



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tlieta, 31 ta' Awwissu, 2021.

Numru 2

Appell numru 126/2021/1

X Clean Limited (C-69875)

v.

**Dipartiment għall-Anzjanità Attiva u Kura
fil-Komunità; Dipartiment tal-Kuntratti; u
*Dibaw Services***

1. Dan huwa appell ta' *X Clean Limited* ["*X Clean*" jew "l-appellanti"] minn deċiżjoni tat-8 ta' April 2021 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 tal-awtorità kontraenti li l-offerta tagħha titwarrab għax ma saritx kif imiss.
2. Il-fatti rilevanti seħħew hekk: kienet saret sejha minn *Active Ageing and Community Care* ["l-awtorità kontraenti"] għal offerti għal "*the*

Provision of Cleaning Services using Environmentally Friendly Cleaning Products for Entities within the Active Ageing and Community Care (Lot 1)” u “*(Lot 2)*”. Il-kriterju tal-għażla kellu jkun “*best price /quality ratio*” u l-awtorità kontraenti stmat illi l-prezz taż-żewġ lots kellu jkun madwar tliet miljuni, sitt mija u disgħa u ħamsin elf, tmien mija u wieħed u sittin euro (€3,659,861), għalkemm dan il-prezz kellu jitqies biss bħala indikattiv u mhux vinkolanti¹.

3. *X Clean* għamlet żewġ offerti, waħda għal *lot 1* (li dwaru sar dan l-appell) u oħra għal *lot 2*. L-offerta ta' *X Clean* għal *lot 1* kellha prezz ta' tliet miljuni, mija u wieħed u tmenin elf, mija u wieħed u erbgħin euro u erbgħa u sebgħin ċenteżmu (€3,181,141.74) u dik għal *lot 2* kellha prezz ta' ħamsa u disgħin elf, sitt mija u sitta u ħamsin euro u tmien ċenteżmi (€95,656.08), b'kollox għalhekk tliet miljuni, mitejn u sitta u sebgħin elf, seba' mija u sebgħa u disgħin euro u tnejn u tmenin ċenteżmu (€3,276,797.82).
4. Saru wkoll offerti minn oħrajn, fosthom *Dibaw Services Joint Venture* [*Dibaw*]. Il-prezz tal-offerti ta' *Dibaw* kien ta' żewġ miljuni, disa' mija u tmienja u għoxrin elf u sebgħa u għoxrin euro u erbgħa u għoxrin ċenteżmu (€2,928,027.24) għal *lot 1* u tmienja u tmenin elf, erba' mija u erbgħa u għoxrin euro u erbgħin ċenteżmu (€88,424.40) għal *lot 2*, b'kollox tliet miljuni, sittax-il elf, erba' mija u wieħed u ħamsin euro u erbgħa u sittin ċenteżmu (€3,016,451.64).

¹ *Instructions to Tenderers*, para. 1.3: “*The purpose of this value shall be the guidance of prospective bidders when submitting their offer and is not considered to be a binding capping price*”.

5. B'ittra tal-15 ta' Jannar 2021 *X Clean* giet mgħarrfa illi l-offerti tagħha ma ntlagqgħux għax ma laħqux il-kriterju tal-għażla (*best price/quality ratio*) u illi l-kuntratt kemm għal *lot 1* u kemm għal *lot 2* sejjer jinġata lil *Dibaw*.
6. B'ittra tal-25 ta' Jannar 2021 *X Clean* ressqet oġġezzjoni quddiem il-Bord ta' Revizjoni kontra d-deċiżjoni li l-kuntratt għal *lot 2* jingħata lil *Dibaw*. Ir-raġunijiet għall-oġġezzjoni qegħdin jinġiebu hawn *verbatim*:

»The objection is based primarily on the fact that the cost quoted by *Dibaw Services* is an abnormally low one when this is compared with other tenderers, in particular those that have a higher cost (- 40%) and yet have been declared inadmissible for reasons yet undisclosed and thus not been part of the BPQR final evaluation.

»The price quoted is furthermore in discord with the costs associated with the fulfilment of the contract as shall be demonstrated during the hearing of the appeal.

