



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, 31 ta' Mejju, 2023.

Numru 8

Appell numru 66/2023/1

Leone Grech

v.

- 1. *Jobsplus*;**
- 2. Direttur Ġenerali tal-Kuntratti; u**
- 3. *South Lease Limited* għal kull interess li jista' jkollha**

1. Dan huwa appell ta' Leone Grech [“l-appellanti”] minn deċiżjoni tal-1 ta' Frar 2023 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 mressqa mill-appellant kontra deċiżjoni ta' *Jobsplus* [“*Jobsplus*” jew “l-awtorità kontraenti”] illi ma tintgħażilx l-offerta tiegħu għall-għoti ta' kuntratt pubbliku billi ma kinitx l-orħos offerta,

u illi tintgħażel, minflok, dik ta' *South Lease Limited* ["*Souith Lease*"] billi din kienet l-orħos offerta kompatibbli mar-rekwiżiti tekniċi u amministrativi.

2. *Jobsplus* għamlet sejħa għal offerti "*for the provision of transport services using low emission minivans and tail-lift vans in an environmentally friendly manner*". Il-kriterju waħdieni tal-għażla fost l-offerti li jilħqu l-kriterji amministrativi u tekniċi kellu jkun il-prezz¹.
3. Il-klawsola 5 ta' *Section 1 – Instructions to Tenderers* tgħid illi biex jitqies eliġibbli oblatur ma għandux ikollu raġunijiet ta' skwalifika² u wkoll illi:

»The service provider must be in possession of a national operator licence or a community licence issued by *Transport Malta* in terms of the Passenger Transport Service Regulations (S.L. 499.56) to national undertakings authorising the holder thereof to carry out passenger transport services.«

4. Fost il-kondizzjonijiet tas-sejħa kien hemm dawk taħt *Section 2 – Special Conditions*, illi jridu illi:

»16.4 After the signing of the contract, the contractor must provide the following documents within four (4) weeks from commencement order notification by the project leader:

»... ..

»Minivans and Drivers

»i. a receipt police conduct [sc. certificate];

»ii. a copy of a valid driver's licence;

».... ..

»v. Logbooks of minivans

»The contractor must also submit a list of all the vehicles which will be used for the whole duration of the contract. Such list should contain

¹ 6. Criteria for Award.

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

² »Grounds relating to criminal convictions, grounds relating to the payment of taxes or social security contributions, grounds relating to insolvency, conflicts of interests or professional misconduct, pPurely national exclusion grounds «

vehicle registration number and shall be submitted within four (4) weeks from notification by the project leader.

»The minivans to be used during the duration of the contract must be compliant with the criteria set in the Terms of Reference, Section 3. In the case that other vehicles are used other than those proposed and indicated in the offer, these must be of the same standards.«

5. Il-kriterji f' *Section 3 – Terms of Reference* taht *exhaust gas emissions*

iridu illi:

»2.2 Specific objectives

»... ..

»45% of vehicles procured must be certified as using alternative fuels according to directive (EU) 2019/116.

»Verification:

»The bidder must provide the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved the required standard, the measures must be documented and included in the tender application, and this must be approved by a credible third party.

»... ..

»4.2.3 Other requirements

»The contractor will be required to confirm as part of the technical offer, the availability of minivans and tail lifts vans to accommodate *circa* 25 to 60 trainees. Upon signing of the contract and as instructed by the project leader, prior to the commencement of the services, the contractor must provide the contracting authority with a list of the vehicles being used for the execution of the contract which should include the vehicle registration numbers, the type of vehicles and in each case the seating capacity. The relevant documents should be presented for verification prior to the provision of service. The contractor is required to inform the project leader if changes in drivers or minivans occur during the execution of the contract.»

