoni għal din id-deċiżjoni ġew imfissra hekk:

»This board,

»having noted this objection filed by *European Pilot Academy-Malta* (hereinafter also referred to as the Appellants) on 8 April 2019, refers to the claims made by the same Appellants with regards to the tender awarded by Armed Forces of Malta, (hereinafter referred to as the Contracting Authority).

»... ..

»Whereby the Appellants contend that:

- »a) the Authority did not obtain the approval of the Director General of the Contracts Department prior to the issue of the negotiated procedure for this tender;
- »b) they were not given details with regard to right of appeal;
- »c) the Authority did not provide information with regard to the award procedure and criteria;
- »d) no negotiations took place so that the whole objective of the offer under the negotiated procedure was not adhered to by the Authority..

»This board has also noted the Contracting Authority's letter of reply dated 17 April 2019 and its verbal submissions during the public hearing held on 16 May 2019, in that:

- »a) the Authority insists that it had all the necessary approvals for the issue of a negotiated procedure for this tender;
- »b) Appellants were given all the information with regard to right of appeal, so much so that, some Appellants filed an objection to the appropriate authority;
- »c) the Authority contends that, had the Appellants any problem in identifying the award criteria and procedure, same had the opportunity to seek clarification prior to submitting their offer;
- »d) the Authority also maintains that Appellants were given the opportunity to adjust their price; however, they just confirmed their original offer. In this regard, the Authority would emphasize that the two submitted offers were compliant and the deciding factor was the price.

»... ..

»This board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witnesses, would treat the merits of Appellants' grievances as follows:

»1. with regard to Appellants' first contention in that the Authority did not obtain the approval of the Director of Contracts for the issue of the negotiated procedure, this Board would respectfully refer to an email dated 11 October 2018, wherein the necessary authorisation to enter into a negotiated procedure was granted by the Department of Contracts, as follows:

»... ..

»The above correspondence clearly shows that the Authority had the necessary authorisation to enter into a negotiated procedure for this particular tender and in this regard this board does not uphold Appellants' first contention.

»2. with regard to Appellants' second contention, this board would refer to the notice of rejection dated 4 April 2019, wherein details with regard to deadline of appeal and deposit to be made were given. It is a fact that, the Public Contracts Review Board was not mentioned in the said rejection letter; however, Appellants were well aware that such appeals are heard by the Public Contracts Review Board and in fact this board notes that, after only four days of receipt of the rejection letter, Appellants filed their objection to the correct Review Board. In this regard, this board opines that enough details were given by the Authority to enable Appellants to appeal without any undue difficulty and in this respect does not uphold Appellants' second contention;

»3. with regard to Appellants' third contention in that they were not served with details and information regarding the award criteria and procedure, this board would refer to the 'Terms of Reference' which Appellants were well aware of and such terms formed the basis of the negotiated procedure. At the same instance, one must point out that Appellants' contentions in this regard and at this particular stage are not justified, as Appellants had the opportunity and remedy to either seek clarifications or submit a call for remedy prior the closing date of submission of offers. This board would refer to an email dated 10 December 2018 whereby the terms of reference were submitted by the Authority, as follows:

»"From: Vassallo Ryan at AFM
»"Sent: 10 December 2018 21:47
»"To: Matthew Rota
»"Cc: Ebejer Jason at AFM; Capt. Ray Zarb; Roe Darren at AFM; Abdilla Jean-Carl at AFM
»"Subject: RE: Terms of Reference AB INITIO FIXED WINGS
»"Dear European Pilot Academy,
»"Attached please find the Terms of Reference, which shall form the basis of this negotiated procedure.
»"Kindly note that any queries must be forward to undersigned by email until Wednesday, 19th December 2018 and offers until Friday 21st December 2018.
»"Regards,
»"Ryan"

»Through the above correspondence, Appellants had the opportunity to seek any necessary clarifications which they deemed necessary and yet no request for any clarifications was sent.

»At the same instance, this board notes that Appellants submitted their offer on 21 December 2018, without any particular concern to the terms of reference, as follows:

»"You replied on 21/12/2018 11:25
»"To whom it may concern.

- »“Kindly find attached quote as per the AFM requirement.
- »“Please acknowledge that you have received our offer.
- »“Feel free to contact us should you require any further clarifications.
- »“Regards
- »“Matthew Rota
- »“Business Development”

»From the documentation made available to this board, same opines that Appellants were availed of the necessary remedies to request the information which they claim to be missing from the terms of reference and which are being contested now and, in this respect, Appellants did not ask for any clarifications. This board, as it has on occasions, would not accept appeals based on claims for which Procurement Regulations provide remedies prior to resorting to an objection and this particular case is a perfect example of such an instance.