»Furthermore, objector has grounds to believe that, in the marking process, *Dibaw Services* having lost marks in the process of evaluation, in particular in those mandatory, and those that allow for discretion which is indicated that such discretion may have been exercised generously, items which in this type and nature of tender are of an inherent important quality and thus the quality of service could be seriously impaired.«

7. B'ittra oħra tat-22 ta' Marzu 2021² *X Clean* kompliet toġġezzjona illi:

»... .. It is relevant to point out that the lack of indications given for pay dates in 2023 has only been given a minor point deduction. It is being termed minor in view of the fact that tender submissions are final and no new conditions may be attached thereto after the process. In this regard it is being submitted that, since the required dates were not given, then the contracting authority would be entering into a contract which is in breach of employment laws and regulations since it cannot enter any new conditions in the tender award, and the dates of pay for 2023 are omitted. Thus a more stringent marking here should have been applicable.«

² Għalkemm fid-deċiżjoni tal-Bord ta' Revizjoni jingħad dwar l-ittra tat-22 ta' Marzu 2021 illi "*The board declared such written submissions as inadmissible and decided to do away with such submissions and deem then as never having been presented*", l-istess bord fid-deċiżjoni tiegħu qies il-kwistjoni dwar "*dates of pay for 2023*" imsemmija f'dik l-ittra bħala t-tieni aggravju ta' *X Clean* u ta wkoll deċiżjoni dwar dak l-aggravju.

8. Il-Bord ta' Reviżjoni bid-deċiżjoni tat-8 ta' April 2021 li minnha sar dan l-appell ma laqax l-oġġezzjonijiet ta' *X Clean* u hekk ikkonferma d-deċiżjoni tal-awtorità kontraenti għal raġunijiet li fissirhom hekk:

»... .. the board notes that appellant claims that the evaluation committee failed to check if the preferred bid was abnormally low, it being alleged to be 40% lower than the appellant's bid.

»To this, the preferred bidder rebutted by saying that the 40% figure cannot be comprehended and one wonders how the appellant came to this conclusion, whereas the legal representative to the contracting authority stated that the appellant as well as the preferred bidder had similar rates for worker's wages using the figures laid down in government circulars and the main difference was in the administrative cost which, over the period of 3 years, amounted to a global difference of around ¼ of a million Euro.

»The board, having evaluated the evaluation report and the final ranking of the administratively and technically compliant tenders, which classified *Dibaw Services* first and the appellant *X Clean Limited* second, in both Lot 1 and Lot 2, cannot but concur with the contracting authority's and the preferred bidder's submissions and reject the appellant's claim that the preferred bidder's bid is abnormally low. The preferred bidder's bid is around 18% less (and not 40%) than the estimated procurement value for the call in question and only around 8% less than the bid submitted by the appellant company.

»Furthermore, as the contracting authority insists, whereas the hourly worker's cost rate from Monday to Sunday for both bidders (appellant and the preferred bidder) were practically identical, the main difference between the two bidders' offer emerged from the additional/administrative costs.

»In terms of article 243 of SL 174.04, it is in the contracting authority's discretion to determine whether a bid is abnormally low or otherwise, in which case the contracting authority may seek clarifications and explanations from the bidders. The board is not satisfied that the appellant has shown or proven that the contracting authority should or ought to have sought such clarification/explanations nor is it satisfied that there were reasons in fact and at law which should have driven the contracting authority in using its discretion differently. Nor is the board satisfied that the contracting authority should have rejected the preferred bidder's bid in terms of article 243(5) of the mentioned subsidiary legislation. In any case, it is hereby highlighted that the appellant company failed to prove or submit any reasons for rejection in this respect, except for the allegation that the preferred bidder's bid was 40% less.

»For these reasons this ground of appeal is being rejected.

»The second ground of appeal, referred to by the appellant as a further ground to the primary one above discussed and dismissed, relates to the appellant's claim that the points deducted in regard to wages for the year 2023 were not being declared. The board

considers that the appellant failed to satisfactorily prove his ground of appeal, which was based on the premise that the appellant “had grounds to believe” and which, in itself, already suggests that the appellant was not basing its ground of appeal on concrete proof and/or reasoning. This board feels that the appellant was expected and was obliged to be specific as to what he was complaining about and not present a general objection with the possible intention of embarking on a fishing expedition.

»The contracting authority, on the other hand, explained, to the satisfaction of the board, that the marks lost by the preferred bidder in the technical section emerged from an ‘add on criteria’ [*sic*] which is not mandatory, and hence of minimal importance as it is not deemed to prejudice the quality of the service to be operated.

»Based on the above considerations, the second ground of appeal is thus also being rejected.

