



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar it-Tlieta, 6 ta' Settembru, 2022.

Numru 1

Appell numru 175/2022/1

Alfred Galea

v.

**Kunsill Lokali Msida u
Melchiorre Dimech**

1. Dan huwa appell ta' Alfred Galea minn deċiżjoni tal-25 ta' April 2022 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku ["L.S. 601.03"], li ċaħad oġġezzjoni tiegħu kontra deċiżjoni tal-Kunsill Lokali tal-Imsida ["l-awtorità kontraenti"] illi tintlaqa' l-offerta ta' Melchiorre Dimech u mhux dik tiegħu għal kuntratt pubbliku.
2. Il-fatti rilevanti seħħew hekk: kienet saret sejħa mill-awtorità kontraenti għal offerti għal kuntratt ta' ġbir ta' skart. Fost il-kondizzjonijiet tal-offerta hemm dawk li jgħidu hekk:

»Instructions to tenderers

»6. Criteria for Award

»6.1 The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.

»Terms of Reference

»4.2.3 Vehicle Type and GPP¹

»The Contractor shall at all times during the operation of the contract make use of those vehicles approved by the Local Council as mentioned in the following clause, and have been duly registered by the Malta Environment and Planning Authority, by virtue of Legal Notice 106 of 2007 and any other further legal notices published.

»The Contractor shall only make use of vehicles which have been approved by the Council's representative at least 7 days before the commencement date of the Contract. Any vehicle obtained thereafter will be subject to the approval of the Council's representative.

»Any vehicle not falling under these criteria will not be permitted to operate under this contract. The Contractor will be obliged to submit a copy of the registration document issued by MEPA together with a copy of the vehicle log book and a photograph of the vehicle. Failing to submit such documents within the above-mentioned stipulated time may constitute grounds for the annulment of the decision to award the contract. In such case, the Local Council shall award the tender to the second successful tenderer.

»All vehicles used in this tender should have an emission level not less than euro IV according to EC Directive 2005/55/EC. Where vehicles are not certified as EURO IV, but technical after-treatment has achieved the same standard, this should be documented in the tender application. The bidder must present the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved EURO IV standard the measures must be documented and included in the tender application, and this must be approved by a credible third party.«

3. Saru tliet offerti, fosthom dik ta' Galea u dik ta' Dimech, u lill-awtorità kontraenti dehrilha li kellha tintlaqa' l-offerta ta' Dimech għax kienet l-orħos u kienet tħares il-kriterji amministrativi u tekniċi.
4. Wara li l-appellant ġie mgħarraf b'dan mill-awtorità kontraenti fid-9 ta' Frar 2022, huwa ressaq oġġezzjoni quddiem il-Bord ta' Reviżjoni b'ittra tal-11 ta' Frar 2022. iżda l-bord, bid-deċiżjoni tal-25 ta' April 2022 li minnha sar

¹ *Green Public Procurement*

dan l-appell, ma laqax l-oġġezzjoni u kkonferma d-deċiżjoni tal-awtorità kontraenti. Il-konsiderazzjonijiet li wasslu lill-bord għal din id-deċiżjoni ġew imfissra hekk:

»... .. the appellant contends that “Recommended bidder is not technically compliant in that he does not own the necessary vehicles requested in the tender.”

»... ..

»Although the law envisages a scenario where a bidder would rely on the capacity of another entity, the law stipulates a very precise methodology and requirements how such relying is to take place.

»Indeed regulation 235(1) of the Public Procurement Regulations stipulates the following:

»“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. With regard to criteria relating to the educational and professional qualifications as set out in regulation 232(f), or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.”

»Therefore, given that the recommended bidder does not himself own suitable vehicles to be utilised for the execution of this particular contract, and since presumably, the recommended bidder intends to utilise the technical capacity of other entities, the recommended bidder should have submitted with its tender the necessary declaration of undertaking / commitment by those other entities to that effect. Indeed the tenderer’s technical offer in response to specifications to be submitted online through the prescribed tender response format and by using the tender preparation tool provided is also denoted as a Note 3 requirement (*i.e.* 3. No rectification shall allowed. Only clarifications on the submitted information may be requested). Otherwise, the bidder could have opted for subcontracting by declaring same as per the relevant tender clause:

»“Any subcontractor proposed and disclosed at this stage shall be evaluated in line with the exclusion and blacklisting criteria as per these instructions to tenderers. Furthermore, if the sub-contractor is relied upon by the contractor to meet the standards established in the selection criteria, apart from submitting the relevant commitments in writing, such reliance will be evaluated to verify its correctness and whether in effect these criteria are satisfied. It is being understood that if the information being requested

regarding sub-contracting is left empty, it will be assumed that no sub-contracting will take place (0% subcontracting).”