»This board would also refer to Appellants’ claim that the ‘Terms of Reference’ did not contain information on the award criteria and procedure to be applied during the evaluation process and, in this regard, same board would point out that a negotiated procedure is applied in certain cases and the object of such a procedure is to obtain the best offer for the Authority, so that it could either be the cheapest or the most advantageous offer, On the other hand, this board also notes that, if Appellants had any concerns regarding the award criteria, they could have requested the necessary explanation or clarifications at the time of receipt of the ‘Terms of Reference’ and this board notes that, again, Appellants are bringing forward a complaint for which they should have sought remedy prior to the submission of their offer. In this regard, this board does not uphold Appellants’ third grievance.

«4. with regard to Appellants’ fourth grievance in that the Authority did not carry out negotiations, this board would, first and foremost, state that the Public Procurement Regulations do not stipulate how negotiations take place. Negotiations can take the form of correspondence as long as the subject matter is contained. In this particular case, this board took note of the various correspondence and requests for clarifications that took place between the Authority and Appellants and, from the contents of such correspondence, the Authority, quite appropriately, enquired about certain aspects of Appellants’ offer so that it will consider same on the correct assertions.

»This board opines that such correspondence served as a substitute for discussions which normally occur during a negotiated process and reaped the expected results for the evaluation committee to form a fair and just opinion.

»In this respect, there were two offers, and both were fully compliant and it is prudent that, when such a situation arises, the evaluation committee can only recommend the cheaper offer and, in this particular case, Appellants’ offer was not the cheaper one.

»One must also point out that the evaluation committee did not find it necessary to consult the bidders further, as the information and clarifications sought by same were sufficient for the committee to

reach a fair, just and transparent decision. In this regard, this board does not uphold Appellants fourth' contention.

»In conclusion, this board opines that:

- »a) the Authority did obtain the necessary authority to enter into a negotiated procedure for this procurement;
- »b) adequate details were given to Appellants for the right of appeal;
- »c) Appellants were notified more than once that this was a negotiated procedure tender;
- »d) there was no requirement to state the award criteria and procedure to be adopted in this tender as the Authority's main objective was to procure the best offer, whether it be the price or the most advantageous offer. One has to take into account that, in this particular case, both submitted offers were compliant and the deciding factor was the price, and, in this case, it was the more advantageous offer;
- »e) negotiation did take place through various correspondence between the bidders and the evaluation committee and were sufficient enough for the Authority to reach a decision;
- »f) all the Appellants' claims could have been resolved and clarified through either a request for clarification or through a 'call for remedies' prior to the closing date of submissions of offers; however Appellants chose not to avail themselves of such remedies.

»In view of the above, this board

- »i) does not uphold Appellants' contentions;
- »ii) upholds the Contracting Authority's decision in the award of the tender;
- »iii) directs that the deposit paid by Appellants should not be reimbursed.«

5. *European Pilot Academy* ressqet appell minn din id-deċiżjoni quddiem din il-qorti b'rikors tar-13 ta' Ġunju 2019. Id-Direttur tal-Kuntratti wieġeb fis-27 ta' Ġunju 2019 u l-Forzi Armati wieġbu fit-28 ta' Ġunju 2019; *Malta School of Flying* ma weġbitx.

6. Fl-ewwel aggravju *European Pilot Academy* tgħid illi l-kriterji tal-għoti tal-kuntratt ma kinux pubblikati minn qabel. Dan l-aggravju huwa msejjes fuq ir-regg. 124(1) u 127(2) u (7) tal-L.S. 174.04:

»124. (1) Fid-dokumenti ta' akkwist, l-awtoritajiet kontraenti għandhom jidentifikaw is-suġġett tal-akkwist billi jipprovdu deskrizzjoni tal-

ħtiġijiet tagħhom u l-karatteristiċi mitluba mill-provvisti, xogħlijiet jew servizzi li ser jiġu akkwistati u jispesifikaw il-kriterji għall-għoti tal-kuntratt. Huma għandhom jindikaw ukoll liema elementi tad-deskrizzjoni jiddefinixxu r-rekwiżiti minimi li għandhom jintlaħqu mill-offerenti kollha.

»127. (2) Ir-rekwiżiti minimi u l-kriterji tal-għoti ma għandhomx ikunu soġġetti għal negozjati.