»The board, having evaluated all the above, concludes and decides:

- »a) to dismiss the appeal submitted by *X Clean Limited*, and
- »b) to order that the deposit paid by the appellant upon filing of this appeal should not be refunded back to the same appellant.«

9. *X Clean* appellat b’rikors tas-27 t’April 2021, li għalih wiegħbu d-Direttur tal-Kuntratti fit-12 ta’ Mejju 2021, l-awtorità kontraenti fis-17 ta’ Mejju 2021, u *Dibaw* fit-18 ta’ Mejju 2021. Fir-rikors tal-appell *X Clean* talbet illi l-qorti:

»... .. tiddikjara li n-nuqqasijiet innotati fl-eżerċizzju ta’ evalwazzjoni kif indikati mis-soċjetà *X Clean* kienu ġustifikati, fondati fil-fatt u fid-dritt, meritevoli u jistħoqqilhorn jiġu milqugħa, u għalhekk id-deċiżjoni tal-*PCRB* tat-8 t’April 2021 għandha tiġi ddikjarata nulla.«

10. Qabel tqis l-aggravji tal-appell il-qorti sejra tibda billi tqis eċċezzjoni ta’ “irritwalità” tar-rikors tal-appell imressqa minn *Dibaw*. L-eċċezzjoni tgħid hekk:

»... .. is-soċjetà appellanti qed titlob li din il-qorti tiddikjara d-deċiżjoni tal-Bord tal-Kuntratti ‘nulla’. Hija ma talbitx ir-revoka tad-deċiżjoni tal-bord jew ir-riforma tal-istess decizjoni. Talbet biss li din il-qorti tiddikjara d-deċiżjoni tal-bord nulla.

»Għal din ir-raġuni biss, l-appell tal-appellanti *X Clean Ltd* huwa irritwali u ma jiswiex, in kwantu ma tqajmet ebda kwistjoni ta’ nullità. *Stante* li din il-qorti għandha biss quddiemha talba sabiex tiddikjara n-nullità tad-deċiżjoni appellata, u *stante* li ma tirriżulta ebda kwistjoni ta’ nullità tad-deċiżjoni tal-Bord ta’ Revizjoni dwar il-Kuntratti Pubbliċi, l-

appell odjern għandu jiġi miċħud fis-sħiħ, bl-ispejjeż kollha kontra l-appellanti.«

11. Tassew illi l-appellanti qiegħda timpunja l-korrettezza u mhux il-validità tad-deċiżjoni tal-Bord ta' Reviżjoni u għalhekk strettament ma kellhiex titlob in-nullità. Madankollu, d-differenza hija waħda pjuttost semantika milli ta' sostanza, u l-eċċezzjoni qiegħda tistieden lill-qorti ta' tagħmel esercizzju ta' tfettiq milli ta' ġustizzja, li hu l-kompitu proprju tal-qorti. Il-qorti qiegħda għalhekk twarrab l-eċċezzjoni u sejra tgħaddi biex tqis il-meritu tal-appell.

12. Fl-ewwel aggravju l-appellanti tibda billi tosserva illi l-Bord ta' Reviżjoni ma fehemx l-argument ta' tagħha li l-offerta ta' *Dibaw* hija erbgħin fil-mija (40%) orħos mill-ogħla offerta għax qabbel l-offerta ta' *Dibaw* mhux ma' dik tal-ogħla offerent – li hija erbgħin fil-mija (40%) ogħla – jew mal-istima tal-awtorità kontraenti – li hija tmintax fil-mija (18%) ogħla – iżda qabbilha mal-offerta tal-appellanti stess. Tkompli tfisser l-aggravju hekk:

»Illi hawn jidher li l-valuri li ġew komparti mill-PCRБ kienu dawk tal-appellant u *Dibaw Services* u mhux dawk ta' *Dibaw Services* mal-ogħla offerenti. Fatt li l-PCRБ naqas li jikkontempla.

»Illi l-offerta ta' *Dibaw Services* hija effettivament għal €3,016,450.00, meta l-prezz previst min-naħa tal-awtorità kontraenti huwa ta' €3,659,861.00, li effettivament hemm diskrepanza ta' €640,409.00, li tiġi madwar 18% orħos mill-prezz stima tal-awtorità kontraenti, liema stima saret wara *comprehensive research including appropriate financial analysis* u *based on market research* skont l-istess document tat-tender filwaqt li tikkomporta [sic] 21% tal-prezz offrut minn *Dibaw*. Dan kollu filwaqt li l-offerta tal-appellanti X *Clean* hija biss ta' €383,063.00 [sc. anqas], li tiġi biss 10% anqas minn dak previst mill-istess awtorità kontraenti.

