

QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF JOSEPH AZZOPARDI
ONOR. IMHALLEF JOSEPH R. MICALLEF
ONOR. IMHALLEF TONIO MALLIA**

Seduta ta' nhar it-Tlieta, 28 ta' Jannar, 2020.

Numru 6

Rikors numru 279/19

Toncam Properties Limited (C-20016)

v.

L-Onorevoli Ministru tal-Affarijiet Ewropej u Ugwaljanza u s-Segretarju Permanenti fi hdan il-Ministeru ghall-Affarijiet Ewropej u Ugwaljanza, it-tnejn, ghan-nom u in rapprezentanza tal-istess Ministeru; Santal Properties Limited (C-37208); Id-Direttur Generali (Kuntratti) ghal kull interess li jista' jkollu

Il-Qorti:

Dan hu appell imressaq fl-1 ta' Ottubru, 2019, mis-socjeta` rikorrenti Toncam Properties Ltd wara decizjoni datata 12 ta' Settembru, 2019 moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'il quddiem imsejjah il-"Bord") fil-kaz referenza MEAE/40/2019 (kaz numru 1347).

Dan il-kaz huwa marbut mas-sejha ghall-offerti li hareg il-Ministeru intimat ghal “*Leasing of Premises to House Departments and Entities within the Ministry for European Affairs and Equality.*” Ghal dan il-kuntratt intefghu zgur zewg offeriti, wahda mis-socjeta` rikorrenti u l-ohra mis-socjeta` intimata Santal Properties Ltd. Fl-ewwel stadju gie rakkomandat li l-kuntratt jinghata lis-socjeta` rikorrenti li offriet proprjeta` gewwa l-Hamrun bil-kera ta’ €33,607 fix-xahar. Is-socjeta` Santal Properties Ltd. ma qablitx ma’ din id-decizjoni u ressqet appell ghall-quddiem il-Bord. Il-Bord, b’decizjoni tat-12 ta’ Settembru, 2019, laqa’ l-appell ta’ Santal Properties Ltd., u ordna lill-kumitat ta’ evalwazzjoni jerga’ iqis iz-zewg offeriti fid-dawl tal-kunsiderazzjonijiet li ghamel il-Bord.

Id-decizjoni tal-Bord hija s-segwenti:

“This Board,

“having noted this objection filed by Santal Properties Ltd (herein after referred to as the Appellants) on 5 August 2019, refers to the claims made by the same Appellants with regard to the tender of reference MEAE/40/2019 listed as case no 1347 in the records of the Public Contracts Review Board, awarded by Ministry for European Affairs and Equality (herein after referred to as the Contracting Authority).

“Appearing for the Appellants: Dr Reuben Farrugia
Appearing for the Contracting Authority: Dr Fiorella Fenech Vella

“Whereby, the Appellants contend that:

- a) The property being offered by the preferred bidder is not situated in the Central Region of Malta, as duly stipulated in the tender

document, so that such an offer should have been rejected by the Evaluation Committee.

- b) It is doubtful as to whether the preferred bidder's property has the necessary parking area as duly stipulated in the tender and yet conforms to the current planning policy.
- c) In accordance with the applicable EU Directive, the award criteria should not be the cheapest offer but rather the most economically advantageous offer, in other words, value for money.

"This Board also noted the Contracting Authority's 'Letter of Reply' dated 13 August 2019 and its verbal submissions during the hearing held on August 2019, in that:

- a) The Authority contends that, by Central Region area, for logistic purposes, the building had to be located in the Valletta, Floriana or the Central Regional area, meaning that the building should be close to the Valletta area, since the Ministry's main office is located in Valletta.
- b) The Authority maintains that the preferred bidder has all the necessary Planning Authority permits, so that the parking area being offered by the bidder conforms with the policy of the Planning Authority.
- c) Although the award criterion was the cheapest price, the Evaluation Committee took into consideration the aspects of the most advantageous offer, in their deliberations.

"This same Board also noted the testimony of the witnesses namely; Mr Adrian Dalli, duly summoned by the Public Contracts Review Board Dr Daniel Saliba, duly summoned by the Public Contracts Review Board Arch Clive Borg Bonaci duly summoned by the Public Contracts Review Board.

