



## **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 5**

**Appell numru 112/2021/1**

***PR20 JV* konsorzju magħmul minn *Rockcut Limited (C-10164)* u *Pato SRL***

**v.**

**Id-Direttur Ġenerali tad-Dipartiment tal-Kuntratti; il-Korporazzjoni għas-Servizzi tal-Ilma; u *Bianco Impianti SRL***

1. Dan huwa appell ta' *PR20 JV* ["il-konsorzju" jew "l-appellanti"] minn deċiżjoni tal-25 ta' Marzu 2021 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [L.S. 601.03], li ċaħad oġġezzjoni tal-konsorzju kontra deċiżjoni tal-awtorità kontraenti li l-offerta tiegħu titwarrab għax ma saritx kif imiss.

2. Il-fatti rilevanti seħnew hekk: kienet saret sejħa mill-Korporazzjoni għas-Servizzi tal-Ilma [“il-korporazzjoni” jew “l-awtorità kontraenti”] għal offerri għall-bini ta’ *“pipes distribution network for new water from Sant’Antnin Teatment Plant (M’scala) to Bulebel, tas-Silġ and Habel Abjad reservoirs through horizontal directional drilling”*. Tefgħu offerri l-konsorzju appellanti u *Bianco Impianti SRL* [“*Bianco*”].
3. B’ittra tat-12 ta’ Frar 2021 id-Dipartiment tal-Kuntratti [“id-dipartiment”] għarraf lill-konsorzju illi l-offerta tiegħu twarrbet għax tqieset *“technically non-compliant”* għal dawn ir-raġunijiet:
  - »• Q[uality] A[ssurance] Plan not signed and dated.
  - »• Missing signed self-declaration for all key experts after rectification has been requested
  - »• CV for Jack Grixti is not comprehensive after rectification has been requested.«
4. Fit-22 ta’ Frar 2021 il-konsorzju ressaq oġġezzjoni quddiem il-Bord ta’ Reviżjoni kontra din id-deċiżjoni li titwarrab l-offerta tiegħu, u bid-deċiżjoni tal-25 ta’ Marzu 2021 li minnha sar dan l-appell il-bord qatagħha kontra l-konsozju għal raġunijiet li fissirhom hekk:
  - »This board ... .. having taken cognisance of all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties ... .. hereby resolves:
  - »That the appellant was disqualified by correspondence dated 12<sup>th</sup> February 2021 on the basis of having been technically non-complaint due to three listed reasons, namely (a) QA Plan not signed and dated, (b) missing signed self declaration for all key experts after rectification has been requested and (c) CV for Jack Grixti is not comprehensive after rectification has been requested.
  - »That on the same date, by letter addressed to *Bianco Impianti Srl*, the same was informed that it was awarded the tender.
  - »The board shall consider separately all three reasons listed by the contracting authority as being the basis for making the tender submission by the appellant technically non-compliant, although it is clear that, even if one of the three subsists, then the contracting authority.s decision would still be deemed valid and be confirmed.

»(a) QA Plan not signed and dated

The appellant argues that the QA Plan was submitted as was required but that the tender document did not state that the tenderer would be disqualified if the same document is not signed and dated. In the appeal/letter of objection, appellant argues that the QA Plan may easily be deemed to have been signed and dated once it was submitted.

»In this respect the contracting authority states that a signature, or any other detail which is clearly and specifically requested in the tender documents, is not some optional formality which can be disregarded by bidders.

»The preferred bidder on the other hand re-iterated that the lack of signature and date on the QA Plan was a cardinal omission. It argues that quality assurance is a cardinal pre-requisite for any tender, more so in this tender, where the contracting authority must be assured of the works and materials provided by each bidder. It furthermore submits that the mere fact that the objector is endorsing the contents of the tender with his signature crystallises the essential importance of a signature.

»The preferred bidder as well as the contracting authority made reference to cases previously decided by this board and this board sees no reason why it should depart from the line of reasoning taken in such decisions.