6. Wieñed mill-oblaturi għamel din it-talba għal kjarifika dwar din il-kondizz-

joni:

»Do diesel vans with EURO 6 engines Class M3 (cleanest diesel emission standard) qualify as an alternative fuel? If not, kindly clarify the specifications of the vehicles using alternative fuels. Would a hybrid vehicle qualify as an alternative fuel?«

7. L-awtorità kontraenti wiegħbet hekk:

»... .. diesel engines do not fall under the classification of an alternative fuel; however if the submitted technical sheets include emission level Euro 5 or Euro 6 for a hybrid transportation vehicle, it will be acceptable as an alternative fuel vehicle. Any Euro emission level standard is acceptable, as long as the vehicle is using alternative fuel and is clearly illustrated during bidding stage.«

8. Fost dawk li tefgħu offerti kien hemm l-appellant u *South Lease*. B'ittra tat-18 ta' Novembru 2022 l-awtorità kontraenti għarrfet lill-appellant illi l-orħos offerta kienet dik ta' *South Lease*, waqt illi t-tieni orħos kienet dik tiegħu. Għalhekk kienet sejra tirrakkomanda illi tintgħażel l-offerta ta' *South Lease* "*this being the cheapest priced offer satisfying the administrative and technical criteria*".

9. B'ittra tal-25 ta' Novembru 2022 l-appellant ressaq oġġezzjoni quddiem il-Bord ta' Reviżjoni billi deherlu illi *South Lease*:

»... .. is not technically compliant since (a) it lacks the necessary vehicles, with the required specifications, to perform the services contemplated in this tender; [and] (b) it lacks the necessary human resources to execute the contract under review.«

10. Bid-deċiżjoni tal-1 ta' Frar 2023 li minnha sar dan l-appell, il-Bord ta' Reviżjoni iddecieda hekk:

»The board

»a) does not uphold appellant's letter of objection and contentions,

»b) upholds the contracting authority's decision in the recommendation for the award of the tender,

»c) directs that the deposit paid by appellant not be reimbursed.«

11. Ir-raġunijiet li wasslu għal din id-deċiżjoni ġew imfissra hekk:

»The board having noted the objection filed by Mr Leone Grech (hereinafter referred to as the Appellant) on 25th November 2022 whereby the Appellant contends that:

»a) The claim in this procedure is that in Mr Grech's opinion the preferred bidder, namely *South Lease*, is not technically compliant since:

- »i. it lacks the necessary vehicles, with the required specifications, to perform the services contemplated in this tender;
 - »ii. it lacks the necessary human resources to execute the contract under review
- »b) From the tender requirements it is evident that the preferred bidder has to fulfil the following requirements:
- »i. has to have available minibuses and tail lift vans in sufficient number to carry between 25 and 60 adults in the mornings and afternoons, which number of vehicles cannot be less than 6, one of which is to be a tail-lift van;
 - »ii. the mini-vans and tail-lift van to be used have to have a year of registration being not older than 2005 and 45% of said vehicles must be certified as using alternative fuels in accordance with Directive (EU) 2019/116;
 - »iii. has to have available sufficient drivers to be able to perform the services under the contract which would range at approximately 18 trips per day with normal mini-vans and 4 trips per day using the tail-lift vans;
 - »iv. have at his disposal additional vehicles (in excess of what is stated in para. (a) satisfying the technical requirements in paragraph (b), including tail-lift vans, and drivers in order to keep the fleet of vehicles used in the performance of the services of the required number.

»It is our opinion that the preferred bidder, namely *South Lease*, is not able to fulfil the said requirements and therefore should not have been awarded the contract under review.

»c) In assessing the fulfilment or otherwise of the requirements stated above, reference is solely to be made to official documentation, namely:

- »i. as to the number of vehicles available to the preferred bidder reference is to be made to the official registration of vehicles with *Transport Malta*, which fact is evidenced by the "log books" of the respective vehicles;
- »ii. as to the year of registration reference is to be made to the official registration of vehicles with *Transport Malta*, which fact is evidenced by the "log books" of the respective vehicles;
- »iii. as to the type of fuel used by the respective vehicles reference is to be made to the official registration of vehicles with *Transport Malta*, which fact is evidenced by the "log books" of the respective vehicles;

