



## **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, 4 ta' Mejju, 2022.**

**Numru 38**

**Rikors numru 23/22/1**

**Managing Consulting Service Industry (MCSI) Limited (C16749)**

**v.**

**Ministeru tal-Edukazzjoni u tal-Impjieg, Direttur Ġenerali (Kuntratti), Specialist Group Cleaners Ltd (C65296) f'isimha u *qua* lead tenderer tal-konsorzju Brightness JV u in rappreżentanza tas-soċjeta` estera Diemme s.c.a.r.l formanti parti mill-istess konsorzju**

**Il-Qorti:**

1. Dan hu appell li tressaq fis-17 ta' Jannar, 2022, mis-soċjeta` rikorrenti Managing Consulting Service Industry (MCSI) Ltd wara deċiżjoni li ta fis-27 ta' Diċembru, 2021, il-Bord ta' Reviżjoni dwar Kuntratti

Pubbliċi (minn hawn 'l quddiem imsejjaħ "il-Bord") fil-każ referenza CT 5000/2021 (każ numru 1661)

2. Is-soċjeta` rikorrenti kienet ilmentat li kuntratt għat-tindif tal-iskejjel f'Malta ngħata lill-konsorzju Brightness JV bi proċedura negozjata mingħajr publikazzjoni minn qabel. L-ewwel darba li dan il-konsorzju ngħata dan il-kuntratt kien fis-sena 2018 wara ħruġ ta' sejħa għall-offerti. Dan il-kuntratt kien għal sentejn. Wara li skada dan il-kuntratt, l-istess soċjeta` Brightness JV ingħatat kuntratt ieħor wara "*negotiated procedure without prior publication.*" Is-soċjeta` rikorrenti lmentat minn din l-għotja u eventwalment ressqet l-ilment tagħha quddiem il-Bord. Dan il-Bord b'deċiżjoni tas-27 ta' Diċembru, 2021, ċaħad l-ilment tas-soċjeta` rikorrenti. Is-sentenza tal-Bord hija s-segwent:

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 30<sup>th</sup> November 2021.

Having noted the application filed by Management Consulting Service Industry (MCSI) Ltd (hereinafter referred to as the Appellant) on 10<sup>th</sup> September 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT5000/2021 – MFED 473/2021 listed as case No. 1661 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Kristina Busuttill & Dr Daniel Inguanez

Appearing for the Preferred Bidder: Dr Marycien Vassallo

Whereby, the Appellant contends that:

a) **The Declaration of Ineffectiveness**

- i. That, for the Claimant to succeed in its application, it must show that the Contracting Authority awarded this contract without prior publication of a contract notice in the OJEU without this being permissible at law. This is the permitted ground under Regulation 277(2) of the PPR. The Claimant has not located a “contract notice in the OJEU” in connection with the Negotiated Procedure, and therefore, the only question that remains is whether the award of the Negotiated Procedure without prior publication was permissible at law.
- ii. That the Negotiated Procedure could have been awarded without prior publication in terms of Regulations 150 et seq. of the PPR which require: a) The Director General (Contracts)'s prior approval to use the negotiated procedure without prior publication. This approval must be requested and provided in writing in advance. The Contracting Authority must have sent a duly substantiated request to substantiate the need to use this procedure; and b) that one of the grounds provided for in Regulation 154 of the PPR for the use of the negotiated procedure without prior publication subsists.
- iii. The Claimant submits that according to Regulation 150(1) of PPR, the prior approval of the Director General (Contracts) must have been obtained for the use of a negotiated procedure without prior publication, and, that it is practice, that the Director General's prior approval is also obtained prior to the award of any public contract pursuant to negotiated procedure. This is not just a formalistic tick-the-box exercise. It is an approval which is required as a matter of law; ad validitatem.
- iv. The claimant submits that it has no evidence in hand, at the date of filing of its application, that this prior approval was duly obtained. On this basis, the Claimant is assuming that such a prior approval was not obtained since: (i) as shall be explained in the subsequent paragraph, any such request (if made at all) could not have substantiated the use of the negotiated procedure without prior publication and/or (ii) the Contracting Authority entered into this contract directly despite the fact that the estimated financial value of the Negotiated Procedure exceeds the relevant thresholds.