»Therefore, unless the recommended bidder submitted the necessary declarations by third parties and/or fully declared the subcontracting proportion (subject to technical and administrative compliance, including lack of blacklisting), the recommended bidder’s bid should have been discarded *ab initio*.

»This board also noted the contracting authority’s reasoned letter of reply filed on 22nd February 2022 and its verbal submission during the virtual hearing held on 12th April 2022, in that: “I-Imsida Local Council is in disagreement with the objection filed by Alfred Galea for tender for the collection of residential bulky refuse & fly tipping from Msida and part of Swatar, in an environmentally friendly manner, for reasons provided hereunder:”

»a) that the recommended bidder was deemed technically compliant by the evaluation committee since all Note 3 requirements were provided by the recommended bidder and any requests for clarification were answered by the recommended bidder, within the established deadline and to the satisfaction of the evaluation committee;

»b) that, the tender does not specifically require for the vehicle or vehicles to be owned by the tenderer;

»c) that, Section 3, Terms of Reference, denoted as Note 3, states:

[Ara para. 2, *supra*, “Terms of Reference, 4.2.3 Vehicle Type and GPP”]

»Hence clause 4.2.3. of Section 3 requires that vehicles used must be approved by the council’s representative at least 7 days before the start of the contract, whereas the ownership of the vehicle is not a requirement according to this section, as part of Note 3;

»d) that regulation 252(1) [*recte*, 235(1)] of the Public Procurement Regulations (S.I. 601.03) provides for the reliance of the economic operator on the capacities of other entities;

»e) that, in the case of the recommended bidder, Melchior Dimech, the evaluation committee noted the bidder had submitted the documentation for four different vehicles. The registered vehicle owner on the logbooks of all vehicles states “*Dimbros Ltd*”;

»f) that, in accordance with the terms of regulation 252(1) [*recte*, 235(1)], of S.I. 601.03 a bidder may rely on the capacities of other entities provided that it is proved to the contracting authority that the resources are in the bidder’s disposal by producing a commitment by those entities to that effect;

»g) that the evaluation committee noted that the bidder Melchior Dimech is in fact a shareholder of the company Dimbros Ltd as confirmed by the Malta Business Registry and deemed it necessary to send a request for clarification to the bidder on this matter to confirm whether the company director confirms the commitment to the bidder to rely on the company’s capacities *i.e.* the use of the vehicles;

- »h) that, in accordance with regulation 62(2) of S.L 601.03:
- »“(2) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities in terms of the procurement document may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit:
- »Provided that such requests are made in full compliance with the principles of equal treatment and transparency.”
- »Hence, given that administrative compliance does not fall within the remits of Note 3, the evaluation committee had the power to request clarifications on the matter;
- »i) that, on 28/09/2021 at 12:55 hrs, the chairperson of the evaluation committee submitted a request for clarification to the bidder Melchior Dimech, requiring that the bidder submits “a board resolution or letter of authorisation signed by the registered owner of the vehicle/vehicles, authorizing the bidder to utilize the vehicle/vehicles proposed in the bid for the collection of residential bulky refuse and fly tipping from Msida and part of Swatar”, within five working days from the request. This request for clarification was answered by the bidder on the same day, providing a letter of authorization signed by Ms Josephine Dimech, director of *Dimbros Ltd*;
- »j) that the evaluation committee was satisfied with the reply provided by the bidder Melchior Dimech including the letter of authorization signed by the company director, proving to the satisfaction of the contracting authority that it will have at its disposal the resources necessary to perform the services required;
- »k) that the evaluation committee acted in a proportionate manner, as required by general principles emerging from the EU Treaties, Directive 2014/24 and specifically regulation 39(1) of S.L. 601.03 which states:
- »“39. (1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.”
- »This board also noted the preferred bidder’s reasoned letter of reply filed on 8th March 2022 and its verbal submission during the virtual hearing held on 12th April 2022, in that:
- »a) that the objector basis his objection on article 235(1) of the Public Procurement Regulations which allows an economic operator to rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. This article stipulates that, in such cases, the economic operator is to prove to the contracting authority that it will have at its disposal the necessary resources. The objector claims that the respondent failed to do so;
- »b) that the respondent is one of the shareholders of the company *Dimbros Limited* (C32506), which is the company which shall

