



## **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 59**

**Appell numru 72/22/1**

**Wara d-decizjonijiet interlokutorji u d-decizjoni finali, ilkoll tal-Bord ta' Revizjoni dwar Kuntratti Pubblici bin-numru 1673 mogħtija nhar il-31 ta' Jannar 2022, fl-ismijiet:**

**South Lease Limited (C 65614)**

**v.**

**Central Procurement and Supplies Unit;  
VZ Lines Limited (C 43513); Smart Transport Limited (C53708);  
Leone Grech u Zarb Coaches Limited (C 28927) ilkoll u flimkien  
magħrufa bhala 'Health JV';  
Direttur Generali tal-Kuntratti għan-nom u in rappreżentanza tad-  
Dipartiment tal-Kuntratti**

**Il-Qorti:**

1. Rat li dan hu appell li s-socjeta` South Lease Ltd ressqet fil-21 ta' Frar, 2022, wara decizjoni li ta l-Bord ta' Revizjoni dwar il-Kuntratti

Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-31 ta' Jannar, 2022, fil-kaz referenza CT2007/2021 (kaz numru 1673).

2. Dan il-kaz jirreferi ghal sejha ghall-offerti li hareg is-Central Procurement and Supplies Unit (CPSU) "*for the provision of non-emergency transport for the Ministry for Health including the use of low emission vehicles*". Ghal din is-sejha ntefghu zgur zewg offerti, wahda mis-socjeta` rikorrenti South Lease Ltd, u l-oħra mill-konsorzju intimat Health JV, bil-kumitat ta' evalwazzjoni jiddeciedi li jirrifjuta l-offerta tas-socjeta` rikorrenti, u jirrakkomanda li l-kuntratt jinghata lill-konsorzju intimat Health JV.

3. Is-socjeta` rikorrenti ressqet aggravju ghal quddiem il-Bord li bis-sentenza tieghu tal-31 ta' Jannar, 2022, cahad l-aggravji kollha li ressqet is-socjeta` rikorrenti, u kkonfermat id-decizjoni tal-awtorita` kontraenti. Id-decizjoni tal-Bord hija s-segwent:

"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 now consider Appellant's grievances. In the Board's opinion there are 2 main issues / grievances to this appeal. Firstly, this Board will delve into and consider Appellant's grievances with regards to its own (Appellant's) technical compliance. Secondly, consideration will be given to the Appellant's grievance which concerns the preferred bidder's compliance.

**Appellant's Technical compliance grievances**

The Board opines that for this 'category' of grievances there are two main aspects that should and will be tackled. The first relating to the Euro VI engine criteria and the relevant documentation to be

submitted by prospective bidders. Secondly and more importantly is the technical compliance in relation to the specific emissions of 'g/km'.

### **1. Euro VI Engine / Authorised Entity**

a. The Board refers to section 3.8.1, page 36 of the tender dossier, which states *"The bidders shall submit a list of the vehicles which will be used for the whole duration of the contract. All vehicles must have at least a Euro VI engine and shall be in line with EU emission standards. The bidder must provide the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved EURO VI standard the measures must be documented and included in the tender application, and this must be approved by an authorised entity. If vehicles being provided are not certified as Euro VI, but technical after-treatment has achieved the same standard, a certificate approved by an authorised entity must be submitted to the Contracting Authority."*

b. Reference is now made to the Self Declaration of South Lease Ltd. of 20<sup>th</sup> February 2021 whereby it is expressly stated that *"The fleet average for the tail-lift vans is 175g CO2/km and is Euro 6"*

c. Reference is also made to the Technical Literature as submitted by the Appellant in his reply to the Clarification note made by the Evaluation Committee. The Euro VI engine requirement is clearly mentioned in such literature. (N.B. Emissions will be dealt with in the next section)

d. In the Board's opinion, the Tender dossier is very clear and unambiguous in section 3.8.1 in that the *'technical sheets of the vehicles where emission standards are defined'* need to be submitted. It is ONLY for those vehicles where a technical upgrade has achieved Euro VI standard which have to be approved by an authorised entity. This is not the case in hand, therefore the 'approval' of an authorised entity is not required in this case.

Therefore, for the Euro VI engine requirement, the Appellant's bid is in line with tender requirements.

