



## **QORTI TAL-APPELL**

### **IMĦALLFIN**

**S.T.O. PRIM IMĦALLEF MARK CHETCUTI  
ONOR. IMĦALLEF JOSEPH R. MICALLEF  
ONOR. IMĦALLEF TONIO MALLIA**

**Seduta ta' nhar l-Erbgħa, 1 ta' Diċembru, 2021.**

**Numru 17**

**Rikors numru 124/21/1**

**Gulf Med Aviation Services Limited (C-8318)**

**v.**

**[i] Forzi Armati ta' Malta**

**[ii] Id-Direttur tal-Kuntratti**

**[iii] Harrods Aviation Limited**

### **Il-Qorti:**

1. Dan hu appell imressaq fis-26 ta' April, 2021, mis-soċjeta` rikorrenti Gulf Med Aviation Services Ltd, wara deċiżjoni datata 6 ta' April, 2021, mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il

quddiem imsejjaħ “il-Bord”) fil-każ referenza CT 5000/2020 (każ numru 1546).

2. Dan il-każ huwa marbut ma’ *“negotiated procedure for the 1200 hour inspections of the AW 139 AS1630 S/N/3162”*, li hu wieħed mill-ħelikopters tal-Forzi Armati. Din il-proċedura negozjata nfetħet mis-soċjeta` rikorrenti u mis-soċjeta` Ingliża Harrods Aviation Ltd. Il-ħsieb kien li jiġi magħżul *“the most suitable economic operator”* għall-kuntratt ta’ manutenzjoni, spezzjoni u tiswija tal-ħelikopter in kwistjoni. Fit-23 ta’ Diċembru, 2020, is-soċjeta` rikorrenti ġiet infurmata li għalkemm l-offerta tagħha *“was administratevely and technically complaint”*, ma ġietx aċċettata peress li *“it was not the most financially viable”*. Eventwalment, fit-30 ta’ Diċembru, 2020, is-soċjeta` rikorrenti ġiet infurmata li l-kuntratt ġie rakkomandat li jingħata lis-soċjeta` Harrods Aviation Ltd *“who had submitted a cheaper offer”*. Irriżulta li d-differenza fil-prezz kienet ta’ €9,202.73. Is-soċjeta` rikorrenti ressqet oġġezzjoni għal quddiem il-Bord, li b’deċiżjoni tas-6 ta’ April, 2021, ċaħad l-oġġezzjonijiet tas-soċjeta` rikorrenti. Id-deċiżjoni tal-Bord hija s-segwenti:

*“That appellant’s appeal is based on three contentions : i) the contracting authority failed to indicate the selection criteria; ii) the contracting authority calculated the preferred bidder’s offer erroneously and iii) it should have also considered other factors in addition to the price. This Board shall consider these three grievances separately.*

*i) **The contracting authority failed to indicate the selection criteria.** This contention was not pursued further and was not mentioned in the submissions made during the hearing and no evidence on this point was produced by the appellant. The contracting authority states in the*

present case the “price quality ratio” cannot be applied since both contracting bidders have the same standard of quality regarding technical compliance; hence the only criteria should be the cheapest price.

The Board agrees with this more so since this was a negotiated procedure where both bidders were asked to submit cost estimates for the scheduled works. It was thus clear that the adjudication would be price based and not “price-quality ratio”.

It is therefore the Board’s opinion that the appellant’s first grievance does not merit to be accepted.

**ii) The contracting authority failed to consider hidden costs which make the chosen bid more expensive.** The appellant pointed out that since the helicopter on which the service would be provided is based in Malta, to enable the service to be provided, the helicopter would have to be flown or ferried to the UK. This at an additional cost which the contracting authority should have taken into consideration when choosing the best priced offer. However, no evidence was produced by appellant to quantify what these additional costs might be. The Contracting Authority on this point insists that both economic operators had been asked to submit the basic price for the helicopter’s inspections, adding that if following inspection, some parts resulted to need replacement then negotiations would be held with the chosen bidder on the acquisition and changing of these parts.