- »iv. as to the number of drivers employed by the preferred bidder reference is to be made to the list of employees duly registered with *Jobs Plus*;
- »d) It is humbly submitted that no alternative documentation can be relied upon in order to verify the above apart from the official documentation indicated above. This is being submitted in view of the fact that:
- »i. all and any information relative to a motor vehicle is solely deemed correct and valid at law if it results in the relative "log book" It is to be reminded that each owner of a motor vehicle has an obligation, at law:
- »• to obtain the prior approval in writing of *Transport Malta* prior to undertaking any changes in the specifications of a motor vehicle, including changes to the seating capacity or seating arrangement, any mechanical alteration to the chassis or engine or change of the engine of any motor vehicle, in default of which this would constitute a violation of the law apart from the fact that such change would be deemed illegal. In actual fact sub-article (2) of the relative article of the law states that no person shall have in his possession, and no person shall use, order or cause to be used any motor vehicle which he knows to be in contravention of the provisions of sub-regulation (1).
 - »• to notify the transfer of a motor vehicle from one person to another within seven days of the date of transaction, such that the new owner may be duly registered as such with the competent authorities, which in the case of public transport vehicles is *Transport Malta*;
- »ii. all and any information relative to employment of individuals is solely deemed correct if it results from the official records of *Jobs Plus*, in default of which such employment would be deemed illegal in terms of law;
- »e) Therefore, what is required to verify compliance are solely two documents:
- »i. the log books of the relative vehicles offered by the preferred bidder; and
 - »ii. the list of employees engaged by the preferred bidder as drivers issued by *Jobs Plus*;
- »If the requirements do not result from the above documents, no other documents may be used to attempt to satisfy compliance. For this purpose, the appellant is hereunder requesting that a representative of *Transport Malta* and a

representative of *Jobs Plus* attend for the hearing to testify in relation to the above.

»f) Furthermore, the appellant is of the opinion that the only manner in which *South Lease* could possibly fulfil part of the requirements stated above would be to sub-contract the majority of the services to third parties, which sub-contracting would constitute a substantial percentage of the services. Such an eventuality would be in breach of the general principles of public procurement, in that the contractor would not have the ability to actually perform the services but would be practically relying upon the ability of third parties for the performance of the large majority of the services. As is reiterated in local and European decisions, whilst sub-contracting is acceptable in public procurement, the award of contracts to entities that are unable to perform the majority of the services is not acceptable. Sub-contracting and the percentage thereof is permissible for the purposes of supporting the main contractor and not intended to practically replace the main contractor. A different approach would lead to a situation where contracts are awarded to entities that have no ability to fulfil the technical requirements but rely entirely on the abilities of third parties; such is not acceptable or desirable in terms of the general principles of public procurement.

»This board also noted the contracting authority's reasoned letter of reply filed on 5th December 2022 and its verbal submission during the hearing held on 24th January 2023, in that:

»a) The appellant is stating that the preferred bidder, namely *South Lease Ltd*, is not technically compliant because:

- »1. it lacks the necessary vehicles, with the requested requirements to perform the services stated in the tender document, and
- »2. it lacks the necessary human resources to execute the services required.

»b) Regarding point 1, bidder through the technical offer questionnaire confirmed that:

- »i. the minivans and tail-lifts used shall accommodate *circa* 25 to 60 trainees;
- »ii. a minimum of six (6) minivans of which one (1) must be equipped with a tail lift will be made available;
- »iii. all the vans registration date is from 2005 onwards;
- »iv. the drivers shall be competent persons in possession of the required license/s (*sic*) and experience;
- »v. he will provide the required number of vans to cover a maximum of 18 trips per day (9 trips morning and 9 trips afternoon) during the execution of the contract from Monday to Friday and a maximum of 4 trips per day for tail-lift vans;

»vi. 45% of vehicles will use alternative fuels.

