



## 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 3

Appell numru 193/2022/1

***C & F Building Contractors Limited***  
**(C-15308)**

v.

**Id-Direttur Ġenerali tal-Kuntratti; il-Fondazzjoni għall-Iskejjel ta' Għada; u**  
***Bonnici Bros Services Limited***

1. Dan huwa appell ta' *C & F Building Contractors Limited* ["C & F" jew "l-appellanti"] minn deċiżjoni tat-28 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 tagħha kontra deċiżjoni tal-Fondazzjoni għall-Iskejjel ta' Għada ["l-awtorità kontraenti"] li warrbet offerta tagħha wara sejha pubblika għal offerti ta' kuntratt "*for the construction of a new football pitch and underground*

*carpark at Naxxar School Complex*” u irrakkomandat illi l-kuntratt jingħata lil *Bonnici Bros Services Limited* [“*Bonnici Bros*”].

2. Il-fatti rilevanti seħnew hekk: kienet saret sejħa mill-awtorità kontraenti għal offerri għall-kuntratt fuq imsemmi. Il-kundizzjonijiet tas-sejħa jgħidu illi l-kuntratt għandu jingħata lil min jagħmel l-orħos offerta, sakemm din tkun tabqbel mal-kriterji amministrativi u tekniċi.
3. Wara li l-appellanti tefgħet l-offerta tagħha l-awtorità kontraenti stednitha “*to rectify the literature submitted and to submit missing literature*”. Peress illi l-appellanti ma kinitx f’posizzjoni illi fiż-żmien li ngħatalha tippreżenta d-dokumenti nieqsa relattivi għall-prodott li jissemma fl-offerta oriġinali tagħha, offriet prodott ieħor minflok, u ippreżentat id-dokumenti relattivi għal dan il-prodott ġdid.
4. L-awtorità kontraenti qieset illi dan kien ekwivalenti għal bdil tal-offerta u illi dan il-bdil ma huwiex permess għax jaqa’ taħt *note 3* tas-sejħa għal offerri, li tgħid hekk:

»No rectification shall be allowed. Only clarifications on the submitted information may be requested.«
5. Għalhekk b’ittra tat-8 ta’ Frar 2022 id-Direttur tal-Kuntratti għarraf lill-appellanti illi l-offerta tagħha twarrbet għax tqieset “*technically non-compliant*” u illi l-kuntratt kellu jingħata lil *Bonnici Bros*.
6. Lil appellanti dehriha li din kienet kwistjoni relattiva għad-dokumenti mehmuża mal-offerta, u għalhekk regolata mhux b’*note 3* iżda b’*note 2*, li tgħid hekk:

»Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.«

7. Għalhekk b'ittra tat-18 ta' Frar 2022 l-appellant ressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta' Revizjoni, iżda l-bord, bid-deċiżjoni tat-28 ta' April 2022 li minnha sar dan l-appell, ma laqax l-oġġezzjoni u ikkonferma d-deċiżjoni tal-awtorità kontraenti. Il-konsiderazzjonijiet li wasslu lill-bord għal din id-deċiżjoni ġew imfissra hekk:

»... .. the appellant, in their letter of objection, contend that:

»a) The rejection letter stated:

»“EO<sup>1</sup> was requested to rectify the literature submitted and to submit missing literature. The EC<sup>2</sup> reviewed the submitted reply and concluded that the bidder is technically non-compliant.

»“Justifications:

»“(1) Dimple Membrane: BoQ Bill 4 (Item No. 4.17, Spec 29) – EO changed brand and model from *Tekno Forma/Dimpled* to *Triton Systems/Platon P8 Membrane* during the rectification request. The technical offer falls under Note 3 - No rectification shall be allowed. Only clarifications on the submitted information may be requested.

»“(2) Expanded Polystyrene: BoQ Bill 7 (Item No. 7.01, Spec 59) – EO changed brand and model from *Sundolitt/Expanded Polystyrene* to *Bitmac* during rectification request. The technical offer falls under Note 3 - No rectification shall be allowed. Only clarifications on the submitted information may be requested.”

