



## **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, 22 ta' Ġunju, 2022.**

**Numru 26**

**Rikors numru 106/22/1**

**E.C. Municipals Limited (C 62598)**

**v.**

- i Ministeru tal-Edukazzjoni u tal-Impjeg u**
- ii Direttur Ġenerali (Kuntratti)**

### **Il-Qorti:**

1. Dan hu appell imressaq mis-soċjeta` E.C. Municipals Ltd. fil-21 ta' Marzu, 2022, wara deċiżjoni li ta l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fl-1 ta' Marzu, 2022, fil-każ referenza MFED746/2021 (każ numru 1684).

2. Dan il-każ jirreferi għal *tender* li ħareġ il-Ministeru tal-Edukazzjoni u tal-Impjieg fis-sens li ġej: “*Open Call/Negotiated Procedure for the Provision of cleaning services in State Schools and Educational Facilities (including summer) in Malta and Gozo using Environmentally Friendly Products*”. Is-sejħa ġiet ippubblikata biss fil-Gazzetta tal-Gvern u fuq is-sit tal-Ministeru tal-Edukazzjoni u mhux fuq is-sit ġenerali aċċessibbli anke mal-Unjoni Ewropea. L-oblaturi ngħataw biss 10 ijiem sabiex jissottomettu l-offerta tagħhom avolja kellhom jipprezentaw ħafna dokumenti. Is-soċjeta` rikorrenti allegat li l-proċedura użata kienet ambigwa u ma ġietx segwita dik appartenenti għas-sejħa. Hija ressqet ilment fuq lot 11 għal quddiem il-Bord li b’deċiżjoni tal-1 ta’ Marzu 2022, ċaħad l-ilment. Is-sentenza tal-Bord hija s-segwenti:

“Whereby, the Appellant contends that:

a) Regulation 262(1)(a) S.L. 601.03 –

i. this regulation grants prospective candidates the possibility to appeal if certain clauses are impossible to be met. More specifically, this appeal, revolves around the 10 days that is allowed for bids to be submitted. The publication process was not as per normal procedures, i.e. publication on the ePPS platform. For some reason the publication was done on the Ministry for Education website. This led to time-wasted from the end of the Appellant.

ii. As per regulation 116 when the value exceeds €5,350,000 (in this case it is more than €9,000,000), the Contracting Authority needs to provide at least thirty five days for bids to be submitted from the date of publication. In this case the CA only provided ten days and did not publish the on the portal of the European Union.

b) Regulation 262(1)(b) S.L. 601.03 –

i. The procedure that should be followed is that the tender should be published on the ePPS, the portal for eprocurement. In this case, the publication was only done on the Ministry for Education website. Even more so, the prospective bid could not be submitted online but is to be submitted in a ‘tendering box’

ii. Irrespective if this procedure is an 'open call/negotiated procedure', it still had to make use of the ePPS platform.

c) Regulation 262(1)(e) S.L. 601.03 –

i. The first 2 grievances constitute unlawful behaviour from the part of the Contracting Authority *vis a vis* Public Procurement Regulations, hence in accordance with Regulation 262(1)(e) this procedure is to be cancelled.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 14<sup>th</sup> December 2021 and its verbal submission during the virtual hearing held on 22<sup>nd</sup> February 2022, in that:

a) On 22<sup>nd</sup> November 2021, the Contracting Authority requested the approval of the Department of Contracts as per Regulation 154(1)(c) for the procedure to be a 'Negotiated Procedure without Prior Publication'. However, the Contracting Authority did not request approval to negotiate with specific operators but wanted all those interested to have the opportunity to participate.

b) On 23<sup>rd</sup> November 2021, this request was acceded to.

c) It is also being stated that, this procedure, apart from being published on the Ministry of Education website, was also published in the Government Gazette. In this publication, the term of ten days for submission of bids was extended to 20<sup>th</sup> December 2021.

d) In reference to the Objection Letter, the Appellant is declaring "*Dan l-appell qiegħed isir b'riferenza għal-lot numru 11 izda l-aggravji li ser jigu sollevati huma applikabbli għal-lots kollha u għas-sejha in generali*". Hence the appellant is declaring that their juridical interest rests solely on Lot 11.

e) This is a 'Negotiated Procedure' in terms of Regulation 150 and 154 of the PPR and not an Open Call, hence the Regulations referred to by the Appellant do not apply.

f) Regulation 262(1)(a) S.L. 601.03 – in relation to this grievance it is Regulation 154(1)(c) that takes 'precedence' on the time limits and not regulation 116 as stated by the appellant. Therefore, the Contracting Authority was not limited to the thirty-five days term.

g) Regulation 262(1)(b) S.L. 601.03 – As already stated this is a Negotiated Procedure in accordance with Regulation 154(1)(c) and hence regulations 150 and 154 apply. Nowhere in these regulations it is stated that publications are to be done on the ePPS. On the contrary, these are regulations for a 'Negotiated Procedure without Prior Publication'.