"This same Board has also taken note of the documents submitted by the witness Dr Saliba which consisted of Doc 1 – an extract from the 'Eleventh Schedule of the Local Government Act (Chapter 363).-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, opines that the first issue which must be considered prior to the treatment of other grievances raised by Appellants, refers to the Authority's requirements with regard to the location of the premises and the actual location of the property being offered by the preferred bidder.

- "1. This issue has been raised by Appellants in the first place, and this Board opines that, it is the important issue to be considered

and decided upon, prior to the treatment of the other two Appellants' claims.

- "2. This Board would respectfully refer to appendix V (Tenderer's Technical Offer). Wherein it is being stipulated that:

"Due to logistical considerations, the building must be located in the Valletta, Floriana or the Central Region area in Malta."

"First and foremost, the tender document, quite explicitly, denoted 'The Central Region Area in Malta'. In this respect, this Board has no doubt in interpreting such a statement, to mean, the 'Central Region of Malta', so that one has to establish which areas are included in the 'Central Region of Malta'.

- "3. This Board has been made aware that Malta is divided into five regions which are; the North, the South, the South East, the Central Region and Gozo. Such a division of regions are clearly denoted in the 'Eleventh Schedule of the Local Government Act (chapter 363)' and for ease of reference, it is being listed hereunder:

Miżjuda:
XVI. 2009.50.
Emendata:
A.L. 231 tal-2011;
A.L. 313 tal-2011.

IL-ĦDAX-IL SKEDA
 (Artikolu 37)
 Reġjuni

Reġjun Għawdex	Reġjun Tramuntana	Reġjun Ċentrali	Reġjun Xlokk	Reġjun Nofsinhar
Ir-Rabat (Città Victoria)	L-Imdina (Città Notabile)	Ħ'Attard	Il-Belt Valletta (Città Umilissima)	Hal Qormi (Città Pinto)
Il-Fontana	Ħad-Dingli	Ħal Balzan	Il-Birgu (Città Vittoriosa)	Ħaż-Żebbuġ (Città Rohan)
Għajnsielem	Ħal-Għarghur	Birkirkara	L-Isla (Città Invicta)	Is-Siġġiewi (Città Ferdinand)
L-Għarb	Il-Mellieha	Il-Gżira	Bormla (Città Cospicua)	Birzebbuġa
L-Għasri	L-Imġarr	L-Iklin	Ħaż-Żabbar (Città Hompesch)	Il-Gudja
Ta' Kerċem	Il-Mosta	Ħal Lija	Iż-Żejtun (Città Beland)	Ħal Għaxaq
Il-Munxar	In-Naxxar	L-Imsida	Il-Fgura	Il-Ħamrun
In-Nadur	Pembroke	Tal-Pietà	Floriana	Ħal Kirkop
Il-Qala	Ir-Rabat	San Ġiljan	Il-Kalkara	Ħal Luqa
San Lawrenz	San Pawl il-Baħar	San Ġwann	Il-Marsa	L-Imqabba
Ta' Sannat	Is-Swieqi	Santa Venera	Marsaskala	Il-Qrendi
Ix-Xaġhra	L-Imtarfa	Tas-Sliema	Marsaxlokk	Ħal Safi
Ix-Xewkija		Ta' Xbiex	Raħal Ġdid	Santa Luċija
Iż-Żebbuġ			Ħal Tarxien	Iż-Żurrieq
			Ix-Xgħajra	

"From the above schedule, it is clearly deduced that location 'Hamrun' is not in the 'Central Region' in Malta but rather in the 'Southern Region'. In this respect, this Board would also refer to extracts from the testimony of Dr Daniel Saliba, as follows:

"Xhud : *Jien għandi hawn hekk miegħi l-iskeda, 11th schedule. Il-Hamrun ma tiffurmax parti mir-Regjun Ċentrali le. Tiffurma parti mir-Regjun Nofsinhar.*