- v. The Claimant has gone through each ground exhaustively listed in Regulation 154 of the PPR (in the case of public service contracts) and none of those grounds exist in the case of the Negotiated Procedure.
- vi. Therefore, and on this basis, the Contracting Authority had no basis or grounds to award the Negotiated Procedure to the Contract Beneficiary by way of a “negotiated procedure without prior publication” in accordance with law.
- vii. For the above-mentioned reasons and others which may be brought during the proceedings, the Contracting Authority could not award the Negotiated Procedure to the Contract Beneficiary without prior publication. The Contracting Authority was duty bound to issue a fresh fair, open and non-discriminatory competitive tender procedure following the lapse of the 2018 Tender and not resort to the negotiated procedure without prior publication. This fresh tender ought to have been issued and publicised on the Official Journal of the European Union as required by law.

b) **Penalty** – In view of the circumstances of the case, the Claimant is also seeking the imposition of the penalty provided for in Regulation 281 of the PPR on the Contracting Authority. The Claimant notes that Regulation 280(1) of the PPR provides that the penalty imposed shall be done “*after assessing in its decision all relevant factors, including the seriousness of the infringement and the behaviour of those authorities*”

c) **Request for Compensation** – The Claimant is formally lodging a request for compensation as a result of the direct award of the Negotiated Procedure and in terms of Regulation 278 of the PPR. However, the Claimant is not able to liquidate the amount of compensation that it is due, in particular, since it does not have sight of the scope of services being procured. This is something that this Honourable Board will be able to do in view that it will have access to this information.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 29<sup>th</sup> September 2021 and its verbal submission during the virtual hearing held on 30<sup>th</sup> November 2021, in that:

a) **Facts** – Due to the re-opening of schools and the adoption of enhanced cleaning practices in conformity with the above-mentioned Guidelines the value of the 2018 Tender contract, representative of cleaning hours awarded, was being used up earlier than had been expected in early 2018 when the 2018 Tender was drafted and issued. At that time in early 2018 nobody could have envisaged the Covid-19 health crisis. The value of the 2018 Tender contract was depleted even before the period of execution is to end on the 31st December 2021. Given this state of affairs, on the 5th of April 2021 the Respondent

Ministry reacted quickly by seeking the approval of the General Contracts Committee for the issue of a negotiated procedure without prior publication. Approval was given by the General Contract Committee on the 2nd July 2021 on the basis of Regulation 154(1c) of the Public Procurement Regulations (S.L. 601.06) - that is, “for reasons of extreme urgency brought about by events unforeseeable by the contracting authority”. While approval for the negotiated procedure was being obtained the Respondent Ministry had already started with the drafting of a new tender for the conclusion of a public contract for the provision of cleaning services in schools. Given that this new tender could not be issued in time for the provision of cleaning services to be uninterrupted, the negotiated procedure with reference 473/2021 was concluded with Brightness JV and the Contract was signed on the 27th of August 2021. The Contract shall terminate on the 31st of December 2021, therefore, together with the 2018 Tender contract. The tender which is currently being drafted is therefore envisaged to cover a period beginning from 1st January 2022.

b) **Regarding the lack of existing grounds for ineffectiveness**

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- i. It must first be stated at the outset that, contrary to what the Claimant seems to suggest, the Respondent has used the negotiated procedure without prior publication for the Contract in question, after having obtained the approval of the General Contracts Committee, and on the basis of extreme urgency in terms of Regulation 154(1c) of the Public Procurement Regulations. The Court of Justice of the European Union (CJEU) has stated that the use of the negotiated procedure on the basis of extreme urgency is subject to three conditions: (1) an unforeseeable event; (2) extreme urgency rendering impossible the observance of time-limits laid down for calls of tenders; and (3) a causal link between the unforeseeable event and the extreme urgency.