»In this regard, this board would like to opine that once the fact that the tender document is accepted to be a contract (which is a basic fact) then such a contractual obligation has to be endorsed to signify acceptance of the conditions of the tender document and also to confirm that his offer is as stated.

»Furthermore, this board opines that the contracting authority is correct in its assessment to the effect that “the tender evaluation committee could not ask the appellants to rectify their submission in order to add or change any details contained therein as this is accompanied by note 3<sup>1</sup>”.

»To this effect, this board shall confirm the first ground for making the appellant’s bid technically non-compliant.

»(b) Missing signed self-declaration for all key experts after rectification has been requested

»In respect of this second basis by the contracting authority for claiming the appellant’s bid to be technically non-compliant, the appellant argues that these self-declaration forms were intended to be submitted only by key experts who were employed in the public administration – and, given that none of the appellant’s key experts were so employed, then there was no need for such declarations to be submitted.

»The contracting authority on its part argued that, irrespective of that, the tender document requested the filing of such forms. It states that

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<sup>1</sup> “No rectification shall be allowed. Only clarification on the submitted information may be requested. Requests for clarifications and/or rectifications concerning a previous request dealing with the same shortcoming shall not be entertained”.

such forms were important to be filled in and duly submitted, if anything, as they would serve to inform the contracting authority that none of the bidder's key experts was in fact employed in the public administration. It furthermore submits that the appellant was in any case asked to rectify – but the appellant failed to do so.

»The appellant confirms that no reply was given in rectification on the basis that, once none of its key experts were employees in the public administration, then that was not required.

»The board refers to art. 16.1 of the *General Rules governing Tenders* V3.0 of April 2019 which specifically states that, when a rectification is requested, the bidder is to reply within 5 days and failure to comply shall result in the tender offer not being considered any further.

»The board deems that it was not up to the bidder to decide on whether or not to submit the forms, but, once requested, the bidder was obliged to submit as required, otherwise the bidder would automatically be deemed to be technically non-compliant in terms of the rule above quoted.

»To this effect, the board shall also confirm the second ground for making the appellant's bid technically non-compliant.

»(c) CV for Jack Grixti is not comprehensive after rectification has been requested

»Whereas the above reasoning is equally applicable to this specific ground and hence the board has no option but to also confirm this ground for making the appellant's bid technically non-compliant, the board would like to emphasize that the c.v. provided in respect of the mason leaves much to be desired and contracting authorities do well to ask for a rectification when faced with such poor documentation, in this case, the mason's c.v.

»Whereas the appellant basis its argument on the fact that the “tender did not require any particular experience for stone mason”, the board cannot but note the following:

- »(i) Whereas it is true to say that in the case of other key experts the tender document might have specifically stated the need for experience, in the case of a mason no such specific reference to experience was made; however, one cannot omit the importance of the umbrella clause with which section A.02 commences, namely that the contractor shall engage staff with “in depth experience”.
- »(ii) Irrespective of the above, there remains, in the board's view, the lack of adherence of the appellant with the request to rectify an otherwise insufficient c.v. provided, on the basis of which it was justifiably concluded by the contracting authority that the c.v. submitted “was not comprehensive”.

»The board has no option but to confirm also the third reason given by the contracting authority for concluding that the appellant's bid was technically non-compliant.

»The board will thus dismiss the appeal and confirm the contracting authority's conclusions and decisions.

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

- »a) to dismiss the appeal submitted by *PR20 JV*, and
- »b) to confirm all three grounds listed in the contracting authority's letter of the 12<sup>th</sup> February 2021 to the appellant as making the latter's bid technically non-compliant, and
- »c) to order that the deposit paid by the appellant upon filing of this appeal should not be refunded back to the same appellant.«

5. Il-konsorzju appella b'rikors tal-14 t'April 2021, li għalih wieġbu l-korporazzjoni fit-30 ta' April 2021, id-dipartiment fl-4 ta' Mejju 2021, u *Bianco* fil-25 ta' Ġunju 2021. Fir-rikors tal-appell il-konsorzju talab illi l-qorti:

»... .. tħassar u tirrevoka d-deċiżjoni tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi tal-25 ta' Marzu 2018 [*recte*, 2021] ... .. tħassar id-deċiżjoni li biha l-offerta tal-esponenti giet miċħuda fil-waqt li l-kuntratt gie propost li jingħata lis-soċjetà intimata *Bianco Impianti SRK*, u, minflok, tordna li ssir evalwazzjoni mill-ġdid bl-inkluzjoni tal-offerta tas-soċjetà esponenti.«

6. Qabel tqis l-aggravji tal-appell il-qorti sejra tibda billi tqis eċċezzjoni ta' nullità tar-rikors tal-appell imressqa kemm mill-korporazzjoni u kemm minn *Bianco*. Essenzjalment l-eċċezzjoni tgħid illi l-konsorzju appellanti ma għandux personalità ġuridika u għalhekk ma jistax jippreżenta atti ġudizzjarji.
7. Jingħad qabel xejn illi jekk il-konsorzju seta' jitfa' offerta – u dan il-fatt ma ġiex kontestat għax l-offerta tiegħu twarrbet minħabba dik li tqieset bħala irregolarità fil-kontenut tal-offerta u mhux għax saret minn entità "ineżistenti" – mela jista' jinqeda bir-rimedji li għandu kull oblatur, fosthom dak li jressaq appell quddiem din il-qorti.
8. Barra minn hekk il-konsorzju *PR20 JV* ma huwiex ħlief ditta, *i.e.* l-isem li bih iż-żewġ soċjetajiet li jiffurmawh – *Rockcut Ltd u Pato SRL* – imexxu n-negozju tagħhom għal dan il-proġett. L-appellanti huma

effettivament iż-żewġ soċjetajiet eżerċenti l-kummerċ bid-ditta  
PR20 JV.

9. L-eċċezzjoni ta' nullità – li l-qorti tqisha x'aktarx fiergħa – hija għalhekk miċħuda.

10. Ngħaddu mela għall-aggravji tal-appell. L-aggravji fil-qosor ġew infissra hekk:

»Illi, fl-ewwel lok, il-bord kien erronju meta ċaħad l-ilment tal-esponenti u ta importanza kritika lill-kwistjonijiet klerikali ta' dokument iktar milli l-kontenut u l-għan aħħari tal-imsemmi dokument;

»Illi, fit-tieni lok ... il-bord kien erronju meta irritjena li l-esponenti ma osservax it-talbiet dwar kjarifiki magħmula lill-esponenti mill-kumitat ta' evalwazzjoni;

»Illi fit-tielet lok ... il-bord kien erronju fl-interpretazzjoni tiegħu tar-rekwiżiti tas-sejha għall-offerti; u

»Fir-raba' lok ... l-esponenti appellanta ma kellhiex ma tingħatax rifużjoni tad-depożitu.«

11. Il-konsorzju appellanti kompli fisser l-ewwel aggravju hekk:

»Illi l-intimati u kif ukoll il-bord jagħmlu referenza għal sentenzi preċedenti tal-bord fejn intqal illi:

»“In this regard, this board would like to opine that, once the fact that the tender document is accepted to be a contract (which is a basic fact), then such a contractual obligation has to be endorsed to signify acceptance of the conditions of the tender document and also to confirm that his offer is as stated.”

»Illi fil-fatt dan huwa dak illi għamel l-esponenti meta fil-bidu nett tal-proċedura għat-tfiġh tal-offerta tiegħu huwa jimmarka u jiffirma dikjarazzjoni li permezz tagħha huwa jkun qiegħed jikkonferma dawk id-dokumenti u l-informazzjoni kollha li tiġi mitluba mill-imsemmija sejha għall-offerta. Illi dan il-fatt ġie anki rikonoxxut waqt is-smiġh tal-appell quddiem il-bord u ma ġiex ikkontestat xort'oħra;

»Illi għaldaqstant lanqas biss kien hemm lok għall-ħtieġa li tintalab xi kjarifika jew rettifika skont in-nota nru 3 kif qed jisħaq il-bord għaliex effettivament l-informazzjoni dwar is-sistema tal-*quality assurance* li kienet sejra tiġi adottata ngħatat, fatt ieħor li ma ġiex ikkontestat mill-kumitat ta' evalwazzjoni;