»Illi jiġi rrelevant ukoll li €250,000 (¼ ta' €1 miljun), jew aktar u aktar id-differenza ta' €640,409.00 bejn l-istima tal-awtorità kontraenti u dik ta' *Dibaw Services* fuq tender ta' ċifra massima ta' €3.6 miljun, li fil-fatt hija biss dwar l-administrative costs (billi il-pagi huma ddikjarati l-istess), mhix figura fiha nfisha li wieħed għandu jiskarta bħala xi

somma miżera, aktar u aktar meta din hija 18% tad-differenza fil-prezz bejn iż-żewġ offerenti, u 21% tal-prezz offrut minn *Dibaw Services* u limitata għal *administrative costs*. Hekk *del resto* l-istess *PCRB* jirri-marka ... li:

»“Furthermore, as the contracting authority insists, whereas the hourly worker’s cost rate from Monday to Sunday for both bidders (appellant and the preferred bidder) were practically identical, the main difference between the two bidders’ offer emerged from the additional/administrative costs.«

»Illi kien għalhekk li l-bord ta’ evalwazzjoni kellu l-obbligu li jindaga u jitolb kjarifika kif intalab fis-sottomissjonijiet tal-appellanti soċjetà *X Clean*, u *cioè* li hija Prattika tassattiva legalment imposta li, meta jkun hemm prezz baxx, l-awtorità kontraenti għandha (*shall*) titlob lill-offerent jispjega l-prezz, jew l-ispejjeż a terminu tal-artikolu 69, fejn ukoll għiet ikkwotata lill-*PCRB* sentenza relativa, li tgħid hekk :-

»“a tangible evaluation that is well-founded is sufficient in this context (joined cases C-285 and 269/99 *Impresa Lombardini* (2001), ECR 1-9233, para 86.”

»Illi jiġi rilevat ulterjorment li s-soċjetà appellanti ipprovat tagħti din l-informazzjoni kollha lill-*PCRB* fin-nota addizzjonali, fejn ukoll ingħata *break down* u spjegazzjoni tal-ispejjeż involuti għal dak mitlub *fit-tender document*.

»Illi minn tali spjegazzjoni finanzjarja... .. joħroġ aktar biċ-ċar li hemm probabbiltà ta’ spejjeż mhux kawtelati fl-offerta ta’ *Dibaw Services* li ser jimpattaw bi kbir l-għoti tas-servizz mitlub, kemm fil-kwalità kif ukoll fil-kontinwità kif mitlub.«

13. Ma jidhirx ċar liema hu l-art. 69 imsemmi fir-rikors tal-appell meta jingħad illi “l-awtorità kontraenti għandha (*shall*) titlob lill-offerent jispjega l-prezz, jew l-ispejjeż a terminu tal-artikolu 69”. Il-materja hija regolata bir-reg. 243 tal-L.S. 601.03³ li jgħid hekk:

»**243.** (1) L-awtoritajiet kontraenti għandhom jesiġu li l-operaturi ekonomiċi jispjegaw il-prezz jew l-ispejjeż proposti fl-offerta meta l-offerti jkunu jidhru baxxi b’mod mhux normali fir-rigward tax-xogħlijiet, il-provvisti jew is-servizzi.

»(2) L-ispegazzjonijiet jistgħu jkunu relatati b’mod partikolari ma’:

- »(a) l-ekonomija tal-proċess ta’ manifattura jew tas-servizzi pprovduti jew tal-metodu tal-kostruzzjoni;
- »(b) is-soluzzjonijiet tekniċi magħżula jew kwalunkwe kondizzjonijiet eċċezzjonalment favorevoli disponibbli għall-

³ Ir-regolament applikabbli huwa r-reg. 243 tal-L.S. 601.03 mhux tal-L.S. 174.04 kif jingħad fid-deċiżjoni tal-Bord ta’ Revizjoni. Fil-fatt ir-reg. 243 huwa l-istess fiż-żewġ Regolamenti flief illi fir-reg. 243 tal-L.S. 601.03 saret emenda bir-reg. 5 tal-A.L. 196 tal-2020 li ma hijex relevanti għall-għanijiet tal-appell tallum.

offerent għall-forniment tal-prodotti jew servizzi jew għall-eżekuzzjoni tax-xogħol;

- »(ċ) l-originalità tax-xogħol, provvisti jew servizzi proposti mill-offerent;
- »(d) konformità mal-obbligi msemmijin fir-regolamenti 13(m)⁴ u 16(k)⁵;
- »(e) konformità mal-obbligi msemmijin fir-regolament 60⁶;
- »(f) il-possibbiltà li l-offerent jikseb għajjnuna mill-Istat.

