



QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF ANTHONY ELLUL

Seduta ta' nhar il-Ħamis, 25 ta' Frar, 2021.

Numru 15

Appell numru 320/2020/1

Specialist Group Cleaners Limited
(C-65296) f'isimha u f'isem is-soċjetà
estera *Diemme Società Cooperativa a*
***Responsabilità Limitata* (numru tal-IVA**
01329191009), flimkien f'isem il-joint
venture bl-isem *Salus Cleaning JV*

v.

Central Procurement and Supplies Unit
tal-Ministeru tas-Saħħa; id-Direttur tal-
Kuntratti; u *Servizi Malta Limited*
(C-45511)

1. Dan huwa appell ta' *Specialist Group Cleaners Limited proprio et nomine* ["*Salus*" jew "l-appellanti"] minn deċiżjoni tal-14 ta' Ottubru 2020 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [L.S. 601.03], li ċaħad oġġezzjoni tagħha kontra deċiżjoni tas-*Central Procurement and Supplies Unit* ["l-awtorità kontraenti"] li biha

twarrbet offerta tagħha wara sejha pubblika għal offerti u illi l-kuntratt relativ jingħata lil *Servizi Malta Limited* [“*Servizi*”].

2. Il-fatti rilevanti seħnew hekk: kienet saret sejha mill-awtorità kontraenti għal offerti “*for the Provision of Cleaning Services using Environmentally Friendly Cleaning Products to the Mental Health Services and Other Entities within the Ministry for Health (Lot 1)*”. Saru offerti minn, fost oħrajn, *Salus* u *Servizi*. Fis-17 ta’ Lulju 2020 *Salus* giet mgħarrfa illi l-offerta tagħha giet imwarrba fuq il-kriterju ta’ *best quality/price ratio* għax “*the treshold of 60 marks was not obtained since various PDF Files could not be opened*”.
3. Li ġara kien li t-tagħrif mitlub mill-awtorità kontraenti għall-għanijiet tas-sejha intbagħat elettronikament minn *Salus* fil-forma ta’ *.pdf files* iżda l-awtorità kontraenti ma setgħetx tiftaħ dawk il-*files* biex taqrahom.
4. Billi dehrila li l-offerta tagħha ma kellhiex titwarrab u l-kuntratt ma kellux jingħata lil *Servizi*, *Salus* b’ittra tas-27 ta’ Lulju 2020 ressqet oġġezzjoni quddiem il-Bord ta’ Revizjoni b’talba biex titfassar id-deċiżjoni li l-offerta tagħha titwarrab.
5. Bid-deċiżjoni tal-14 ta’ Ottubru 2020 li minnha sar dan l-appell, il-Bord ta’ Revizjoni ċaħad it-talbiet ta’ *Salus*. Il-konsiderazzjonijiet li wasslu lill-bord għal din id-deċiżjoni ġew imfissra hekk:

»This board having noted this objection filed by *Salus Cleaning JV* (hereinafter referred to as the Appellants) on 27th July 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2198/2019 (Lot 1) ahereby, the Appellants contend that:

- »a) their main concern refers to the alleged reason given by the Authority for the penalisation through the deduction of marks on their offer, claiming that certain files could not be opened on the ePPS¹ by the Authority. Appellants insist that they had submitted all the requested information through the proper channels of the system and, since such an issue is of a highly technical nature, requested that an independent IT expert should be appointed to investigate and determine the real cause of such alleged shortcoming;
- »b) Appellants also insist that they had submitted the requested certificate relating to the 'Equality Mark'. However, since it was in the Italian language, the Authority decided to ignore it completely.

This board also noted the Contracting Authority's letter of reply dated 5th August 2020 and its verbal submissions during the virtual hearings held on 24th August and 5th October 2020, in that:

- »a) the Authority maintains that certain files from Appellants' submissions could not be opened on the ePPS and, after further investigation carried out, it was established that the problem originated at source. In this respect, the evaluation committee had no other option but to deem Appellants' offer as incomplete, thus being allotted the corresponding proportionate marks;
- »b) with regard to the 'equal[ity] mark', Appellants submitted a certificate in the Italian language which showed no evidence that it was equivalent to that issued by the National Commission for the Promotion of Equality (NCPE) and, in this respect, Appellants were awarded a fair yet proportional mark.

»... ..

»This board, after. having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the various witnesses duly summoned, opines that the issues that should be treated on their merits are two-fold, namely:

- »a) non-Receipt of Documentation by the Authority; and
- »b) 'equal[ity] mark' certificate submitted by Appellants.

»1. Non-Receipt of all Documentation by the Authority

- »1.1 This Board noted that one of the reasons why Appellants' offer was deprived of a number of points was due to the fact that some of the files submitted through the ePPS by Appellants could not be opened at the Authority's end. In this respect, this board also noted that the evaluation committee took all the necessary possible action to investigate this problem. At the same instance, this board was requested to appoint an IT expert to examine and establish the cause of this particular technical problem and in this regard the board appointed Mr David Mifsud, an experienced IT programmer, to examine the

¹ *Electronic Public Procurement System*

issue and to give his professional opinion (through a report) on his findings.

- »1.2. this board would respectfully refer to extracts from the expert's testimony wherein [sc. it results] the source of the problem originated from Appellants' end, as follows:

»... ..

»“Xhud: Jiena mill-informazzjoni li rajt, kemm fuq id-*device* tal-*bidder* u kemm mis-*submission* li tawni access min-naħa tal-*contracting authority*, hemm miktub *file* ġo *log file* li kienet imtliet il-*hard disk* waqt parti mill-process meta kienet qed issir it-*tender preparation*. Infatti kien hemm *file* minnhom li waqaf f'nofsu u ma ġiex sħiħ, u ma' dak il-*file* kien hemm numru ta' *files* li ġew kollha zero, kollha vojta.