»As can be attested from the technical offer questionnaire submitted by *South Lease Ltd*, the bidder 'agreed' to all the requirements listed under this form. Bidders had to submit the technical sheets of the vehicles where emission standards are defined. Following a clarification by the evaluation committee (EC), *South Lease Ltd* submitted a declaration by a third party engineer stating that the procured fleet shall be converted to LPG as sustainable fuels. The bidder also declared that the fleet, which is already Euro 6 shall be converted to sustainable fuels if the tender is awarded in their favour. This document was accepted by the EC in line with the provisions of the literature list. Furthermore, as is within its full powers, the EC sought guidance from the Ministry for Environment, Energy and Enterprise whether the offer can be considered as technically compliant at bidding stage as the bidder did not have in his possession 45% of the fleet running on sustainable fuel but will be converted only if the award is in his favour. The Ministry replied back that the "bids are compliant with the GPP requirement as long as 45% of the vehicles will use alternative fuels after contract award".

»Thus, the offer of *South Lease* was in fact valid and up to specifications and therefore, deemed as both administratively and technically compliant.

»c) In his second point raised, the appellant alleges that the preferred bidder does not have the necessary human resources, mainly that the preferred bidder does not have the necessary drivers at his disposal. At no point did the CA ask the bidders to submit information on either the number of drivers employed by the bidders, nor a list of employees duly registered with *Jobsplus*. In fact, the appellant himself did not submit this information at bidding stage either as this was neither requested nor necessary. The CA solely asked for the bidders to agree to be compliant to the following requirements as listed in the technical offer questionnaire:

- »i. drivers shall be competent persons in possession of the required licence/s and experience,
- »ii. they must be fully conversant with traffic regulations as well as the conditions of the contract,
- »iii. to provide a recent police conduct (obtained in the last 6 months) for the drivers,
- »iv. to provide a copy of a valid drivers' permit.
- »v. to provide a TM tag for the drivers.

»Verification of the above is required by the CA only after the signing of contract as per Article 6.1 - Personnel and Key Experts under the Terms of Reference of the Tender Document

»This board also noted the preferred bidder's reasoned letter of reply filed on 5th December 2022 and its verbal submission during the hearing held on 24th January 2023, in that:

»a) The appeal filed by the appellant is nothing more than a fishing expedition, intended to prolong unnecessarily the award of this contract. Indeed, the appellant presents this board with no evidence whatsoever to back his claims except his “opinion” that *South Lease* is not able to fulfil tender requirements. However, the same appellant misrepresents tender requirements in that the appellant reads into the tender document requirements which do not result therefrom and which in fact run counter to the express provisions of the tender document itself. It is only on the basis of his wrong reading of the tender document that the appellant arrives at the likewise wrong “opinion” that *South Lease* is not technically compliant while nonchalantly and cavalierly asserting that “there is no doubt that Leone Grech is both technically and administratively compliant”.

»b) Personnel and equipment

»In his appeal, the appellant quotes various extracts from the tender document to support his (incorrect) interpretation of the tender. Very conveniently, however, the appellant omits to mention a crucial aspect of the tender relating to personnel and equipment, namely article 16.4 of the Special Conditions which clearly and unequivocally stipulates that:-

»“After the signing of the contract, the contractor must provide the following documents within four (4) weeks from commencement order notification by the project leader: The contractor shall provide a list of the minivan drivers to be deployed under this contract. Minivans and Drivers: i. a recent police conduct (obtained in the last 6 months) ii. a copy of a valid drivers’ licence. iii. a *Transport Malta* (TM) tag. iv. a copy of all vehicles’ valid licenses. v. ILogbooks of minivans. The contractor must also submit a list of all the vehicles which will be used for the whole duration of the contract. Such list should contain vehicle registration number and shall be submitted within four (4) weeks from notification by the project leader”

»Contrary to the appellant's unfounded assertions, therefore, the tender document leaves no doubt whatsoever that the aforementioned documentation regarding personnel and vehicles did not need to be submitted as part of the tender submission / technical literature. The tender therefore clearly provided that the examination of the said documentation was not to fall within the remit of the evaluation committee and that it was to take place only after the relative contract is signed and not before. It is respectfully submitted that, faced with such clear and unambiguous wording, had the evaluation committee proceeded to demand and/or examine such documentation as part of its evaluation exercise, it would have acted *ultra vires* and would have usurped for itself powers which were not granted to it by the tender document. Indeed, it is further respectfully submitted that should this PCRБ accede to the appellant's request and embark on an exercise of collating and examining *South Lease's* personnel and equipment documentation at this stage, this PCRБ itself would be acting *ultra vires*