»(3) Jekk l-operatur ekonomiku jonqos milli jibgħat l-ispegazzjonijiet tiegħu fi żmien il-limitu ta' żmien miktub impost mill-awtorità kontraenti, dan għandu jiġi intepretat bħala aċċettazzjoni min-naħa tal-operatur ekonomiku li l-offerta tiegħu hi baxxa b'mod anormali.

»(4) L-awtorità kontraenti għandha tivvaluta l-informazzjoni pprovduta billi tikkonsulta lill-offerent. Din tista' tiċċhad l-offerta biss fejn il-provi pprovduti ma jispjegawx b'mod sodisfaċenti l-livell baxx tal-prezz jew tal-ispejjeż proposti, b'kont meħud tal-elementi msemmija fis-sub-regolament (2).

»(5) L-awtoritajiet kontraenti għandhom jiċċhdu l-offerta, fejn ikunu stabbilixxew li l-offerta hija baxxa wisq għax ma tikkonformax mal-obbligi applikabbli msemmija fir-regolamenti 13(m) u 16(k).

»(6) Fejn awtorità kontraenti tistabbilixxi li offerta hija baxxa wisq għax l-offerent kiseb għajjnuna mill-Istat, l-offerta tista' tiġi miċċhuda għal dik ir-raġuni waħedha biss wara konsultazzjoni mal-offerent fejn, fi hdan limitu ta' żmien suffiċjenti stabbilit mill-awtorità kontraenti, dan tal-aħħar ma jistax juri li l-għajjnuna inkwistjoni hija kompatibbli mas-suq intern skont it-tifsira tal-Artikolu 107 tat-TFUE. Fejn l-awtorità kontraenti tiċċhad offerta f'dawk iċ-ċirkustanzi, din għandha tgharraf lill-Kummissjoni dwar dan.«

⁴ »13. Fir-rigward ta' proċedura dwar akkwisti pubbliċi mwettqa mid-Direttur fisem awtorità kontraenti b'valur stmat li jaqa' taħt ir-regolament 9(1)(b) [viz. kuntratti li l-valur stmat tagħhom hu daqs jew jeċċedi l-limitu ta' mija u disa' u tletin elf euro (€139,000)] id-Direttur ikollu wkoll il-funzjoni:

»... ..«

»(m) li jieħu miżuri xierqa biex jiżgura li fit-tweqqif ta' kuntratti pubbliċi operaturi ekonomiċi josservaw l-obbligi applikabbli fl-oqsma tal-ambjent, id-dritt soċjali u dwar ix-xogħol stabbilit bil-liġi tal-Unjoni, il-liġi nazzjonali, ftehim kollettivi jew b'dispożizzjonijiet dwar liġi internazzjonali dwar l-ambjent u liġi soċjali u dwar ix-xogħol«

⁵ »16. l-awtoritajiet kontraenti kollha għandhom id-dmir:

»... ..«

»(k) li jieħdu l-miżuri xierqa biex jiżguraw li fil-waqt tal-eżekuzzjoni ta' kuntratt, operaturi ekonomiċi josservaw l-obbligi applikabbli fl-oqsma tad-dritt dwar l-ambjent, soċjali u dwar ix-xogħol stabbilit mil-liġi tal-Unjoni, liġi nazzjonali, ftehm kollettivi jew minn dispożizzjonijiet dwar liġi internazzjonali dwar l-ambjent, soċjali jew dwar ix-xogħol«

⁶ Ir-reg. 60 jirregola s-sitwazzjoni meta l-oblatur ikollu l-ħsieb li jagħti sehem mill-kuntratt lil terzi b'subkuntratt.

