



## QORTI TAL-APPELL

IMĦALLFIN

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

**Seduta ta' nhar l-Erbgħa, 30 ta' Marzu, 2022.**

**Numru 22**

**Appell numru 404/2021/1**

***Kerċem Ajax Football Club***

**v.**

**Ministeru għal Għawdex; *Sectoral  
Procurement Directorate* fi ħdan il-  
Ministeru għal Għawdex; u  
*Sannat Lions Football Club***

1. Dan huwa appell ta' *Kerċem Ajax Football Club* ["*Kerċem Ajax*"] minn deċiżjoni tat-8 ta' Novembru 2021 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbliku [L.S. 601.03], li ċaħad oġġezzjoni tiegħu kontra deċiżjoni tas-*Sectoral Procurement Directorate* fi ħdan il-Ministeru għal Għawdex ["l-awtorità kontraenti"] li kuntratt għal servizzi lill-Ministeru għal Għawdex jingħata lil *Sannat Lions Football Club* ["*Sannat Lions*"].
2. Il-fatti rilevanti seħħew hekk: kienet saret sejħa mill-awtorità kontraenti għal offerti *for the supply of 'Be Active' services for the elderly for the Ministry for Gozo*. Il-kriterju waħdieni tal-għażla kellu jkun il-prezz. Saru

erba' offerti izda tnejn minnhom twarrbu għax ma ħarsux il-kondizzjonijiet tekniċi tas-sejħa; tqiesu l-offerti ta' *Sannat Lions* u ta' *Kerċem Ajax* u peress illi l-offerta ta' *Sannat Lions* – sebgħa u għoxrin elf, mija u għoxrin euro (€27,120) – kienet orħos minn dik ta' *Kerċem Ajax* – tnejn u tletin elf, tmien mija u tmenin euro (€32,880) – intgħażlet l-offerta ta' *Sannat Lions*.

3. B'ittra tat-3 ta' Ottubru 2021 *Kerċem Ajax* ressaq oġġezzjoni quddiem il-Bord ta' Revizjoni, izda l-bord bid-deċiżjoni tat-8 ta' Novembru 2021 li minnha sar dan l-appell ċaħad l-oġġezzjoni u kkonferma d-deċiżjoni tal-awtorità kontraenti għal raġunijiet li fissirhom hekk:

»This board ... .. having noted the objection filed by *Kerċem Ajax F.C.* (hereinafter referred to as the appellant) on 6<sup>th</sup> September 2021, refers to the claims made by the same appellant with regard to the tender ... .. whereby, the appellant contends that:

- »a) the criteria for award was [*sic*] based solely on the price and the contract is to be awarded to the bidder submitting the cheapest priced offer satisfying the administrative and technical criteria;
- »b) no site visits were conducted in connection with the said call for tenders. It should be noted that the specifications listed under Section 3 of the tender documents requires that: "Premises and equipment used during the sessions are to be provided by the service provider. There should be a minimum total footprint of 3,000 square metres consisting of an indoor and outdoor area. The gym equipment should at a minimum include treadmills, air walkers, gym weight benches, balance balls and mats. The premises should also have male, female and gender-free dressing rooms with shower facilities".
- »c) that, as part of the evaluation process, no site visits have been conducted and therefore no verification as to the adherence to the specific requirements has been made. In view of such specific requirements, the evaluation board should have made the necessary verifications prior to the award. This is being said since the other tenderers were not technically compliant as per tender's requirements. In line with this the objector submits that the other tenderers do not possess the necessary facilities in order to provide the service requested.

»This board also noted the Contracting Authority's reasoned letter of reply filed on 13<sup>th</sup> September 2021 and its verbal submission during the virtual hearings held on 4<sup>th</sup> October 2021, in that:

- »a) the appellant in his objection states that "no site visits were conducted in connection with the said call for tenders" and that

no verification as to compliance with tender specific requirements was made and that therefore this means that the other renderers were not compliant. Defendant makes it clear that the tender document does not stipulate for a site visit for the evaluation of this tender. However, the tender makes it compulsory for bidders to sign the technical declaration in the technical offer form that was part of the tender document. The technical declaration states that: "I / we declare that as part of our technical offer, I / we confirm that the provision of 'Be Active' services for the elderly for the Ministry for Gozo being requested in this document will be carried out in accordance with the technical specifications and all conditions and standards indicated in the terms of reference, and as detailed in the financial bid form";

- »b) therefore, it stands to reason that when signing this declaration the bidders are confirming that they will abide by the technical specifications as per tender document, including those listed by the appellant in the letter of objection. Both *Kerċem Ajax F.C* and *Sannat Lions Football Club* were compliant in this area;
- »c) furthermore, the tender document included a literature list to be submitted for the plans of the premises the tenderer is proposing and as detailed in point 1.1(f) in Section 3 – Technical Specifications.