»The appellant is appealing from this decision for the following reasons: It is not proportionate to consider that a change in literature would have resulted in a change in the technical offer when the new submissions were for equivalent, interchangeable items of the same standard.

»“b) At the outset, when taking note of the principle of proportionality, reference is made to the judgment delivered by the Court of Appeal in the case in the names Cassar Petroleum Services Limited v. Gozo Channel Company Limited u d-Direttur General tad-Dipartiment tal-Kuntratti, decided on the 12<sup>th</sup> January 2015, wherein it was quoting the European Court of Justice on the principle of proportionality as a general principle of European Law, it held that a measure taken by an authority must be such that it can be used to achieve the intended goal and cannot go beyond that which is required to reach that aim:

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<sup>1</sup> *Economic operator*

<sup>2</sup> *Evaluation committee*

»“As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.” (ECJ, United Kingdom vs Council of the European Union, C84/94, 12<sup>th</sup> November 1996, para 57)

»“The Court of Appeal continued:

»“15. Għalkemm din is-silta hija dwar leġislazzjoni, tgħodd ukoll għal miżuri ta' implimentazzjoni u deċiżjonijiet meħuda taħthom. Din il-qorti għalhekk tagħraf illi għandha qabel xejn tara x'inhu l-għan ewlieni għas-sejha għal offerti għax ma' dan għandha titkejjel il-proporzjonalità tal-miżura meħuda biex jinkiseb. Fil-każ tallum l-għan ewlieni kien illi *Gozo Channel* tixtri n-nafta bl-orħos prezz.

»“16. Ma humiex sejrin jinkisru l-prinċipju tal-trattament ugwali, il-prinċipju ta' bla diskriminazzjoni, il-prinċipju ta' għarfien reċiproku u l-prinċipju tat-trasparenza jekk, bla ma jinbidlu l-kondizzjonijiet tal-offerta nfisha, jingħata żmien biex jinġieb dokument illi forsi, bi żvista, ma tqegħidx mad-dokument tal-offerta, waqt li ċertament ma jkunx qiegħed jitħares il-prinċipju tal-proporzjonalità jekk offerta vantaġġjuża tiġi mwarrba għax ma nġiebx dokument li għad jista' jinġieb.’

»“Ample reference is also made to Case No. 960 – FTS 55/16: ‘Tender for the Construction of Lift Shaft and Minor Internal Alterations Using Environmental Friendly Products at Haż-Żebbuġ Child Care Centre’ ... .. this board, as differently composed, on the 9<sup>th</sup> August 2016 had decided on merits which are essentially identical to the case at hand. In this case the appellant had submitted its tender with a particular product; however following a request for clarification the appellant had sent literature of another identical product that was identical and interchangeable with the product submitted, and both products were identical, equivalent and had the same standard and quality level. In this case, as in the case at hand, the contracting authority had also considered this change to be a disallowed rectification to the technical offer.

»“It is humbly submitted that where a submission of literature for equivalent, interchangeable products that had the same standard and quality level as not deemed to be a change in the technical offer and not an instance that gave an advantage over other technically compliant bidders [*sic*].

»“It is therefore submitted that, since there was only a change of brand name, and not a change of form, then substance persisted and the appellant’s bid remained technically compliant since there was no rectification to the technical offer, and consequently the evaluation committee was not justified in deeming the appellant’s offer as technically non-compliant.”

»This board also noted the contracting authority’s reasoned letter of reply filed on 25<sup>th</sup> February 2022 and its verbal submission during the virtual hearing held on 26<sup>th</sup> April 2022, in that:

»“b) Change in the original bid vs equivalence

»“In its appeal, the objector argues that the FTS was bound to accept the second submission made by it, following the request for clarification dated 19<sup>th</sup> January 2022, and this since the objector claims that,

»“it submitted technical literature, for those items indicated in the rectification request, which corroborated the technical specifications, which literature was simply provided from different, but equivalent brands’ [sic].