»Illi li kieku dan id-dokument kellu jiġi ffirmat minn xi persuna oħra li ma hijiex l-esponenti, kieku wieħed jifhem li din il-firma tista' tkun waħda essenzjali għaliex imkien fis-sejha tal-offerta ma jkun hemm xi haġa li turi konferma tal-impenn ta' din il-persuna, Dan ovvjament ma huwiex

il-każ fil-konfront tal-esponenti għaliex dan tal-aħħar ikun diġà ikkonferma l-impenn tiegħu billi ffirmat d-dikjarazzjoni kif spjegat hawn iktar 'il fuq;

»Illi rigward id-data, minkejja li din ma ġietx immarkata fuq id-dokument in kwistjoni mill-esponenti, huwa ċar li d-data tal-imsemmi dokument tista' titqies li hija l-istess data li fiha saret l-offerta;

»Illi mingħajr preġudizzju għal dak li ntqal hawn iktar 'il fuq, meta wieħed jieħu in konsiderazzjoni l-prinċipji kollha li joħorġu mis-sentenzi mogħtija mill-Qorti tal-Ġustizzja tal-Unjoni Ewropea, u *cioè* li l-entitajiet ikkonċernati għandhom jagħmlu dak kollu li jistgħu biex isalvaw offerta, speċjalment meta din tkun l-irħas, u l-fatt li żbalji klerikali ma għandhomx jikkostitwixxu raġuni b'saħħitha biżżejjed li twassal għall-iskwalifika ta' offerta, wieħed jista' faċilment jistabbilixxi li l-offerta tal-esponenti ma kellhiex tiġi skwalifikata;

»Illi jsegwi għalhekk li dan l-ewwel aggravju għandu jiġi milqugħ. «

12. Dan l-aggravju jolqot l-ewwel raġuni għala twarrbet l-offerta tal-appellanti, *viz.* illi l-*quality assurance plan* ma kienx iffirmit u ma jurix id-data meta sar.
13. Għandu raġun il-Bord ta' Revizjoni jqis illi dak id-dokument huwa parti tar-rabta kuntrattwali u għalhekk għandu jkun iffirmit bħala prova tal-inkorporazzjoni tiegħu fil-ftehim; ma huwiex biżżejjed li ssir referenza għalih f'dokument kuntrattwali ieħor għax il-firma hija l-prova li d-dokument iffirmit huwa dak li dwaru sar il-ftehim, u li dak id-dokument ma nbidilx sussegwentement.
14. Fejn il-qorti ma taqbilx mal-bord huwa fejn qal illi "*the tender evaluation committee could not ask the appellants to rectify their submission in order to add or change any details contained therein as this is accompanied by note 3*". Il-firma kienet isservi biss biex tawtentika d-dokument u ma tibdel xejn mill-kontenut tiegħu; għalhekk ma titqiesx bħala "rettifika" tal-offerta għax l-offerta tibqa' dik li kienet.

15. Dan l-aggravju għalhekk għandu jintlaqa' fis-sens lin-nuqqas ta' firma ma kellux iwassal *ipso facto* biex titwarrab l-offerta izda l-appellant kellu jissejjaħ biex jiffirma d-dokument, u l-offerta titwarrab biss jekk l-appellant jibqa' ma jiffirmax fiż-żmien li jingħatalu.

16. Naturalment dan ma huwiex biżżejjed biex jintlaqa' l-appell għax l-offerta twarrbet għal tliet raġunijiet li kull waħda minnhom, wehdedha, kienet tkun biżżejjed biex l-offerta titwarrab. Nġgaddu għalhekk biex inqisu l-aggravji l-oħra li jolqtu r-raġunijiet l-oħra għala twarrbet l-offerta.

