



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, 26 ta' Ottubru, 2022.

Numru 54

Rikors numru 369/22/1

Koperattiva Għawdxija tal-Indafa Pubblika Limitata

v.

- (i) Kunsill Reġjonali Għawdex**
- (ii) Dipartiment tal-Kuntratti**

Il-Qorti:

1. Rat li dan hu appell imressaq fil-11 ta' Awwissu, 2022 mis-soċjeta` Koperattiva Għawdxija tal-Indafa Pubblika Limitata (minn hawn 'il quddiem imsejħa "KIP Gozo") wara deċiżjoni tat-22 ta' Lulju, 2022 mogħtija mill-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi (minn hawn 'il

quddiem imsejjaħ “il-Bord”) fil-każ referenza CT 2139/2022 (każ numru 1756).

2. Dan il-każ jirreferi għall-ħruġ ta' *tender* “for household Waste Collection using low emission vehicles in Gozo region”. Is-soċjeta` rikorrenti KIP Gozo ressqet talba għal rimedju pre-kuntrattwali għall-għanijiet tar-Regolament 262 *et seq* tar-Regolamenti dwar l-Akkwist Pubbliku (Leġiżlazzjoni Sussidjarja 601.03). Dan għamlitu kif jirrikjedi r-regolament imsemmi qabel l-għeluq taż-żmien għall-offerti li kellhom isiru mill-oblaturi interessati. Il-Bord wara li sema' dak li kellhom xi jgħidu l-avukati tal-partijiet ta d-deċiżjoni tiegħu fit-22 ta' Lulju, 2022, fejn ċaħad it-talbiet ta' KIP Gozo għajr għal żewg punti, li dwarhom talab lill-awtorita` kontraenti sabiex tikkjarafika l-pożizzjoni tagħha fir-rigward. Id-deċiżjoni tal-Bord hija s-segwenti:

“The Appellant contends that:

a) **First Grievance – The Tender Documentation was not drafted by the appropriate authority**

It must be pointed out that this tender procedure (pre and post publication) is effectively being managed by the Department for Local Government (DLG). This came to light, when at the clarification meeting (held as per the tender dossier) only representatives of the Department for Local Government were present, without any representative of the same Region Council being present. Moreover, the same clarification meetings were held in the premises of the same Department. Furthermore, contextually with the captioned tender, another five (5) tenders were published - i.e. one for each Region-, which in the most part are indistinguishable, bar a limited number of requirements with respect to the number vehicles required amongst others. In terms of law, and as better outlined above, the Department for Local Government has no locus standi in this

procurement exercise and has acted ultra vires and arbitrarily assumed a role which it was not endowed with.

The Department for Local Government can only act within the powers given to it by the law. Any action which is not so authorised to carry out or which is the responsibility of a different public body, is ultra vires - beyond its powers. Ultimately, the involvement of the DLG is ultra vires and beyond the powers of the same is void in law and is deprived of any legal effects, The DLC's actions/ conduct shall be replaced by a lawful one. The Public Procurement Regulations cannot be derogated from at whim.

These actions of the DLG and the inaction of the Regional Council, apart from being ultra vires as above-described, undermines the autonomy of the Gozo Regional Council and goes against the system of checks and balances prescribed by law. Ultimately, it was the legislator's intention for the Regional Council to carry out such role - vide Article 37B(a) of the Local Government Act (Chapter 363 of the laws of Malta).

b) **Second Grievance – The Tender was not issued by the correct Contracting Authority**

It must be stated that whilst Regulation 18 of the Public Procurement Regulations states “*Where a contracting authority or body governed by public law is not listed under any schedule it shall have the same obligations of an authority listed under Schedule 16.*”, one must also refer to Article 37B of the Local Government Act - Chapter 363 of the Laws of Malta which enlists the functions of the Regional Councils. Article 37B reads as follows: “*37B. The functions of Regional Councils shall be the following. (a) the issuance of a call for tenders for the service to local councils within them for waste management and this shall come into effect from the year 2022, and this without prejudice to the functions of the local councils in terms of article 33(1) (b);*”

On the one hand, by application of the Public Procurement Regulations Contracting Authorities listed under Schedule 16 the procurement procedure needs to involve the Director of Contracts for procurement processes which exceed seven hundred and fifty thousand euro (€750,000) which have to be issued by the Director of Contracts on behalf of the contracting authority. On the other hand, Article 37B of the Local Government Act - Chapter 363 clearly stipulates that the Regional Council shall issue the call for tenders for the waste management. In this situation, the latin(sic) maxim *Lex specialis derogat legi generali* (Special law repeals general laws) applies i.e. on this point the ad hoc Local Government Act setting up the Gozo Regional prevails over the Public Procurement Regulations, Furthermore, Regulation 18 of the PPR is a general article/statement, whereas Article 37B of the Local Government is a

specific one. Thus, the Legal Maxim *Generalia Specialibus non derogant* (General provisions do not derogate from special provisions). Thus, in the circumstances it should have been the Regional Council that published the said Call for Tenders and not the Director of Contracts on behalf of the Gozo Regional council. In view of the above, and the fact that the Director of Contracts issued this captioned call for tenders on behalf of the Gozo Regional Council renders the entire tendering publication null and void. In this respect the principle *Quod Nullum Est Nullum Producit Effectum* applies (That which is a null, produces no effect).

c) **Third Grievance: A Regional Impact Assessment - Study was not carried out**

Article 8(1)(f) of Chapter 600, outlines one of the mandatory key functions of the Authority, that is to ensure that a regional impact assessment study, as laid down in Schedule II of the same Act, is carried out, with respect to matters of National Strategy (such as the national waste strategy /Long-Term Waste Management Plan) National Policy, National Action Plan, major new services (such as the Regional bundling of the waste collection) and regulatory and legislative provisions, which will affect Gozo.

Furthermore, Schedule II of the same Act, imposes the obligation on Ministries, departments, authorities, agencies and other form of government entities is to undertake any one of the initiatives referred to in article 8(1)(f) of the Act, the responsible Permanent Secretary, Executive Chairman or Chairman of the government department or entity to ensure that such work is complemented by a Regional Impact Assessment Study.

The tender subject to these proceedings is identical to that of the other regions that were contextually published, this without addressing the specific requirements and needs of Gozo, such as the size of vehicles required, logistical and practical issues that are not addressed in the National Waste Policy and in the Tender Document. Thus, it is evident that the Gozo Regional Development Authority was not even consulted and a 'Regional Impact Assessment Study' was not carried out. This renders the entire tendering procedure in breach of the law.

