



QORTI TAL-APPELL

IMĦALLFIN

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

Seduta ta' nhar l-Erbgħa, 30 ta' Novembru, 2022.

Numru 4

Appell numru 375/2022/1

Ruslan Cilia

v.

Aġenzija għas-Servizzi tal-Qrati

1. Dan huwa appell ta' Ruslan Cilia [“l-appellant”] minn deċiżjoni tas-16 ta' Awwissu 2022 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi [“il-Bord ta' Revizjoni”], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [“L.S. 601.03”], li ċaħad oġġezzjoni tiegħu kontra deċiżjoni tal-Aġenzija għas-Servizzi tal-Qrati [“l-aġenzija”] li warrbet, għax qisitha “*technically non-compliant*”, offerta tiegħu għal servizz ta' *preventive maintenance and support for the air conditioning systems* tal-qrati u laqgħat, minflok, l-offerta ta' *Smart Effects Limited* [“*Smart Effects*”].
2. Il-fatti rilevanti seħħew hekk: saret sejħa mill-aġenzija bħala awtorità kontraenti għal offerti għal kuntratt għal *preventive maintenance and support*

for the air conditioning systems for the Court Services Agency. Il-kon-dizzjonijiet tas-sejha igħidu *inter alia* hekk:

»4.2 Specific Activities

»... ..

»iii. Quarterly maintenance – this shall take place and be completed by the last day of March, June, September and December of each year respectively

»... ..

»Tenderer's Technical Offer

»1. Timetable of activities

»1.1 As part of the technical offer, bidders are to compile and submit the following Gantt Charts outlining the response and resolution time for preventive maintenance in line with article 4.2

»a. Gantt Chart showing the start and end date of each quarterly maintenance (to be completed by the last day of March, June, September and December of each year respectively)

»

3. Intefgħu żewġ offerti, dik tal-appellant u dik ta' *Smart Effects*. B'ittra tal-14 ta' Lulju 2022 l-aġenzija għarrfet lill-appellant illi:

»... .. the tender submitted by your company [*sic*] was not successful since it failed technically for the following reason:

»As per ... Terms of Reference, the completion requirement for the quarterly maintenance is by the last day of March, June, September and December of each respective year. On the other hand, in the Gantt Chart of the quarterly maintenance which was submitted as part of the technical offer, the bidder introduced a condition with respect to the completion date. This condition states:

»“Allowance of 8 weeks in any one year to allow for leave / sick leave / public holidays / tool breakdowns and call outs.”

»In line with ... General Rules governing Tenders, “no account can be taken of any reservation in the tender as regards the tender document; any disagreement, contradiction, alteration or deviation shall lead to the tender offer not being considered any further”. Therefore, the evaluation committee has no alternative other than to consider the offer as being technically non-compliant. «

4. L-appellant ressaq oġġezzjoni quddiem il-Bord ta' Revizjoni b'ittra tat-23 ta' Lulju 2022 u talab revizjoni tad-deċiżjoni. Ir-raġunijiet għall-oġġezzjoni ġew imfissra hekk:

»Dak li qed jingħad mill-bord ta' vvalwazzjoni mhux korrett. Minn eżami tal-*Gantt chart* sottomessa minn Cilia mal-offerta tiegħu joħroġ ċar li huwa qed jipproponi li l-ewwel *quarter* jieqaf fil-11-il ġimgħa (mhux fit-12 jew 13-il ġimgħa), it-tieni *quarter* jieqaf fit-22 ġimgħa (mhux fit-23 jew 24 ġimgħa). L-istess japplika għall-*quarters* l-oħra. Huwa ċarissimu li allura l-*quarterly maintenance* jispicċa qabel it-tmiem ta' kull *quarter*, eżattament kif mitlub.

»Il-ġimgħat indikati lejn l-aħħar tas-sena huma indikati hekk bħala *allowance* mhux bħala *qualification* kif qed isostni l-bord ta' evalwazzjoni. Dan joħroġ ukoll minn eżami, ukoll superfiċjali, tal-*Gantt chart* sottomessa minn minn Cilia mal-offerta tiegħu.

»... .. apparti l-*Gantt Chart* mal-offerta kien hemm ukoll dikjarazzjoni iffirmata minn Cilia li tiddikjara proprju l-perjodi meta għandu jkun lest il-*maintenance* f'kull *quarter*. Minkejja li hija dikjarazzjoni ċara u dettaljata u iffirmata, din ġiet skartata għal kollox mill-kumitat ta' evalwazzjoni.