**An unforeseeable event**

The emergence of the Covid-19 health crisis could surely not have been foreseen when the 2018 Tender was being prepared. Even the European Commission has issued guidance classifying as an unforeseeable event the need for medical equipment and facilities during the pandemic. The ‘Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis’ (2020/C 108 W01) states in particular that “The number of COVID-19 patients requiring medical treatment is rising daily and in most Member States, is expected to increase further until the peak will be reached. These events and especially their specific development has(sic) to be considered unforeseeable for any contracting authority.” (para. 2.3.1). In much the same manner, the new required standards relating to the enhanced cleaning of school premises must be considered an unforeseeable event.

Particularly, the direction of the health authorities to adopt enhanced cleaning measures due to the Covid-19 health crisis, and the extent of such measures, could also not have been foreseen. In May 2021 the Ministry for Health, by means of the Advice and guidelines to the educational sector for the re-opening of primary and secondary schools in Malta, advised that primary and secondary schools should apply enhanced cleaning to their premises. The said guidelines, namely pages 27 and 28, required inter alia that:

- premises be cleaned daily using a combination of soap, water and disinfectant;
- disinfectants be left for 10 minutes before being removed;
- premises be cleaned thoroughly between one cluster of students and another;
- toilets be cleaned regularly, at least three times a day;
- common resources used by students must be cleaned appropriately at regular intervals and at the beginning and at the end of the day;
- floor cleaning should be carried out more regularly and frequently throughout the day;
- handles, railing, light switches, tablets, phones, and all other grip areas be cleaned particularly thoroughly and, if possible, several times a day in heavily frequented areas.

The attempts of the Respondent Ministry to implement all of the above resulted in an unprecedented increase in workload required to maintain the sanitary standard which would provide the students with a safe environment. These enhanced cleaning measures continue to be enforced through the issue of progressive guidelines most recently in the detailed Guidelines for the Education Sector up to Secondary Schools issued in September 2021. When the Respondent Ministry drafted and issued the 2018 Tender it could not have possibly known of the situation which would arise shortly after that contract came into force and could not, therefore, make contingency for a higher demand of cleaning hours which needed to be catered for, and for a higher budget.

#### Extreme urgency

Adherence to the sanitary standard and enhanced cleaning measures required by the above-mentioned guidelines issued by the health authorities has a direct effect on the health and safety of all students of school age who depend on the Respondent Ministry to provide them with a safe environment. In this sense, the need to procure further hours than those originally stipulated in the 2018 Tender contract was

undoubtedly a matter of extreme urgency in order to ensure that schools remain open in safe conditions for the students and staff. In particular, the 2018 Tender contract is to end on 31st December 2021 but due to the Covid-19 health crisis the value awarded will be used up before that date. Also, since requesting approval for the issue of the negotiated procedure in April 2021 the Respondent Ministry has attempted to draft and issue a call for tenders before the value of the 2018 Tender contract is used up but this has not been possible.

For the above reasons, the remark by the Claimant that the urgency has been caused by the contracting authority's negligence or delay to issue a new tender is unfounded. It is the unforeseen circumstances which have been brought about by the Covid-19 health crisis and the urgent need to continue operating schools with a higher sanitary standard than is ordinarily required that bring about the applicability of Regulation 154(1)c).

*A causal link between the unforeseen circumstances and the extreme urgency*

In the case at issue there also exists a causal link between the unforeseen circumstances, that is(sic) the increasingly burdensome cleaning measures which were not needed at the time when the 2018 Tender was drafted, and the extreme urgency resulting from the need to ensure safety of school pupils and staff during the continued operation of primary and secondary schools. The Respondent Ministry could not meet this need with urgency had it resorted to a call for tenders precisely because, even while arrangements were being made to obtain approval for and proceed with a negotiated procedure, the enhanced cleaning standards had to be adopted.