»“... ..

»“Avukat: Mela inti stabbilejt illi r-raġuni għaliex dan il-*compressed file* – biex kulhadd jifhem, dan il-*compressed file* huwa *zip file* jew l-ekwivalenti ta' *zip file*? Kif ikun?

»“Xhud: Hekk hu. Dan bażikament qabel jitla' fis-sistema jgħaddi minn numru ta' processi. L-aħħar wieħed huwa fejn jagħmlu bħala *zip file*, iġhaqqadhom f'salt bħala *file* wieħed u *encrypts them* u mbagħad jitla' fis-sistema.

»“Avukat: U għaliex hemm bżonn *hard disk space* biex isir dan il-process? Ara fhimtx tajjeb jiena: jiena fhimt li dan it-*tool* jerġa' jiddupplika l-*files* u allura jkollok bżonn dak l-*extra space* biex imbagħad jikkompresahom jew jippakkeġġjahom ġo dan iż-*zip file*.

»“Xhud: Iva.

»“... ..

»“Avukat: U *at one point* minn dak li stajt tikkonstata inti, meta kien f'dan l-istadju ta' ddupplikar biex jippakkeġġjahom, sab li l-*hard disk*, il-*work station* minn fejn kien qiegħed jagħmel *upload* il-*bidder* imtliet, ma sabx spazju iktar biex jiddupplika u jippakkeġġja u konsegwentement xi *file* kif għidtilna inti waqaf f'nofsu, u xi *files* ohra, minkejja li ħoloqhom, kienu vojta, naqblu?

»“Xhud: Iva.

»“Avukat: Inti x'għamilt biex skoprejt dan?

»“Xhud: Bażikament hemm *log file*, kull ċertu *steps* li jagħmel it-*tool*, *it is* informazzjoni x'għamel u m'għamilx u dik tkun miktuba ġo *file* li l-istess *file* kien għadu preżenti kemm fuq id-*device* ta' Mr

Giulio ² kif ukoll gie prezentat min-naħa tal-Kuntratti.

»“Avukat: U dan il-*log file* huwa *text file*?

»“Xhud: Iva.

»“Avukat: Huwa *text file* li kien fiż-*zip file* innifsu Jew jiġi kkreat barra miż-*zip file*?

»“Xhud: Għax hu jkun hemm *zip file* ġo *zip file* imma bażikament jiġi kkreat apparti.

»“Avukat: U jiġi kkreat allura ġol-istess *package* li jittella’ *on line* u li jintbagħat lill-*contracting authority*?

»“Xhud: Iva.

»1.3. Furthermore, this board was made aware through the explanation given by Mr Mifsud, how such a fault has been detected from the text file which represents an audit trail of the files processed by the originator, as follows:

»“Avukat: Inti jiġifieri tista’ tgħid jekk meta sar il-proċess, meta sar dan il-*packaging* u allura t-*tool* sab il-*hard disk* mimlija, jitlax jew telax xi *warning*? Xi avviz? Xi haġa? Jew *just* tniżżel fil-*log file* jew *that’s it*?

»“Xhud: Is-Sur Giulio kkummenta li hu għamli darbtejn il-proċess. Jiġifieri xi raġuni kien hemm biex għamli t-tieni darba. Jiena qed nimmaġina li xi messaġġ telaż. Fil-fatt fil-*log* hemm parti fejn jgħid dan u naħseb li jitla’ l-messaġġ. Hu għal xi raġuni rrepetieh. Hu iġhidlek “*your submission is rejected because you are attempting to upload a tender that was not generated by the tender preparation tool*”. Jiġifieri dik l-ewwel darba li għamel ii-proċess telagħlu dak il-messaġġ.

»“Avukat: Raġuni differenti imma, qed nifhem sew?

»“Xhud: If-*likelihood* li hu dak il-hin ma kellux spazju fuq id-*disk*.

»“Avukat: Qed jiġi *shared*.

»“Xhud: Jekk tinżlu ‘l isfel ... hemm dak il-messaġġ ta’ meta imtliet il-*hard disk*. Issa hawn hekk *within one second* kien hemm messaġġ li kien hemm problema bis-*submission*. għax imbagħad hemm *gap* ta’ *11 minutes*. Waqaf hemm hekk imbagħad iktar ‘l isfel reġa’ għamel it-tieni *attempt*.

»“Avukat: Mela din jidher li kienet l-ewwel tentattiv, naqblu?

»“Xhud: Iva.

»“Avukat: Fl-ewwel tentattiv kif għidtilna tajjeb inti kien hemm xi haġa fil-*log file* bit-Taljan, ‘*spazio su disko insufficiente*’. Però ‘*currently packing file*’; l-istruzzjoni, ħalli ngħidu hekk, baqa’ għaddej.

² Rappreżentant ta’ *Salus*.