17. It-tieni aggravju ġie mfisser hekk:

»Illi fost affarijiet oħra l-bord jgħid hekk: *“The contracting authority on its part argued that, irrespective of that, the tender document requested the filing of such forms. It states that such forms were important to be filled in and duly submitted, if anything, as they would serve to inform the contracting authority that none of the bidder’s key experts was in fact employed in the public administration”*.

»Illi dak illi sostniet l-awtorità kontraenti assolutament ma huwiex minnu għaliex effettivament imkien ma jirriżulta mis-sejha għall-offerti, kif jirriżulta minn sejhiet għall-offerti oħrajn, li f'każ li xi espert ma jkunx jaħdem fis-settur pubbliku l-esponenti kellu xorta waħda jissottometti l-formola u jimmarka l-kliem “N/A” f'każ li l-esperti ma jkunux jaħdmu fis-settur pubbliku;

»Illi lanqas fl-ittra għall-kjarifiki mibgħuta lill-esponenti ma ġie mitlub minn dan tal-aħħar li jagħmel hekk u għaldaqstant ikun tassew ingust li wiehded jipprova jittfa' xi tip ta' obbligu fuq l-esponenti meta dan l-obbligu la ġie imponut fuqu mis-sejha għall-offerti u lanqas mill-ittra msemmija;

»Illi għalhekk anki t-tieni aggravju għandu jiġi milqugħ.«

18. Il-klawsola relevanti fil-kondizzjonijiet tas-sejha għal offerti tgħid hekk:

»... ..«

»b) A list of key experts as per form marked “Key Experts” to be submitted online.

»c) Provide the form marked “Public Employees Declaration” (duly filled in as applicable by the key expert) which is to be submitted



online through the prescribed tender response format (tender structure). Note 2<sup>2</sup>

- »• This declaration is to be submitted in respect of all key experts who either work with the Public Administration or in the Private Sector.
- »• In case of key experts who are not in the Public Administration a “Not Applicable” declaration must be entered on the form and uploaded online.«

19. L-appellanti interpreta din il-klawsola bħallikieku tapplika biss għal esperti mis-settur pubbliku. It-test iżda jagħmilha ċara li tapplika għall-esperti kollha – dan huwa wkoll sottolinjat fit-test – u r-raġuni għal dan hija ovvja: l-oblatur għandu jiddikjara li l-esperti maħtura minnu ma jaħdmux fis-settur pubbliku, u mhux – kif donnu jifhem l-appellant – jistenna li l-awtorità kontraenti għandha tassumi, mill-fatt li ma saritx dikjarazzjoni dwar espert partikolari, li dak l-espert ma jaħdimx fis-settur pubbliku. L-appellant baqa’ jzomm din l-interpretazzjoni anke wara li ntalab jagħti t-tagħrif meħtieġ.

20. Il-qorti kienet tasal li tilqa’ dan l-aggravju, bħalma laqgħet l-ewwel wieħed, b’dan li l-appellant għandu jagħti t-tagħrif meħtieġ, li mhux għax l-appellant għa ntalab jagħti dak it-tagħrif u minkejja dan baqa’ jinsisti fuq l-interpretazzjoni żbaljata tiegħu tal-kondizzjoni tas-sejha. Jekk issa jingħata opportunità oħra biex jagħmel tajjeb għan-nuqqas dan imur kontra l-kondizzjoni tas-sejha li tgħid illi “*Requests for clarifications and/or rectifications concerning a previous request dealing with the same shortcoming shall not be entertained*”.

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<sup>2</sup> Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification. ... Requests for clarifications and/or rectifications concerning a previous request dealing with the same shortcoming shall not be entertained”

21. Dan l-aggravju għalhekk ma jistax jintlaqa'.
22. Għalkemm dan in-nuqqas tal-appellanti huwa biżżejjed biex l-offerta titwarrab, il-qorti għall-kompletezza sejra tqis ukoll it-tielet aggravju, li gie mfisher hekk:

»Illi, fir-rigward tal-kwalifiki tal-esperti, fil-waqt li fil-konfront ta' ċertu esperti, b'hal per eżempju fir-rigward ta' perit, is-sejha għall-offerti talbet speċifikament numru ta' snin ta' esperjenza sabiex dan ikun jikkwalifika li jagħti s-servizzi tiegħu f'din l-imsemmija offerta, l-istess ma kienx il-każ fil-konfront tal-bennej;

»Illi dan il-fatt effettivament gie rikonoxxut mill-bord għaliex qal:

»“Whereas it is true to say that in the case of other key experts the tender document might have specifically stated the need for experience, in the case of a mason, no such specific reference to experience was made.”