c) *The existence of overriding reasons relating to a general interest*

– In line with Regulation 280(2) of the Public Procurement Regulations, the Public Contract Reviews Board may find that the overriding reasons relating to a general interest require that the effects of the contract shall be maintained and therefore cannot consider the contract ineffective. Even if, for the sake of the argument, the Board were to find that the reason of extreme urgency is not justified (something which the Respondent contests), the Respondent Ministry submits that there exist overriding reasons of general interest which require that the Contract be maintained. Specifically, the need for the Contract has resulted from the public interest need to adopt enhanced cleaning measure to mitigate the risk of Covid-19 infections in State schools.

d) *Regarding the request for penalties* – According to Regulation 280(1) of the Public Procurement Regulations: “If the Public Contracts Review Board declares a contract to be ineffective, it shall impose

penalties on the authority responsible for the tendering process and the contracting authority after assessing in its decision all relevant factors, including the seriousness of the infringement and the behaviour of those authorities." Given that the Contract has been legitimately issued through a negotiated procedure for reasons of extreme urgency there is no ground for the ineffectiveness of the ground and, in consequence, no ground for the imposition of penalties.

e) **Regarding the request for compensation** - The Claimant also requests compensation in terms of Regulation 278 of the Public Procurement Regulations. According to that Regulation "the applicant may request the Public Contracts Review Board to liquidate and order the authority responsible for the tendering process and the contracting authority to compensate him for actual damages suffered." Without prejudice to all that has been submitted above, even if the Board should deem it fit to award compensation to the Claimant, it can only grant compensation for actual damages suffered. Whereas Article 2, paragraph 1, sub-paragraph (c), of Directive 89/665/EEC (also called the Remedies Directive) requires that a claimant must be able to request damages in the public procurement review procedures of the Member States, there is no EU-level harmonisation of what these damages should cover.

This Board also noted the Contract Beneficiary's Reasoned Letter of Reply filed on 30<sup>th</sup> September 2021 and its verbal submission during the virtual hearing held on 30<sup>th</sup> November 2021, in that:

a) In terms of Reg. 277(2) of S.L. 601.03 appellant contends that since it could not locate the publication of the notice for the proposed award of the negotiated procedure on the Official Journal of the European Union, the notice was never published and this in breach of the mentioned regulation. Applicant conveniently makes no reference to the exception to Reg. 277 (2) provided for in sub-regulation (4) which provides that sub-regulation (2) is inapplicable where:-

(a) the authority responsible for the tendering process or the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal of the European Union is permissible in accordance with Directive 2014/24/C and Directive 2014/25/EC;

(b) the authority responsible for the tendering process or the contracting authority has published in the Official Journal of the European Union a notice as described in Article 3a of Directive 89/665 or Article 3a of Directive 92/13 expressing its intention to conclude the contract, and;

(c) the contract has not been concluded before the expiry of a period of at least ten calendar days with effect from the day following the date of the publication of this notice.



If the notice was not published in the Official Journal of the European Union, sub-regulation (4)(a) is applicable since the negotiated procedure without publication at the merits of this appeal is permissible due to the exceptionality of the circumstances which fall squarely with preamble 50 of Directive 2014/24/E provides:-

In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure.

This Board, after having examined the relevant documentation to this application and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider, as follows.

- a) The Board opines that the first issue to be tackled is regulation 150 of the Public Procurement Regulations (“PPR”) which administers ‘Negotiated procedures without prior publication’;
  - i. Whereby in 150 (1) it is stated *“Upon being requested in writing by the contracting authority the Director may, subject to any conditions he may deem appropriate to impose, approve the use of the negotiated procedure without prior publication for public works contracts, public supply contracts and public service contracts as specified in the following regulations.”*
  - ii. Regulation 150 (2) continues to state, *“The request made by the contracting authority must duly substantiate the need for the negotiated procedure”*.
  - iii. The Board notes that the Contracting Authority wrote to the Director General of the Department of Contracts on the 5<sup>th</sup> April 2021 requesting the use of a ‘Negotiated procedure without prior publication’ in terms of Regulation 154(1)(c) of the PPR. An approval by the Department of Contracts (DoC) was issued on the 2<sup>nd</sup> July 2021.