This Board notes that while it was taken for granted that the chosen bidder would carry out the inspection in the UK; no evidence was produced on this fact. It also is of the opinion that what the prospective bidders were asked to submit was the basic costs of the helicopter’s inspection and it was this that the evaluation committee had to take into consideration. Thus even the second grievance does not merit to be accepted.

**iii) The Contracting Authority should have considered other factors into consideration other than the price.** Appellant contended that the Contracting Authority should have considered Malta’s defence and security when awarding the tender to an overseas operator because of the additional downtime when the helicopter would not be available for service in Malta and also the question of warranties after the work was finished. The contracting authority insists that downtime could also result from waiting for the delivery of spares and in any case it had a fleet of aircraft to deal with operations and downtime is already factored in into the schedules.

The Board is also of the opinion that the appellant’s third grievance was a bit vague and again no evidence to sustain it was provided. Satisfied with the contracting authority’s reply that contingencies are catered for, this Board is of the opinion that it should also be rejected.

*During the hearing, when submissions were being made, appellant alleged that there were serious anomalies in the evaluation process and that this was a direct order masked as a negotiated procedure.*

*The Board notes that from the documents submitted and from the minutes of the **Negotiating Board Recommendations (the Evaluation Report)** dated 3 December 2020, it can be seen during the said Negotiating Board's meeting held on the 27<sup>th</sup> November 2020 a decision selecting Harrods for negotiations had been taken since it had provided the cheapest offer. Up to that date the board had had regular correspondence with both bidders who had both been found to be administratively, technically and financially compliant. The emails sent to both parties tally, day for day, up to the 25<sup>th</sup> November 2020.*

*The evaluation board also recommended that from that moment onward all negotiations were to be carried out with Harrods Aviation. This would explain why from the 2<sup>nd</sup> December onwards, communications were held only with the preferred bidder, including the submission of a draft contract on the 14<sup>th</sup> December 2020. This Board opines that the contracting authority should have been clearer in stating that the tender was being awarded to Harrods Aviation Ltd in their communication with appellant dated 23<sup>rd</sup> December 2020.*

*In view of all the above considerations the Board rejects appellant's contentions and the request to cancel the award of the negotiated procedure. The deposit paid for the filing of this appeal should not be refunded"*

3. Is-soċjeta` rikorrenti issa qiegħda tappella mid-deċiżjoni li ha l-Bord għal quddiem din il-Qorti, u għalkemm ressqet diversi aggravji, jistgħu jiġu sintetizzati fi tlieta: (1) l-awtorita` kontraenti naqset li tindika fil-bidu nett li kienet sejra timxi fuq l-orħos offerta bħala kriterju tal-għażla; (2) l-istess awtorita` kontraenti naqset milli tikkunsidra fatturi oħra li jrendu l-offerta ta' Harrods Aviation Ltd aktar għolja; u (3) l-istess awtorita` kien imissha kkunsidrat fatturi oħra lil hinn mill-prezz.

4. Wara li semgħet dak li kellhom xi jgħidu d-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti; din il-Qorti sejra tgħaddi għas-sentenza tagħha.