»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 witnesses duly summoned, will consider Appellant's grievances, as follows:

- »a) Site visit – The board notes:
  - »i. that the tender document did not require any site visit as part of its technical compliance aspect;
  - »ii. that both *Kerċem Ajax F.C.* (appellant) and *Sannat Lions Football Club* (preferred bidder) submitted all the documentation necessary for a proper evaluation to be conducted;
  - »iii that both appellant and preferred bidder replied to clarification requests within the duly allotted timeframes as per Public Procurement Regulations;
  - »iv. that the evaluation committee is bound by the principle of self limitation and no instances / proof has been brought forward to attest that this has not been done,
- »b) Requested information by appellant during the hearing – the board makes reference to the request by Dr Grech, *i.e.* that the plan submitted by the preferred bidder as part of its bid be provided to the appellant for further scrutiny. The board declines this request on two (2) grounds:
  - »i. reference is made to case number 1646 in the records of the Public Contract Review Board. Such a similar request had also been declined whereby:
  - »ii. regulation 40 (1) of the Public Procurement Regulations states "Subject to the obligations established under these

Regulations and, or any other law obliging the Director, the contracting authority and the Ministerial Procurement Unit to disclose information, a contracting authority, the Director or the Sectoral Procurement Directorate shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders”;

- »iii. regulation 40(2)(c) of the Public Procurement Regulations states “Without prejudice to the other provisions of these Regulations, the following information shall not be considered as confidential documentation submitted by economic operators attesting that they comply with selection criteria”;
- »iv. this board opines that point (iii) above is not wide enough to encapsulate the whole bid, including all technical and financial matters of the preferred bidder’s bid. On the other hand it refers to “attestations” (*i.e.* confirmations) that there is compliance to the selection criteria;
- »v. regulation 40(2)(d) of the Public Procurement Regulations states “Without prejudice to the other provisions of these Regulations, the following information shall not be considered as confidential technical information which is already made available in public”;
- »vi. the board opines that even if this information that is being requested by the appellant is publicly available, and could therefore be disseminated, then the appellant had every opportunity to present this himself during the letter of objection stage, during the virtual hearing or even in the interim.

» Finally, this board does not uphold the grievances of the appellant.

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

- »a. does not uphold appellant’s letter of objection and contentions;
- »b. upholds the contracting authority’s decision in the recommendation for the award of the tender;
- »iii. directs that the deposit paid by appellant not to be reimbursed. «

4. *Kerċem Ajax* ressaq appell minn din id-deċiżjoni tal-Bord ta’ Reviżjoni b’rikors tad-29 ta’ Novembru 2021. Għal dan ir-rikors wiegħbu *Sannat Lions* fis-6 ta’ Diċembru 2021, u l-Ministeru għal Għawdex u l-awtorità kontraenti *SRF* fit-22 ta’ Diċembru 2021.

5. L-aggravju ta' *Kerċem Ajax* huwa msejjes fuq dak li l-appellant isejjaħlu "apprezzament manifestament ħażin tal-fatti u tal-liġi" u ġie mfišser hekk:

»Ir-rekwiżiti tat-*tender* hekk kif speċifikati f'*Section 3* tad-dokumenti tat-*tender* jispeċifika illi:

»"Premises and equipment used during the sessions are to be provided by the service provider. There should be a minimum total footprint of 3,000 square metres consisting of an indoor and outdoor area. The gym equipment should at a minimum include treadmills, air walkers, gym weight benches, balance balls and mats. The premises should also have male, female and gender-free dressing rooms with shower facilities."

»Matul il-provi prodotti waqt is-smiġħ tal-appell quddiem il-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi, partikolarment mir-rappreżentant ta' *Sannat Lions Football Club*, Teddy Bajada, ġie kkonfermat b'mod ċar li l-ambjenti li l-*preferred bidder* issottometta u li qegħdin jiġu offruti *in line*a mal-offerta tagħhom għadhom f'fażi ta' kostruzzjoni u li l-faċilitajiet fil-preżent mhux qegħdin jiġu utilizzati għal logħob kompetittiv. Infatti, mir-ritratti li ġew esebiti waqt it-trattazzjoni tal-oġġezzjoni quddiem il-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi, jidher ċar li s-sit indikat minn *Sannat Lions* huwa wieħed f'fażi ta' kostruzzjoni. Dan kollu huwa evidenzjat minn materjal u taħmil ta' kostruzzjoni.