»“With all due respect, what the objector did is nothing more than a change in the original bid, which change cannot be accepted by the evaluation committee, nor can it be deemed acceptable to any judicial entity, since it directly infringes the procurement principles of ‘level-playing field’ and ‘equal treatment’.

»“The claim by the objector that it proposed equivalent brands is completely unconceivable (sic), since equivalence within this context is completely irrelevant – the conduct by the objector should lead to an automatic disqualification; The PCRB has repeatedly argued and confirmed that any changes to the original bid, post the closing date of the tender submission, amount to a change in the original bid, and cannot be accepted.

»“PCR case 1410/2020

»“this board would point out that, whilst it is the responsibility and obligation of the bidder to abide by the stipulated requirements of the tender document, it is also the duty and obligation of the evaluation committee to abide by the principle of self-limitation so as to ensure that equal treatment and level playing field prevail.’

»“b) Proportionality

»“While the reference by the objector to judgements on the principle of proportionality delivered by Maltese Courts and of the Court of Justice of the European Union is certainly authoritative, it must be stated that the decision of the contracting authority to declare the offer to be technically not compliant is proportionate since it is suitable, necessary and does not place an excessive burden on the objector as shall be explained hereunder. Hereby, reference is being made to a Court of Appeal judgment, which clearly demonstrates the requisites of proportionality, and which clearly confirm that they are not applicable to the situation *de quo*. In Fire-tech Limited (C17901) u Cross Zlin AS (60715886) flimkien magħrufa u msejha bħala Firetech Cross TLS Joint Venture kontra Dipartiment tal-Kuntratti, the court held that:

»“Għalkemm huwa minnu illi, biex tithares it-trasparenza u ma jkunx hemm diskriminazzjoni, ir-regoli għandhom jitharsu b'mod uniformi u prevedibbli, u s-soggettività u d-diskrezzjonalità jinaqqsu kemm jista' jkun, madankollu l-prinċipju ta' proporzjonalità jrid illi mhux kull nuqqas ikollu l-istess konsegwenza, iżda din għandha tiddependi mill-gravità tan-nuqqas u mill-konsegwenzi tiegħu, partikolarment jekk jagħtix vantaġġ lil min jonqos jew joħloqx preġudizzju lil oblaturi oħra. Ma huwiex biżżejjed illi, kif iġhid id-dipartiment fit-twegiba tiegħu, huwa żamm id-dritt li jagħzel jiskwalifikax lil min ma jħarisx ir-regoli f'kollox (“*The Department of Contracts reserves the right to disqualify economic*

*operators who do not abide by the above instructions”)* iżda trid tqis ukoll in-natura u l-konsegwenzi tan-nuqqas.”

»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 witness duly summoned, will consider appellant’s grievances, as follows:

- »a) Deposit – ... ..
- »b) Change in the original bid vs equivalence – This board agrees with the contracting authority in that this is not a case of equivalence but a change of submissions. Changing a brand in relation to a product which was offered / submitted in the technical offer form (which falls under Note 3) is not possible and / or allowable. A change in ‘brand’ of a product is not the same as a change in a ‘standard’, something which may be considered acceptable under certain circumstances by a contracting authority.
- »c) Proportionality – Considering that, as per above, the actions of the appellant are deemed to have changed its original offer, this board opines that in this specific case the contracting authority did in fact act proportionally whilst also observing the principle of self limitation.