14. Jingħad qabel xejn illi huwa aktar loġiku li l-prezz tal-offerta jitqabbel mal-prezz stmat mill-awtorità kontraenti milli mal-prezz tal-ogħla offerta. Il-prezz stmat huwa bażat fuq riċerka dwar il-kondizzjonijiet tas-suq u għandu għalhekk jitqies realistiku. Kif ingħad fuq⁷, il-prezz stmat mill-awtorità huwa biss indikattiv u offerta ta' prezz anqas jew ogħla ma tfissirx neċessarjament illi l-offerta hija għolja jew baxxa wisq.
15. Jekk il-prezz ta' *Dibaw* ta' tliet miljuni, sittax-il elf, erba' mija u wieħed u ħamsin euro u erbgħa u sittin ċenteżmu (€3,016,451.64) għaż-żewġ partiti huwiex baxx b'mod mhux normali meta mqabbel mal-istima ta' tliet miljuni, sitt mija u disgħa u ħamsin elf, tmien mija u wieħed u sittin euro (€3,659,861) – differenza ta' sitt mija u tlieta u erbgħin elf, erba' mija u disa' euro u sitta u tletin ċenteżmu (€643,409.36) jew sbatax punt deċimali ħamsa tmienja fil-mija (17.58%) tal-istima – hija kwistjoni ta' apprezzament tekniku. Dan ma jfissirx li minħabba f'hekk ma huwiex soġġett għal skrutinju tal-qorti. Għalkemm il-Bord ta' Revizjoni fid-deċiżjoni tiegħu jgħid illi "*it is in the contracting authority's discretion to determine whether a bid is abnormally low or otherwise*" il-mod kif l-awtorità tingeda b'din id-diskrezzjoni jibqa' sindakabbli mill-bord stess u mill-qorti.

⁷ Para. 2, *supra*.

16. F'sentenza mogħtija fit-2 ta' Frar 2017 fil-każ ta' European Dynamics

Luxembourg SA et v. Kummissjoni Ewropea⁸ il-Qorti Ġenerali

osservat illi:

»41 it is necessary to examine the single plea concerning the abnormally low nature of the tender submitted by the successful tenderer.

»42 It should be recalled that, at the time of the facts, Article 113(2) of the Financial Regulation was worded as follows:

»'The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, as well as the duration of the standstill period referred to in Article 118(2). The contracting authority shall notify all tenderers who meet the exclusion and selection criteria, and who make a request in writing, of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded. ...'

»43 At the time of the facts, Article 161 of the Implementing Regulation provided as follows:

»'1. The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract or framework contract or admission to a dynamic purchasing system, including the grounds for any decision not to award a contract or framework contract, or set up a dynamic purchasing system, for which there has been competitive tendering or to recommence the procedure.

»'2. The contracting authority shall, within not more than 15 calendar days from the date on which a written request is received, communicate the information provided for in Article 113(2) of the Financial Regulation.

»'3. In the case of contracts awarded by the Union institutions on their own account, with a value equal to or more than the thresholds referred to in Article 170(1) and which are not excluded from the scope of Directive 2004/18/EC, the contracting authority shall inform all unsuccessful tenderers or candidates, simultaneously and individually, by electronic means, that their application or tender has not been accepted at either of the following stages:

»'(a) shortly after decisions have been taken on the basis of exclusion and selection criteria and before the award decision, in procurement procedures organised in two separate stages;

»'(b) as regards the award decisions and decisions to reject offers, as soon as possible after the award decision and within the following week at the latest.

⁸ Każ T-74/15

»'In each case, the contracting authority shall indicate the reasons why the tender or application has not been accepted and the available legal remedies.

»'Unsuccessful tenderers or candidates may request additional information about the reasons for their rejection in writing by mail, fax or email, and all selected tenderers whose tenders are not eliminated may obtain information about the characteristics and relative merits of the tender accepted and the name of the successful tenderer, without prejudice to the second subparagraph of Article 113(2) of the Financial Regulation. The contracting authority shall reply within no more than 15 calendar days from receipt of the request.'

»44 Accordingly, the contracting authority had to provide the same information to the rejected tenderers, irrespective of whether it was a tender procedure for a framework contract with reopening to competition or another contract.

»45 In the present case, it is apparent that the applicants expressly requested clarification from the Commission in order to demonstrate that the price offered by the successful tenderer was not abnormally low and not only, as the latter claims, clarification of the effort allocated to the project by the successful tenderer. In reply to a question asked by the General Court at the hearing on that claim, the Commission confirmed that its letter of 16 January 2015 contained its reply in that regard. So far as concerns the nature of the tender selected for Request for Quotation No 455, it is apparent from the last page of that letter that the Commission merely stated, in a single sentence, that "the winning offer" of the IPT tender did not fall under the case of "abnormally low" offers'.