iv. Hence the Board opines that the requirement of regulation 150 (1), i.e. the request in writing by the Contracting Authority to the Director, was met. Moreover, the requirement of regulation 150 (2), i.e. the request to be duly substantiated, was also met with the reference to regulation 154(1)(c).

b) The second issue that the Board will now consider is whether the parameters of 154(1)(c) were duly observed or otherwise.

i. 154(1)(c) states: *“The negotiated procedure without prior publication may be used for public service contracts in the following instances: where in so far as is strictly necessary, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority;”*

ii. Regulation 154(1)(c) therefore brings about three (3) specific criteria / parameters to be observed, i.e. an unforeseeable event, the time limits factor and finally the circumstances invoked to justify extreme urgency shall not be attributable to the contracting authority. The Board opines that all these 3 requirements need to be satisfied.

iii. **Unforeseeable event** – the ‘original’ tender drafted and awarded during years 2018/2019 certainly pre-dates the Covid-19 pandemic. Therefore, it is the Board’s opinion that the Contracting Authority could not foresee such an eventuality when preparing the ‘original’ tender in reference to the number of hours required and total financial value for the effective cleaning of State Schools and Educational Facilities (‘state schools’). The Board further opines that additional cleaning hours would have been required especially after the guidelines by the Ministry for Health were issued which required enhanced cleaning at regular and more frequent intervals.

iv. **Extreme urgency** – The Board opines that the closing of schools due to the Covid-19 pandemic and the re-opening of such with new enhanced cleaning mechanisms is not something which the Contracting Authority could have foreseen. Also, such decisions were being taken according as to how the pandemic was evolving in the Maltese islands and the Contracting Authority was duty bound to act rapidly to such decisions. Apart from not being able to foresee such events, the Board notes that the Contracting Authority was responsible for the effective implementation of such guidelines issued by the Ministry for Health if and when the schools were to be re-opened. The health and safety of all students, teachers and other workers within school premises was and still is a responsibility resting on the shoulders of the Contracting Authority as it is obliged to provide a safe and secure working environment for all mentioned above.

v. **The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority** – This Board again refers to the responsibility mentioned above which rests on the Contracting Authority to provide a safe and secure working environment for all within state schools. Also, on the fact that the enhanced cleaning guidelines are issued by another competent authority and the Ministry for Education is duty bound to observe all such guidelines in the interest of the whole population. The Board opines that no-one could have predicted when schools were going to be closed, re-opened etc, hence proper budgeting of hours could not have been done during the year 2020 with such a confidence level to be certain that the tender would have had within it sufficient working hours to cover till end of 2021. It was only later that the situation started to crystallize. This certainly not to the fullest extent as even today, the pandemic is still with us and with it, it brings uncertainty, especially in the forecast of resources required. The Board certainly opines that such events could not be attributable to the contracting authority.

Therefore, this Board opines that the 'requirements' listed in regulation 154(1)(c) have all been met.

**In conclusion this Board;**

Having evaluated all the above and based on the above considerations, concludes and decides:

a) That the Contracting Authority acted in terms of the Public Procurement Regulations and disposes of the application as brought forward by the Appellant / Claimant.”

3. Is-soċjeta` rikorrenti Managing Consulting Service Industry (MCSI) Ltd issa qed tappella minn din id-deċiżjoni għal quddiem din il-Qorti u l-aggravju prinċipali tagħha huwa marbut mal-fatt li fil-każ ma ġewx rispettati l-elementi meħtieġa ta' urġenza biex il-kuntratt jiġi allokat bil-mod li sar;

4. Wara li semgħet lid-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti, tinsab f'pożizzjoni li tgħaddi għas-sentenza tagħha;

5. Il-kwistjoni f'din il-kawża ddur ma' interpretazzjoni tal-Artikolu 154 (1) (c) tar-Regolamenti tal-Akkwist Pubbliku (Leġislazzjoni Sussidjarja numru 601.03). Dan l-artikolu jaqra hekk:

*“ The negotiated procedure without prior publication may be used for public service contracts in the following instances: [...]*