»Illi, speċifikament, fil-konfront tal-bennej, is-sejha għall-offerti, talbet biss li dan il-bennej ikollu liċenzja valida biex ikun jista' validament joffri s-servizzi tiegħu f'din is-sejha għall-offerti;

»Illi jekk wieħed jifli s-sezzjoni teknika tas-sejha għall-offerti wieħed immedjatament jithem li l-awtorità kontraenti kienet korretta li titlob ċertu ammont ta' snin ta' esperjenza fil-konfront ta' per eżempju l-perit iżda mhux fil-konfront tal-bennej għaliex fil-waqt li l-involviment fix-xogħol previst mis-sejha għall-offerti tal-ewwel espert ser ikun wieħed sostanzjali, l-involviment tal-bennej ser ikun wieħed vera minimu u ta' flit importanza;

»Illi bid-dovut rispett kollu, li wieħed jikkwota xi *umbrella provision* li tgħid li “*The contractor shall engage staff with ‘in depth experience’ ...*” biex jiġġustifika l-fatt li l-liċenzja tal-bennej ma hijex biżżejjed, hija żbaljata.

»... ..

»Illi kif jirriżulta b'mod ċar, fil-waqt li l-konsulenti tal-kuntrattur huma rikjesti b'mod ġenerali li jkollhom *in depth experience*, il-*minimum staff* huwa rikjest li jkollu biss dik l-esperjenza mitluba fis-sejha għall-offerti, li fil-każ tal-bennej hija dik biss li jkollu liċenzja;

»Illi għalhekk il-bord kellu jilqa' l-appell tal-esponenti u jirrifondi d-depożitu.«

23. Il-fatt illi fis-sejha għal offerti ma ntabax tagħrif partikolari dwar il-bennej ma jfissirx illi jekk, bit-tagħrif li jingħata, il-kumitat tal-għażla jkollu dubji dwar il-kompetenza ta' dak il-bennej, il-kumitat ma għandux is-setgħa li jitlob aktar tagħrif. Il-kumitat hekk għamel iżda,

bħal fil-każ tad-dikjarazzjoni dwar l-esperti li ma jaħdmux fis-servizz pubbliku, l-appellanti baqa' jwebbes rasu fl-interpretazzjoni żbaljata tiegħu. Għall-istess raġuni mogħtija għaċ-ċaħda tal-aggravju ta' qabel dan, dan l-aggravju wkoll huwa miċħud.

24. L-aħħar aggravju jolqot id-deċiżjoni tal-Bord ta' Reviżjoni illi lill-appellanti ma jintraddx id-depożitu mħallas minnu biex seta' jressaq l-oġġezzjoni tiegħu quddiem il-bord.
25. Billi l-bord għamel sew li ma laqax l-oġġezzjoni tal-appellant u kkonferma d-deċiżjoni li l-offerta tiegħu titwarrab, ma hemm ebda raġuni tajba għala d-depożitu jintradd.
26. Il-qorti għalhekk tiċhad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Reviżjoni tal-25 ta' Marzu 2021.
27. Il-korporazzjoni u *Bianco* jħallsu f'ishma ndaqs bejniethom sehem minn ħamsa ( $\frac{1}{5}$ ) tal-ispejjeż peress illi l-eċċezzjoni ta' nullità tar-rikors tal-appell, li tressqet minnhom, ġiet miċħuda. L-ispejjeż l-oħra ta' dan l-episodju jħallashom il-konsorzju appellanti.

Mark Chetcuti  
Prim Imħħallef

Giannino Caruana Demajo  
Imħħallef

Anthony Ellul  
Imħħallef

Deputat Reġistratur  
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