The process of a Regional Impact Assessment Study is not in vain, but a meticulous exercise with the purpose of ensuring that (a) Gozo's significant economic, social and environment characteristics are factored; (b) the impacts of proposed policies and actions are assessed within the context of the regional development strategy for Gozo; (c) Gozo is incorporated within the implementation targets and actions of such national strategy, policy design and planning.

d) **Fourth Grievance – a number of issues are Unclear and/or Ambiguous in the Tender – Critical for a compliant bidder, effective evaluation and effective contract execution**

In certain respects the tender documentation -as is- is unclear/unambiguous whether tenderer are required to supply proof of that(sic) they shall abide by the award criteria (i.e. The Eligibility Criteria, Specifications, and Financial Offer), this as will be explained further below. This is being said that for certain issues, the Contracting Authority / Evaluation Board will not be in a position to assess and verify the accuracy of the information contained in the submissions.

I. **Selection – Criteria for qualitative selection (Section 5)**

The tender dossier lists a number of criterias (sic) under this criterion namely: *“Average Yearly Turnover - The Average Yearly Turnover during the years 2018 - 2020 (being 1 January 2018 - end December 2020) shall be not less than €500,000 excluding VAT per year meaning that in total the turnover for the three (3) year period must be a minimum of €1,500,000 Excluding VAT in total. Bidder to provide the yearly turnovers for the years 2018, 2019, 2020. It is important that the bidders submit the respective annual turnovers for each one of the years indicated above. [.....] Evidence that the economic operator has, at its disposal, a minimum credit facility of €300,000 to finance the project for the duration of the contract. The economic operator must submit a statement by a recognised bank or any licensed credit institution certifying such credit facilities.”*

On the outset, the Turnover that is being requested by the bidders is unclear i.e. whether such has to be related to the subject matter i.e. kerbside door-to-door waste collection or general turnover. In line with the recommendations of the National Audit Office it is apt that such is clarified that turnover is to be related to the subject matter.

With respect to the financing requested, the applicant submits that this is not sufficiently verified. Section 4.2.8 of the Terms of Reference it states that: *“Contractors will be responsible for provision of any required funding to enable any proposed fleet and/or infrastructure establishment”* while the Tender Document recognises that funding is required, on the other hand it fails to verify such at bidding stage.

II. **Technical and Professional Ability**

The tender dossier lists out a number of criterias(sic) under this heading namely:

“1. Performance of Services of the Specified Type: Provide a list of services performed of a similar nature, which must consist of collection of waste. The list must include at least two (2) years' experience (locally or abroad) in the household waste collection from 2019 onwards. In so listing the end clients, the tenderer is giving his consent to the Evaluation Committee, so that the latter may, if it deems necessary, contact the relevant clients, with a view to obtain from them any information on the works provided to them, by the tenderer. The Evaluation Committee reserves the right to request additional documentation in respect of the deliveries listed”.

The legal basis of such a requirement stems from Regulation 232 of the PPR. However, the provision as drafted in the tender document does not fully embrace the contents of Regulation 232.

Therefore, it is critical that this clause is clarified, in the sense that the Economic Operators have to provide the details as requested in Regulation quoted above.

III. Specifications

This section forming part of the Selection and Award Criteria in the tender dossier reads as follows:

“(i) 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 (Note 3)

Tenderer's Technical Offer shall Constitute of the Following (Note 3)
a) Technical Offer. b) Minimum number required of RCVs and Waste collectors (runners) and Actual number to be used by the Contractor. c) Calculation of Distances Travelled to Execute the Service”.

The Technical Offer Questionnaire leaves much to be desired, being only a self-declaration, namely, because the Evaluation Board will be *“... relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria [...] it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure.”*

As a general remark, whilst the said technical self declaration is being requested, the Evaluation Board will not be in a position to verify and evaluate the same. The reason being that in the tendering process the relative documentation relating to the same is not being requested. This infringes the basic principles of public procurement namely that of equal treatment.

IV. Reliance / Subcontracting

That in line with the PPR and the Directive it is possible that a bidder relies on the capacity of a third party. However, with the tender dossier as it is the Evaluation Board will not be in a position to effectively evaluate whether a bidder is going to rely on the capacity of third parties and to ensure that a bidder has correctly declared such. Furthermore, in situations where a bidder will rely on the capacity of a third party and/ or subcontract part of a service to a third party, such third party shall also be evaluated as outlined in the PPR.

V. Financial Offer

A) Glass Collection

As per page 22 of the Tender Dossier, the following household waste streams shall be part of this contract:

- a. Mixed waste (black bag)
- b. Organic waste (White Bag)
- c. Recyclable waste (with only plastic, metal, and paper)*
- d. Glass (in a reusable container)

The collections for each of the above shall take place as per the Schedules contained in the Tender Document (Page 26). However, the financial bid fails to take into account the fees in connection with the collection of Glass. Thus, an economic operator is not being requested to provide the fee for such collection.

B) Minimum hourly rates

The financial bid and the tender dossier outlines(sic) that this tender is subject to precarious work conditions as per Contract Circular 21/2021 and the bidder is to ensure that the price quoted factors such conditions. Whilst such is commendable, the Applicant points out that; i) with the current financial bid the Contracting Authority will be unable to determine that such are observed; ii) the fee requested is per collection only and no hourly rates are requested; and iii) given that the contract term exceeds the yearly rates outlined in the Contract Circular 21/2021, it will not be possible for the Contracting Authority to determine the annual increase due to the contractor with respect to the minimum hourly rates. Ultimately, in line with the same Circular, Contracting Authorities will have to issue, an Addendum to the Contract reflecting the new relevant 'Total Rate Payable to Contractor' rates, without such rates being singled out from the remainder part of the fee due to the contractor.

C) Rates for Year 6 onwards:

The Applicant (sic) to Article 18.2 of the Special Conditions. In the event of any extension of the contract the fee/ price for each subsequent year from the 6th year onwards will be the price fixed on the 5th year. Furthermore, the Financial bid form for this tender only requests the rates for the first 5 years. This will result in a situation whereby bidders will allocate most of their fees in the 5th year, so in the event of an extension they will get better rates, and at face value the said bids will seem cheaper, whilst on closer inspection of such bids over a 10year period will be more expensive. However, from the tender documentation it is unclear as to whether the evaluation of such offers will only take into account the rates for the first 5 years i.e. of the financial bid form.