»*Di più* l-istess ritratti ġew debitament ikkonfermati mill-istess Teddy Bajada li kkonferma li dak huwa s-sit offrut mill-*preferred bidder*,

»Kien f'dan id-dawl illi l-esponenti appellanti ssottometta li l-istess *preferred bidder* ma kienx *technically compliant* ma' dak mitlub permezz tat-*tender*.

»Fid-dawl ta' dan, jigi ribadit li "kull oblatur suppost jaf li jrid ikollu l-mezzi f'posthom hekk kif jagħmel l-offerta" - Qorti tal-Appell *Cater-essence Limited vs Ministeru tal-Intern u Sigurtà Nazzjonali* - 27 ta' Marzu, 2020 (401/2019).

»Għalhekk, kull oblatur meta jissottometti l-offerta tiegħu jikkonferma li dak li qiegħed jissottometti huwa veritier u għandu l-mezzi kollha sabiex iwettaq dak mitlub minnu. Dan evidentement mhux il-kaz hekk kif ippruvat quddiem il-bord u kkonfermat mill-istess Bajada. Għaldaqstant l-oblatur *Sannat Lions Football Club* assumew tali responsabilità meta kienu jafu però li l-ambjenti minnhom offruti għadhom fil-fażi ta' kostruzzjoni. Il-fatt li għaddej xogħol ta' kostruzzjoni hija problema unika tiegħu. Jibqa' fatt però li dak is-sit, inkluż ukoll fejn qiegħda ssir il-kostruzzjoni, huwa inkluż f'dawk it-3,000 metru kwadru neċessitati permezz tat-*tender*. Għalhekk l-awtorità kontraenti kellha d-dover li tiċċad l-offerta ta' *Sannat Lions Football Club*.

»Applikabbli għal dan il-kaz hija li offerent għandu obbligu josserva r-regoli tas-sejħa meta jagħmel offerta, u, jekk dak sottomess ma jkunx konformi fl-intier tiegħu mad-dokument tas-sejħa, dik l-offerta ma għandhiex titqies bħala waħda valida (*vide Cherubino Limited (C-3677) v. Dipartiment tal-Kuntratti et* deciza mill-Qorti tal-Appell fl-24 ta' Novembru 2017).

»Fid-dawl ta' dan kollu huwa evidenti għalhekk illi l-Bord ta' Revizjoni dwar il-Kuntratti Pubbliċi naqas milli jevalwa l-fatti tal-każ quddiemu, filwaqt li naqas milli janalizza l-provi prodotti u x-xhieda u għadda biex ċaħad l-appell tal-appellanti.«

## 6. *Sannat Lions* wieġeb hekk:

»L-esponenti jemmnu illi dan l-appell huwa wieħed fieragħ intiż unika-ment biex jiddelonga l-inizju ta' dan il-kuntratt bla bżonn u merament għal pika.

»Qabel xejn jidba biex jiġi osservat illi r-raġuni għall-appell ... quddiem il-Bord ta' Revizjoni dwar il-Kuntratti Pubbliċi kienet differenti minn dik li qed titqanqal f'dan l-appell.

»Quddiem il-bord tal-appelli l-appellant illanja mill-fatt illi ma nżammitx *site inspection* biex jiġi verifikat jekk l-esponenti kinux *technically compliant*. Imkien ma ssemma fl-att promotur ta' dak l-appell li hemm xi partijiet mill-binja illi għadhom mhux lesti kif qed jiġi lmentat issa. Għalkemm mhux miċħud illi dan il-punt tqajjem fit-trattazzjoni orali tal-appell u anke ġie mistoqsi fuqu x-xhud Teddy Bajada, dan fl-ebda mument ma tqajjem uffiċjalment bħala gravam fit-talba għall-appell. Għadarba dan l-aggravju ma ġiex lanjat uffiċjalment f'dak l-istadju tant illi l-anqas jiffigura fid-deċiżjoni tal-bord tal-appelli, hu prekluzi illi l-appellant jintavola din il-lanjanza f'dan l-istadju.

»Fil-mertu proprju u mingħajr preġudizzju għas-suespost, il-mertu ta' dan l-appell huwa msejjes fuq fatti inveritieri u huwa għalhekk illi fil-bidu ta' din ir-risposta l-esponenti għamel l-osservazzjoni illi dan l-appell huwa wieħed fieragħ intiż unika-ment biex jiddelonga l-inizju ta' dan il-kuntratt bla bżonn merament għal pika.

»Fil-fatt meta xehed Teddy Bajada quddiem il-bord tal-appelli dan spjega illi l-parti tas-sit li għadha fi stat ta' kostruzzjoni (u li llum fid-data ta' din ir-risposta hi lesta għal *finishing*) ma hijiex parti mill-*premises* mertu ta' din it-*tender*.