"Avukat : *Tista tipprezenta kopja tal-iskeda*

"Xhud : *Mela le.*

- “Avukat : Jigifieri l-Hamrun ma tiffurmax parti mis-Central Region?”*
- “Xhud : Ghall-finijiet tal-Att 363, ma tiffurmax parti mir-Regjun Centrali le*
- “Chairman : meta tghidli ghall-finijiet, x’finijiet huma?”*
- “Xhud : ghal- ligi taghna tal-att dwar il-Gvern Lokali. Jigifieri jien qed ninterpreta din l-iskeda f’dan li ghandu x’jaqsam il-Gvern Lokali biss*
- “Chairman : Meta tghid il-Gvern, mhux il-Gvern Lokali, iqis il-Hamrun outside the Central Region?”*
- “Xhud : Again ghall-finijiet tal-Kunsilli Lokali u l-Kunsilli Regjonali li jiffurmaw*
- “Chairman : Dan huwa ghall-finijiet tal-kunsilli hux vera*
- “Xhud : Iva*
- “Avukat : Din il-ligi giet promulgata mil-legislatur*
- “Xhud : Process normali*
- “Avukat : Meta nghidu ghall-finijiet tal-Gvern Lokali, legislatur, qasam lil Malta f’diversi regjuni ghall-finijiet ta’ Governanza Lokali*
- “Xhud : Ghax jekk nista nispjega ftit, jezistu l-Kunsilli Regjonali li johorgu minn Article 37 tal-Att li fil-fatt l-Iskeda taghmel referenza ghaliha. Dawn il-Kunsilli Regjonali tahthom ghandu numru ta’ kunsilli. Kull kunsill jidhol taht wiehed minnhom. Huma maqsumin ghall-finijiet ta’ dawn il-Kunsilli Regjonali*
- “Chairman : Jigifieri kemm hemm regjuni?”*
- “Xhud : Hemm 5 regjuni. North, South, East, West u Ghawdex*
- “Chairman : U tas-Central kif gie stabbilit?”*
- “Xhud : Jigifieri liema lokalitajiet jidhlu that ir-Regjun Centrali? Xi haga storika ta’ 25 sena ilu. Il-Kunsilli Lokali ilhom jezistu 25 sena. Wiehed irid imur lura 25 sena biex jara x’kienet ir-raguni ghalfejn certu lokalitajiet dahlu taht dak ir-regjun u ohra*

“Chairman : U l-Hamrun ma jigix

“Xhud : Le jaqa’ that ir-Regjun Nofsinhar

“Avukat : Xejn iktar”

“4. On the other hand, the Authority is claiming that Appellants’ argument is based upon an Act which specifically divides Malta into Regions, for the sole purpose of identifying Local Councils. At the same instance, the Authority is insisting that in accordance with the ‘Central Malta Local Plan’, ‘Hamrun’ is included therein. An extract from the testimony of Arch Clive Borg Bonaci is being referred to:

“Avukat : Bhala lokazzjoni f’Malta, il-Hamrun kif jitqies fil-local plans mahrugin mill-Awtorita tal-Ippjanar?

“Xhud : Il-Hamrun jitqies bhala parti mis-Central Area Local Plan

“Avukat : Ahna printjajna l-ewwel pagna ta’ dan il-Local Plan sabiex nuru li s-Central Malta Local Plan meta l-Contracting Authority giet biex tiddeciedi u taghmel l-ispecifications tal-post, hadet in consideration dan il-Local Plan ukoll. Dan is-Central Malta Local Plan covers the central areas of u jsemmilek il- postijiet. Fil-fatt il-Hamrun huwa mnizzel ukoll bhala parti mir-Regjun Centrali ta’ Malta

“Chairman : Mela allura ser ikollna zewg dokumenti li ma jaqblux ma xulxin hawn hekk

“Avukat : Lanqas xejn. Dak huwa id-definition ta’ Central Region u dak qieghed fil-ligi u dawn huma building policies. Height limitations and so on so forth. Hemm hekk dik hija d-definition ta’ Central Region area. Dik hija d-definition tal-istess terminologija uzata fit-tender. Dan huwa l-pjan lokali ta’ x’jista jigi zviluppat f’zona jew ohra. Din issa hargu biha in the eleventh hour ghax fir-risposta ma ssemma xejn

“Chairman : Document number 2. Allura B’Kara taqa wkoll taht Central region?