»Fl-aħħarnett l-offerta sottomessa minn Cilia kienet l-aktar waħda vantaġġjuża.«

5. Il-bord iddeċieda hekk:

»The board concludes and decides:

- »a) to uphold the first grievance of the appellant;
- »b) not to uphold appellant's second grievance and therefore reject demands of the letter of objection;
- »c) upholds the contracting authority's decisions in the recommendation for the award;
- »d) directs that the deposit paid by appellant not to be reimbursed.«

6. Ir-raġunijiet li wasslu lill-bord għal din id-deċiżjoni ġew imfissra hekk:

»... .. the appellant contends that:

- »a) the evaluation board makes reference to article 4.2 of section 3 in its rejection letter. However it is evident that this has been interpreted wrongly.
- »b) what the evaluation committee is attesting is wrong. An analysis of the Gantt Chart shows that the first quarter ends by week 11, 2nd quarter by week 22 *etc.*, hence prior to the end of each quarter.
- »c) the weeks indicated at the end of the year are there as an 'allowance' and not as a 'qualification'.
- »d) Finally, reference is also made to the signed declaration by the appellant confirming the periods when the maintenance is to take place. It appears this was not taken into consideration by the evaluation committee.

»This board also noted the contracting authority's reasoned letter of reply filed on 4th August 2022 and its verbal submission during the virtual hearing held on 11th August 2022, in that:

»a) Quarterly Maintenance -

»Although the bidder noted that each quarterly maintenance shall be completed within 11 weeks, the bidder did not confirm through the quarterly preventive maintenance Gantt chart that each quarterly preventive maintenance shall be definitely completed by end of March, June, September and December of each year as was requested in the tender document. The tender document under article 4.2 of the Terms of Reference in page 15 specifies that "Bidders are to submit a Gantt Chart showing the start and end date of each quarterly maintenance (the quarterly maintenance of all premises are to be completed by the last day of March, June, September and December of each year respectively) as part of the technical offer. This requirement was prescribed in the tender document and the evaluation committee could not waive this obligation since such Gantt chart with the explicit information of the quarterly maintenance as required by the tender document would have inevitably [sc. to] be part of the contract agreement. This is in line with the principle of self-limitation and non-discrimination as per Public Procurement Regulations. Should the evaluation committee [sc. have] derogated from such obligation as prescribed in the tender document the evaluation committee would be in breach of the mentioned principles and therefore vitiating the whole evaluation process. For this reason alone, the bid is to be excluded from the ranking and hence disqualified as per reason given and this appeal dismissed.

»b) Extra weeks indicated at the end of the year

»In the presented Gantt chart by the bidder for the quarterly preventive maintenance, the evaluation committee noted that at the bottom a condition was included which states that "Allowance of 8 weeks in any one year to allow for leave / sick leave / public holidays / tool breakdowns and call outs". This extra condition together with the contents of the Gantt chart seemed to be altering the requirements of the tender document. Moreover, in subsistence [sic] to the previous point, this raised doubts as to whether the quarterly preventive maintenance would be actually completed by end of March, June, September and December of each year as requested in article 4.2 (iii). But, albeit this incomprehension, the evaluation committee was also faced with additional conditions laid down by the bidder which unequivocally ... lead to disqualification of the bid.

»The statement regarding the overall allowance of 8 weeks was listed at the end of the quarterly preventive maintenance Gantt chart in weeks 45-52. The evaluation committee takes this as a condition being imposed on the contracting authority to allow the bidder flexibility in completing the overall quarterly preventive maintenance in any given year, and not only the actual quarterly preventive maintenance.

»In line with the principle of level-playing field among bidders and self-limitation the bid is to be excluded from the ranking and hence disqualified as per reason given and this appeal dismissed. In both instances mentioned above the evaluation committee could not opt for a rectification of the submission since did (*sic*) would involve a change in offer which is not possible under the tender document. The principle of self-limitation indicates that the evaluation committee is not able to do and act at free will but only according to what is indicated in the tender document.

»... .. In the board's opinion there are two main grievances and instances to be analysed. These are in respect of the 'quarterly maintenance' and 'extra weeks' indicated at the end of the year in the Gantt Chart.