provide the necessary resources for the respondent to be able to satisfy the requirements of the tender in question. Therefore there is no doubt that such vehicles will be provided since the respondent has absolute control over the company which will provide him with the resources necessary, and thus over the mentioned vehicles;

- »c) that the objector alleges that the respondent is not technically compliant since he does not own the necessary vehicles requested in the tender. That with all due respect, the objector is not correct in stating so, and this in light of the above-mentioned Article of the Regulations which specifically allows economic operators to rely on the capacities of other entities;
- »d) that it is a well-known fact that the respondent is a shareholder in the company *Dimbros Limited* and such information is available publicly when one accesses the Malta Business Registry. Article 235(1) of the above-mentioned Regulations holds that the economic operator needs to prove that the resources will be at his disposal. The respondent needs no better proof than his shareholding in the above-mentioned company for the contracting authority to be satisfied that the respondent will have at his disposal the vehicles in question.

»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) This board will initially list out what matters it is considering as relevant to this case:
 - »i. Firstly, this board will delve into the argument as put forward by the preferred bidder whereby it was stated: "That it is a well-known fact that the respondent is a shareholder in the company *Dimbros Limited* and such information is available publicly when one accesses the Malta Business Registry. Article 235(1) of the above-mentioned Regulations holds that the economic operator needs to prove that the resources will be at his disposal. The respondent needs no better proof than his shareholding in the above-mentioned company for the contracting authority to be satisfied that the respondent will have at his disposal, the vehicles in question". This board opines that the appellant, by just having 25% shareholding in *Dimbros Limited*, while at the same time not being a director of the aforementioned company, is in no way proof enough that the appellant will have at its disposal the vehicles in question. 25% shareholding is a minority holding, while the executive powers of the company rests with the directors appointed by the shareholders;
 - »ii. Secondly, clause 4.2.3 of Section 3 of the tender document did not enter the merits of the ownership of the vehicles. Amongst other points, it stated "The contractor shall only make use of vehicles which have been approved by the council's representatives".
- »b) The evaluation committee, whilst reviewing the bid of the appellant [*recte*, the preferred bidder], noted that no photographs of the

vehicles were provided, whilst also noting that the vehicle logbooks provided are all registered on the owner *Dimbros Limited* / Joseph Dimech. At this point the evaluation committee requested the photographs to be duly provided and for the submission of a board resolution or letter of authorisation duly signed by the registered owner of the vehicle/s, authorising the bidder to utilise the vehicle/s proposed in the bid. This board notes that these requests were immediately provided by the appellant [*recte*, preferred bidder], in turn making his bid technically compliant.

»Therefore, when considering all of the above, this board does not uphold the grievances brought forward by the appellant.

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

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

5. Galea ressaq appell minn din id-deċiżjoni tal-Bord ta' Reviżjoni b'rikors tad-9 ta' Mejju 2022. Għal dan ir-rikors wieġbu Dimech fis-27 ta' Mejju 2022 u l-awtorità kontraenti fl-1 ta' Ġunju 2022.
6. L-appellant talab illi l-qorti "i) tħassar ir-rakkomandazzjoni tal-kunsill appellat li t-*tender de quo* jinghata lill-appellat Melchiore Dimech u sabiex, minflok, ii) ... tordna li t-*tender de quo* għandu jinghata lill-[appellant], filwaqt li iii) tordna li d-depożitu mħallas in konnessjoni mal-oġġezzjoni mressqa lill-Bord ta' Reviżjoni jiġi rifiuż *in toto*".
7. Fl-ewwel aggravju l-appellant iġid illi "d-deċiżjoni appellata ma tittrattax l-argumenti mqajma ... waqt is-smiġh tal-appell". Kompla fisser l-aggravju hekk:

»Huwa pależi illi l-Bord ta' Reviżjoni ma sħarriġx *subnditus* l-argumenti mqajma waqt l-appell u sempliċement ikkonkluda – mingħajr ebda motivazzjoni – li għadarba l-offerent rakkomandat issana l-offerta inizjali tiegħu, mela ma kienx hemm bażi għall-ilment tal-esponenti. Madankollu tali approċċ, bir-rispett kollu, huwa wieħed li jiddefetta għal kollox mil-lat proċedurali u sostantiv. L-ilment tal-esponenti kien proprju li l-offerent rakkomandat qatt ma seta' jintalab jissana l-offerta

tiegħu bil-mod kif sar in kwantu dan jinneċċessita bidla sostanzjali fl-offerta oriġinali *stante* li l-offerta inizjali tiegħu kienet tippreżumi li kien ser ikun hu li sejjer jattwa s-servizz maħsub fit-*tender de quo*, mentri bir-risposta tiegħu għall-kjarifika huwa biddel b'mod essenzjali l-offerta tiegħu u iddikjara li sejjer jaħdem it-*tender* b'vetturi ta' entità oħra, ossija li mhijiex l-oblatur oriġinali. Kif ġie argumentat quddiem il-Bord ta' Revizjoni, tali għażla kellha ssir *ab initio*, ossija mal-offerta inizjali u mhux bħala reazzjoni għal eżerċizzju ta' 'kjarifika'. Bir-rispett kollu, dan ma kienx dokument mankanti [bħal e.g. meta xi ħadd jinsa jinkludi *log book* partikolari jew ritratt ta' vettura) iżda element essenzjali li ried jiġi dikjarat u sostnut bil-mod kif titlob il-liġi mal-offerta nnifisha! Dawn l-argumenti bl-ebda mod ma ġew indirizzati fid-deċiżjoni appellata li wara li għamlet l-ewwel konsiderazzjoni favorevoli għall-esponenti (kif ser jiġi spjegat fl-aggravju li jmiss) għaddiet għal konsiderazzjoni sempliċistika u li ma ġiet sorretta bl-ebda referenza legali u/jew amministrattiva, li galadarba l-offerent rakkomandat issana l-offerta inizjali tiegħu ma kienx hemm iktar lok għall-ilment tal-esponenti. «

8. Igħid hażin l-appellant illi d-dokument relattiv għall-vetturi huwa “element essenzjali li ried jiġi dikjarat u sostnut bil-mod kif titlob il-liġi mal-offerta nnifisha”. Li jgħidu l-kondizzjonijiet tas-sejħa hu illi l-vetturi għandhom ikunu “*approved by the Council’s representative at least 7 days before the commencement date of the Contract*”. Igħidu wkoll illi “*Any vehicle obtained thereafter will be subject to the approval of the Council’s representative*” u illi “*Failing to submit such documents within the above-mentioned stipulated time may constitute grounds for the annulment of the decision to award the contract*”. Fi kliem ieħor, setgħu jintużaw vetturi illi ma ssemwewx fl-offerta, sakemm it-tagħrif dwarhom jingħata mill-oblatur magħżul fiż-żmien fuq imsemmi.

9. L-aggravju huwa għalhekk miċħud.

10. It-tieni aggravju jgħid illi “d-deċiżjoni appellata tiddifetta in kwantu t-tieni sejbien huwa *non sequitur* tal-ewwel sejbien”, u ġie mfisser hekk:

»Fl-ewwel konsiderazzjoni tagħha (minn tnejn) id-deċiżjoni appellata effettivament tagħti raġun lill-esponenti inkwantu ġustament xejjnet l-argumenti tal-appellati li, inkwantu azzjonista minoritarju fis-soċjetà li

hija s-sid tal-vetturi, l-offerent rakkomandat huwa prattikament l-istess persuna b'hall-entità li tagħha, fi stadju ulterjuri, iddikjara li kien se jistrieħ fuq il-kapaċità tagħha.

»... ..