VI. General issues in the Terms of Reference:

A) Waste Collection Timings:

The Applicant refers to section 4.2.2 of The Terms of reference i.e. those of the Waste Collection Timings. The manner in which the tender is drafted is unclear as to whether the timings will remain as is or be subject to change post award of the captioned tender. Ultimately, the Technical specifications should mainly be oriented towards ensuring a reasonable degree of technical precision.

B) Service Vehicles Specifications:

The Applicant refers to the Terms of reference with respect to the service vehicles leaves much to be desired with scant verification. As per the tender documentation no technical data sheets / literature on the vehicles proposed are provided. Additionally, there will be no verification by the Contracting Authority on such pertinent information at the evaluation stage. Furthermore, more clarity is necessitated on such a point.

C) Depot

The Applicant refers to Section 4.2.8 point no 3 of the Terms of Reference, which reads as follows: *“Contractors will be required to provide suitable depot facilities for all vehicles associated with service delivery, to allow for year-round storage, inspection, maintenance, and cleaning.”* Moreover, such requirement also results from the law i.e. Subsidiary Legislation 65.08, regulation no. 12., which reads as follows; *“No person shall stop, whether temporarily or otherwise, and leave unattended, or shall park any motor tractor and/or trailer or any heavy commercial vehicle or other commercial vehicle loaded with a container or leave a container in any road, yard, area or open puce whether enclosed or otherwise other than in*

an authorised parking place or at an authorised container storage depot [...]” The Applicant submits that the Tender as written does not address such points, and does not effectively verify whether a bidder either has such facilities in place and/or has the resources available to have a depot at execution stage.

D) Uniform

Section 6.1.4 of the Terms of Reference outlines the mandatory requirements with respect to the proposed uniforms of a bidder. However, the bidders are not required to provide a specimen of the same uniform. Thus, the Evaluation Board will not be in a position to verify the same.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 14th June 2022 and its verbal submission during the virtual hearing held on 30th June 2022, in that:

a) **First Grievance –**

The PPR does not prohibit that contracting authorities, or even the central government bodies such as the Department of Contracts, to require the assistance of third parties, including private consultants, to draft procurement documents, but the ultimate responsibility of the procurement documents lies with the contracting authority issuing that procurement procedure.

The Applicant is further alleging that this is in breach of Article 37B(a) of the Local Government Act (Chapter 363 of the Laws of Malta) which states that the function of regional councils is: *“the issuance of a call for tenders for the service to local councils within them for waste management and this shall come into effect from the year 2022, and this without prejudice to the functions of the local councils in terms of article 33(1)(b). The Local Government Act empowers the Gozo Regional Council to issue a tender process, and this Tender was indeed issued by the latter qua Contracting Authority.”*

The Applicant argues that the Department for Local Government has acted *ultra vires* and further that the Contracting Authority's passive role has undermined its autonomy and the checks and balances prescribed by law. The Contracting Authority submits that this argument is inadmissible within the context of this present Application. This Application is an application for a pre-contractual remedy in terms of Regulation 262 of the PPR which allows prospective candidates to request one of five remedies, namely: a) setting aside of impossible-to-perform or unlawful clauses; b) determination of issues relating to offer submissions; c) removal of discriminatory specifications; d) correction of errors or removal of ambiguities; or e) cancellation due to any violation of the law.

Apart from being completely unfounded, the allegation that the tender documentation was not drafted by the appropriate authority leads to nowhere. It does not admit of nor fit within one of the foregoing five categories for the Honourable Board to provide a pre-contractual remedy.

b) **Second Grievance**

Article 37 of Directive 2014/24, which is transposed by the PPR, allows Member States to provide that contracting authorities may acquire services from a central purchasing body offering central purchasing activities. In line with Directive 2014/24, Regulation 21 of the PPR states that “contracting authorities listed in Schedule 4 are authorised to act as a central purchasing body.” Schedule 4 identifies the Department of Contracts as one of the only two central purchasing bodies.

In accordance with Regulation 9(1) (b) of the PPR, the procurement process of public contracts which exceeds the estimated value of EUR 139,000 is issued and administered by the Director of Contracts who heads the Department of Contracts (the 'Director'). The estimated value of this Tender is EUR 6,245,179. Clearly, the rules determining the instances in which the public procurement processes of contracting authorities should be run by the latter or by the Director on their behalf are established in the PPR. The fact that the Local Government Act (Chapter 363 of the Laws of Malta) states that regional councils have the authority to issue waste management tenders is neither here nor there. It is the Local Government Act that has to be read within the context of the PPR and not the other way around(!) The special law here is the latter and not the former, and this ground represents the Applicant's attempt to upset the applecart merely for its own sake.

c) **Third Grievance**

This allegation is unfounded in fact and in law. It is the Gozo Regional Development Authority itself which is under an obligation to ensure that a regional impact assessment is carried out in specific scenarios, that is, when “*government ministries intend presenting to Cabinet (i) a national strategy (ii) a national policy (iii) a national action plan (iv) major new projects or services and (v) regulatory and legislative provisions which affects or affect, as the case may be, Gozo [.....],.*” None of the foregoing scenarios are applicable to this Tender.

The GRDA Act provides a specific remedy for the specific scenarios abovementioned: if a government entity fails to carry out the assessment if and when required by law, the Gozo Regional Development Authority is entitled “*after consultation with the*

Minister, to initiate the relative procedures itself for the carrying out of the regional impact assessment [...].”

In light of the foregoing, a number of inevitable conclusions arise: a) the filing of a precontractual remedy is not the appropriate or specific remedy provided for at law with respect to the alleged failure to carry out a regional impact assessment; and b) the Applicant does not have the locus standi required at law to file an objection on this basis. Neither the right nor the remedy envisaged in terms of the GRDA Act belongs to the Applicant. It is the Gozo Regional Development Authority itself which may avail itself of the remedy provided under the GRDA Act, and the Applicant cannot invoke or seek the application of a remedy which belongs to a third party to these proceedings.

In addition, the GRDA Act does not lay down an obligation at the feet of local or regional councils to carry out regional impact assessments. Article 8 of this Act refers to government ministries and government entities. There is no question that the Gozo Regional Council is not a government ministry. Therefore, the question which remains to be answered is whether the Contracting Authority can be classified as a 'government entity'.