“Xhud : Iva

“Avukat : Central Malta mhux Central Region. Central Malta Local Plan. Dik mhix is-Central Region. Ma nhawwdux it-terminologiji.

“Chairman : *Din is-schedule ghalkemm qed jghidlek hawn hekk il-Gvern Lokali, din is-schedule fejn qed jghidlek ir-regjuni, hija l-ligi. Enacted u ghaddiet mill-Parlament*

“Avukat : *Iva dak huwa Kap 363.*

“Chairman : *Allura Gharghur tigi central area wkoll?*

“Xhud : *Fil-Local Plan innizzla bhala Central Area*

“Avukat : *Pero bhala local plans, naqblu li hemm iktar minn wiehed? Kif inhuma mqassmin il-local plans f'Malta?*

“Xhud : *Hemm in-Northern Area, hemm is-South u hemm il-Grand Harbour Area wkoll*

“Avukat : *Bhala Local Plans, naqblu li dawn jigu approvati mill-Parlament?*

“Xhud : *Jiddispjacini imma minix l-ahjar wiehed li naghti risposta ghal dik il-mistoqsija. Pero li nista nghid zgur, jigu prezentati mill-Planning Authority. Il-procedura ezatt ma nafhiex pero jghaddu through a legal system*

“Avukat : *Bhala Local Plans ghalfejn saru?*

“Xhud : *Saru biex ikun hemm policies li jkunu ovjament abbonati ma' kull area u saru minghajr ma tigi eskluza l-ebda lokalita fin-nofs. Jigifieri jekk qed nghidli li forsi huwa diskutibbli jekk il-Gharghur hux parti mil-local plan, pero l-areas tal-madwar bhal ma huma Hal Lija, Birkirkara u n-Naxxar, huma parti mill-area. Jigifieri dan kien hemm delineation line li gewwa minn dak il-line tigi l-lokalita kollha*

“Chairman : *Imma that is for planning purposes. Ghax ahna jinteressana xi haga regjun li huwa ufficjali. L-ufficjali hija din. What you are talking about is an area. There is a difference between an area and a region*

“Xhud : *Jien ir-remit tieghi huwa fl-ippjanar. Jigifieri jekk ser issem mili ligi ta' governanza, zgur mhux l-ahjar wiehed li nwiegeb*

“Chairman : *Imma you are covering an area*

“Xhud : *Hekk hu*

“Chairman : Grazzi”

“From the above testimony, this Board establishes that the mentioned ‘Central Plan’ was published for the purposes of identifying building zones and planning areas. Such a plan does not provide a faithful geographical representation of areas, whilst on the other hand, the Eleventh Schedule (Article 37) chapter 363, denotes clearly which zones are situated in the North, South, South East and Central Region in Malta. In this regard, this Board opines that the regions, as denoted in the Eleventh Schedule, are logically and geographically established and at the same instance, it should be noted that, such Local Government Act has been legally established for the last 25 years.

“5. It has been argued that, the intention of the Authority, for logistical purposes, was to have the property situated in Valletta, Floriana or a nearby area so that ‘Hamrun’ would fit in the desired area, as it was near Valletta and Floriana. In this respect, this Board is not concerned on what the authority intended, but rather considers what the tender document stipulated, wherein, reference is clearly and explicitly being made to ‘The Central Region in Malta’, which in fact, represents the actual geographical regions, as duly denoted in the Eleventh Schedule (Article 37), so that ‘Hamrun’ is not situated in the Central Region in Malta.

“6. It has also been claimed by the Authority that intentions do overrule what is written and with all due respects, this Board opines that, such a maxim applies in a situation where dispute on the interpretation of a contract condition is being considered. In this particular case, the tender document is stipulating conditions to prospective bidders prior to any contractual obligations, so that such conditions bind the Authority and the bidder and this Board is justifiably convinced that, had the Authority wished to express its intentions, it should have stipulated exactly what is being meant by ‘The Central Region’, so that all prospective bidders would be aware of the exact locations where the property had to be situated.