*Where in so far as is strictly necessary, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.*

*The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.”*

Illi minn qari ta' dan ir-Regolament, li huwa traspost kelma b'kelma minn Artikolu 32(2)(c) tad-Direttiva 2014/24, joħorġu s-segwent i rekwiziti:

- a. irid ikun hemm **“events unforeseeable by the contracting authority”**;
- b. irid ikun hemm **“extreme urgency”**;
- c. irid ikun hemm **ness kawżali** bejn dawn it-tnejn , fis-sens , li *events unforeseeable by the contracting authority* ikunu direttament u immedjament ikkaġunaw l-**“extreme urgency”**;
- d. **“the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with”**;
- e. in-*negotiated procedure* trid tkun **“strickly necessary”**;
- f. *“The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority”*.

6. Bħala prinċipji ġenerali li jirregolaw din il-proċedura jista' jingħad, b'referenza għas-sentenza mogħtija mill-Qorti Ewropea tal-Ġustizzja, każ C- 318/94 "*Commission vs Germany*" deċiża fit-28 ta' Marzu, 1996, u aktar riċenti f'każ fl-istess ismijiet numru C-275/08 deċiża fil-15 ta' Ottubru, 2009, illi:

a. *In-negotiated procedure without prior publication* għandha tiġi użata biss "*in very exceptional circumstances*" minħabba l-ħsara li tagħmel fuq il-konkorrenza libera fis-suq u minħabba li tista' tkun "*the most serious breach of Community law in the field of public procurement*" dan skont Recital 50 tad-Direttiva 2014/24, Recital 13 tad-Direttiva 2007/66;

b. L-oneru tal-prova jinkombi fuq l-awtorita` kontraenti (u mhux fuq min jiftaħ il-proċeduri ai termini tar-Regolament 277 tar-Regolamenti sabiex turi li l-estremi tal-liġi jeżistu sabiex tkun tista' tiġi użata *n-negotiated procedure without prior publication*.

7. Issa f'dan il-każ ma jirriżultawx l-estremi għall-użu ta' din il-proċedura urgenti. Hemm fil-Legislazzjoni mod kif it-termini jiġu ridotti għall-15-il jum ("*Request for Participation*") u għaxart ijiem ("*Submission Of Tender*"), u f'dan il-każ ma kinitx impossibli li jiġu segwiti dawn it-termini abbrevjati minkejja ċ-ċirkostanzi li ssemmi l-awtorita` kontraenti.

8. L-emergenza ġiet reklamata minħabba l-pandemija tal-Covid-19 li affettwat anke lil Malta. Din il-Qorti tirrileva illi l-ewwel każ ta' Covid-19 f'Malta nstab fil-bidu ta' Marzu, 2020. Il-protokollu rigward it-tindif fl-iskejjel inħargu mis-Suprintendent tas-Saħħa Pubblika f'Awwissu, 2020 u f'Settembru 2020. Il-każijiet tal-Covid-19 bdew neżlin sew minn April

2021 (ara xhieda ta' Dr. Kenneth Grech mill-uffiċċju tas-Superintendent tas-Saħħa Pubblika li qal li wara Marzu 2021 il-każijiet kienu bdew jonqsu). It-talba għall-għotja tan-*negotiated procedure* saret mill-Ministeru fil-5 ta' April, 2021, jiġifieri xhur wara l-ħruġ tal-protokoll. Id-Direttur konvenut approva l-użu ta' din il-proċedura fit-2 ta' Lulju, 2021, jiġifieri 3 xhur wara li saret it-talba. Ħarġet *negotiated procedure without prior publication* għas-soċjeta` appellata Brightness JV biss fit-28 ta' Lulju, 2021, li pero`, ġiet kanċellata għax instab li kien hemm żball. Reġgħet ħarġet oħra, u l-kuntratt ingħata lill-Brightness JV fl-10 ta' Awwissu, 2021. Mill-premessi jirriżulta illi fl-ewwel lok, it-trapass taż-żmien mill-ħruġ tal-protokoll f'Awwissu/Settembru 2020 u t-talba għan-*Negotiated Procedure* fil-5 ta' April, 2021 – 7 xhur - kien biżżejjed sabiex jinkiteb it-*tender*, jinħareġ it-*tender* u saħansitra jiġi aġġudikat. Bl-istess mod, u fit-tieni lok, it-trapass taż-żmien mit-talba għan-*Negotiated Procedure* fil-5 ta' April, 2021, għall-għotja tan-*Negotiated Procedure* lill-appellata Brightness JV fl-10 ta' Awwissu, 2021 – 4 xhur - kien ukoll biżżejjed sabiex jinkiteb it-*tender*, jinħareġ it-*tender*, u saħansitra jiġi aġġudikat.