According to Article 3 of the Public Administration Act (Chapter 595 of the Laws of Malta), a 'government entity' is defined as: *“an organisation, not being a government department, specialised unit, a government agency or a commercial partnership, in which Government has a controlling interest, whether or not such organisation is established by law.”*

The very raison d'être of the Gozo Regional Council is to function as a decentralised organisation having a distinct legal personality and which is autonomous from national government. These two tiers of government are enshrined in the highest law of the land. According to Article 115A of the Constitution (Chapter 0 of the Laws of Malta): *“The State shall adopt a system of local government Local Councils, whereby the territory of Malta shall be divided into such number of localities as may by law be from time to time determined, each locality to be administered by a Local Council elected by the residents of the locality and established and operating in terms of such law as may from time to time be in force.”*

In view of the foregoing, the Contracting Authority humbly submits that it was not obliged to carry out a regional impact assessment.

d) **Fourth Grievance**

I. Selection – Criteria for qualitative selection (Section 5) – Economic and Financial Standing Requirements

The Contracting Authority submits that this selection criterion clearly and unambiguously refers to turnover in general and without reference to a specific subject-matter. This is fully compatible with Regulations 218 and 219 of the PPR on financial and economic standing which provide that: a) *"For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract."* The operative word here is "including" which permits a margin of discretion to a contracting authority as to whether it wishes to limit the yearly turnover to "the area covered by the contract" or more generally so. b) This requirement shall not, except in duly justified cases, exceed 2 times the estimated contract value. This is certainly not the case here. The Applicant's suggestion that the turnover is related to the subject-matter of the Tender is one which artificially narrows competition and which the Contracting Authority has, in its discretion, decided to avoid. The Contracting Authority has, on this specific point, exercised its discretion reasonably and lawfully.

The Applicant is further aggrieved by the fact that Clause 4.2.8 of the terms of Reference does not enable the evaluation committee to "sufficiently verify" that *"the contractor will be responsible for provision of any required funding to enable any proposed fleet and/or infrastructure establishment."* On this point, and others made in the Application, it does appear that the Applicant is confusing "SELECTION & ELIGIBILITY CRITERIA" which need to be satisfied by bidders at evaluation stage, such as the Economic & Financial Standing and Technical & Professional Standing, with "PERFORMANCE CONDITIONS" which will bind the successful bidder (hence the use of the word "contractor") in case of an award. These are also governed by SEPARATE provisions in the PPR. The former are governed by Regulation 217 et seq., while the latter are governed by Regulation 245 of the PPR. The Applicant's contention that the evaluation committee needs to "sufficiently verify" this funding obligation is unfounded.

In any case, the Contracting Authority has provided for a specific selection criterion which require bidders, at tender submission, to produce evidence of funding. This is the following: *"Other economic or financial requirements - Evidence that the economic operator has, at its disposal, a minimum credit facility of €300,000 to finance the project for the duration of the contract. The economic operator must submit a statement by a recognised bank or any licensed credit institution certifying such credit facilities. In case of a consortium or joint venture, these criteria may be met by the respective members in aggregate."*

II. Technical and Professional Ability.

The Applicant is aggrieved by the following tender specification:

“1. Performance of Services of the Specified Type: Provide a list of services performed of a similar nature, which must consist of collection of waste. The list must include at least two (2) years' experience (locally or abroad) in the household waste collection from 2019 onwards. In so listing the end clients, the tenderer is giving his consent to the Evaluation Committee, so that the latter may, if it deems necessary, contact the relevant clients, with a view to obtain from them any information on the works provided to them, by the tenderer. The Evaluation Committee reserves the right to request additional documentation in respect of the deliveries listed”.

The Applicant laments by the fact that the list of main services to be provided by bidders does not contain the information indicated in Regulation 232(a) (ii) of the PPR.

First, the Applicant, perhaps by way of oversight, gives the impression that Regulation 232 (a)(ii) of the PPR imposes an exhaustive description of how such a selection criterion is to be drafted. This is not correct. Regulation 232 (a)(ii) of the PPR provides that *“Evidence of the economic operators' technical abilities may be provided by one or more of the following means [...]”*

Secondly, and in any case, the bidders ARE required to provide full details on the services performed by including the "sums, dates and recipients" and this is required by the European Single Procurement Document.

Thirdly, the Contracting Authority was again guided by the general principles of public procurement law, in particular, proportionality and promotion of genuine competition, in the design of this selection criterion. The selection criterion is drafted clearly and unambiguously in such a way that competition on this tender is not artificially narrowed and such that bidders are not disproportionately and unduly excluded/restricted.

The Applicant is further aggrieved that this selection criterion refers to “services performance of a similar nature which must consist of collection of waste” and argues that it should refer expressly to “kerbside door-to-door household waste collection”. The Applicant's suggestion is one which, yet again, artificially narrows competition and which the Contracting Authority has, in its discretion, decided to avoid. The Contracting Authority has, on this specific point, exercised its discretion reasonably and lawfully.

III. Specifications.

The Applicant laments of the fact that the Technical Offer Questionnaire bases the evaluation of bidders based on self-

declarations and further oddly claims that this breaches the principle of equal treatment. The Applicant's grievance under this indent is poorly motivated. There is nothing contrary to the PPR or against the general principles of public procurement in requesting self-declarations on matters of technical compliance, and in fact, as this Honourable Board is very much aware, it is common practice to do so. Naturally, the successful bidder's acceptance of the Terms of Reference by the submission of the bid and by the submission of the Technical Offer will bind that successful bidder qua contractor to abide by the same after award and during the performance of the contract.

In the case that the contractor is in default of the Special Conditions, Terms of Reference and its Technical Offer, then the Contracting Authority has an array of tools at its disposal, including, the imposition of pre-liquidated damages, imposition of penalties, the invocation of an event of default and also the termination of the contract and the compensation of damages. These tools are further secured by the performance guarantee provided by the contractor. There is absolutely nothing illegal or contrary to the general principle of equal treatment in the Contracting Authority's decision to design the tender specifications in this fashion and the Applicant's suggestion to request documentation to "verify" each and every self-declaration is disproportionate and burdensome on bidders.

IV. Reliance/ Subcontracting.

The Applicant's grievance under this indent is simply incoherent and perhaps based on a misreading of the Tender and lack of familiarity with the system of public procurement in Malta. The principle is that bidders may rely on the capacity of third parties through a sub-contracting arrangement. The PPR, the general Rules Governing Tenders, the ESPD, and most times the Tender, provide how this can be done.