“7. With regard to the claim made, in that, for logistical purposes ‘Hamrun’ is more beneficial to the Authority than other areas more distinct from Valletta, this Board opines that, it could also be argued that ‘The Central Region in Malta’, can also be beneficial to the Authority, for other logistical reasons. In this respect, this Board opines that such an argument would not justify the fact that, although ‘Hamrun’ is not in ‘The Central Region’ in Malta, the logistical element would supersede what is being dictated in the tender document.

“8. This Board would emphasize that the technical specifications and stipulated conditions in a tender must be:

- Unambiguous
- Verifiable
- Concise, simple and precise
- Understandable
- Feasible

In this particular case, this Board does not identify any deficiency in the stipulated specifications of the tender document and confirms that the latter were clear, unambiguous, feasible and understandable.

“9. This Board would refer to correspondence received from the Authority, after the hearing of this Appeal, whereby issues which were not treated and considered, were raised. In this regard, this Board would point out that, such correspondence is unethical and is being ignored as the issues considered by this Board, do not pertain to the claims mentioned therein.

“In conclusion, this Board opines that:

- “a) The specifications so stipulated in the tender document, with regard to the location of property, were clear enough for prospective bidders to identify the requested location.
- “b) The Eleventh Schedule of the Local Government Act (Chapter 363) gives a reliable and faithful geographical direction of the towns and villages in Malta and the division into the five Regions clearly identifies that, the town of ‘Hamrun’ is situated in the Southern Region of Malta.
- “c) If the Authority’s intentions were to limit the location of property as much as possible, close to Valletta, it should have denoted such a requisite in the first place and this Board confirms that ‘The Central Region in Malta’ does not include ‘Hamrun’ whilst at the same instance the Evaluation Committee ignored such an important stipulated condition in the tender document, in their deliberations.

“In view of the above, this Board,

- “i) does not uphold the Authority’s decision in the award of the tender,
- “ii) directs the Authority to re-integrate Appellants’ offer in the evaluation process,

- “iii) directs the Authority to appoint a new Evaluation Committee,
- “iv) directs the new Evaluation Committee, in their deliberation, to take into consideration this Boards’ findings,
- “v) directs the new Evaluation Committee to resume the evaluation process of both offers received,
- “vi) directs that the deposit paid by Appellants should be fully refunded.”

L-offerta tas-socjeta` Santal Properties Ltd. kienet ta' proprjeta` f'Birkirkara bil-keru ta' €54, 075 fix-xahar. Skont is-sejha, il-bini offrut kellu jkun "*in the Valletta, Floriana or the Central Region Area in Malta*". Il-Bord, kif jidher mid-decizjoni tieghu, kellu jiddeciedi fuq it-tifsira li kellha tinghata lil "*the Central Region Area*". Il-Bord irrefera ghall-Att dwar Gvern Lokali fejn Birkirkara titqies fir-Regjun tan-Nofs, waqt li l-Hamrun jaghmel parti mir-Regjun tal-Qibla. Il-Bord, ghalhekk, hassar ir-rakkomandazzjoni li nghatat favur il-proprjeta` tal-Hamrun (dik tas-socjeta` rikorrenti) u ordna stharrig mill-gdid tal-offerti fid-dawl tal-kunsiderazzjoni tieghu li Birkirkara u mhux il-Hamrun jinsab fir-Regjun tan-Nofs.

Is-socjeta` Toncam Properties Ltd. issa qed tappella mid-decizjoni li ha l-Bord ghal quddiem din il-Qorti u ressqet aggravju marbut mal-fatt li fit-tender ma hemmx referenza ghall-Att dwar il-Gvern Lokali bhala tifsira ta-Central Region Area. Tghid ukoll li, min-naha l-ohra, fil-Pjan Lokali ghac-Centru ta' Malta promulgat taht l-Att dwar l-Ippjanar tal-Izvilupp,

1992 (Kap 356 tal-Ligijiet ta' Malta) u li ghadu fis-sehh taht l-Att dwar l-Ippjanar tal-Izvilupp, 2016 (Kap 552 tal-Ligijiet ta' Malta), il-Hamrun (u anke Birkirkara) huwa kollokat fost il-lokalitajiet li jinsabu fic-centru ta' Malta.