- »“Xhud: Imma mbagħad ikun ippakkja *zero files*. Il-*file* sabu u *it packed it*.
- »“Avukat: *Granted*. Fil-fatt mela, jekk qed nifhem sew, dak il-*file* minn eżatt wara dak il-*warning* ‘l isfel ġew *0 bytes*.
- »Xhud: Hekk hu.
- »1.4. This Board is credibly convinced that the files could not be opened by the Authority due to an error which occurred during the application of the Tendering Preparation Tool (TPT) in the submission of files at the original source, as asserted by the expert, Mr Mifsud, as follows:
- »“Xhud: Mela *basically* milli nista’ nifhem jiena huwa li hawn hekk fl-ewwel biċċa jgħid li l-*files* individwali, jiġifieri dawn *pdf* u *excel* dawk ġew 0. Kien hemm problema wkoll meta qed jiġġenera iż-*zip*. Iż-*zip* huwa *collection* ta’ *files*. Meta qed jiġġenerah dak, kellu problema wkoll *at this stage*. Fl-*istep* ta’ wara bażikament iż-*zip* irnexxielu jikkreaħ sħiħ imma l-kontenut taż-*zip* hemm *files* minnhom – kien hemm bejn 10 u 15 – li bażikament il-*files* ippekkjahom kif sabhom, iż-*zip* ġie sħiħ imma l-*files* kienu [sc. vojta]. So fl-ewwel *step* anke l-*package itself* kien *corrupt*. U fit-tieni *step* il-*package* bħala forma ta’ *package* kien sħiħ imma l-kontenut ta’ ġo fih kien fih *files* vojta.
- »“Avukat: OK. Jiġifieri sa ‘*currently packing file*’, hemmhakk il-problema li kien sab jekk qattx il-*hard disk* kienet mimlija. Sa ‘*currently packing file*’ l-aħħar waħda. Għax inti għidtilna li hemmhakk diġà kien sab problema. Il-problema kienet għax il-*hard disk* kienet mimlija, naqblu?
- »“Xhud: Iva; dak mhux *error* hemmhakk. Dak kien qed jipprova jippekkjah.
- »“Avukat: F’*logfile* iktar ‘il fuq kien hemm ‘*spazio non sufficiente*’.
- »“Xhud: Ezatt: hemmhakk kien hemm ‘*disk full*’; il-*hard disk* mimlija.
- »“Avukat: Mela dik hija l-problema waqt il-*packaging*; naqblu?
- »“Xhud: Iva fl-ewwel biċċa. Dik imma l-problema hija konġunta għax hemm hemm il-*preparation* u l-*packaging*. Jiġifieri waqt il-*preparation* kien hemm *issue* u fil-*packaging* tkomplet għax iż-*zip file* ukoll fit-*tieni stage* kien *corrupt*.
- »“Avukat: Kien *corrupt* għax kienu vojta? f’dak is-sens?
- »“Xhud: Le; kien *corrupt* għax iż-*zip* ma sarx sħiħ. U ma jidhirx li t-*tool* jiċċekkja l-*file* hux vojta jew le.
- »“Avukat: U allura għalfejn qed tgħid li kien hemm *corruption* fit-tieni biċċa?

- »“Xhud: Għax iż-*zip* ikollu ċertu *check sum*; hu jagħmel a *mathematical formula* biex jara bażikament li l-kontenut jaqbel. Inti tassumi li ser ikun hemm *some sort of corruption* u inti tagħmel *mathematical formula* u taħdem b’numru biex tara jekk il-*file* baqax intatt. Issa fl-ewwel darba, meta qed jagħmel dan iż-*zip*, kien hemm xi *issue*. Fit-tieni darba li qed jagħmel *packaging*, iż-*zip* file ħalqu tajjeb imma ovvjament il-kontenut tad-dokument, ma qagħadx jipprova jara l-kontenut tad-dokument. Mhux parti imma iż-*zip file* ġie kkreat sħiħ, ma kellux *corruption* tat-tip li jista’ jinduna bih l-*algorithm* u allura għalih kien tajjeb bħala *zip file*.
- »“Avukat: U l-*error message* ‘*your submission is rejected because you are attempting to upload a tender that was not generated by the*’
- »“Xhud: ‘*by the tender preparation tool*’.
- »“Avukat: U għalfejn giet hekk dik?
- »“Xhud: Għax iż-*zip file* ma kienx fih kull ma kien qiegħed jistenna fih. Jiġifieri hu, appartu dawn il-*files* tal-*criterion* waħda waħda, fiż-*zip file* ta’ barra: għax hu jagħmel il-*package* tal-affarijiet *that you submit il-bidder himself*. Imbagħad hemm ċertu struttura, inkluż il-*log file* biex nagħtu eżempju, hemm xi *files* oħra u hu jinduna li l-istruttura m’hi jkx kompluta. Jiġifieri s-*server* induna li hemm xi partijiet mill-istruttura tal-*package* li ma kinitx kompluta u ta dak l-*error*.”

»2. “Equality Mark” Certification

»2.1. With regard to Appellants’ second contention, this board would refer to article C.1, Equal Opportunities, of the award criteria wherein the following is specifically requested:

»“C.1 – Equal Opportunities Maximum of 4 points

»“N.B. to Sole Traders/companies with no Employees:

»“‘Sole Traders/Companies with no Employees’ that are sub-contracting the services to known third parties at tendering stage, are also to provide the necessary proof/evidence as per the set requirements of the ‘Company with Employees’ on behalf of the sub-contractors.

»“The Economic Operator is to submit:

»“1. Evidence that the economic operator is an equal opportunities operator in line with the Equality Mark or equivalent	Maximum 2 points	100% of 1% as a minimum
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»“A copy of the NCPE (or equivalent) Equality Mark Certificate is to be provided”

»2.2. The above-mentioned article clearly dictates that, a copy of the NCPE (or equivalent) equality mark certificate is to be provided. Appellants submitted documentation in the Italian

language without any proof of equivalency to that issued by the NCPE.