The General Rules Governing Tenders V4.4, which applies to the Tender, clearly provides that: *"2.5 An economic operator may, where appropriate and for a particular contract, with regard to criteria relating to economic and financial standing and to criteria relating to technical and professional ability, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria regarding educational and professional qualifications, or to 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 must in that case prove to the contracting authority that it will have at its*

disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.”

The Tender is also very specific that a bidder may rely on third-parties through sub- contracting with respect to the selection criteria: *“b) Economic and Financial Standing (Note 2) [...] If the economic operator relies on the capacity of a sub-contractor to satisfy the criteria on Economic and Financial Standing, then the Contracting Authority requires that the sub-contractor is jointly and severally liable with the tenderer for the execution of the contract in terms of Regulation 235(3) of the Public Procurement Regulations. A written declaration in favour of the Contracting Authority, confirming that the sub-contractor will, in such a case only, be jointly and severally with the tenderer for the execution of this contract, is to be executed by the sub-contractor and addressed to the Contracting Authority is to be uploaded through the tender response format by the tenderer. (Note 2)*

Technical and Professional Ability (Note 2) [...] 2. Subcontracting Proportion - Provide data concerning subcontractors and the percentage of works to be subcontracted. This information shall be included in the online ESPD form in Part IV: Selection criteria - Technical and professional ability. Any subcontractor proposed and disclosed 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).”

V. Financial Offer.

Under this indent, the Applicant raises 3 grievances.

The first grievance relating to Glass Collection is well-founded, and in fact, the Contracting Authority will, by way of a clarification note, address this.

The Applicant's second grievance relates to the Minimum Hourly Rates. The Applicant argues that the fact that the Contracting Authority is asking for a fee per waste collection rather than an hourly rate will not enable the Contracting Authority to determine the annual increase due to the contractor with respect o (sic) minimum hourly rates. This grievance appears to be misguided. The duty to pay employees, at the very least, the minimum salary according to law is one which vests SOLELY in the contractor.

This is the contractors' responsibility and so is the duty to pay the minimum salary in accordance with any annual increases at law. This is clear and unambiguous from the Tender and it is a deliberate decision of the Contracting Authority as part of its financial modelling of the contract. It is for the bidder to factor, as part of its financial offer, any prospective statutory increases in wages. The Contracting Authority has, on the other hand, decided to make a provision for potential compensation to the contractor in case of increase in fuel prices as per Section 9 (Tendered Price, Fuel Costs and Indexation) of the Terms of Reference. On a concluding note, all bids submitted by bidders will be monitored by the evaluation committee for abnormally low tenders as required by law.

The Applicant's third grievance relates to the fact that the price to be used by the parties in case of an extension of the duration of the contract shall be fixed on the basis of the price quoted by the contractor in its financial bid form for the 5th year. The Applicant's grievance is unfounded. The Tender is very clear that bidders will be evaluated, on a like with like basis and transparently, on the basis of the GRAND TOTAL of the Financial Bid Form, including, the price quoted by bidders for the 5th year. In fact, it reads as follows: *“(D) Financial Offer - A financial offer calculated on the basis of Delivered Duty Paid (DDP) (Grand Total) for the services tendered as per Tender Response Format. (Note 3)”* On this basis, the Contracting Authority finds that the Tender is sufficiently clear and unambiguous and no clarification is necessary.

VI. General Issues in the Terms of Reference.

The Applicant, under this indent, laments that the Tender "lack critical details".

Firstly, the Applicant argues that Section 4.2.2 of the Terms of Reference is unclear as to whether the time schedule for collection provided in Annex 1 of the Tender will remain as-is or be subject to change post award. The Contracting Authority can clarify that the default position is that the time schedule for waste collection is that provided in Annex 1 of the Tender. This time schedule is to be used by bidders in the compilation of the financial bid form and for evaluation purposes. The contractor and the Regional Council may, by mutual consent, agree to change the time of a waste collection, that is, whether it is in the morning, afternoon or evening--the waste collection in a given day will still be required. The Contracting Authority will, by way of a clarification note, address this.

Secondly, the Applicant argues that the tender specifications on the matters of: (i) RCV's standard, whether it is Euro V or Euro VI; (ii) waste depot; and (iii) uniforms; does not enable the evaluation

committee to sufficiently verify on the bidders' bids, On this point, the Contracting Authority has deliberated opted for the imposition of a "performance condition" on the eventual successful bidder qua contractor with respect to the resources it will deploy to perform the contract and this in order to promote genuine competition and to act proportionately.

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 consider Appellant's grievances as follows:

a) **First Grievance – The Tender Documentation was not drafted by the appropriate authority**

This Board will from the outset make its opinion clear, in that, the Public Procurement Regulations ("PPR") nowhere prohibit contracting authorities the possibility to require, seek and engage third parties and / or consultants to assist in the drafting of the tender dossier. It is also understood that it is then the contracting authority which assumes the final responsibility for such tender document issued. It is, after all, quite a normal practice to outsource the drafting of the tender dossier. This has never been an issue!

In this specific case, with a number of similar tenders issued, one for each region, it was even more important to have one entity / consultant involved in the management of drafting the tender dossiers, in order to achieve a level of uniformity and consistency across the board.

In fact, paragraph 3.1 of Section 1 of the Tender dossier states *"This regionalisation is intended to achieve harmonisation of waste collection services across Malta and Gozo with respect to: (i) waste streams collected; (ii) frequency of collections, (iii) service levels; (iv) performance management; and (v) customer care."*

How is the Appellant expecting this 'harmonisation' to be achieved if each region went on to draft their respective tender document on its own accord without any sort of communication between regions?

This Board strongly advocates that proper efficient management techniques will aid in the better utilization of public funds, hence resulting in better value for money. Such techniques will also lead to achieving wider competition whilst also aiding in having a more transparent procurement process. These are all important for good governance.

Hence, this Board does not uphold the Appellant's first grievance.

b) **Second Grievance – The Tender was not issued by the correct Contracting Authority**

This Board opines that by having the tender document issued through the Department of Contracts, there is an ulterior safety check / safeguard in place. Obviously, this is done if the thresholds as per regulation 9(1)(b) of the PPR are exceeded. Since the Estimate Procurement Value of this tendering procedure by far exceeds such threshold, it is this Board's opinion that good procedure was observed when such a tender was issued through the Department of Contracts.