»In conclusion this 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 to *Bonnici Bros Services Ltd*;
- »iii. directs that €9,000 out of the €59,000 deposited paid by appellant to be reimbursed. The remaining balance of €50,000 is not to be reimbursed.«

8. L-appellanti rressqet appell minn din id-deċiżjoni tal-Bord ta’ Reviżjoni b’rikors tat-18 ta’ Mejju 2022. Għal dan ir-rikors wiegħbu l-awtorità kontraenti fit-2 ta’ Ġunju 2022 u *Bonnici Bros* fit-13 ta’ Ġunju 2022.
9. L-appellanti talbet illi l-qorti tħassar id-deċiżjoni tal-Bord ta’ Reviżjoni (ħlief fejn ordna li jintraddulha disat elef ewro (€9,000) mid-depożitu li għamlet biex setgħet tressaq l-oġġezzjoni), u “tiddeċiedi illi għandu jiġi sospiż il-proċess ta’ aġġudikazzjoni, tikkancella n-*notice of award* datata 8 ta’ Frar 2022, tikkancella l-*letter of rejection* maħruġa lis-soċjetà appellanti datata 8 ta’ Frar 2022 u tordna li l-offerta tas-soċjetà appellanti għandha tiġi

reintegrata fil-proċess ta' evalwazzjoni u d-depożitu mħallas jiġi rifuż lis-soċjetà appellanti, bl-ispejjeż”.

10. L-aggravju tal-appell huwa illi l-Bord ta' Revizjoni “ma kienx korrett meta qies illi t-tibdil fid-dokumentazzjoni kien isarraf f'tibdil fl-offerta teknika meta l-*items* offruti kienu ekwivalenti, interkambjabbli u tal-istess *standard*”. L-aggravju ġie mfisser hekk:

»Is-soċjetà esponenti tibda billi tagħmel riferenza għad-deċiżjoni mogħtija mill-Qorti tal-Appell fil-kawża fl-ismijiet Cassar Petroleum Services Limited v. Gozo Channel Company Limited u d-Direttur Ġenerali tad-Dipartiment tal-Kuntratti, deċiża fit-12 ta' Jannar 2015 fejn b'riferenza għad-deċiżjoni tal-*European Court of Justice* fuq il-prinċipju ta' proporzjonalità kien intqal illi miżura meħuda minn awtorità kellha tħares lejn li jintlaħaq l-għan aħħari u ma tistax tmur *oltre* milli jintlaħaq dak l-għan:

»“As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.”

»Il-qorti kompliet:

»“15. Għalkemm din is-silta hija dwar leġislazzjoni, tgħodd ukoll għal miżuri ta' implimentazzjoni u deċiżjonijiet meħuda taħthom. Din il-qorti għalhekk tagħraf illi għandha qabel xejn tara x'inhu l-għan ewlieni għas-sejha għal offerti għax ma' dan għandha titkejjel il-proporzjonalità tal-miżura meħuda biex jinkiseb. Fil-każ tallum l-għan ewlieni kien illi *Gozo Channel* tixtri n-nafta bl-orħos prezz.

»“16. Ma humiex sejrjn jinkisru l-prinċipju tal-trattament ugwali, il-prinċipju ta' bla diskriminazzjoni, il-prinċipju ta' għarfien reċiproku u l-prinċipju tat-trasparenza jekk, bla ma jinbidlu l-kondizzjonijiet tal-offerta nfisha, jingħata żmien biex jinġieb dokument illi forsi, bi żvista, ma tqegħidx mad-dokument tal-offerta, waqt li ċertament ma jkunx qiegħed jithares il-prinċipju tal-proporzjonalità jekk offerta vantaġġjuża tiġi mwarrba għax ma nġiebx dokument li għad jista' jinġieb.”

»Issir riferenza ukoll għall-kawża deċiża mill-*PCRB case No. 960-FTS 55/16: Tender for the construction of lift shaft and minor internal alterations using environmentally friendly products at Haż Żebbuġ Child Care centre* fid-9 t'Awissu 2016 fejn dak il-bord kien iddeċieda fuq mertu essenzjalment identiku għall-każ odjern. F'dak il-każ l-appellant kien issottometta l-offerta tiegħu bi prodott partikolari u, wara talba għal kjarifika, kien issottometta dokumentazzjoni għal prodott identiku u interkambjabbli mal-prodott sottomess, u ż-żewġ prodotti

kienu identiċi, ekwivalenti u kellhom l-istess standard u kienu tal-istess kwalità. F'dak il-każ, u b'riferenza għad-deċiżjoni ta' din l-onorabbli qorti diversament presjeduta fil-kawża fl-ismijiet John Micallef Builders Limited v. Id-Direttur Ġenerali tal-Kuntratti et, deċiża fis-27 ta' Mejju 2016, il-bord kien stabilixxa illi:

»“the other different product offered by the appellant in response to the clarification was technically compliant and met all the requirements dictated by the tender document, although by a different brand name ... The principle positively decided by the Court of Appeal applied to the non-conformity of literature when compared to the technical specifications of the product in the original offer. The acceptance of such a submissions would have amounted to a 'rectification'. In this regard, this board credibly notes that the different brand name of the product was submitted on the strength of a clarification. In this case, through the expert's testimony, it was credibly established that the new product had the same technical specifications of the originally offered product as stated under oath by the expert who confirmed that both *Bayern S-Gray* and *Cemex* were “equivalent and interchangeable and both products were identically equivalent and had the same standard and quality level”. In this regard, it is being confirmed that both products offered by *I Projects Limited* were identical, in so far as the technical compliancy is concerned but they had a different brand name.

»“The board opines that since both the product in the original submission and the product offered in the clarification, were both identical and both compliant, there was no instance which gave the appellant an advantage over the other technically compliant bidders. The board also opines that since the product *Bayern S-Grey* had the same standards of *Cemex*, the only change that existed was the brand name and, although there was a change of form, substance persisted. In this regard this board upholds the appellant's contentions.”

»Għaldaqstant huwa palesi illi lanqas fil-każ odjern ma kien hemm l-ebda tibdil peress li fis-sustanza s-sottomissjoni tal-esponenti baqgħet l-istess. Għalhekk la l-kumitat tal-evalwazzjoni u lanqas il-bord ma kellhom iqisu illi din kienet xi tibdil fis-sottomissjoni jew xi sottomissjoni ġdida.

»L-argumenti li jressaq il-bord dwar il-prinċipju ta' *self-limitation* ikunu applikabbli biss fl-evenwalità li kien hemm xi tibdil fis-sustanza mis-soċjetà esponenti, u allura, ladarba dan ma kienx il-każ, l-applikazzjoni ta' dan il-prinċipju ma ssibx lokha.

»Il-fatt illi l-offerta tas-soċjetà esponenti baqgħet dejjem konformi jirriżulta wkoll minn art 62(3) tar-Regolamenti dwar l-Akkwist Pubbliku L.S 174.04 li jaqra kif isegwi:

»“62. (1) Mingħajr preġudizzju għat-Taqsima VI u għar-regolament 235(2), l-awtorità responsabbli għat-tmexxija tas-sejha għandha tiżgura li operatur ekonomiku jkun mill-bidunett eliġibbli li jikkwalifika għal offerta u għalhekk għandu jkun fil-pussess tal-ħtiġiet kollha stipulati fid-dokumenti tal-akkwist sad-data tal-għeluq għas-sottomissjoni tagħhom.

»“(2) Fejn l-informazzjoni jew id-dokumentazzjoni li għandha tiġi sottomessa mill-operaturi ekonomiċi tkun jew tidher li tkun mhux



kompleta jew żbaljata jew fejn dokumenti speċifiċi huma nieqsa, l-awtoritajiet kontraenti jistgħu, skont il-klawżoli tad-dokument tal-akkwist, jesigū lill-operaturi ekonomiċi kkonċernati li jissottomettu, jissupplementaw, jikkjarifikaw jew jimlew l-informazzjoni jew id-dokumentazzjoni rilevanti f'limitu ta' żmien adatt:

»“Iżda dawn l-esiġenzi għandhom isiru b'konformità sħiħa mal-prinċipji ta' trattament ugwali u ta' trasparenza.