- »2.3 The fact that the certificate was in the Italian language without a certified translation into the English language does breach clause 6.3 of the General Rules Governing Tenders which clearly dictates that documents are to be submitted in the English language. In this regard, Appellants were quite aware of such a provision, yet they failed to submit a translated version into English.
 - »2.4 This board would also respectfully point out that the fact that Appellants are claiming that, the international standard SA 8000 (2014) is equivalent to NCPE Regulations was not actually proven and this board would remind the Appellants that the equivalency of such documentation had to be certified by the NCPE and, in this respect, no such certification was submitted to the Authority.
 - »2.5 On the other hand, it is important to acknowledge that the evaluation committee is in duty bound to adhere to the principle of self-limitation; even so, the bidder is in duty bound to submit the information as duly dictated in the tender dossier.
 - »2.6 This Board would also note that, if Appellants were in doubt as to which certificate had to be submitted, they had the remedies to clarify and resolve this issue prior to the submission of their offer; however, this board notes that Appellants did not avail themselves of such remedies.
- »In conclusion, this board opines that,
- »a) from the submission made and from the testimony of Mr Mifsud, the appointed IT expert, this board justifiably established that the error in submitting the files through the ePPS system to the Authority occurred at source and the Authority could only retrieve the incomplete information;
 - »b) the evaluation committee upon realising the problem took all the necessary appropriate action to investigate such an occurrence;
 - »c) The 'equality mark' certification was not translated in the English language, as duly stipulated in clause 6.3 of General Rules Governing Tenders;
 - »d) Appellants did not provide evidence to prove that the submitted 'equality mark' document was equivalent to that issued by the NCPE;
 - »e) the marks allotted to Appellants' offer, with special reference to 'Incomplete Documentation' and 'Equality Mark' were proportionate and just;
 - »f) The evaluation process was carried out under the BPQR and marks proportionately allotted so that this board does not identify any justifiable reason whatsoever why the tender should be cancelled. The recommended bidder credibly obtained higher percentage points in a fair and transparent adjudication process. It must also be pointed out that, under such circumstance, the

Authority is in duty bound to save a compliant and the most advantageous offer.

»In view of the above, this board:

- »i. does not uphold appellants' contentions;
- »ii. upholds the Contracting Authority's decision in the recommendation for the award;
- »iii. directs that an amount of three thousand euro (€3,000) from the deposit paid by appellants be refunded.«

6. *Salus* ressqet appell minn din id-deċiżjoni tal-Bord ta' Reviżjoni b'rikors tat-2 ta' Novembru 2020. Għal dan ir-rikors l-awtorità kontraenti u d-Direttur tal-Kuntratti wiegħbu fl-24 ta' Novembru 2020 u *Servizi* wiegħbet fit-30 ta' Novembru 2020.

7. L-appellanti talbet illi

- »(i) tħassar jew tikkancella s-sejha għall-offerti;
- »(ii) sussidjarjament, u mingħajr preġudizzju għall-ewwel talba, tordna li l-offerta ta' *Salus Cleaning JV* terġa' tiġi redintegrata fil-proċess tal-għażla u tordna lill-awtorità kontraenti sabiex issir evalwazzjoni mill-ġdid tal-offerti, inkluż bid-dokumentazzjoni kollha provduta mill-esponenti mal-oġġezzjoni tagħha tas-27 ta' Lulju 2020;
- »(iii) b'żieda mat-tieni talba, tirrevoka u tħassar id-deċiżjoni tal-bord in kwantu ddecieda li l-esponenti ma pprezentawx ċertifikat ekwivalenti għall-*equality mark*, u tikkonferma li ċ-ċertifikat SA 8000 kien wieħed ekwivalenti u suffiċjenti għall-finijiet tas-sejha għall-offerti *de qua*;
- »(iv) f'kull każ, u mingħajr preġudizzju għas-suespost, tordna li d-depożitu mħallas mill-esponenti għandu jiġi ritornat lilha fis-siġh.

8. L-aggravji tal-appell huma ħamsa:

- »I ir-raġunijiet mogħtiia mill-bord għall-konferma tad-deċiżjoni tal-awtorità kontraenti f'dak li jirrigwardja l-*files* inaċċessibbli hija invalida jew, fl-aħjar ipotesi, insufficienti għall-ilment tal-esponenti;
- »II *inoltre*, l-esponenti ma għandha ebda tort għal dak li ġara u konsegwentement ma taħtix għall-fatt li l-*file* kompressat sottomess minnha ma kienx jikkontieni l-*files* kollha magħżula minnha;
- »III il-bord kien fid-dmir, u kellu l-funzjoni, li f'każijiet bħal dawn jordna l-kancellament tas-sejha u li din terġa' tinħareġ mill-ġdid;

- »IV fir-rigward tat-tieni ilment tal-esponenti, jirriżulta li l-esponenti ssoddisfaw ir-rekwizit tal-*equality mark*;
- »V sussidjarjament u mingħair preġudizzju għas-suespost, il-bord kellu jirrifondi lill-esponenti d-depożitu mħallas minnhom għall-oġġezzjoni in kwistjoni.

9. L-ewwel tliet aggravji huma marbuta ma' xulxin, u ġew imfissra hekk:

»L-ewwel aggravju

Fid-deċiżjoni tiegħu dwar l-ewwel ilment tal-esponenti, il-bord essenzjalment jagħti erba' raġunijiet li wassluh biex jiċċad l-oġġezzjoni tal-esponenti u jikkonferma d-deċiżjoni tal-awtorità kontraenti f'dan l-aspett: (i) li huwa minnu li l-awtorità kontraenti ma setgħetx tiftaħ il-*files* in kwistjoni; (ii) li l-*files* gew reżi inaċċessibbli fis-sors tagħhom, ossija fuq il-*workstation* tal-esponenti; (iii) li l-awtorità kontraenti ħadet il-passi investigattivi neċessarji meta ntebħet b'din il-kwistjoni; (iv) li l-għotja tal-punti da parti tal-awtorità kontraenti, fil-kuntest ta' dan l-ilment, kien[et] gust[a] u proporzjonat[a].

»B'kull dovut rispett, ir-raġunijiet mogħtija mill-bord huma invalidi, u, fl-aħjar ipotesi, insuffiċjenti, għal dak li kien jirrigwardja l-ilment tal-esponenti.