5. Fil-kuntest tal-preġudizzjali ssollewat mill-Forzi Armati ta' Malta fis-sens li skont ir-Regolament 285 tal-Leġislazzjoni Sussidjarja numru 601.03, l-appell kellu jiġi notifikat lill-istess Forzi Armati fi żmien ġimgħatejn mill-presentata tar-rikors tal-appell, jiġi rilevat illi dan ir-Regolament ma jimponix id-deżerzjoni f'każ li ma ssirx notifika, iżda jhalli f'idejn id-diskrezzjoni tal-Qorti jagħtix ordni ta' deżerzjoni. F'dan il-każ, in-notifika intalbet iżda bi żball ingħata indirizz ħażin, u wara li dan ġie senjalat lid-difensur tal-appellant, intalbet mill-ewwel notifika b'indirizz tajjeb. Dan mhux każ fejn l-appellant kien qed jipprova jtawwal iż-żmien biex jieħu xi vantaġġ tant li fl-ewwel dehra quddiem din il-Qorti dehru r-rappreżentanti tal-Forzi Armati li talbu kopja tar-rikors tal-appell bil-Malti, peress li kienu rċevew kopja bl-Ingliż. Kien hemm problema bin-notifika tar-rikors tal-appell lill-oblatur rakkomandat, Harrods Aviation Ltd, iżda ma kien hemm ebda dewmien jew xi preġudizzju għall-Forzi Armati minħabba n-nuqqas ta' notifika lilha tempestivament. Din il-Qorti fehmet ir-raġunijiet li wasslu għad-dewmien tan-notifika fi żmien ġimgħatejn, u ma tqisx li għandha tiddikjara l-appell deżert. Dan l-aggravju hu, għalhekk miċħud.

Ikkunsidrat:

6. Dwar il-meritu, din il-Qorti tosserva li l-proċedura għall-għoti tal-kuntratt kienet waħda negozjata, pero`, jirriżulta li mas-soċjeta` rikorrenti ma saru ebda negozjati. Din is-soċjeta` sottomettiet l-offerta tagħha fid-19 ta' Novembru, 2020, iżda ma saru ebda negozjati sakemm fit-23 ta' Diċembru, 2020, giet infurmata li l-offerta tagħha "was not the most financially viable". Min-naħa l-oħra, jidher li l-Forzi Armati komplew bil-korrispondenza mas-soċjeta` Harrods Aviation Ltd, tant li din giet anke mitluba tnaqqas mill-prezz tal-offerta tagħha xi spejjeż, bħalma huma l-*parking fees*. Għalkemm ingħad mid-difensur tal-Forzi Armati quddiem il-Bord li dan kien "*misleading as these fees were never mentioned in the first place*", dan jikkonferma li l-Forzi Armati kienu lesti jinnegozjaw mas-soċjeta` Ingliża iżda mhux mas-soċjeta` rikorrenti.

7. Kif qalet is-soċjeta` rikorrenti, fl-istedina għan-negozjati, ma giex indikat mill-Forzi Armati li kienet sejra taddotta kriterju bażat fuq l-orfios prezz. Il-kompetituri mitluba juru interess ġew mitluba jipparteċipaw f'kuntest bil-ħsieb li jiġi magħżul "*the most suitable economic operator*", li jindika li l-kriterju ma kienx sejjer ikun biss il-prezz, iżda fatturi oħra li kienu jagħmlu offerta waħda aħjar minn oħra. Kien biss meta l-offerta tas-soċjeta` rikorrenti giet miċħuda li hija giet infurmata li dan ġara għax ma

ressqitx l-orħos offerta. Kif qalet is-soċjeta` rikorrenti, li kieku kienet taf li dan kien sejjer ikun il-kriterju prinċipali, kienet tipproċedi billi tnaqqas xi prezzijiet mill-offerta tagħha. Hija mxiet biex tressaq offerta idonea għall-iskop meħtieġ u inkludiet diversi affarijiet (bħal taħriġ tal-bdoti) biex l-offerta tagħha tkun aktar tajba. Kieku, fil-fatt, saru negozjati mas-soċjeta` rikorrenti, din il-Qorti tagħraf li din żgur kienet tasal biex traħħas l-offerta, meta tqis id-differenza żgħira bejn iż-żewġ offerti. Ma kienx hemm għalfejn jistaqsu xi mistoqsijiet lill-Forzi Armati peress li l-kriterju kien ċar li ma kienx jirreferi għall-orħos offerta biss.