It is also a well-established principle in the law that regional and local councils have to manage their procurement needs in accordance with the Public Procurement Regulations. Therefore, it is this Board's opinion that the 'overriding' law in this case is the Public Procurement Regulations S.L.601.03 and not the Local Government Act (Chapter 363 of the Laws of Malta)

Hence, this Board does not uphold the Appellant's second grievance.

c) **Third Grievance: A Regional Impact Assessment - Study was not carried out**

Article 8(1)(f) of the Gozo Regional Development Authority Act (Chapter 600 of the Laws of Malta) states "*Subject to the provisions of articles 4 to 7, both inclusive, the functions of the Authority **shall be to ensure** that a regional impact assessment, as established in Schedule II, is carried out when government ministries intend presenting to Cabinet*" (bold & underline emphasis added)

This Board opines that an application under regulation 262 of the PPR by the Appellant and in front of this Board is certainly not the appropriate tool provided for in the law to argue a case of alleged failure to perform a regional impact assessment.

Therefore, this Board, without going into further merits of this specific grievance, does not uphold the Appellant's third grievance.

d) **Fourth Grievance – a number of issues are Unclear and/or Ambiguous in the Tender – Critical for a compliant bidder, effective evaluation and effective contract execution**

I. Selection – Criteria for qualitative selection (Section 5) – Economic and Financial Standing Requirements

This Board cannot but fully agree with the arguments as brought forward by the Contracting Authority. With reference to the 'Turnover – Average Turnover' issue, this Board notes that

regulation 218 of the PPR uses the word “*may*” and not “*shall*” and is therefore allowing a certain element of judgment and discretion in favour of Contracting Authorities. This judgement and discretion is always to be applied in the best interests of the main principles governing public procurement.

With regards to the ‘*credit facility / financing requested*’ issue, this Board notes that ‘Selection & Eligibility Criteria’ are to be treated and considered differently to ‘Performance Conditions’. This Board, after thorough analysis, finds nothing ambiguous and / or unclear in such criteria and therefore deems the arguments of the appellant to be irrelevant.

In conclusion this Board notes that since i) this section of tender document is not contravening any regulations of the PPR as drafted, and ii) the amendments as requested by the Appellant are more stringent on competition, it will not uphold the grievance of the Appellant. Upholding such would mean going against the promotion of genuine competition.

II. Technical and Professional Ability.

Again, this Board fully concurs with the arguments of the Contracting Authority. Regulation 232 uses the word “*may*” when it states “*Evidence of the economic operators’ technical abilities may be provided by one or more of the following means.....*” i.e. not an exhaustive list. Arguments by the Appellant to restrict genuine competition are and will not be accepted by this Board.

This Board does not uphold Appellant’s grievance.

III. Specifications.

This Board notes that Technical Offer Questionnaires are very much common practice and widely used in tender documents. They are certainly not contravening any regulations of the PPR! Safeguards are in place in the tender document should the eventual recommended bidder / economic operator awarded the tender, defaults.

This Board does not uphold Appellant’s grievance.

IV. Reliance/ Subcontracting.

The Board notes that the Appellant did not provide a clear enough reason for this specific grievance. By just stating that “.... *The Evaluation Board will not be in a position to effectively evaluate whether a bidder is going to rely on the capacity of third parties*” and not providing valid reason to back the argument, this Board cannot but reject such grievance. This Board opines that

the tender dossier, as drafted, is very clear on how economic operators should act in such circumstances.

V. Financial Offer.

i) Glass collection – This Board notes that the Contracting Authority is acceding to the Appellant's arguments and approves that such should be tackled by way of clarification.

ii) Minimum hourly rates – The Contracting Authority is free to choose and implement the 'financial model' which it deems most appropriate to each circumstance. Nothing as is being proposed in this tender, goes against the PPR. It is the economic operator's responsibility to adopt salary / wages structures which are in compliance with 'Contract Circulars' and tender provisions. Safeguards are in place to be adopted by the Evaluation Committee should the need arise. This Board does not uphold Appellant's grievance.

iii) Rates for Year 6 onwards – The Tender document is very clear when it states that economic operators will be evaluated on the basis of 'Grand Total'. This term is found to be unambiguous. This Board does not uphold Appellant's grievance.

VI. General Issues in the Terms of Reference.

i) Waste Collection Timings – This Board notes that the Contracting Authority is acceding to the Appellant's arguments and approves that such should be tackled by way of clarification.

ii) Service Vehicles Specifications / Depot / Uniforms - the stance taken by the Contracting Authority to proceed with the 'obligation' of a performance condition on the economic operator eventually awarded the tender, is totally acceptable in the views of this Board. 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 all of appellant's grievances except for:
 - i. 4th grievance – V – Financial Offer – Glass collection.
 - ii. 4th grievance – VI – General Issues in the Terms of Reference – Waste Collection Timings

- b) To order the contracting authority to clarify its position on points i. and ii. above:
- c) To amend the 'Closing Date of the Call for Tenders' to the 16th August 2022;
- d) after taking all due consideration of the circumstances and outcome of this Call for Remedies, directs that the deposit not be refunded to the Appellant”.

3. Is-soċjeta` rikorrenti KIP Gozo issa qed tappella mill-imsemmija deċiżjoni għal quddiem din il-Qorti u ressqet diversi aggravji, taħt il-kappa tal-aggravju prinċipali illi l-Bord għamel apprezzament manifestament ħażin tal-fatti u tal-liġi.

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

Ikkonsidrat:

5. It-talba ta' KIP Gozo appellanti, kif ingħad, tinkwadra ruħha fir-Regolament 262 tar-Regolamenti dwar l-Akkwist Pubbliku li daħlu fis-seħħ għall-ewwel darba bl-Avviż Legali 352 tal-2016. Dan ir-regolament jipprovdi hekk:

“Remedies before Closing Date of a Call for Competition.

262. (1) Prospective candidates and tenderers may, within the first two-thirds of the time period allocated in the call for completion for the

submission of offers, file a reasoned application before the Public Contracts Review Board:

- (a) to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform; or
- (b) to determine issues relating to the submission of an offer through the government's e-procurement platform; or
- (c) to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or
- (d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or
- (e) to cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued".