### **2. Emissions of 'g/km'**

a. The Board refer to section 3.4.2.10 of the tender dossier 'Technical Specifications for Tail-Lift Vans' whereby *"The fleet average for vans should not exceed 175g CO2/km"* and goes on to say that *"Bidder must list the technical specifications for Tail Lift vans demonstrating that he complies with the criteria established under this heading"*

b. The Tenderer's Technical Offer apart from a number of exclusions falls under 'Note 3'. The Technical Offer Form relating to emissions criteria does not form part of the exclusions, therefore is subject to Note 3.

c. The initial submission of the Appellant company in the section entitled 'Emission standards: Tail lift vans' listed 196g/km. In the reply for clarification, a handwritten note stated *"typing error should read 176g/km as stated below"*.

d. Therefore, the facts of the case are very clear in the Board's opinion:

- i. Self-Declaration by South Lease Ltd of 20<sup>th</sup> February 2021 stating "the fleet average for the tail-lift vans is 175 g/km" (i.e. in line with tender requirements)
- ii. An initial Technical offer form stating 196 g/km (i.e. not in line with tender requirements)
- iii. An amended technical offer form, post clarification, stating 176 g/km (i.e. not in line with tender requirements)
- iv. Technical Literature submitted by same South Lease Ltd stating 176 g/km (i.e. not in line with tender requirements)
- e. At this point, this Board opines that the Evaluation Committee made use of all the possible tools at its disposal in querying / clarifying with the prospective bidder, now Appellant, on the emissions criteria.
- f. Ambiguity still remains even after the re-submission of the Technical Offer form, which falls under note 3. Even though the Self Declaration states 175 g/km (which is in line with tender requirements), the technical literature and technical offer form contradict this statement, in that they list 176 g/km (which is outside the limits permitted as per tender requirements).

Therefore, this Board, will not uphold Appellant's grievance.

### **Preferred Bidder's compliance grievances**

In this specific section, the Appellant raises two (2) main issues. The first regarding the financial compliance of the preferred bidder with specific reference to the credit facilities as required by the tender dossier. The second issue revolves around technical compliance with specific reference to the number of contracts / services of similar nature, being transportation of clients during the last three (3) years, namely from 2018 up to 2020.

#### **3. Credit Facilities**

- a. Section 1 Paragraph 5(B)(b)(i) of the Tender Dossier – Selection and Award Requirements states "*Economic Operators must provide a Credit Facility which is to remain effective for the whole duration of the contract: The minimum credit facility/credit balance required for the duration of this project is Seven hundred Thousand Euro (€700,000). The tenderer must submit a statement by a bank or a financial institution recognized by the MFSA (Malta Financial Services Authority) (or an equivalent authority in the country of origin of the bank) certifying such credit facilities during tendering stage. In the case of a consortium/joint venture the aforementioned statement must cover all members/companies forming the consortium/joint venture,*"
- b. Health JV did submit a statement in this regard from Bank of Valletta which reads ".....to cover the credit facility requirements of **all** members/companies forming the Joint Venture". (bold emphasis added)

c. The Board opines that what the Contracting Authority is after is a Credit Facility, which is to remain effective for the whole duration of the contract which as a minimum amounts to €700,000. In the case of consortia / joint ventures it surely isn't expecting that each and every member of the consortium / joint venture is able to provide such a facility on his own accord. Therefore, the submission by Health JV in favour to the Department of Contracts covering "*all members / companies forming the Joint Venture*" should be deemed enough for financial compliance in this specific requirement.

d. Moreover, this Board refers to the Public Procurement Regulations ("PPR") regulation 235(1) whereby "*With regard to criteria relating to economic and **financial standing** as set out pursuant to regulations 218 to 221, and to criteria relating to technical and professional ability as set out pursuant to regulations 222 and 223, **an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them.....***" (bold emphasis added)

#### **4. Number of contracts / services of similar nature**

a. Section 1 Paragraph 5(B)(c)(ii) of the Tender Dossier – Selection and Award Requirements states "*State the number of contracts / services of similar nature, being transportation of clients during the last three (3) years, namely from 2018 up to 2020 that satisfy the following criteria: a. the minimum number of contracts / services must not be less than two (2); b. the cumulative value of all the contracts/services listed in (a) above must not be less than €1.5 million (excl. VAT) for the quoted period; c. One (1) of the contract/service listed in (a) above must not be less than Euro 1 million (excl. VAT).*"

b. The Board notes that for this specific requirement, the Tender Dossier is expecting a 'statement' / self-declaration from prospective bidders in their respective ESPD. This statement was duly reviewed by the Evaluation Committee and found to be compliant. The Board opines that no substantial proof was brought forward to shed doubt on the submission as provided by the Preferred Bidder.