»Mir-rapport tal-espert tekniku, hemm qbil li l-*files* in kwistjoni nholqitilhom problema fuq il-*workstation* tal-esponenti u li dawn ma kinux aċċessibbli għall-awtorità kontraenti. Ma hemmx qbil, però, li l-awtorità kontraenti ħadet il-passi investigattivi kollha neċessarji biex tara x'kienet il-problema – lanqas ma hemm qbil li d-deċiżjoni tal-awtorità kontraenti kienet waħda ġusta u proporzjonata.

»Effettivament, jirriżulta li meta l-esponenti għażlu l-*files* li għandhom jiġu proċessati mit-*Tender Preparation Tool* (aktar 'il quddiem tissejjah '*TPT*'), waqt l-ipproċessar, il-*workstation* tal-esponenti mtela għal dik li hija *disk capacity* u ma setax ikompli jipproċessahom, bir-riżultat li l-istess *TPT* holoq *compressed file* li kien fih numru ta' *files* pjenament aċċessibbli, u oħrajn li, għalkemm inholqu, kienu ta' *size "0 bytes"* għaliex kienu vojta. Mix-xieħda tar-rappreżentant tal-esponenti Giulio La Scala, jirriżulta li ma tela' ebda avviż li wissa lill-offerent li mtliet il-*hard disk* u li, għalhekk, kien hemm xi problema. Għall-kuntrarju, l-uniku avviż li l-esponenti gew rinfacċjati bih kien wieħed li juri l-*upload* bħala wieħed *successful*.

»Jirriżulta wkoll li l-proċess meta wieħed juża t-*TPT* jinvolvi essenzjalment żewġ stadji, l-ewwel meta tagħzel u tikkompressa l-*files* in kwistjoni, u mbagħad meta ttellagħhom jew tagħmel *upload* fuq l-*ePPS*. Jirriżulta mhux kontestat li, fil-proċess tal-ikkompressar, l-esponenti ma ġew rinfacċjati b'ebda avviż, iżda meta ppruvaw itellgħuhom fuq l-*ePPS* is-sistema avżathom li huma kienu kkompressaw il-*files* b'programm ieħor, u mhux bit-*TPT*.

»Fil-fatt, dan l-avviż kien ta' sorpriża għal kulhadd, inkluż għall-espert tekniku, peress li huwa evidenti li kienet qed tintuza biss it-*TPT* u xejn aktar. Kien għalhekk li l-esponenti għamlu tentattiv ieħor u ppruvaw itellgħu il-*file* kompressat li kien holoq it-*TPT* għat-tieni darba. Din id-darba ma tela' ebda avviż u l-*upload* ġie indikat li sar b' suċċess.

»Meta l-espert tekniku eżamina *log file* li ġie generat fil-*file* kompressat li jiġi *uploaded* fis-sistema tal-*ePPS*, hemmhekk kien hemm indikat li, f'mument minnhom, waqt l-ikkompressar, il-*hard disk* tal-esponenti mtliet u l-proċess tal-ikkompressar ma setax jitkompli.

»Mistoqsi jekk dan ii-*log file* huwiex faċilment aċċessibbli wkoll għall-awtorità kontraenti, l-espert tekniku jwieġeb fl-affermattiv. Konsegwentement, hawnhekk wieħed ġà jintebaħ li ma huwa minnu xejn li l-awtorità kontraenti għamlet dak kollu neċessarju sabiex tinvestiga r-raġuni jew l-għaliex tal-kwistjoni *de quo*. Għall-kuntrarju, minkejja li x-xhud Leonidas Bardis, *CEO* tal-kumpannija li kkreat it-*TPT* u l-*ePPS*, iġhid li huwa u n-nies tiegħu eżaminaw il-kwistjoni, u jgħid li huwa impossibbli sabiex wieħed jiddetermina x'ġara fir-realtà, jidher li l-kwistjoni kienet faċilment determinabbli minn *log file* li kellu kull aċċess għalih. Il-faċilità li biha l-espert tekniku iddetermina u kkonkluda minn fejn originat il-problema, bil-qari ta' sempliċi *.txt file*, juri li, kontra dak li jgħid il-bord, mhux minnu li l-awtorità kontraenti għamlet dak kollu neċessarju sabiex tinvestiga l-kwistjoni.

»*Di più*, il-fatt li l-kwistjoni originat fuq il-*workstation* tal-esponenti ma jfissirx li l-esponenti għandha taħti għal tali kwistjoni.

»Jirriżulta li t-*TPT* ma ta ebda avviż għal dak li realment seħħ. Għall-kuntrarju, jirriżulta li t-*TPT* ta avviż li kien erronju u żbaljat, peress li, fl-ewwel tentattiv tal-*upload*, l-esponenti ngħatat avviż li kienet qed tuża xi programm ieħor, u mhux it-*TPT* – ħaġa li tirriżulta li kienet għal kollox invertiera u inkorretta.

»*Inoltre*, l-esponenti segwiet, *alla lettera*, il-linji gwida kollha mogħtija lilha għall-użu tal-istess *TPT*. Dawn gew ċirkolati mill-esponenti qabel l-aħħar seduta fil-każ odjem u qegħdin jergħu jiġu annessi ma' dan ir-rikors tal-appell għall-faċilità ta' referenza.

»Kif jidher minn dawn il-linji gwida, ma hemm xejn li jindikaw li l-offerent għandu jzomm spazju suffiċjenti fuq ii-*hard disk* tiegħu biex it-*TPT* ikun jista' jaħdem korrettement. Għall-kuntrarju, l-istess linji gwida jindikaw x'inhuma r-rekwiżiti bażiċi u minimi biex wieħed iħaddem l-istess *TPT* u mkien ma jingħad li hemm ħtieġa ta' xi ammont minimu ta' *hard disk space*. Minn imkien ma jirriżulta li l-offerenti li juzaw it-*TPT* għandhom jassiguraw li l-istess *workstation* tagħhom għandu jkollu spazju żejjed sabiex it-*TPT* jithaddem b'suċċess.