6. Fi ftit kliem, dan ir-regolament jippermetti l-ksib ta' rimedju qabel l-għeluq tas-sejha għall-ħames raġunijiet:

- (a) meta jirriżultaw klawsoli jew deċiżjonijiet li huma impossibbli li jitwettqu;
- (b) meta jirriżultaw kwistjonijiet dwar offerti bil-mezzi tekniċi;
- (c) meta jkun hemm speċifikazzjonijiet diskriminatorji;
- (d) biex jitneħħew jew jiġu korreġuti klawsoli żbaljati jew ambigwi; u

(e) meta s-sejha għall-kompetizzjoni hija kontra l-liġi.

7. F'dan il-każ is-sejha saret biex tagħti effett lill-politika tal-Gvern li ried li l-ġbir tal-iskart isir fuq bażi reġjonali u dan biex tiġi evitata l-frammentazzjoni tal-ġbir bl-inefficijenzi u l-problemi ta' mikro-ġbir lokalizzati f'kull lokalità individwali. Is-sejha odjerna hija waħda minn 6 sejhiet li ħareġ id-Dipartiment tal-Kuntratti għan-nom ta' kull kunsill reġjonali f'Malta u Għawdex. Il-gżira ta' Għawdex giet miġbura f'reġjun wieħed li jkopri l-gżira kollha. Dan qed jingħad għax l-ilmenti safejn huma intiżi li jmorru kontra din id-deċiżjoni governattiva li tolqot il-politika dwar kif isir il-ġbir tal-iskart ma jistgħux jitqiesu f'dawn il-proċeduri għax imorru lil hinn mill-funzjoni ta' din il-Qorti. Il-politika tal-Gvern dwar ir-reġjonalizzazzjoni tal-ġbir tal-iskart hi li hi u ma tistax tinbidel f'dawn il-proċeduri.

8. L-ewwel aggravju tas-soċjeta` appellanti jkopri lmenti li skont hi juru nuqqas ta' osservanza tal-liġi. Taħt din il-kappa tressaq erba' lmenti: (i) it-*tender* ma nkitibx mill-awtorità kontraenti; (ii) il-koordinazzjoni mad-Dipartiment tal-Kuntratti bdiet issir mid-Dipartiment tal-Gvern Lokali; (iii) il-*budget* għat-*tender* ma ġiex approvat, u (iv) kien hemm xi riservi fuq is-sejha da parti tal-Kunsill Reġjonali ta' Għawdex. Din il-Qorti trid tirmarka mill-bidu li dawn l-ilmenti ma jolqtux l-interessi tas-soċjeta` appellanti

peress illi huma materji ta' amministrazzjoni interna, u bl-ebda mod ma jilledu xi drittijiet tagħha. Dawn l-allegazzjonijiet ma jolqtux il-konkorrenza fis-suq u ma jagħmlux ħsara lil xi oblatur partikolari għax japplikaw għal kulħadd.

9. F'dan il-każ, il-Kunsill Reġjonali Għawdex approva bla riservi s-sejha u aċċetta li jkun l-awtorita` kontraenti responsabbli. Peress illi, kif ingħad, din is-sejha kienet parti minn eżerċizzju nazzjonali fejn il-ġbir tal-iskart ser jieqaf ikun lokali u jsir reġjonali, kellu jkun hemm koordinazzjoni bejn is-sitt Kunsilli Reġjonali u dan l-irwol ħadu d-Dipartiment tal-Gvern Lokali li kiteb it-*tender* bil-konsultazzjoni tal-Kunsilli Reġjonali b'korrispondenza mad-Dipartiment tal-Kuntratti. Finalment, ir-responsabbilta` aħħarija hija ta' kull Kunsill Reġjonali, u għall-fini ta' din il-kawża, dik Għawdxija li approvat u nidiet il-proċess relattiv. Id-diskussjonijiet, ovvjament, setgħu nħolqu għax kien hemm diverġenza ta' opinjonijiet, pero`, fl-aħħar mill-aħħar, sar qbil, forsi anke kompromessi, u d-dokumenti għas-sejha nħargu fuq ir-responsabbilta` tal-Kunsill Reġjonali Għawdex li sejjer imexxi l-proċess bħala l-awtorita` kontraenti.

10. Fil-kuntest tal-ilment li ma sarx *regional impact assessment* mill-*Gozo Regional Development Authority* kif maħsub fil-Kap. 600 tal-Liġijiet ta' Malta, il-Bord iddeċieda li ma kienx kompetenti jidhol f'din il-materja. Din il-Qorti tara li, f'kull każ, il-Kap. 600 daħal fis-seħħ wara li ttieħdet id-

deċiżjoni li l-iskart jibda jinġabar b'mod reġjonali. Ma jistax isir *regional impact assessment* b'mod retroattiv. La ma kienx meħtieġ meta ttieħdet id-deċiżjoni, l-istess deċiżjoni ma tistax tiġi attakkata fuq is-saħħa tagħha. Apparti dan, f'każ ta' din ix-xorta mhux qed jiġi ndikat in-nuqqas ta' xi Ministru jew entita` governattiva li jagħmel valutazzjoni tal-impatt reġjonali qabel ma jressaq xi strateġija, politika, pjan, proġett jew abbozz leġiżlattiv għall-konsiderazzjonijiet tal-Kabinett Malti.

11. Is-soċjeta` appellanti tilmenta wkoll dwar ir-redazzjoni tas-sejħa. Ma jidhirx li quddiem il-Bord tressqu provi fir-rigward u ma tarax li hemm x'tikkritika fuq il-mod kif inkitbu ċerti paragrafi jew klawsoli. Hekk, fil-kuntest tal-kriterju għas-selezzjoni bażat fuq "*Economic and Financial Standing*", huwa ċar minn qari tan-nota spjegattiva li dak li oblatur irid juri huwa li hu finanzjarjament b'saħħtu, liema saħħa finanzjarja ma tkunx neċessarjament marbuta mal-ġbir ta' skart mid-djar. Dak li oblatur irid juri hu li huwa bniedem tas-sengħa u kompetenti biex jeseġwixxi l-kuntratti. Ir-Regolament 218 tar-regolamenti in materja jgħid li l-awtorita` kontraenti "*may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract*", u għal dan il-fini tista' titlob dokumenti tas-saħħa finanzjarja tal-oblatur "*in the area covered by the contract*". F'dan il-każ intalbet prova tas-saħħa ekonomika tal-oblatur, iżda mhux neċessarjament relatat ma' ġbir ta' skart bieb bieb.