and in violation of the tender stipulation that such documentation would be examined after and not before the tender is awarded. Finally, the fact that the list of vehicles to be utilised for the execution of the contract need only be submitted “within four (4) weeks from notification by the project leader” and not at tender stage, clearly negates and totally quashes the appellant’s arguments that the necessary vehicles are to be/or should be readily available upon the submission of the tender document. There is absolutely nothing in the tender document which precludes the selected contractor from utilising vehicles acquired even after closing date for submissions and, indeed, even after the conclusion of the contract, as the appellant erroneously submits. For the record and for the comfort of the PCRB, *South Lease* hereby confirms that it has the ability and the capacity to honour all of its obligations under this procurement.

»c) Doctrine of self limitation

»The doctrine of self-limitation is an important public procurement principle which has been referred to by this board, the Court of Appeal and the Court of Justice of the European Union (CJEU) on various occasions. This doctrine lays down that tender submissions are adjudged only on the basis of conditions stipulated within the tender document and nothing else, thereby ensuring predictability and transparency. In the recent PCRB decision with number case 1665 of 2021 (27th December 2021), this board held that: “This board opines that the evaluation committee did not observe the principle of self-limitation when it deemed the appellant’s offer as technically non-compliant when it adjudged the equipment of the appellant company on issues not included within the tender dossier”.

»*South Lease* respectfully submits that if the appeal submitted by the appellant had to be upheld, it would infringe the principle of self-limitation, and all other procurement principles regulated *inter alia* by article 39 of the PPR.

»It further respectfully submits that if the appellant genuinely felt that there was any shortcoming in the way the tender document was drafted, the appellant had other remedies available to it of which he did not avail himself prior to the submission of his bid. The submission of his bid conclusively confirms his acceptance of all tender conditions by which he is now bound. Finally, it is also respectfully submitted, that should the evaluation and recommendation be confirmed and after *South Lease*’s personnel and vehicle documentation is scrutinised after the contract is signed (as stipulated in the tender documentation) and, for the sake of the argument only, they are found to be lacking or *South Lease* fails to honour its contract commitments, both the contracting authority and the appellant may avail themselves of the various remedies provided at law, including in terms of the Public Procurement Regulations.

»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 now consider appellant's grievances.

»a) This appeal is based on two (2) main grievances (reference to para. (a) of appellant's contentions).

- »i. In relation to the first grievance, *i.e.* the lack of necessary vehicles, it was established that the appellant submitted a number of logbooks to satisfy item n° 1.13 of the technical offer questionnaire (reference to article 2.2 of the Terms of Reference). The preferred bidder submitted a declaration stating "Kindly be informed that all vehicles provided have a Euro 6 engine. The technical sheet of the vehicle declaring that the engine is Euro 6 is herewith being attached. If our offer is favourably considered 45% of the fleet shall be converted to alternative fuel (liquified petroleum gas) as previously declared in the engineer's report submitted with the tender offer and which is being forwarded again".
- »ii. As for the second grievance, through the testimony under oath of Ms Maria Bartolo Galea it was ascertained that none of the economic operators submitted a list of personnel (drivers).

»b) Therefore, in the opinion of this board, the only relevant matter to be considered is whether such specification had to be satisfied at the tender stage or at contract stage.

»c) Relevant sections of the tender dossier are hereby being reproduced

- »i. Paragraph 16.4 – section 2 – "After the signing of the contract, the contractor must provide the following documents within four (4) weeks from commencement order notification by the project leader: The contractor shall provide a list of the minivan drivers to be deployed under this contract. Minivan and Drivers: i) a recent police conduct; ii) a copy of valid drivers' licence; iii) s *Transport Malta* (TM) tag; iv) a copy of all vehicles' valid licenses v) logbooks of minivans"
- »ii. Paragraph 16.4 – section 2 – "the minivans to be used during the duration of the contract, must be compliant with the criteria set in the terms of reference, section 3. In the case that other vehicles are used other than those proposed and indicated in the offer, these must be of the same standards."
- »iii. Paragraph 2.2 – section 3 – "the bidder must provide the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved the required standard, the measures must be documented and included in the tender application, and this must be approved by a credible third party".