»(7) Fejn l-awtorità kontraenti għandha l-intenzjoni li tikkonkludi n-negozjati, għandha tinforma lill-offerenti li jkun baqa' u tistabbilixxi data ta' skadenza komuni għas-sottomissjoni ta' kwalunkwe offerta ġdida jew riveduta. Hija għandha tivverifika li l-offerti finali huma f'konformità mar-rekwiżiti minimi u jikkonformaw mar-regolament 61(2), tivvaluta l-offerti finali fuq il-bażi tal-kriterji tal-għoti inizjalment indikati u tagħti l-kuntratt skont ir-regolamenti 238, 239, 240 u 243.«

7. Dawn id-disposizzjonijiet iżda jgħoddu fil-każ ta' "proċedura kompetittiva b'negozjar" taħt ir-regg. 123 *et seqq.*, waqt illi l-każ tallum ma kienx taħt dik il-proċedura iżda kien taħt il-"proċedura negozjata mingħajr pubblikazzjoni minn qabel" taħt ir-regg. 150 *et seqq.* Waqt illi, taħt il-proċedura kompetittiva b'negozjar, għandha ssir sejha għall-kompetizzjoni permezz ta' avviż, u kull operatur ekonomiku jista' jitlob li jieħu sehem, kif iġid ir-reg. 123(2), taħt il-proċedura negozjata mingħajr pubblikazzjoni minn qabel, taħt ir-regg. 150 *et seqq.* L-awtorità kontraenti tista' tagħzel hi l-operaturi ekonomiċi li magħhom tinneozja. Fil-każ tallum l-awtorità kontraenti – il-Forzi Armati – ingħatat permess mid-Direttur tal-Kuntratti biex tinneozja mal-operaturi ekonomiċi magħzula – *European Pilot Academy* u *Malta School of Flying* – mingħajr pubblikazzjoni ta' avviż b'sejha għal offerti. Ir-regg. 124 u 127, għalhekk, ma jgħoddux għall-każ tallum.
8. F'kull każ, l-ilment ta' *European Pilot Academy* huwa dwar nuqqas li kien jeżisti qabel id-data ral-għeluq tal-offerti u għalhekk, kif sewwa

osserva l-Bord ta' Reviżjoni, l-oġġezzjoni kellha ssir qabel id-data tal-għeluq, u mhux wara, kif iġid u jrid ir-reg. 262¹:

»262. Kandidati prospettivi u offerenti jistgħu, qabel id-data tal-għeluq ta' sejha għall-kompetizzjoni, jipprezentaw rikors b'raġunijiet quddiem il-Bord ta' Reviżjoni:

»... ..

»(e) biex jikkanċellaw is-sejha għall-kompetizzjoni għar-raġuni li s-sejha għall-kompetizzjoni tkun bi ksur ta' xi liġi jew x'aktarx tikser xi liġi partikolari jekk titkompla.«

9. Dan l-ewwel aggravju huwa għalhekk miċhud.

10. Fit-tieni aggravju *European Pilot Academy* tgħid illi, għalkemm il-proċedura magħżula kienet dik "negozzjata", saret "mingħajr negozzjati":

»Illi dan l-aggravju huwa relatat ħafna mal-ewwel wieħed fis-sens illi hawnhekk għandna sejha għall-offerti bi proċedura negozzjata fejn għalhekk wieħed jassumi li ser ikun hemm xi forma ta' negozzjati;

»Illi negozzjati m'humieq kjarifiki. Negozzjati huma negozzjati. Dan il-punt jidher li sfuġġa lill-bord;

»Illi din hija proċedura negozzjata mingħajr pubblikazzjoni skond kif jiddisponi l-artikolu 150 tar-Regolamenti;

»Illi l-bord jgħid illi l-*emails* mibgħutha bejn il-partijiet kienu sostitut tajjeb għan-negozzjati u diskussjonijiet li solitament isiru f'proċedura negozzjata bħal din u dawn l-*emails* kienu biżżejjed biex il-kumitat li għamel l-evalwazzjoni jasal għal opinjoni li tkun ġusta u ekwa;

»Illi hawn wieħed jistaqsi – tenut kont tal-fatt li dina s-sejha ma jeżistux fiha *award criteria*, x'kienet qed tinnegozzja eżatt l-awtorità kontraenti? U jekk innegozzjat, x'titjib għab l-awtorità f'dawn in-negozzjati?;

»Illi l-appellanti fil-waqt li tikkonferma li wiegħbet mistoqsijiet ta' kjarifika li għamlet l-awtorità kontraenti, ċertament qatt ma intalbet tinnegozzja l-pożizzjoni tagħha;

»Illi dan kollu jkompli jikkonferma li dina s-sejha għall-offerti hija kompletament irregolari – mill-bidu sat-tmiem – u fuq dan ma tantx hemm wieħed x'izid;

»Illi finalment dwar il-pożizzjoni li ħa l-bord dwar x'ifissru "negozzjati", fil-waqt li huwa minnu li taħt il-kappa tar-Regolament ma hemmx definizzjoni ċara, pero l-leġislator wera biċ-ċar, anki permezz ta' regolamenti oħra, li xejn f'dawn it-tip ta' negozzjati m'għandu jittiehed b'leġġerezza u qisu xejn m'hu xejn;

¹ Ara *Managing Consulting Service Industry (MCSI) Limited v. Direttur tal-Kuntratti et*, App. 17 ta' Ġunju 2019.