»a) Quarterly maintenance – in the board's view, the tender dossier, in ... paragraph 4.2.iii is clear and unambiguous when it states "Quarterly maintenance – this shall take place and be completed by the last day of March, June, September and December of each year respectively". Even though this board agrees with the logical arguments as brought forward that they expected the quarterly maintenance to finish in March / June / September / December, this was not specifically required in the tender dossier. What the tender dossier required is for the maintenance to be completed by the last day of each quarter. Therefore, as long as the maintenance is completed before 31st March, 30th June so on so forth, the appellant's bid was within tender specifications. There were no restrictions on when the quarterly maintenance was to start.

»Hence, this board upholds the appellant's first grievance.

»b) Extra weeks indicated at the end of the year – within the submitted Gantt chart, the appellant included the following for weeks 45 to 52 "Allowance of 8 weeks in any one year to allow for leave / sick leave/ public holidays / tool breakdown and call outs". It is the board's opinion that such an inclusion, allowance or condition is a qualification on the appellant's part. This qualification in the appellant's submission is to the detriment of other economic operators who participated in such procurement procedure and therefore if accepted the contracting authority would not be keeping the same level playing field between all economic operators. It is also important to point out that, if accepted, this Gantt chart, and hence this 'extra' condition / allowance, would be part of the contract signed by the economic operator and the contracting authority and would therefore be binding on the contracting authority. Acceptance of such condition would have gone against the principle of self-limitation imposed on evaluation boards.

»Hence, this board does not uphold the appellant's second grievance.«

7. Sar appell b'rikors tal-5 ta' Settembru 2022 li għalih l-aġenzija wieġet fid-19 ta' Ottubru 2022.

8. L-aggravju tal-appell iġħid hekk:

»... .. il-bord iddeċieda li dikjarazzjoni li hemm f'*Gantt chart* li hija mniżżla bħala *allowance* u mhux *qualification* bħala fatt li jekk aċċettat kien se jippreġudika lil persuni oħrajn li għamlu l-offerti tagħhom. L-appellant jissottometti li għamel żball il-bord meta ma fliex dokumenti oħra li juru li ċertament ħadd ma kien se jitpoġġa fi żbilanċ. Allura l-appellanti ħass ruħu aggravat u qed jressaq dan l-appell.

»... .. kien żbaljat il-bord meta skarta s-sottomissjonijiet interposti mill-istess appellant. L-iskuża għall-iskwalifika kienet għaliex kien hemm ġimgħat indikati lejn l-aħħar tas-sena li l-bord ha bħala fatt u kwalifika meta fil-verità dawn kienu indikati bħala *allowance*. L-appellant jissottometti li kieku l-bord evalawa kif suppost u bir-reqaa d-dokumenti kollha li kellu quddiemu kien jasal għal konkluzjoni diversa.

»Dan għaliex il-ġimgħat indikati lejn l-aħħar tas-sena huma indikati hekk bħala *allowance* u mhux bħala *qualification*. Jekk wieħed jagħmel eżami, anke superfiċjali, tal-*Gantt chart* sottomessa minn Cilia mal-offerta tiegħu, jista' faċilment jasal għal din il-konkluzjoni li din kienet *allowance* mhux *qualification*.

»*Inoltre* u sabiex tneħħi kull dubbju li seta' kien hemm rigward din id-dikjarazzjoni li hija l-unika raġuni għalfejn l-appellant ma ngħatax dan it-*tender*, il-bord seta' qara u ta aktar piż d-dikjarazzjoni iffirmata minn Cilia li tiddikjara proprju l-perjodi meta għandu jkun lest il-*maintenance* f'kull *quarter*. Minkejja li hija dikjarazzjoni ċara u dettaljata u iffirmata, din ġiet skartata għal kollox mill-kumitat ta' evalwazzjoni kif wkoll mill-bord in kwistjoni.

»Fl-aħħarnett l-offerta sottomessa minn Cilia kienet l-aktar waħda vantaġġjuza u għalhekk ikompli jagħmel l-iskwalwifika tiegħu għall kollox ingusta apparti li hija wkoll bla bażi.

»L-esponenti hawn appellant jisottometti li waqt is-smiġħ tax-xhieda kellu l-opportunità jisma' x'kienet l-intenzjoni tal-appellant u għalhekk li dejjem kienet l-intenzjoni tiegħu li jibqa' strettament ma' dak dettatt mil-appellati fit-*tender*«

9. L-aġenzija wiegħbet hekk:

»Il-parti appellata ma taqbilx ma' dan l-aggravju għas-segwenti raġunijiet:

»Il-mertu mqajjem mill-appellant jirrigwarda l-*Gantt chart* għall-*quarterly preventive maintenance* kif ġiet sottomessa mill-appellant fi stadju tal-offerti.