»d) It is this board's opinion that the evaluation committee correctly interpreted such clauses in the sense that both the logbooks of vehicles to be used and the specific list of minivan drivers (personnel)

were required to be provided after the signing of the contract, more specifically within four (4) weeks from commencement order notification by the project leader.

»e) Arguments brought forward by appellant to the contrary of such interpretation are deemed irrelevant and erroneous by this board.

»i. Where in paragraph 16.4 of section 2 the appellant referred to “the minivans to be used during the duration of the contract must be compliant with the criteria set in the terms of reference, section 3. In the case that other vehicles are used other than those proposed and indicated in the offer, these must be of the same standards.”, this board opines that this applies in cases where in the course of the contract the contractor would be in need of changing the vehicles being used.

»ii. As for the arguments in relation to paragraph 2.2 of section 3, this board opines that this criterion applies only to any vehicles which at tender application stage would have been already upgraded to the required standard. This as per the wording used and emphasised in bold and underline hereafter “the bidder must provide the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved the required standard, the measures must be documented and included in the tender application, and this must be approved by a credible third party.” Hence this does not apply to *South Lease Ltd's* offer.

»Hence, this board does not uphold the appellant’s grievances.«

12. Leone Grech appella b’rikors tal-14 ta’ Frar 2023 u talab illi din il-qorti tħassar id-deċiżjoni tal-Bord ta’ Reviżjoni u tordna li l-kuntratt jingħata lilu. Wieġbu l-awtorità kontraenti u d-Direttur Ġenerali tal-Kuntratti, flimkien, fit-28 ta’ Frar 2023, u *South Lease* fl-10 ta’ Marzu 2023.

13. L-aggravji tal-appell ġew imfissra hekk:

»... . . . il-bord għamel interpretazzjoni żbaljata kemm tal-liġi u kif ukoll tat-termini tas-sejħa għall-offerti.

»L-iżball grosslan tal-bord huwa rifless fil-fatt li, skond il-bord, *South Lease* setgħet liberament tissottometti offerta mingħajr ma kienet tissodisfa r-rekwiżiti tekniċi mitluba fis-sejħa u huwa biss fl-eventwalità li *South Lease* tirbaħ is-sejħa għall-offerti li jkollha l-obbligu li tissodisfa r-rekwiżiti tekniċi mitluba fis-sejħa.

» A. Rekwiżiti Tekniċi dwar il-Vetturi

»... . . .

»F'dana l-kuntest dak li jrid jiġi mistfarreġ huwa jekk ir-rekwiżiti tas-sejha għal offerti ġewx sodisfatti, liema stħarriġ isir fil-kuntest tal-liġi, b'mod partikolari l-liġi sussidjarja 601.03, u dana *stante* li r-rekwiżit ta' sejha jridu bil-fors ikunu konformi mal-liġi u fin-nuqqas ikunu qed jiġu mwarrba l-prinċipji bażilari tal-akkwist pubbliku b'konsegwenzi xejn sbieħ f' dan il-kuntest,

»Issir referenza għal żewġ regolamenti tal-Liġi Sussidjarja 601.03 u *cioè* ir-regolament 62 u r-regolament 239(6).

»Ir-regolament 62(1) jistabilixxi hekk:

»“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.”

»Ir-regolament 239(6) jistabilixxi dan li ġej:

»“(6) Il-kriterji tal-għoti ma għandux ikollhom l-effett li jagħtu lill-awtorità kontraenti libertà mingħajr restrizzjonijiet għall-għażla. Huma għandhom jiżguraw il-possibbiltà ta' kompetizzjoni effettiva u għandhom jiġu akkumpanjati mill-ispeċifikazzjonijiet li jippermettu li l-informazzjoni mogħtija mill-offerenti tiġi vverifikata b'mod effettiv sabiex jiġi vvalutat kemm l-offerti issodisfaw il-kriterji tal-għoti. Fil-każ ta' dubju, l-awtoritajiet kontraenti għandhom jivverifikaw b'mod effettiv il-preċiżjoni tal-informazzjoni u l-evidenza mogħtija mill-offerenti.”