On the basis of the above, this Board does not uphold the grievances of the Appellant in relation to the financial and technical non-compliance of the Preferred Bidder.

#### **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,
- c) Directs that the deposit paid by Appellant not to be reimbursed."

4. Is-socjeta` rikorrenti issa qed tappella mid-decizjoni tal-Bord ghal quddiem din il-Qorti b`diversi aggravji li sejrin jigu trattati f`din is-sentenza.

5. Ghalhekk, wara li semghet lid-difensuri tal-partijiet u rat l-atti kollha tal-kawza u d-dokumenti esebiti, sejra tghaddi ghas-sentenza taghha.

Ikkunsidrat:

6. Fl-ewwel lok, l-aggravju marbut mal-fatt li, qabel ma tressaq dan l-appell, li s-socjeta` appellanti ma nghatatx kopja tas-sottomissjonijiet li saru verbalment quddiem il-Bord, huwa x`aktarx fieragh u qed jigi michud peress illi meta saru dawn is-sottomissjonijiet kemm is-socjeta` appellanti kif ukoll id-difensur taghha kienu prezenti u semghu x`kien qed jinghad u setghu, jekk riedu, jiehdur noti ta' dak li kien qed jintqal mill-parti l-ohra.

7. Dwar il-mertu tal-appell, din il-Qorti tara li, ghallanqas f`uhud mill-aggravji, is-socjeta` rikorrenti ghandha ragun. L-ewwelnett, jidher li l-Bord ma ppermettiex li s-socjeta` rikorrenti tipprezenta dokumenti u ssaqsi domandi biex turi li l-vetturi tal-offerta tal-oblatatur preferut u taghha huma tal-istess ghamla. Il-Bord irrifjuta din it-talba peress li l-informazzjoni kienet, skont hu, "*of a commercially sensitive nature.*" Din il-Qorti ma taqbilx ma' dan l-argument peress illi kull parti fi kwistjoni quddiem Tribunal kwazi gudizzjarju (kif inhu l-Bord in kwistjoni) ghandu

dritt ghal kull informazzjoni rilevanti għall-kaz tiegħu, u l-parti l-oħra, speċjalment fejn ikun hemm dettalji teknici, trid tipprovdi dik l-informazzjoni u mhux tinheba wara n-natura kummerċjali kunfidenzjali tal-informazzjoni. Speċjalment f'kazijiet ta' din ix-xorta fejn, hafna drabi, l-għazla ddr fuq l-istruttura teknika tal-offerta, kull parti għandha obbligu li tikxef dak kollu li hu rilevanti u relatat mal-offerta tagħha. Jekk l-informazzjoni li tkun se tingħata tkun sensittiva, il-Bord jista' jordna li l-informazzjoni tkun accessibli biss għaliha u għall-partijiet fil-kwistjoni, u li ma jinhargux kopji tad-dokumenti relattivi, izda jibqgħu issigillati f'envelop għall-uzu biss kif inghad. L-avversarju, però, għandu dritt jitlob mill-parti l-oħra kull informazzjoni marbuta mal-kaz u rilevanti għall-materja quddiem il-Bord. Wara kollox, is-socjeta` appellanti tgħid li hi riedet informazzjoni dwar l-għamla tal-vetturi li l-konsorzju Health JV taspira li jkunu fit-toroq Maltin, u allura din l-informazzjoni ma' tista' qatt tkun meqjusa ta' natura kunfidenzjali.