»Il-*Gantt chart* kienet mitluba fid-dokument tas-sejħa u kienet ukoll rekwiżit mandatorju li tiffirma parti mill-offerta teknika tal-oblaturi.

»Din il-*Gantt chart* kif ġiet sottomessa, jekk wieħed jifliha, kienet qed tikkreja kundizzjoni speċifika għall-offerent *qua* appellant [*recte*, għall-appellant *qua* offerent]. Il-*Gantt chart* kienet tinkludi perjodu ta' kontinġenza fl-aħħar tas-sena ta' tmien ġimgħat biex tkopri diversi eventwalitajiet li jissemmew fuq l-istess *Gantt chart*.

»Din il-kundizzjoni addizzjonali da parti tal-offerent mhix aċċettabbli skond ir-regoli tax-xiri pubbliku għar-raġunijiet segwenti:

- »• I-oblaturi fl-offerti tagħhom – senjatament fil-parti amministrativa tat-*tender* fejn fiha l-offerent jagħmel diversi dikjarazzjonijiet ta' natura *standard* fi kwalunkwe sejha għall-offerti – jiddikjaraw fost affarijiet oħra illi jekk jimponu derogi jew kundizzjonijiet oħrajn apparti dawk imposti fit-*tender* dawn iwasslu għall-iskwalifika tagħhom mis-sejha;
- »• il-kundizzjoni għall-kontinġenza jew inkella *allowance* kif inhi msejha mill-appellant fl-offerta tiegħu m'hija xejn għajr kundizzjoni jew inkella kwalifika addizzjonali fuq il-*Gantt chart* li toħloq deroga minn dak li qed jitlob id-dokument tas-sejha fir-rigward tal-*quarterly maintenance*;
- »• id-dokument tas-sejha jitlob li l-*quarterly maintenance* jiġi kompletat fl-aħħar ta' Marzu, Ġunju, Settembru u Diċembru ta' kull sena (article 4.2(iii) ta' section 3 – Terms of Reference). Il-*“quarter”* (trimestru) minnu nnifsu huwa perjodu ta' żmien li fih għandu jsir dan il-*quarterly maintenance*, u allura l-impożizzjoni da parti tal-offerent li jkun hemm perjodu ta' kontinġenza fl-aħħar 8 ġimgħat tas-sena huma *over and above* dak li qed jiġi rikjest fid-dokument għas-sejha għall-offerti u għalhekk din il-kundizzjoni hija addizzjonali min-naħa tal-offerent sabiex jaġevola lilu nnifsu u l-inklużjoni tagħha fl-offerta ma ssibx il-komfort fil-prinċipji fundamentali tax-xiri pubbliku;
- »• ukoll din il-kundizzjoni imposta mill-offerent hija mnizzla bħala kontinġenza li tinkludi *call-outs*. Il-*call-outs* huwa servizz li huwa pprovdut għalih f'parti tad-dokument tas-sejha f'parti apposta (article 4.2 (xi) ta' section 3 – Terms of Reference) u għalhekk m'għandu x'jaqsam xejn mal-*quarterly maintenance* li għalih qed tirreferi l-*Gantt chart* mitluba. Għaldaqstant l-appellant qed juża 'fenomeni' apparti li huwa għa pprovdut għalih digà b'sett ta' obbligi oħrajn fis-sejha pubblika biex joħloq kontinġenza għal rasha fl-obbligi assunti għall-*quarterly maintenance*, liema kundizzjoni għalhekk mhix aċċettabbli fil-kuntest ta' prinċipji *level-playing field* u *non-discrimination*, u iktar u iktar fil-kuntest tal-istess sejha.

»Għal kull bwon fini l-parti appellata tirrileva ukoll il-punt li l-*Gantt chart* mertu ta' dan l-appell bħala parti mill-offerta teknika tal-oblatur kienet prekluzja milli ssir proċedura ta' rettifika mill-kumitat evalwattiv u dan skond il-kundizzjonijiet tas-sejha għall-offerti bl-applikazzjoni tal-prinċipju tas-*self limitation*. Għalhekk il-kumitat evalwattiv ma kellu l-ebda triq oħra għajr jirakkomanda l-iskwalifika skond ir-raġunijiet kompleti li ngħataw fl-ittra tal-iskwalifika datata 5 ta' Lulju 2022.