»Filwaqt li r-regolament 62(1) jistabilixxi li operatur ekonomiku jrid jkollu r-rekwiżiti stabbiliti fis-sejha għall-offerti sal-għeluq tas-sejha, l-artikolu 236(6) jistabilixxi li huwa d-dmir tal-awtorità kontraenti li fis-sejha għall-offerti titlob dawk id-dokumenti li jippermettula li tivverifika b'mod effettiv l-informazzjoni mogħtija mill-offerenti.

»F'dana r-rigward il-liġi hija ċara u dana fis-sens illi:

»(a) oblatur ekonomiku jrid jissodisfa r-rekwiżiti tas-sejha għall-offerti mill-bidu nett u *cioè* meta jissottometti l-offerta tiegħu u għandu jkun fil-pussess ta' dak kollu neċessarju u mitlub fis-sejha sad-data li jagħmel l-offerta tiegħu;

»(b) l-awtorità kontraenti għandha tinkludi speċifikazzjonijiet fis-sejha għall-offerti b'mod illi l-informazzjoni mogħtija mill-oblatur ekonomiku tkun tista' tiġi valutata kontra tali speċifikazzjonijiet u jiġi determinat il-konformità *o meno* tal-offerta mal-ispeċifikazzjonijiet.

»Iżda jidher illi għall-bord il-liġi kienet irrelevanti tant illi l-bord stqarr “*Arguments brought forward by appellant to the contrary of such interpretation are deemed irrelevant and erroneous by this board*”.

»... ..

»Is-sejha għall-offerti odjerna stabbilixxiet, fost rekwiżiti ohra, f' *Section 2.2 (Specific Objectives)* ta' *Section 3 (Terms of Reference)* is-segwenti rekwiżiti:

»“Adhere with the following National GPP³ Guidelines

³ *Green Public Procurement*

»“Exhaust Gas Emissions

»“45% of vehicles procured must be certified as using alternative fuels according to Directive (EU) 2019/116.

»“Verification: The bidder must provide the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved the required standard, the measures must be documented and included in the tender application, and this must be approved by a credible third party.”

»Ma’ dan għandu jiżdied il-fatt li l-*literature list* (annessa mas-sejħha għall-offerti) li kellha tiġi sottomessa mal-offerta tibda billi taqra hekk:

»“List of literature to be submitted with the offer”

»L-istess *literature list* imbgħad tkompli billi tispjega x’dokumenti għandhom jiġu sottomessi mal-offerta u taqra hekk:

»“The bidder must provide the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved the required standard, the measures must be documented and included in the tender application, and this must be approved by a credible third party.”

»Ukoll issir riferenza għal *clarification note 2* u b’mod partikolari għar-risposta lil *question 10* fejn fl-aħħar linja tar-risposta jingħad hekk:

“Any Euro emission level standard is acceptable, as long as the vehicle is using alternative fuel and is clearly illustrated during bidding stage.”

»Ukoll għandu jigi rilevat illi l-ewwel paragrafu ta’ *section 3 (Terms of Reference)* tas-sejħha għall-offerti tibda billi tgħid:

»“However it will be the responsibility of the respective bidders, at tendering stage, to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the contracting authority”

»Minn dak hawn fuq espost flimkien ma’ dak li tgħid il-liġi għandu jirriżulta b’mod inekwivoku illi l-oblaturi ekonomiċi kellhom, flimkien mal-offerta minnhom sottomessa, juru u jipprovdu dokumenti bħala prova li huma kellhom 45% tal-vetturi mitluba fis-sejħha li kienu joperaw b’*alternative fuel*.