»L-osservazzjoni li huma dawn il-linji gwida li għandhom japplikaw giet magħmula mill-istess bord fil-każ numru 825 - CT3241/2014 fejn, għalkemm fuq punt tekniku differenti, f'każ fejn l-appellant ma segwiex il-*guidelines* mogħtija għall-użu tat-*TPT* u tal-*ePPS*, il-bord ċahad l-oġġezzjoni tal-offerent appellant. F'dik id-deċiżjoni, il-bord jgħid hekk:

»“This board, after having heard credible submissions by both the contracting authority and the expert appointed by this board, justifiably opines that the contracting authority did give specific guidelines to be followed when applying the e-Tendering procedure. The guidelines so issued specifically stated that the files to be uploaded had to be local. It has been credibly and technically proven that this was not carried out by the appellant.

»“The bidders were advised that the files to be uploaded had to be stored locally and not shared. This was not strictly adhered to by the appellant in submitting his bid through the “e-Tendering

System". This event was also confirmed through a reply to a query made by the contracting authority to the service providers, namely *European Dynamics*, through an e-mail dated 16th July 2015 wherein they confirmed that the appellant had uploaded the file from a "shortcut file" or from a shared network, hence resulting in the files being corrupted.

»"In this regard, this board is justifiably convinced that the appellant did not follow the correct guidelines for the submission of his bid under the e-Tendering process. This board is also justifiably convinced that the CD submitted by the appellant was not accompanied with the submitted tender document and it was only presented with the objection. At the same time, this board credibly opines that the guidelines given to prospective e-tenderers are not capriciously dictated, but they are laid out to avoid any such circumstances.

»"This board also notes that those bidders who followed the said guidelines as instructed by the contracting authority did not encounter problems with regards to the uploading or documentation and transmitting the same information at the receiving end. In this regard, this board does not uphold the appellant's second grievance.

»"On a general note, this board after having heard submissions by both the appellant company, the contracting authority and the appointed expert, firmly asserts that:

»"a) there exists a clear manual of *Guidelines to e-Tenderers* of how to apply the system in submitting an "e-Tender";

»"b) it has also been credibly proven that the appellant did not follow the instructions given in the said manual;

»"c) this board would emphasize the fact that the evaluation committee acted in a just and fair manner, in that it could not adjudicate a tender which was not received and where the documentation could not be downloaded through no fault from the receiving end *i.e.* the contracting authority."

»F'dan il-każ appena citat, għall-kuntrarju ta' dak odjern, il-linji gwida kienu effettivament jagħtu gwida dwar in-nuqqas kommess mill-appellant, u kien proprju għalhekk li l-appellant f'dak il-każ ma ngħatax raġun. Għall-kuntrarju, f'dan il-każ, il-linji gwida ma jagħtu ebda fjiel dwar l-allegat 'nuqqas' tal-esponenti, li aderixxiet mat-termini tal-linji gwida fis-sħiħ, inkluż dawk indikati fid-dokument għas-sejha għall-offerti nfisha, li kienet teħtieġ li jiġi skarikat it-*TPT* aġġornat, peress li dan kien ġie *updated*.

»"Fid-dawl ta' dan kollu, u fid-dawl li r-raġuni mogħtija mill-espert tekniku għalxiex il-*files* ma kinux aċċessibbli kienet faċilment ottenibbli għall-awtorità kontraenti, u aġħar minn hekk, għall-iżviluppatur tal-istess *TPT*, m'hemmx dubju li d-deċiżjoni tal-awtorità kontraenti ma kinitx waħda ġusta u proporzjonata, anke peress li hija qatt ma kienet avżat lill-offerenti bl-obbligu li jkollhom l-ispazju speċifiku disponibbli fuq il-*hard disk* tagħhom biex iħaddmu t-*TPT* b'suċċess.

»"Konsegwentement, ir-raġunijiet kollha mogħtija mill-bord għalxiex l-ewwel ilment tal-esponenti kellu jiġi miċhud mħumiex validi, u f'kull każ huma insuffiċjenti, għaliex il-bord bl-ebda mod ma eżamina jew

iġġudika fuq in-nuqqas ta' tort tal-esponenti f'dak li kien it-tfaddim tat-*TPT* da parti tagħhom.

»It-tieni aggravju

»Għall-istess raġunijiet ġà spjegati fl-ewwel aggravju ... l-esponenti tissottometti li l-bord naqas milli jqis li l-esponenti ma kellha ebda tort għal dak li ġara.

»Minkejja li l-bord isemmi l-prinċipju ta' *self-limitation*, m'hemmx dubju li dan il-prinċipju qed jiġi mgebbed u użat straliberament mill-istess bord.

»Il-bord kien fid-dmir li jeżamina l-fatt li l-esponenti ma kellha ebda tort f'dak li ġara, li hija qatt ma kienet avżata li kellha toqgħod attenta li, bl-użu nnifsu tat-*TPT*, kien hemm fteigħa li jkollha spazju żejjed biex tfaddmu b'suċċess, u li l-istess kwistjoni nholqot biss b'rizultat ta' dan in-nuqqas ta' informazzjoni u xejn aktar.

»Il-prinċipju ta' *self-limitation* jitlob li l-awtorità kontraenti tkun ristretta li ssegwi d-dokumenti li għalihom kienu esposti l-offerenti kollha fis-siġġ, u xejn aktar. Il-prinċipju f'dan il-każ ma japplikax, peress li ma hemm ebda regola li kienet titlob l-offerenti li jzommu spazju speċifiku fil-*hard disk* tagħhom għat-tfaddim tat-*TPT*, u li xi wieħed jew aktar offerenti ma segwewx.