»Għaldaqstant huwa *non sequitur* loġiku u legali li mbagħad il-Bord ta' Revizjoni għadda sabiex, b'sempliċi daqqa ta' pinna, jiġġustifika l-issanar tal-offerta inizjali tal-offerent rakkomandat.«

11. Dan l-aggravju huwa fieragħ. Li qal il-Bord ta' Revizjoni hu illi, għalkemm ma setax joqgħod fuq il-fatt li Dimech għandu ishma fis-soċjetà sidt il-vetturi b'ħala konferma li dawn il-vetturi jkunu disponibbli għalih (safejn dan kien meħtieġ f'dak l-istadju), seta' joqgħod fuq dikjarazzjoni ta' direttur tas-soċjetà. Ma hemm ebda inkonsistenza fiż-żewġ konsiderazzjonijiet.

12. L-añhar aggravju jgħid illi "jidher ċar li l-Bord ta' Revizjoni dikjaratament s'fharreg l-offerta tal-appellant u mhux dik tal-offerent rakkomandat, u għalhekk id-deċiżjoni hija affetta minn nullità", u gie mfisser hekk:

»Huwa ċar illi t-tieni konsiderazzjoni (u *cioè* dik li wasslet għaċ-ċaħda tal-oġġezzjoni tal-esponenti) tirreferi għall-offerta tal-esponenti u mhux dik tal-offerent rakkomandat.

»... ..

»Għalhekk ir-referenza li saret kienet għall-offerta tal-"appellant" u mhux għal dik tal-offerent rakkomandat. Fiċ-ċirkostanzi, u peress li tali żball jolqot direttament il-mertu tal-appell tal-esponenti, tali żball dikjarat u lampanti għandu jwassal neċessarjament għal dikjarazzjoni ta' nullità tad-deċiżjoni appellata.

»Lanqas jista' jingħad tali żball jista' jiġi sanat b'xi mod minn qari tal-kumpliment tad-deċiżjoni appellata *stante* li l-unika konsiderazzjoni oħra *oltre* dik appenna ċitata magħmula mill-Bord ta' Revizjoni effettivament tissufraga t-teżi tal-esponenti!

»Għaldaqstant anke minħabba din ir-raġuni għandu jkun hemm tħassir tad-deċiżjoni appellata.«

13. Tassew illi f'żewġ okkażjonijiet il-Bord ta' Revizjoni fid-deċiżjoni appellata semma lill-appellant meta huwa wisq ovvju li r-referenza kellha tkun għall-oblatur magħżul. Fl-ewwel okkażjoni jingħad illi mill-appellant ġew preżentati *logbooks* ta' vetturi tas-soċjetà *Dimbros Ltd*, meta huwa ovvju illi

kien Dimech, l-oblatur magħżul, li ppreżenta dawk il-*logbooks*. It-tieni okkażjoni jingħad illi l-appellant ta minnufih it-tagħrif mitlub mill-kumitat ta' evalwazzjoni meta għal darb'ohra huwa ovvju illi dik it-talba kienet saret lil Dimech u li kien Dimech li ta t-tagħrif.

14. Dawn kienu okkażjonijiet ovvji ta' *lapses* mill-Bord ta' Reviżjoni; dak li tassew ried igħid il-bord fid-deċiżjoni huwa ċar u ma hemmx fejn titfixkel. Il-fatt illi l-appellant ressaq aggravju hekk fieragħ xejn ma jirrifletti sabih fuqu u fuq il-lealtà tiegħu lejn il-qorti, kif mistenni minn kull litigant.
15. Għal dawn ir-raġunijiet il-qorti tiċhad l-appell u tikkonferma d-deċiżjoni appellata. L-ispejjeż ta' dan l-episodju iħallashom l-appellant. Ukoll, billi l-qorti hija tal-fehma illi l-appell huwa wieħed fieragħ, wara li rat il-para. 10 tat-Tariffa A mehmuża mal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili tordna lill-appellant iħallas lir-Regjstratur tal-Qrati spejjeż addizzjonali ta' ħames mitt euro (€500).

Mark Chetcuti
Prim Imħallef

Giannino Caruana Demajo
Imħallef

Anthony Ellul
Imħallef

Deputat Regjstratur
rm