8. Barra dan, hemm kwistjoni oħra marbuta mal-*istatement* tal-bank li l-konsorzju appellat esebixxa biex juri li għandu l-*Economics and Financial Standing* rikjest fis-sejha għall-offerti. Dan l-*istatement* inqara parti minnu fl-udjenza quddiem il-Bord mill-avukat tal-konsorzju appellat, izda d-dokument la gie esebit u lanqas ma nghatat kopja tal-istess lis-socjeta` appellanti. Barra minn dan, il-Bord ippermetta li jigi pprezentat dan id-dokument wara l-għeluq tas-smigh u wara li ntemmu s-

sottomissjonijiet tal-partijiet minghajr ma dan kien ghad-disposizzjoni tas-socjeta` appellanti. Jinghad li kien hemm xi dokumenti ohra li l-awtorita` kontraenti kif ukoll il-konsorzju Health JV ressqu wara l-gheluq tal-kaz, u dan ukoll bi ksur tal-principju ta' *equality of arms* li ghandu jirregola kull disputa quddiem bord jew tribunal kwazi gudizzjarju.

9. Kwistjoni ohra marbuta ma' dan ir-rekwizit, hija li skont is-sejha, l-istatement "*must cover all members/companies forming the consortium/joint venture*". Issa f'dan il-kaz, il-konsorzju kien maghmul minn tliet kumpaniji u persuna izda d-dokument kien jirreferi ghat-tliet kumpaniji biss u mhux ukoll ghall-individwu. Mix-xhieda moghtija quddiem il-Bord, fil-fatt l-ittra relattiva mill-bank sottomessa mill-konsorzju appellat Health JV kienet tindika li t-tliet socjetajiet indikati kellhom *credit facilities* izda ma kinitx tindika li l-individwu kellu *credit facilities* mal-bank.

10. Materja ohra li holqot problema hu r-rekwizit li, fir-rigward tal-emissjonijiet, fis-sejha kien hemm klawsola li tghid hekk:

"the fleet average for vans should not exceed 175 Co<sup>2</sup>/km".

Is-socjeta` appellanti offriet vannijiet li whud kellhom emissjonijiet taht dak stabbilit u ohrajn aktar minn hekk. Il-Bord donnu stenna li kull vann inkluz fl-offerta kellu jkollu emissjonijiet taht il-175 Co<sup>2</sup>/ km, izda s-socjeta` appellanti – bir-ragun tara din il-Qorti – targumenta li l-klawsola ma tesigix



li kull vettura proposta minn oblatur kellu jkollha 175 Co<sup>2</sup> /km *rating*, izda li l-average tal-vetturi kollha f'daqqa proposti minn oblatur ikunu inqas minn dak stabbilit. Jista' jkun li l-hsieb tal-awtorita` kontraenti kien li kull vettura kellu jkollha dak ir-*rating*, pero` jekk hu hekk dan il-hsieb ma giex espress fid-dokument tas-sejha, u oblatur ma ghandux jigi penalizzat fuq is-sahha ta' klawnsola li mhix cara fit-tifsira taghha.

11. Kif wiehed jista' jara mill-premess, l-ghazla li ghamlet l-awtorita` kontraenti u sussegwentement ikkonfermata mill-Bord, hija monka u trid tigi mhassra. Iz-zewg decizjonijiet iridu jigu mhassra u peress li din il-Qorti mhix sejra tissuplixxi d-diskrezzjoni taghha dwar l-ghazla flok il-kumitat evalwattiv, sejra tibghat il-kaz lura lill-kumitat evalwattiv biex dan, b'nies godda fuq il-kumitat, jerga' jevalwa fuq l-offerti sottomessi.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell ta' South Lease Ltd, billi tilqa' l-istess, thassar u tirrevoka s-sentenza li ta l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici tal-31 ta' Jannar, 2022, kif ukoll id-decizjoni relattiva li tkun hadet l-awtorita` kuntrattwali (is-CPSU), u tibghat il-kaz ghal quddiem l-istess awtorita` sabiex, tramite persuni li ma kienu bl-ebda mod involuti fil-kaz, terga' titratta u tiddeciedi fuq l-offerti fid-dawl ta' dak li jinghad f'din is-sentenza. Id-depozitu li thallas ghas-smigh tal-appell quddiem il-Bord ghandu jintradd lura lis-socjeta` rikorrenti.

App. Ċiv. 72/22/1

L-ispejjez marbuta ma' dan l-appell ghandhom jithallsu mit-tliet appellati  
*in solidum.*

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