»Konsegwentement, il-bord naqas meta ma rax li ma kien hemm ebda nuqqas ta' parti tal-esponenti – aktar u aktar meta l-istess esponenti ma ngħatat ebda avviż *real-time* meta t-*TPT* falla.

»It-tielet aggravju

»Tajjeb jew ħażin, in-nuqqas li seħħ, għadarba ċertamenet ma kienx tort tal-esponenti, u ma kien hemm ebda avviż li jindikalha l-istess nuqqas, il-bord kellu bilfors jordna l-kancellament tal-istess sejha.

»Tali funzjoni, setgħa u dmir tal-bord jirriżulta mir-Regolamenti dwar l-Akkwist Pubbliku (L.S. 601.03), regolament 90(3), fejn jingħad illi:

»“Fid-deċiżjoni tiegħu l-Bord ta' Reviżjoni jkollu s-setgħa li jhassar il-proċess tas-sejha jekk huwa jidhirlu li din tkun l-aqwa soluzzjoni fiċ-ċirkostanzi tal-każ; f'dan il-każ l-ebda parti ma jkollha ebda jedd li titlob għad-danni minħabba f'tali deċiżjoni li tiġi mħassra s-sejha.”

»M'hemmx dubju li f'sitwazzjoni anomala bħal dik tal-każ preżenti, il-bord kien fid-dmir li jara li l-proċess tas-sejha jiġi mħassar jew kancellat ladarba l-esponent ma kienx jaħti għan-nuqqas fis-sistema, inkluż in-nuqqas li javverti lill-esponent, bħala utent, b'dak in-nuqqas u mhux jagħtih informazzjoni skorretta u serħan li kollox kien sar sew.«

10. Effettivament l-appellanti, għalkemm taqbel illi l-problema nholoq min-naħa tagħha, tgħid illi l-awtorità kontraenti naqset milli tinvestiga r-raġuni għal dan u illi, għalkemm tassew li l-problema nholoq min-naħa tagħha, dan ma kienx bi fteigħa tagħha għax hija mxiet fuq il-linji gwida

maħruġa mill-awtorità kontraenti stess. Tgħid ukoll illi l-konsegwenza ta' dan kellha tkun li titħassar is-sejħa għal offerti.

11. Nibdew bl-ewwel argument, viz. illi l-awtorità kontraenti naqset milli tinvestiga r-raġuni għala ma setgħetx tiftaħ il-*files* elettronici mibgħuta minn *Salus*.
12. Mix-xieħda li nstemgħet quddiem il-Bord ta' Revizjoni jirriżulta li ma huwiex minnu illi l-kumitat ta' għażla maħtur mill-awtorità ma investigax x'kienet ir-raġuni għala ma setax jiftaħ il-*files* mibgħuta elettronicament minn *Salus*. Il-verbal tas-seduta tal-24 t'Awissu 2020 fil-fatt igħid hekk:

»Mr David Gatt called as a witness by the Public Contracts Review Board testified on oath that he is a manager in the IT section of the Department of Contracts, He stated that the CPSU requested the Department of Contracts to investigate why certain files in appellants' bid could not open. The matter was in turn referred to *Euro Dynamics*, the systems operator. The Department of Contracts cannot investigate the problem themselves as no one can access the files uploaded on the *e-PPS* except the evaluation committee and hence the referral to *Euro Dynamics*.

»Mr Leonidas Bardis called as a witness by the CPSU testified on oath that he is the chief executive officer at *Euro Dynamics* and a graduate in IT and engineering. He explained that the files that could not open were corrupted at source – that is, on the work station of the bidder. The *Euro Dynamics* systems shuffles files from one source to another but does not in any way change them. If the files cannot open they must be corrupted as there is no processing of, or changes to, files in their system. The corruption could be due to various reasons including a virus or disk problems.«

13. Dan juri li l-kumitat tal-għażla f'isem l-awtorità kontraenti qabba lill min seta' jgħinu jsib ir-raġuni għala l-*files* ma setgħux jinfethu u ngħata l-parir li dan ġara għax il-*files* kienu "*corrupted at source*". L-ewwel parti tal-aggravju għalhekk ma hijjex tajba.
14. It-tieni kwistjoni hi jekk *Salus* kinitx taħti għal dak li ġara.

15. Tassew illi l-linji gwida ma jwissux dwar il-ħtieġa li min jibgħat *files* elettronici għandu, qabel jibda, jaċċerta ruħu illi hemm spazju biż-żejjed fuq il-*hard disk* biex il-proċess ikun jista' jsir, u ma jidhirx li *Salus* ma mxietx kif iridu l-linji gwida. Madankollu hemm x'juri illi *Salus* intebħet li kollox ma kienx sew; li ma kienx hekk ma kinitx tfitteb li tibgħat il-*files* darbtejn. Barra minn hekk, il-verbal tas-seduta tal-5 ta' Ottubru 2020 quddiem il-Bord ta' Reviżjoni jgħid illi l-espert tekniku mañtur mill-bord xehed illi:

»... .. at a certain stage a message that the hard disk was full must have been given and, according to the log file, 11 minutes after [*recte*, later] a further message was given that there was a problem with the submission of files. The process found 'zero' files and packaged them as such so that when the process was restarted using those same files in generating the zip file at the second attempt all the content files were 'zero' files as the packaging was already corrupted. The issue arose at the preparation stage since, once the hard drive was full, then the zip file was corrupted; at the second stage although the zip file was correct the files were corrupted and the server indicated that submission had not been in full. [W]itness stated that appellants put all files together into a zip file but at the second attempt the previous files which were already corrupted were used and packaged as such.«