h) Regulation 262(1)(e) S.L. 601.03 – this grievance is based on the other 2 grievances. The Contracting Authority did in fact follow procedure in terms of the law. Hence this grievance should also be rejected.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant's grievances as follows:

a) The Board considers that the main issue to be analysed and decided upon is whether this procedure falls within the remits of an 'open call' or a 'negotiated procedure without publication'. This for various reasons, with the main ones being:

i. whether the regulations listed in the letter of appeal, i.e. 262(1)(a), 262(1)(b) and 262(1)(c) are relevant or otherwise to this appeal and

ii. Whether the time limits of regulation 116 (1) apply or otherwise

b) This Board immediately notes that the Contracting Authority obtained an approval from the Department of Contracts, dated 23<sup>rd</sup> November 2021 to conduct a negotiated procedure in terms of Regulation 154 (c) of the Public Procurement Regulations.

c) Regulation 154 (c) deals with matters of 'extreme urgency'. Therefore the time limits of thirty five days referred to by the Appellant, are superseded by regulation 116(5) which drastically reduces this term.

d) Being a Negotiated Procedure without Publication, there is no obligation on the Contracting Authority to publish such a call on the ePPS.

Hence, this Board does not uphold Appellant's grievances.

### **The Board,**

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

a) Does not uphold Appellant's contentions regarding the call for Remedies.

"b) Directs that the deposit paid by Appellant not to be reimbursed.

3. Is-soċjeta` rikorrenti issa qed tappella din id-deċiżjoni għal quddiem din il-Qorti u qed tressaq l-istess aggravji li ressqet għal quddiem il-Bord, u ċioe`, li l-istess deċiżjoni hija rritwali u nulla għax applikat il-liġi l-ħażina.

4. Din il-Qorti wara li semgħet it-trattazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawża u d-dokumenti esebiti, tinsab f'pożizzjoni li tagħti sentenza tagħha.

Ikkonsidrat:

5. Trattat l-appell, din il-Qorti tara li s-soċjeta` appellanti għandha raġun tilmenta fuq il-mod ta' kif il-Ministeru appellat ipproċeda. Dan ma kienx jaf kif se jimxi u pprova joħroġ sejha ta' fejn laqat, laqat! Is-sejha stess turi din l-indeċizzjoni għax ħarġet bħala "*Open Call/Negotiated Procedure*", bil-Gvern jippretendi illi huwa aġixxa bi proċedura oħra, u ċioe`, bl-użu ta' proċedura negozjata mingħajr pubblikazzjoni minn qabel u bir-riduzzjoni tal-limiti taż-żmien għal raġunijiet ta' urġenza kbira. Biex tgħaqqad, dan il-proċess ma segwiex il-proċedura solita għall-għoti tal-kuntratti u ċioe`, il-pubblikazzjoni fuq il-pjattaforma msejha ePPS aċċessibbli fuq <https://www.etenders.gov.mt/epps.home.do>. Il-pubblikazzjoni saret biss fuq is-sit tal-Ministeru tal-Edukazzjoni u fil-Gazzetta tal-Gvern bil-konsegwenza li meta s-soċjeta` appellanti bdiet tfittex fuq is-sit tal-ePPS għas-sejħiet, din lanqas kienet teżisti. Meta ndunat bis-sejha, laħqu għaddew granet mill-għaxart ijiem li fihom setgħu jigu sottomessi l-offerti.

6. L-awtorita` kontraenti ma avvicinat lil ebda oblator partikolari sabiex tinneozja miegħu hekk kif suppost jiġri meta jkun każ ta' użu ta' proċedura negozjata mingħajr pubblikazzjoni. Jekk allura, il-proċedura kienet waħda ta' sejha miftuħa, din ukoll ma saritx kif suppost kellha ssir għax l-offerta ma ġietx ippubblikata fuq il-*web site* solita, u *considerando* n-numru vast ta' informazzjoni mitluba, li tagħti biss għaxart ijiem minn pubblikazzjoni ristretta ma kienx raġonevoli. Ta' min jinnota li l-kriterju għall-assenjazzjoni tal-kuntratt kien a bażi tal-*best price/quality ratio*, jiġifieri, mhux l-orħos prezz biss, u min kellu l-ħsieb jiffa' offerta kellu jikkonsidra mhux biss il-prezz, iżda fuq kollox, il-kwalita` tal-prodott, u biex juri dan kellu jissottometti diversi dokumenti biex isostni l-offerta tiegħu.

7. Lanqas ma ġie muri x'kienet l-urġenza f'dan il-każ. L-urġenza, ovvjament, ma tridx tkun riżultat ta' aġir tal-Gvern jew nuqqas ta' aġir tempestiv. Jekk din is-sejha kienet riżultat tal-pandemija tal-*Covid 19*, din bdiet tiġri f'Malta madwar sena qabel ma ħarġet is-sejha f'Novembru tal-2021 u kien hemm altru minn żmien biżżejjed biex tittieħed proċedura abbrevjata iżda fit-termini tal-Liġi.

Għaldaqstant, għar-raġunijiet premissi, tidisponi mill-appell tas-soċjeta` E.C. Municipals Ltd. billi tilqa' l-istess u tħassar u tannulla l-proċedura kollha illi seħhet bil-ħruġ tas-sejha, inkluż id-deċiżjoni tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi tal-1 ta' Marzu, 2022, u tordna li, jekk għad hemm interess, il-proċess għandu jibda mill-ġdid.

L-ispejjeż ta' dan l-appell jitħallsu mill-appellat Ministeru tal-Edukazzjoni u tal-Impjieg.

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