»Illi per eżempju taħt il-kappa tal-proċedura kompetittiva b'negozjati, ir-regolament 127(4) jipprovdi illi:

“127. (4) Matul in-negozjati, l-awtoritajiet kontraenti għandhom jiżguraw it-trattament ugwali lill-offerenti kollha. Għal dak il-għan, ma għandhomx jipprovdu informazzjoni b'mod diskriminatorju li tista' tagħti vantaġġ lil xi offerenti fuq oħrajn. Huma għandhom jinfurmaw lill-offerenti kollha, li l-offerti tagħhom ma ġewx eliminati skont is-subregolament (6), bil-miktub dwar kwalunkwe bidla għall-ispeċifikazzjonijiet tekniċi jew dokumenti oħra ta' akkwist, minbarra dawk li jstabilixxu r-rekwiżiti minimi. Wara dawn il-bidliet, l-awtoritajiet kontraenti għandhom jagħtu biżżejjed ħin lill-offerenti biex jimmodifikaw u jerġgħu jipprezentaw l-offerti emendati, kif adatt.

»Illi fil-waqt li huwa minnu li dan ir-regolament jirreferi għal proċedura differenti, pero juri biċ-ċar li l-kelma “negozjati” ma tfissirx għamel li trid mingħajr kontroll;

»Illi skond il-bord, email fejn l-awtorità kontraenti titlob kjarifika hija ekwivalenti għal negozjati serji. L-appellanti bir-rispett ma taqbilx. «

11. Jingħad qabel xejn illi l-fatt illi kemm fil-“proċedura negozjata mingħajr pubblikazzjoni minn qabel” taħt ir-regg. 150 *et seqq.* u kemm fil-“proċedura kompetittiva b'negozjar” taħt ir-regg. 123 *et seqq.* issir referenza għal negozjar, iż-żewġ proċeduri huma differenti ferm:

»Under the 2004 Directive there are in fact two distinct types of negotiated procedure. Under the first type, the “negotiated procedure with prior publication of a prior contract notice”, the contracting authority must advertise the contract and hold a competition. However, the form of the competition is more flexible than that in open/restricted procedures and also more flexible than that of competitive dialogue. With the second type of negotiated procedure, the “negotiated procedure without publication of contract notice”, the authority may simply negotiate a contract with one or more economic operators, without any advertisement or competition ... The negotiated procedure with a notice and the negotiated procedure without a notice are in fact very different procedures, and it is confusing to refer to both under the single name of “negotiated procedure” «²

12. Ir-referenza għar-reg. 127(4), għalhekk, ma hijiex relevanti.

13. Jidher illi għall-appellanti “negozjati” huma biss dawk li jsiru wiċċ imb'wiċċ madwar mejda. Dan ovvjament ma huwiex korrett. Il-

² Sue Arrowsmith, *The Law of Public and Utilities Procurement*, Sweet & Maxwell, 3rd ed. pp. 959 *et seq.*

korrispondenza bejn l-awtorità kontraenti u l-oblaturi wkoll titqies forma ta' negozjar, u l-fatt li, wara li qieset l-offerti u l-kjarifiki magħmula, l-awtorità sabet illi ż-żewġ oblaturi kienu għamlu offerta valida iżda kien hemm differenza sostanzjali fil-prezz bejn offerta u oħra, u għalhekk għażlet li tkompli n-negozjati mal-oblatur li għamel l-orħos offerta, ċertament ma jammontax għal "għamel li trid mingħajr kontroll" kif tallega *European Pilot Academy* fir-rikors tal-appell tagħha.

14. Dan l-aggravju wkoll għalhekk huwa miċħud.
15. Għal dawn ir-raġunijiet il-qorti tiċħad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Revizjoni. L-ispejjeż ta' dan l-episodju tħallashom *European Pilot Academy*.

Joseph Azzopardi
President

Giannino Caruana Demajo
Imħallef

Noel Cuschieri
Imħallef

Deputat Reġistratur
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