»Il-proġett li fuq parti minnu ser jiġi esegwit l-kuntratt mertu ta' din it-*tender* huwa wieħed estensiv u l-parti li kien għadha fi stadju ta' kostruzzjoni ma tifformax parti mit-3,000 metru kwadru li *Sannat Lions* offrew għall-esekuzzjoni tal-kuntratt mertu tat-*tender*.

»Iżda minkejja li ġie spjegat bl-aktar mod ċar illi din il-parti li kien għadha mhux lesta ma għandha x'tasam xejn ma din it-*tender* l-appellanti xorta jidher li għadhom iwebbsu rashom u qed jippruvaw jisvijaw lil din il-qorti billi jgħidu illi dawn huma parti mill-offerta u kwindi l-esponetni qed joffru post li għadu mhux lest.

»Il-parti mill-*premises* tagħhom li *Sannat Lions* offrew għall-esekuzzjoni ta' din it-*tender* huma lesti u mgħammara b'apparat, *changing rooms* u dak kollu meħtieġ. Il-parti li kien għadha mhux lesta hi intiża għal skopijiet oħra li ma għandhom x'jaqsmu xejn ma' din it-*tender* u ma jifformawx pari minnha. Dan kollu ħareġ ċar mix-xiehda ta' Teddy Bajada u kien magħruf lill-appellanti iżda dawn xorta waħda sabiex jagħmlu bastun fir-roti intavolaw dan l-appell.«

7. L-eċċezzjoni preliminari mressqa minn *Sannat Lions* ma għandhiex mis-sewwa. L-ittra ta' oġġezzjoni tat-3 ta' Ottubru 2021 tgħid hekk:

»As part of the evaluation process, no site visits have been conducted and therefore no verification as to the adherence to the specific requirements has been made. In view of such specific requirements, the evaluation board should have made the necessary verifications prior to the award.

»This is being said since the other tenderers were not technically compliant as per tender's requirements. In line with this the objector submits that the other tenderers do not possess the necessary facilities in order to provide the service requested«

8. Għalkemm fl-ewwel paragrafu hawn fuq miġjub *Kerċem Ajax* qiegħed igħid biss li ma saritx verifika li tharsu l-kondizzjonijiet tas-sejha, fit-tieni paragrafu igħid espressament illi "*the other tenderers do not possess the necessary facilities*", li huwa dak li qiegħed jallega f'dan l-appell tallum. L-eċċezzjoni preliminari hija għalhekk miċhuda.

9. Lanqas ma hu korrett dak li jingħad dwar il-meritu fit-tweġiba illi "meta xehed Teddy Bajada quddiem il-bord tal-appelli dan spjega illi l-parti tas-sit li għadha fi stat ta' kostruzzjoni (u li illum fid-data ta' din ir-risposta hi lesta għal *finishing*) ma hijiex parti mill-*premises* mertu ta' din it-*tender*". Kif rapportat fil-minuti tal-Bord ta' Revizjoni, Bajada xehed hekk:

»Mr Teddy Bajada called as a witness by the preferred bidder said that the photos that he had seen of the site indicated that work was in progress on the site offered in the tender with some rooms still being built.«

10. Mela Bajada ma qalx, kif jingħad fit-tweġiba, illi "l-parti tas-sit li għadha fi stat ta' kostruzzjoni ma hijiex parti mill-*premises* mertu ta' din it-*tender*", iżda qal l-oppost, *cioè* illi "*work was in progress on the site offered in the tender with some rooms still being built*".

11. Barra minn hekk, jidher li lanqas meta ġiet preżentata t-tweġiba tal-appell fis-6 ta' Diċembru 2021 ma kinux lesti x-xogħlijiet, tant illi fit-tweġiba (li ġiet preżentata minn Teddy Bajada stess f'isem *Sannat Lions*) jingħad illi għad fadal li jsir il-*finishing*.
12. Fid-dawl ta' dan kollu jidher illi l-appell huwa ġustifikat.
13. Il-qorti għalhekk tilqa' l-appell, tħassar id-deċiżjoni tal-Bord ta' Reviżjoni, tilqa' l-oġġezzjoni kontra d-deċiżjoni tal-awtorità kontraenti u tordna li d-depożitu biex saret l-oġġezzjoni quddiem il-bord jintradd lil *Kerċem Ajax*. Id-deċiżjoni li issa għandha tittieħed mill-awtorità kontraenti għandha tittieħed fid-dawl ta' dak deċiż f'din is-sentenza
14. L-ispejjeż ta' dan l-appell iħallashom *Sannat Lions*.

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Deputat Reġistratur  
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