16. Tassew illi r-rappreżentant ta' *Salus* igħid illi l-messaġġ fl-ewwel stadju kien ieħor – *viz.* mhux illi l-*hard disk* kien mimli iżda li ntuża sistema differenti flok it-*TPT* – kif jixhed il-verbal tas-seduta tal-5 ta' Ottubru 2020 quddiem il-Bord ta' Reviżjoni:

»Mr Giulio La Scala called as a witness by appellants testified on oath that he was the project manager responsible for submitting appellants' tender. He confirmed that the uploading of the files had been done by him and that he had loaded the files twice. He originally tried to upload the files with a different tool to the one used by TPT and had been given a message to that effect. He therefore started the process again from scratch following the instruction of the TPT – this time no error messages were received.«

17. Għalkemm x'aktarx li mhux minnu li meta s-sistema ta' *Salus* iltaqa' ma' *disk full error* naqas milli jwissi lill-utent – l-espert tekniku xehed illi “*at a certain stage a message that the hard disk was full must have been given*” u anke l-*log file* generat mis-sistema ta' *Salus* igħid illi “*Error with coping [sic] file ... Exception: Spazio su disco insufficiente*” – madankollu, ukoll jekk l-affarijiet graw kif xehed ir-rappreżentant ta' *Salus*, il-fatt li f'xi waqt kien imwissi li kien inħoloq problema tefa' fuqu l-oneru li jaċċerta ruħu li l-*files* waslu fejn kellhom jaslu u li waslu sew. Ukoll fl-aħjar ipotesi, mhux nieqes element ta' htija fuq *Salus*. Il-fatt imbagħad li, kif x'aktarx ġara, ingħatat twissija illi “*Spazio su disco insufficiente*” u baqa' ma sar xejn biex il-*files* jiġu kompattati mill-ġdid wara li jitnaddaf il-*hard disk* ikompli jkabbar il-htija ta' *Salus* għal dak li ġara.

18. Fis-sentenza mogħtija fit-22 ta' Ġunju 2020 fl-ismijiet *V.J. Salomone Pharma Limited v. Central Procurement and Supplies Limited et* din il-qorti kienet tat raġun lill-oblatur appellant li l-offerta tiegħu ma kellhiex titwarrab għar-raġuni illi, bħal ma ġara fil-każ tallum, il-kumitat tal-għażla ma setax jiftaħ *files* mibgħuta elettronikament mill-oblatur għax osservat illi:

»Lanqas ma huwa minnu illi, kif tgħid l-awtorità kontraenti, hemm xi prova konkluziva li l-*file* elettroniku mibgħut minn *V.J. Salomone* kien *corrupted at source*. Wara kollox, kif qal Jason Grech, li hu l-persuna responsabbli għat-tħaddim tas-sistema elettroniku tad-Dipartiment tal-Kuntratti, meta xehed quddiem il-Bord ta' Reviżjoni, “*There were other occasions where corrupted files were received and this certainly was not a unique case. He had no way of knowing if there was anything wrong with remitters' computer*”. Fi kliem ieħor, għalkemm ma hemmx prova li d-difett kien min-naħa tas-sistema elettroniku tad-Dipartiment tal-Kuntratti, min-naħa l-oħra lanqas ma hemm prova li n-nuqqas kien min-naħa tal-appellanti.«

19. Il-każ tallum huwa differenti mhux biss għax hemm prova illi l-*files* tassew kienu *corrupted at source* iżda wkoll għax x'aktarx iva milli le l-oblatur kellu indikazzjonijiet biżżejjed illi l-*upload* tad-dokumenti x'aktarx ma rnexxiex u naqas milli jara kif jagħmel biex jirmedja għal dan in-nuqqas. L-imġieba tal-oblatur f'dan il-każ ma kinitx dik ta' "*reasonably well-informed and normally diligent tenderers*".
20. Tassew illi, fl-istess sentenza tat-22 ta' Ġunju 2020, din il-qorti kienet osservat ukoll illi "ma hemm xejn xi jżomm lil min jirċievi dokument elettroniku u għal xi raġuni jew oħra ma jkunx jista' jiftħu milli jgħid lil min bagħtu biex jerga' jibagħtu" – wara kollox waħda mill-*instructions to tenderers*³ ukoll tgħid illi "*Tenderers will be requested to rectify/ submit only missing documents within five working days from notification*" – u, għax l-awtorità kontraenti ma kinitx tat lill-oblatur f'dak il-każ fakoltà li jippreżenta d-dokumenti nieqsa, ordnat li titħassar is-sejha għal offerti. F'dak il-każ iżda ma kienx intwera – bħal ma ntwera fil-każ tallum – illi n-nuqqas kien min-naħa tal-oblatur. Iċ-ċirkostanzi fil-każ tallum huma differenti u ma jiġġustifikawx illi, minħabba nuqqas tal-oblatur, jittieħed il-pass drastiku u għali tat-tħassir tas-sejha.
21. Dawn l-aggravju huma għalhek miċhuda.
22. Billi dan huwa biżżejjed biex titwarrab l-offerta tal-appellanti, ma jibqax meħtieġ li nqisu l-aggravji l-oħra; ukoll jekk dawn jintlaqgħu, xorta l-offerta ma tistax titqies li tiswa la hemm dokumenti essenzjali nieqsa.

³ *Notes to Clause 7 (selection and award requirements), note 2B.*

23. Il-qorti għalhekk tiċċhad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Reviżjoni.

24. L-ispejjeż ta' dan l-appell tħallashom l-appellanti *Salus*.

Mark Chetcuti
Prim Imħallef

Giannino Caruana Demajo
Imħallef

Anthony Ellul
Imħallef

Deputat Reġistratur
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