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

Ikkonsidrat:

Illi din il-Qorti thoss li ghandha tibda biex tirrimarka li z-zmien mohli fuq dan il-kaz, kemm mill-Bord u kif ukoll minn din il-Qorti, u l-ispejjez kbar inkorsi, huma kollha rizultat tal-fatt li min hejja t-*tender* ma deherlux li kellu joffri tifsira ta' ghal xiex kien qed jirreferi bil-frasi "*the Central Region Area*". Ghalfejn intuzat dik il-frazi ma giex spjegat, ghalkemm inghad fid-dokument ghas-sejha li l-indikazzjoni tal-lokalitajiet ghall-proprijeta` ghall-uzu mill-Ministeru saret "*due to logistical consideration*". Ma hux sew li fi hrug ta' sejha jitpoggew frazijiet vagi li jistghu jaghtu lok ghall-varji interpretazzjonijiet.

Din il-Qorti tifhem il-hsieb wara d-decizjoni tal-Bord. L-uzu tal-frasi "*Central Region*" jista' jaghti x'jifhem li l-Ministeru koncernat ried jirreferi

ghal-legislazzjoni li taqsam Malta f'regjuni, li hu l-Att dwar il-Kunsilli Lokali, u dik il-frazi ma thallix lok ghall-interpretazzjoni ohra. Il-Ministeru ma irriferietx ghal-lokalita` li tista' tkun vicin il-Belt jew il-Floriana jew fl-inhawi ta' dawn iz-zewg postijiet. Lanqas ma rrefera ghall-area centrali, izda ghar-regjun centrali.

Din il-Qorti, pero`, tara li m'ghandhiex tinjora l-frasi "*due to logistical consideration*" li tikkwalifika l-lokalitajiet indikati. Hu car li l-Ministeru, minhabba ragunijiet logistici, ried postijiet gewwa jew vicini l-Belt, u ma riedx postijiet 'il boghod mic-centru tal-attivita` tieghu.

Il-Qorti tara li, per ezempju, anke H'Attard, l-Iklin u San Giljan huma inkluzi ma' Birkirkara, fir-Regjun Centrali, skont skeda Hdax tal-imsemmi Att dwar il-Kunsilli Lokali (Kap 363 tal-Ligijiet ta' Malta), li zgur ghandhom jitqiesu 'l boghod mic-centru tal-Belt. Id-decizjoni tal-Bord, fl-ahhar mill-ahhar, effettivament tinjora ghal kollox kull konsiderazzjoni logistika, li bih il-Belt, il-Floriana, u Birkirkara jitqiesu bhala lokalitajiet centrali, logistikament accettabbli ghal-finijiet tas-sejha, izda mhux ukoll il-Hamrun minkejja li dan huwa geografikament u logistikament kollokat bejn il-Floriana u Birkirkara.

Din il-Qorti tinnota wkoll li fid-dokumenti tas-sejha saret referenza ghac-*Central Regional Area* u *Central Region Area* u mhux b'mod kostanti

ghac-Central Region Area, li juri li ma kienx hemm hsieb li l-lokalita` tintrabat mal-uzu tar-Regjun Centrali tipika fl-Att dwar il-Kunsilli Lokali.

Ghalhekk, tara li d-decizjoni tal-Bord ghandha tigi mhasra, hlief fejn ordnat li d-depozitu li ghamlet is-socjeta` Santal Properties Ltd. ghall-appell li ghamlet quddiemha ghandu jigi rifuz, u dana peress li dik is-socjeta` ma kellhiex tort sal-ahhar li hasbet kif hasbet, minhabba l-inezattezzi ta' kif saret is-sejha ghall-offerti.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell ta' Toncam Properties Ltd. billi tilqa' l-istess u thassar u tikkancella d-decizjoni li ha l-Bord f'dan il-kaz fit-12 ta' Settembru, 2019, hlief ghall-punt (vi) tad-decide li qed ikun konfermat.

L-ispejjez ta' dan l-appell, minhabba dak li ntqal qabel, jithallsu kollha mill-Ministeru tal-Affarijiet Ewropej u Ugwaljanza.

Joseph Azzopardi
Prim Imhallef

Joseph R. Micallef
Imhallef

Tonio Mallia
Imhallef

Deputat Registratur
gr