12. Dwar il-klawsola li tgħid li kull oblatur irid ikollu, għad-dispożizzjoni tiegħu €300,000 biex jiffinanzja l-proġett, kull ma hu meħtieġ f'dan l-istadju hija dikjarazzjoni mill-oblatur f'dan is-sens, koperta b'dikjarazzjoni f'dan is-sens minn bank. Mhux komputu tal-awtorita` kontraenti tidhol fid-dettal u tivverifika f'istadju tal-evalwar tal-offerta jekk l-oblaturi jistgħux jiffinanzjaw il-prestazzjoni tal-kuntratt. L-importanti hu li ssir dikjarazzjoni f'dan is-sens, bil-konsegwenzi għal min iqarraq bl-awtorita`, u jforni "*a statement by a recognised bank or any licensed credit institution certifying such credit facilities*". Ovjament, min jieħu l-kuntratt u jsir kuntrattur, jintrabat b'"*performance condition*" li biha jintrabat għat-twettiq tal-kuntratt kif stipulat fl-istess kuntratt.

13. Is-soċjeta` appellanti tilmenta li l-kundizzjoni tal-kriterju għas-selezzjoni hija vaga u trid tiġi interpretata fis-sens ristrett. Din il-kundizzjoni hi fis-sens li min japplika jrid "*to provide a list of services of a similar nature, which must consist of collection of waste*". Is-soċjeta` appellanti tgħid li din il-kundizzjoni tirreferi għal "*kerb-side door-to-door household waste collection*". Apparti l-fatt li l-klawsola ma tirrispekkjax dak li qed tgħid is-soċjeta` appellanti, hija setgħet dejjem titlob kjarifiki tat-tifsira mingħand l-awtorita` kontraenti. Hi x'inhi, is-soċjeta` appellanti ma tistax tagħti lil din il-klawsola tifsira li ma tirriżultax mill-klawsola stess.

14. L-aggravju marbut mal-fatt li l-oblaturi ntalbu biss *self-declarations* fit-*Technical Offer Questionnaire* huwa wkoll bla bażi. Gia ntwera li, fi stadju pre-kuntrattwali, li titlob biss dikjarazzjonijiet huwa aċċettabbli, għax ikun kważi impossibbli li l-awtorita` kontraenti tagħmel il-verifikazzjonijiet tagħha f'dak l-istadju għal kull oblatur. Wieħed ifakkar li l-kuntrattur magħżul jintrabat b'garanzija bankarja u b'mekkaniżmu ta' penali f'każ li jkun moruż fil-prestazzjoni tal-obbligi tiegħu. Oltre dan, il-kuntratt li eventwalment jingħata jista' jithassar jekk jirriżulta li jkun ġie akkwistat b'qerq jew tkun saret xi dikjarazzjoni falza.

15. Din il-Qorti trid tfakkar li dawn il-kundizzjonijiet japplikaw għall-oblaturi kollha l-istess u ma hemmx każ ta' diskriminazzjoni favur xi ħadd. Kif ingħad l-awtorita` kontraenti trid timplimenta l-politika tal-Gvern favur ir-reġjonalizmu tal-ġbir tal-iskart u hemm bżonn għalhekk ċerta uniformita`. Għalhekk, il-prezz tal-offerta se jkun marbut għall-ħames snin, u anke għaž-żmien ta' wara jekk dak it-terminu jiġi estiż. B'dan il-mod mhux se jinkiser it-trattament ugwali bejn l-oblaturi, u ma hemm xejn ambigwu f'din il-kundizzjoni. Għalhekk, ma tarax li hu prospettat xi rimedju taħt ir-Regolament 262 aktar qabel imsemmi.

16. Anke jekk hemm riservat li jista' jkun hemm, qabel jew wara l-għoti tal-kuntratt, xi negozjati dwar l-iskeda ta' kif isir ix-xogħol, dana mhux ta' preġudizzju għal xi oblatur partikolari. Fuq kollox, hu naturali li jista' jkun

hemm diskussjonijiet mal-oblatur magħżul dwar l-iskeda għall-ġbir tal-iskart, għax din l-iskeda jista' jkun li jkollha bżonn xi tibdil skont l-esiġenzi u l-añjar interessi tar-residenti f'Għawdex.

17. Dwar id-depożitu li tħallas għall-appell quddiem il-Bord, li s-soċjeta` appellata ddiskrivietu bħala esaġerat u eżorbitanti, din il-Qorti ftit għandha xi tgħid. Id-depożitu ġie maħdum skont il-liġi, u meta tqies li l-valur tal-kuntratt jeċċedi s-sitt miljun ewro, ma tqisx li l-ammont ta' depożitu` huwa esaġerat. Veru li s-soċjeta` appellanti kellha tressaq l-ilmenti tagħha quddiem il-Bord qabel ma kellha risposta għal ċerti kjarifiki li talbet, iżda wara li ħadet ir-risposta setgħet dejjem tirtira l-oġġezzjoni li ressqet jew, tal-anqas, uñud mill-ilmenti li tagħhom ingħatat spjegazzjoni.

18. Ilmenti oħra wkoll ma jaqgħux fl-ambitu tar-Regolament 262 għax il-kundizzjonijiet japplikaw b'mod ġenerali u jolqtu kull oblatur b'mod l-istess, u ma jidherx li saru għall-vantaġġ jew għall-preġudizzju ta' xi ħadd partikolari. Il-Bord dañal fid-dettal fil-kuntest tal-aggravji, u laqa' ċerti aggravji fis-sens li qal li hemm bżonn xi kjarifika fuq żewġ punti, u din il-Qorti sejra tikkonferma dawn l-ordnijiet għaċ-ċertezza li tista' tinħoloq bil-kjarifika, anke jekk hi tħoss li l-klawsoli u l-kundizzjonijiet tas-sejħa ma humiex ambigwi.

App. Ċiv. 369/22/1

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell tas-soċjeta` Koperattiva Għawdxija tal-Indafa Pubblika Limitata billi tiċhad l-istess u tikkonferma *in toto* d-deċiżjoni li fha l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi tat-22 ta' Lulju, 2022.

L-ispejjeż kollha tal-kawża jitħallsu kollha mis-soċjeta` msemmija KIP Gozo.

Mark Chetcuti
Prim Imħallef

Joseph R. Micallef
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Deputat Reġistratur
rm