»“(3) L-offerta finanzjarja ma tistax tinbidel flief għal korrezzjoni ta' żbalji evidenti fl-aritmetika kif jista' jkun permess fid-dokument tal-akkwist.”

»Fil-każ odjern m'hemmx dubju illi l-offerta tas-soċjetà esponenti giet meqjusa bħala valida iżda li kien hemm dokumentazzjoni nieqsa. Ladarba s-soċjetà esponenti kienet issottomettiet dokumentazzjoni ta' prodotti identiċi, iżda sempliċement b'ismijiet differenti, dan ma kien ser jirruvta fl-ebda tibdil fl-offerta tagħha. Kien għal din ir-raġuni wkoll illi l-offerta tas-soċjetà esponenti ma setgħetx tiġi sempliċement rifjutata bħal ma fil-fatt ġara imma l-kumitat ta' vvalwazzjoni kellu tal-inqas jevalwa d-dokumentazzjoni ġdida li giet sottomessa fuq il-mertu tagħha anke għaliex issa, bl-aġir tal-istess kumitat, is-soċjetà esponenti giet preġudikata irrimedjabbilment billi l-offerta tagħha saret pubblika.«

11. L-appellanti tistrieñ fuq deċiżjoni tal-Bord ta' Revizjoni fil-każ numru 960/2016 li fih il-bord ippermetta bdil ta' prodott flok ieħor għax sab illi ż-żewġ prodotti kienu interkambjabbli u illi *“the other different product offered by the appellant in response to the clarification was technically compliant and met all the requirements dictated by the tender document, although by a different brand name”*.
12. Il-bord, min-naħa tiegħu, kien sejjes dik id-deċiżjoni fuq dak li qalet din il-qorti f'sentenza tas-27 ta' Mejju 2016 fl-ismijiet John Micallef Builders Limited v. Direttur Ġenerali tad-Dipartiment tal-Kuntratti et<sup>3</sup>.
13. Madankollu, ma jidhirx illi l-bord kien fehem sew dak li riedet tgħid din il-qorti fis-sentenza fuq imsemmija. Din il-qorti ma qalitx illi oblatur jista' jibdel il-prodott illi jkun offra; li qalet hu illi jekk bi żball jippeżenta

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<sup>3</sup> Rikors nru 125/2016

dokumenti relattivi għal prodott ieħor flok għal dak li offra, jista' jingħata żmien biex jipproduci d-dokumenti tajba, sakemm il-prodott jibqa' l-istess u d-dokumenti l-ġodda ma jservux biex jibdlu s-sustanza tal-offerta. Is-sentenza tgħid hekk:

- »9. L-argument tal-appellanti ... .. jidher illi hu illi kien hemm inkompatibilità bejn l-ispeċifikazzjonijiet tekniċi tal-offerta tagħha u d-deskrizzjoni ta' dawk l-ispeċifikazzjonijiet fil-*"letteratura"*, presumibilmment għax riedet toffri l-prodott *"X"* li għandu l-ispeċifikazzjonijiet deskritti fl-offerta, u wriet ċar li qiegħda toffri prodott *"X"*, iżda bi żball ipprovdiet il-*letteratura* ta' prodott *"Y"* li għandu speċifikazzjonijiet oħra. Għalhekk, tgħid l-appellanti, kellha tingħata fakoltà *"to rectify any incorrect documentation"*.
- »10. L-appellanti kien ikollha argument li kieku tassew l-ispeċifikazzjonijiet tekniċi tal-offerta tagħha kienu kompatibbli ma' dak li riedet is-sejha iżda twarrbet għax ipprezentat dokumenti bi żball li juru speċifikazzjonijiet oħra. Iżda kif jidher mill-ittra tal-1 ta' Frar 2016 (li biha d-dipartiment għarraf lill-appellanti li l-offerta tagħha giet imwarrba) l-offerta twarrbet għax il-prodotti offerti nfushom ma kinux kif riedet is-sejha għal offerti. Li kieku l-appellanti tħalliet tibdel il-*letteratura* kienet tkun qiegħda effettivament tinqeda bid-dokumenti ġodda biex tibdel is-sustanza tal-offerta: fi kliem il-Bord ta' Revizjoni, *"this would have lead to a "rectification" [tal-offerta, mhux tad-dokumenti] which is not allowed"*.
- »11. Li ma tistax issir bidla fl-offerta għal kuntratt pubbliku wara li jkun magħrufa l-offerti ta' oblaturi oħra huwa prinċipju bażiku u fundamentali. ... ..«