»46 It is clear that, in requesting the communication of the grounds on which the Evaluation Committee found that the successful tenderer's tender was not abnormally low, the applicants sought to have the contracting authority set out the characteristics and advantages of that tender (see, by analogy, judgment of 15 October 2013, *European Dynamics Belgium and Others v EMA*, Case T-638/11 not published, EU:T:2013:530, paragraph 63).

»47 It must be stated that the single sentence in the letter of 16 January 2015 stating that the tender was not abnormally low does not fulfil the duties assigned to the obligation to state reasons, that is, the reasons must be disclosed clearly and unequivocally so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its power of review. It cannot be accepted that a contracting authority should explain the not abnormally low nature of a tender merely by stating that such was considered not to be the case (see, by analogy, judgment of 15 October 2013, *European Dynamics Belgium and Others v EMA*, T-638/11, not published, EU:T:2013:530, paragraph 64).

»48 In so far as the Commission claims, in the rejoinder, to have fulfilled its obligation to state reasons, in its letter of 16 December 2014, by commenting on the satisfactory nature of the effort estimated in the selected tender, that argument cannot be accepted. It appears

from that letter that none of the comments therein sets out the reasoning required by the case-law.

»49 It should be added that requiring the contracting authority to present the grounds on the basis of which an offer was not considered to be abnormally low does not require it to disclose precise information on the technical and financial aspects of that tender, such as the prices offered or the resources that the successful bidder proposes to use in order to provide the services that it offers. In order to provide a sufficient statement of reasons for that aspect of the selected tender, the contracting authority must set out the reasoning on the basis of which, on the one hand, it concluded that, because of its principally financial characteristics, such an offer complied with the national legislation of the country in which the services were to be carried out in respect of the remuneration of staff, contribution to the social security scheme and compliance with occupational safety and health standards and, on the other, it determined that the proposed price included all the costs arising from the technical aspects of the selected tender (see, to that effect, *European Dynamics Belgium and Others v EMA*, T-638/11, not published, EU:T:2013:530, paragraph 68; see also, to that effect and by analogy, judgment of 8 October 2015, *Secolux v Commission*, T-90/14, not published, EU:T:2015:772, paragraph 62 and the case-law cited). Accordingly, the Commission's argument that the tenders in the present case had not raised any doubts that they were not abnormally low and that there was therefore no other information which it could have provided to the applicants must be rejected.

»50 In its rejoinder, the Commission claims that the Financial Regulation and the Implementing Regulation do not lay down any obligation for the contracting authority to indicate to an unsuccessful tenderer the reasons why it did not consider the selected tender to be abnormally low, a fortiori so because, according to Article 151(1) of the Implementing Regulation, such an analysis is carried out only in cases in which an offer appears abnormally low.

»51 However, it cannot be accepted that a contracting authority, by merely invoking that provision, is relieved of the duty to inform the unsuccessful tenderer of the characteristics and advantages of the successful tender, as stated in Article 113(2) of the Financial Regulation in the version applicable at the material time, which undoubtedly includes the reasons for which the successful tenderer's tender was not abnormally low. In the present case, it does not appear from the documents before the Court that the Commission inquired of the successful tenderer as to the abnormally low nature of the selected tender for the Request for Quotation No 455. Furthermore, the applicants have supported their observations by calculations based on factors which were, prima facie, such as to raise doubts as to the trustworthiness of the selected tender. In such circumstances, it cannot be accepted that the Commission should merely state that it did not consider the selected tender to be abnormally low without providing any other explanation, even if it considered that the points of comparison used for the applicants' calculations were invalid.

»52

»53 In the light of the foregoing, the single plea in law alleging an inadequate statement of reasons concerning the abnormally low nature of the selected tenderer's tender for Request for Quotation No 455 must be upheld. Consequently, the Commission's disregard of essential procedural requirements relating to the first contested decision must lead to its annulment (see, to that effect and by analogy, judgment of 30 March 1995, *Parliament v Council*, C-65/93, EU:C:1995:91, paragraph 21), without it being necessary to reply to the substantive argument that the contracting authority was wrong to estimate the effort required to carry out the tasks laid down in the context of Request for Quotation No 455 and, therefore, was wrong to consider that the tender selected was not abnormally low.