»Magħduda dawn ir-raġunijiet kollha suesposti l-parti appellata ma tarax kif setgħet tikkonsidra l-offerta tal-appellant u għalhekk tqis ukoll li kienet korretta ħafna d-deċiżjoni tal-bord li applikat il-prinċipji bażiċi tax-xiri pubbliku filwaqt li kkunsidra li din il-kundizzjoni addizzjonali ma setgħetx tiġi imponuta [*sic*] mill-offerent u li għustament kellha twassal għall-iskwalifika tal-offerta tiegħu.«

10. Tgħid ħażin l-aġenzija illi “d-dokument tas-sejħa jitlob li l-*quarterly maintenance* jiġi kompletat fl-añħar ta’ Marzu, Ġunju, Settembru u Diċembru ta’ kull sena”; li jgħid id-dokument huwa illi x-xogħol jitlesta sa l-añħar ta’ Marzu, Ġunju, Settembru u Diċembru ta’ kull sena. Testwalment igħid “*Quarterly maintenance – this shall take place and be completed by the last day of March, June, September and December of each year respectively*”.
11. Il-*Gantt chart* tal-appellant turi illi x-xogħol hu maħsub li flok isir kull tliet xhur, jew kull tlittax-il ġimgħa, isir kull ħdax-il ġimgħa minflok. Għalhekk ix-xogħol li kellu jitlesta sar-añħar ta’ Marzu – *i.e.* sat-tlittax-il ġimgħa tas-sena – huwa maħsub li jitlesta sal-ħdax-il ġimgħa; dak li kellu jitlesta sal-añħar ta’ Ġunju – sas-sitta u għoxrin ġimgħa – huwa maħsub li jitlesta sat-tnejn u għorxin ġimgħa; dak li kellu jitlesta sal-añħar ta’ Settembru – sad-disgħa u tletin ġimgħa – huwa maħsub li jitlesta sat-tlieta u tletin ġimgħa; u dak li kellu jitlesta sal-añħar ta’ Diċembru – sat-tnejn u ħamsin ġimgħa – huwa maħsub li jitlesta sal-erbgħa u erbgħin ġimgħa, li jfisser li sal-añħar tas-sena jkunu “ntrebħu” tmien ġimgħat.
12. Safejn is-sejħa għal offerti riedet li x-xogħol jitlesta sal-añħar ta’ kull tliet xhur (flok fl-añħar ta’ kull tliet xhur) l-offerta tal-appellant hija konformi; fil-fatt ingħata raġun mill-Bord ta’ Revizjoni fl-ewwel oġġezzjoni tiegħu.
13. Bl-istess mod, iżda, ix-xogħol li kellu jibda fit-tieni tliet xhur hu maħsub li jibda ġimagħtejn qabel, waqt li għadhom għaddejjin l-ewwel tliet xhur; dak tat-tielet tliet xhur jibda erba’ ġimgħat qabel; u dak tal-añħar tliet xhur jibda sitt ġimgħat qabel. Imbagħad ix-xogħol tal-ewwel tliet xhur tas-sena ta’

wara hu maħsub li jibda fil-bidu ta' Jannar biex it-tieni sena tkun bħal ta' qabilha.

14. Il-problema b'dan is-sistema jkun illi l-intervall tal-añħar tliet xhur flok tlittax-il ġimgħa jiġi li jkun dsatax-il ġimgħa¹ – aktar minn erba' xhur – u jkun hemm żmien itwal bejn manutenzjoni u oħra. Dan ma huwiex kompatibbli mal-kunċett ta' "*quarterly maintenance*" li ma jridx li jkun hemm aktar minn tlittax-il ġimgħa bejn intervent u ieħor.
15. Kellhom raġun għalhekk kemm il-kumitat tal-għażla kif ukoll il-Bord ta' Revizjoni li jgħidu illi l-offerta tal-appellant ma kinitx konformi mal-kon-dizzjonijiet tas-sejħa, għalkemm forsi r-raġuni għad-deċiżjoni setgħet tfissret aħjar.
16. Il-qorti għalhekk tiċhad l-appell u tikkonferma d-deċiżjoni tal-bord. L-ispejjeż ta' dan l-appell iħallashom l-appellant.

Mark Chetcuti
Prim Imħallef

Giannino Caruana Demajo
Imħallef

Anthony Ellul
Imħallef

Deputat Reġistratur
da

¹ Il-ħdax-il ġimgħa proġettati mill-appellant u t-tmien ġimgħat "mirbuħa" jiġu dsatax-il ġimgħa.