14. Fil-każ tallum l-appellanti fil-fatt biddlet il-prodott.

15. L-appellanti iżda tgħid illi ż-żewġ prodotti – dak oriġinali u dak li trid toffri minflok – huma identiċi, u ressqet bħala xhud ta' dan lill-Perit Michela Borg Francalanza illi *"testified on oath that when one referred to the technical data sheets it was clear that the brands specifications when compared were equivalent for both the polystyrene and the membrane products"*.

16. Jingħad qabel xejn illi jekk tassew huwa minnu illi ż-żewġ prodotti huma l-istess f'kollox dan il-fatt sar magħruf biss meta nstemgħet ix-xhud waqt il-

proċeduri quddiem il-Bord ta' Reviżjoni; dan il-fatt għalhekk ma kienx magħruf waqt il-proċess tal-għażla u l-kumitat ta' għażla, appuntu għax ma kellux id-dokumenti relattivi għall-prodott oriġinali, ma kellux mod li jkun jaf li ż-żewġ prodotti tassew huma identiċi.

17. Incidentalment, din il-qorti ma tistax ma tikkummentax illi huwa stramb kif il-ħamest ijiem żmien mogħtija lill-appellanti ma kinux biżżejjed biex din tipproduċi d-dokumenti relattivi għall-prodott oriġinali li offriet, għalkemm kienet taf mill-bidu li dawn kienu meħtieġa, iżda kienu biżżejjed biex tipproduċi dokumenti relattivi għal prodott ġdid. Ma jistax ma jqumx is-suspett illi d-dokumenti tal-prodott oriġinali mhux "ma setgħux jinġiebu" iżda ma ngibux għax forsi kienu juru li l-prodott ma kienx kompatibbli mal-kondizzjonijiet tas-sejha.
18. Barra minn hekk, l-appellanti ma ressqitx l-aħjar prova li ż-żewġ prodotti huma tassew identiċi. L-aħjar prova kienet tkun id-dokumenti tekniċi, mhux ix-xiehda tal-perit, iżda d-dokumenti relattivi għall-prodott oriġinali la ngiebu quddiem il-bord u lanqas quddiem il-qorti sabiex ikunu jistgħu jitqabblu ma' dawk tal-prodott ġdid.
19. Fl-aħħar nett, ukoll jekk iż-żewġ prodotti tassew huma identiċi, u kulma għandhom differenti hija t-tikketta fuq barra, dan ma huwiex biżżejjed, għax iridu jkunu wkoll identiċi fil-prezz biex żgur ma jiġrix li l-appellanti tieħu xi vantaġġ mill-bidla. Prova ta' dan ma ngabitx.
20. Effettivament dak li trid l-appellanti hu illi tagħmel tibdil fis-sustanza tal-offerta wara li ż-żmien għall-offerti ingħalaq. Dan imur kontra l-kondizz-

jonijiet tas-sejha li jgħidu illi “*no rectification shall be allowed*”. L-appell għalhekk ma jistax jintlaqa’.

21. Għal dawn ir-raġunijiet il-qorti tiċhad l-appell u tikkonferma d-deċiżjoni appellata. L-ispejjeż ta’ dan l-episodju tħallashom is-soċjetà appellanti.

Mark Chetcuti  
Prim Imħallef

Giannino Caruana Demajo  
Imħallef

Anthony Ellul  
Imħallef

Deputat Reġistratur  
da