17. Għalkemm dak kien każ ta' kuntratt mogħti minn istituzzjoni ewropea, u għalhekk jintlaqat bid-disposizzjonijiet legali msemmija fis-sentenza li jolqtu lill-istituzzjonijiet ewropej, fil-liġi domestika – il-L.S. 601.03 – hemm disposizzjoni analoga fir-reg. 242 li tobbliga lill-awtorità kontra-enti tagħti “lil kull kandidat li ma ġiex aċċettat bir-raġunijiet għaċ-ċaħda tat-talba għall-partecipazzjoni tiegħu”. Fil-każ tallum ir-raġuni li l-offerta ta' *Dibaw* ma tqisitx baxxa b'mod mhux normali kienet waħda mir-raġunijiet għala l-kuntratt sejjer jingħata lil *Dibaw* u, konsegwentement, għala ġiet miċħuda l-offerta ta' *X Clean*, u għaldaqstant għandu jingħata tagħrif għala l-offerta ta' *Dibaw* ma tqisitx baxxa b'mod mhux normali, aktar u aktar jekk saret oġġezzjoni dwar hekk.
18. Il-Bord ta' Reviżjoni deherlu illi dak li baxxa l-prezz tal-offerta ta' *Dibaw* ma kinux fatturi meqjusa “fatali” mir-reg. 243 iżda “*the main difference between the two bidders' offer emerged from the additional/ administrative costs*”. Igħid ukoll il-bord illi “*the appellant as well as the preferred bidder had similar rates for worker's wages using the figures laid down in government circulars and the main difference was in the administrative cost which, over the period of 3 years, amounted to a global difference of around ¼ of a million Euro*”.

19. Verament, din l-ispjegazzjoni – li d-differenza ma hijiex fir-rata ta' ħlas ta' pagi u li d-differenza hija biss fi spejjeż amministrativi li jlaħħqu kwart ta' miljun euro (\approx €250,000) – ma hijiex għalkollox sodisfaċenti. Ma humiex biss ir-rati ta' ħlas ta' pagi lill-impjegati li jistgħu jkunu fatali taħt ir-reg. 243, li jqijs ukoll fatturi ambjentali u soċjali.
20. Barra minn hekk, id-differenza fl-ispejjeż amministrativi tiġġustifika biss madwar kwart ta' miljun euro (\approx €250,000) mid-differenza ta' sitt mija u tlieta u erbgħin elf, erba' mija u disa' euro u sitta u tletin ċenteżmu (€643,409.36) bejn l-offerta ta' *Dibaw* u l-istima.
21. Dan ma jfissirx illi l-offerta ta' *Dibaw* għandha fuq kriterju purament matematiku titqies baxxa b'mod mhux normali u għandha għalhekk titwarrab⁹. Fil-fehma ta' din il-qorti, iżda, id-differenza hija sostanzjali biżżejjed biex tobbliga lill-awtorità kontraenti titlob mingħand l-oblatur it-tagħrif imsemmi fir-reg. 243(1) tal-L.S. 601.03 u tagħmel l-eżercizzju li jrid dak ir-regolament qabel tiddeċiedi tagħtihx il-kuntratt.
22. Fil-fehma tal-qorti dan hu biżżejjed biex jintlaqa' l-appell.
23. Il-qorti għalhekk, wara li tiċhad l-eċċezzjoni ta' irritwalità tar-rikors tal-appell, tilqa' l-appell, tħassar id-deċiżjoni tal-Bord ta' Revizjoni tat-8 ta' April 2021 u, konsegwentement, tħassar ukoll id-deċiżjoni tal-awtorità kontraenti li l-kuntratt jingħata lil *Dibaw* u tordna, minflok, illi l-proċess ta' evalwazzjoni tal-offerti u tal-għażla jsir mill-ġdid wara li l-awtorita

⁹ Ara *Impresa Lombardini SpA v. ANAS*, C-285/99, QĠEU, 27 ta' Novembru 2001.

kontraenti tkun talbet mingħand *Dibaw* it-tagħrif kif irid ir-reg. 243(1) tal-L.S. 601.03.

24. L-ispejjeż ta' dan l-episodju jinqasmu hekk: sehem minn ħamsa ($1/5$) tħallsu *Dibaw*, peress li din rressqet l-eċċezzjoni ta' irritwalità tar-rikors li ma ntlagghetx; l-erba' ishma l-oħra minn ħamsa ($4/5$) jħallsuhom id-Direttur tal-Kuntratti u l-awtorità kontraenti.

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da