8. Jidher ukoll li l-awtorita` kontraenti ma qisitx il-fatt li s-soċjeta` Harrods Aviation Ltd twettaq l-operazzjoni tagħha ġewwa l-Ingilterra, li jfisser spiza akbar u ħela ta' ħin biex il-ħelikopter jittieħed lejn u jingieb minn dak il-pajjiż. Il-Forzi Armati qalu li din l-ispiza kienet "*beyond the remit of the call*", u tkun tista' tuża l-vjaġġi bħala taħriġ għall-bdoti. Hu ċar mill-atti, kuntrarjament għal dak li osserva l-Bord, li l-manutenzjoni kienet se titwettaq l-Ingilterra u mhux Malta. Ma tistax tgħid li l-ispiza biex tibgħat ħelikopter l-Ingilterra, speċjalment jekk ma jkunx f'qagħda li jtir, ma kellhiex tiġi kkunsidrata. Jekk kellha tintgħażel l-orħos offerta, żgur li kellha titieħed in kunsiderazzjoni l-ispiza ta' trasport lejn l-Ingilterra, u dan meta kien hemm fehma li t-tiswija ssir Malta stess. Kif tista' tqis l-offerta tas-soċjeta` rikorrenti bħala li ma kinitx "*financially viable*" meta mal-offerta tas-soċjeta` Harrods Aviation Ltd wieħed kellu jżid l-ispiza tat-

trasport lejn u mill-Ingilterra ?!. Jista' jkun li l-Forzi Armati kellha iżjed fiduċja fl-operaturi Ingliži milli f'dawk Maltin, imma jekk kien dan, f'għieħ it-trasparenza, dan kellu jiġi indikat u ppruvat.

9. Din il-Qorti, fid-dawl tal-premess, mhux persważa li kollox sar b'mod trasparenti u ġust fil-kuntest ta' dan il-kuntratt. Is-soċjeta` Harrods Aviation Ltd mhux biss ingħatat l-opportunita` tinnegozja l-offerta, iżda saħansitra ġiet mistiedna sabiex tbiddel l-offerta finanzjarja tagħha b'mod li ġiet tidher iżjed kompetittiva. Is-soċjeta` rikorrenti ma ngħatatx l-istess trattament. Ladarba l-awtorita` kontraenti għażlet li tmexxi proċedura negozjata bejn żewġ oblaturi kien meħtieġ illi hija tittratta liż-żewġ oblaturi bl-istess mod. Jekk huwa minnu, kif qal il-Bord, illi d-deċiżjoni tal-għażla ta' Harrods Aviation Ltd ittieħdet fis-27 ta' Novembru, 2020, ma kien hemm ebda raġuni li s-soċjeta` rikorrenti tinżamm fil-għama sat-23 ta' Diċembru, 2020.

10. Din il-Qorti tara li mill-premess jirriżultaw biżżejjed ċirkostanzi biex tħassar id-deċiżjoni li ħa l-Bord fis-6 ta' April, 2021, u d-deċiżjoni li ħadet l-awtorita` kontraenti, u peress li mhux il-kompitu ta' din il-Qorti li tassinja l-kuntratt lil xi parti, sejra tpoġġi lill-partijiet fis-sitwazzjoni li kienu mat-tfiġħ tal-offerta, b'ordni lill-awtorita` kontraenti tinnegozja maż-żewġ partijiet u tieħu d-deċiżjoni tagħha wara li tqis il-fatturi u ċ-ċirkostanzi kollha rilevanti u relatati mal-każ.



Għaldaqstant, għar-raġunijiet premissi, tiddisponi mill-appell tas-soċjeta` Gulf Med Aviation Services Ltd billi tilqa' l-istess, tħassar u tirrevoka d-deċiżjoni li ħa l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi fis-6 ta' April, 2021, tħassar u tirrevoka wkoll id-deċiżjoni li ħadet l-awtorita` kontraenti meta rrakommandat li jingħata l-kuntratt lis-soċjeta` Harrods Aviation Ltd, u tordna lil din l-awtorita` terġa' tirrikonsidra l-każ kif intqal qabel.

L-ispejjeż ta' dan l-appell jitħallsu mill-Forzi Armati ta' Malta u mid-Direttur tal-Kuntratti *in solidum*.

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