9. Kif il-gvern mexa f'dan il-każ jirriżulta ċar li l-urgenza, jekk kien hemm, ħoloqha hu stess bil-prokrastinar fil-proċedura adoperata. It-trapass taż-żmien kien tali li elimina kwalunkwe immedjatezza li seta' kien

hemm bejn il-pandemija tal-Covid-19 u l-protokollu u l-urġenza għax-xiri tas-servizzi tat-tindif.

10. Jidher ukoll mid-Direttiva li wasslet għall-ħruġ tar-Regolamenti ta' Malta illi din il-proċedura hija intiża għall-użu li jkun "*strictly necessary*" u użata bħala *stop-gap* sakemm ikun jista' jingħata kuntratt wara li tintuża l-proċedura regolari. Fi kliem ieħor, anke jekk kien hemm ħtieġa ta' din il-proċedura speċjali, kellu jiġi indikat kif se taħdem, is-sigħat miżjuda u għal kemm żmien, ħaġa li f'dan il-każ ma sarx.

11. Inoltre, din il-Qorti taqbel mas-soċjeta` appellanti meta rrimarkat li dak li kien imprevedibbli f' Marzu tal-2020, ma baqax hekk imprevedibbli xhur wara, u l-Awtoritajiet kellhom jaħsbu biex jippjanaw ix-xiri tas-servizzi tat-tindif fl-iskejjel. Fil-verita`, il-ħruġ tal-protokollu f'Awwissu/Settembru 2020 ta biżżejjed ċans lill-awtorita` responsabbli sabiex tippjana x-xiri tas-servizz tat-tindif, għaliex saħansitra kellha linji gwida ċari u bil-miktub kif għandhom jitnaddfu l-iskejjel f'din ir-realta`. Hija inverosimili li targumenta li 7 xhur wara l-ħruġ tal-protokollu, is-sitwazzjoni baqgħet imprevedibbli. L-awtorita` kompetenti, li baqgħet titnikker fuq il-materja, ma tistax, wara żmien, tgħid li l-materja saret urġenti !

12. Hemm aktar xi tgħid dwar l-użu ta' din il-proċedura speċjali f'dan il-każ, pero`, minn dak li ntqal aktar qabel hemm biżżejjed biex titfassar id-deċiżjoni tal-Bord. Anke jekk il-kuntratt issa skada, xorta jibqa' l-fatt li s-soċjeta` appellanti qed titlob ħlas ta' danni u għal dan il-fini tali dikjarazzjoni hija importanti biex din titlob u tingħata kumpens skont il-liġi.

Għaldaqstant, għar-raġunijiet premissi, tiddisponi mill-appell ta' Managing Consulting Service Industry (MCSI) Ltd billi tilqa' l-istess, tħassar u tikkanċella d-deċiżjoni li ħa l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi fis-27 ta' Diċembru, 2021, f'dan il-każ, u tiddikjara li n-*negotiated procedure* in kwistjoni hu null u ineffettiv. Tordna li l-atti jintbghatu għall-quddiem il-Bord għall-prosegwiment tas-smiġħ tal-każ dwar it-tieni u t-tielet talba.

L-ispejjeż kollha tal-proċeduri sa issa għandhom jithallsu mid-Direttur Ġenerali (Kuntratti).

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da