»Dana r-rekwiżit kellhu jiġi sodisfatt fil-mument tal-offerta u mhux kif erronjament iddeċieda l-bord li tali rekwiżit kellu jiġi sodisfatt fi żmien erba’ ġimgħat wara li l-oblatur ekonomiku jingħata l-kuntratt.

»Għandu jkun ovvju, minn dak hawn fuq sottorness, li l-oblaturi ekonomiċi kellhom jissottomettu d-dokumenti tekniċi li juru l-*standards* tal-emissjonijiet tal-vetturi li qed jiġu offruti, flimkien mal-offerta minnhom sottomessa.

»... .. tenut kont ta’ dak indikat iktar ‘il fuq dwar il-Liġi Sussidjarja 601.03, dan ir-rekwiżit sar bil-ħsieb li tkun tista’ ssir verifika, waqt l-evalwazzjoni, li l-emissjonijiet tal-vetturi offruti jikkonformaw ma’ dak rikjest u b’hekk il-kumitat tal-evalwazzjoni jkun jista’ jara li l-emissjonijiet jilħqu ir-rekwiżit tas-sejħha.

»Altrimenti dana r-rekwiżit ma jagħmilx sens!

»Dana huwa konformi mat-tagħlim tal-Qorti tal-Ġustizzja tal-Unjoni Ewropea fejn fis-sentenza mgħtija fl-4 ta' Diċembru 2003 fl-ismijiet EVN AG, Wienstrom GmbH v. Republik Österreich, Stadtwerke Klagenfurt AG, Kärntner Elektrizitäts-AG (C-448/01), stabilixiet is-segwenti:

»“Therefore, an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement.”

»Dana l-fatt ġie anke rikonnoxxut mill-kumitat ta' evalwazzjoni tant illi *chairperson* tal-istess spjegat illi huma talbu parir mingħand Mark Vella Bamber (*Green Public Procurement*) sabiex jigi iċċarat il-fatt li *South Lease* kienet iddikjarat li fil-mument tas-sottomissjoni tal-offerta u anke waqt l-evalwazzjoni *South Lease* ma kellhiex vetturi li jissodisfaw ir-rekwiżiti tal-emissjonijiet fuq indikati.

»Fil-fatt *I-email* mibgħuta lil Mark Vella Bamber (datata 7 ta' Ottubru 2022) mill-kumitat ta' evalwazzjoni tgħid hekk fir-rigward tal-offerta ta' *South Lease*:

»“... .. can it be considered technically compliant as till now bidder does not have in his possession 45% of the fleet running on sustainable fuel but will be converted only if award is in his favour?”

»Minn dan jidher li anke l-kumitat tal-evalwazzjoni kien konsapevoli li għadarba *South Lease* ma kinitx f'pożizzjoni li tissodisfa r-rekwiżiti tekniċi fil-mument tal-offerta u l-evalwazzjoni, l-offerta tagħha ma setgħetx titqies valida iżda *nonostante* tablet parir mingħand terza persuna estranja għall-kumitat tal-evalwazzjoni dwar jekk l-offerta għandhiex titqies valida jew le.

»L-appellant jissottometti li r-rekwiżit in eżami kien rekwiżit mandatorju u d-dokumenti mitluba kienu intiżi sabiex jikkorroboraw iddikjarazzjonijiet li saru mill-operaturi ekonomiċi fit-*technical offer form*. Fil-fatt is-sejha għall-offerti tuza l-kelma “*must*” fejn qed tittratta dana r-rekwiżit u d-dokumenti li għandhom jiġu sottomessi bhala prova. Tant l-awtorità kontraenti riedet li tiġi i-verifikata l-flotta tal-*minibuses* li tkompli billi tgħid li: “*45% of vehicles procured must be certified*”. Tabilhaqq is-sejha b'din il-frazi tirreferi għal vetturi mixtrija meta tuza l-kelma *procured* fil-passat. Imkien ma tuza il-frazi *to be procured*. Li kieku l-*intendere* kien biss li jiġu vverifikati l-vetturi wara li jintrebaħ il-kuntratt x'kien il-bżonn li wiegħed jistabbilixxi tali kundizzjoni?

»Sabiex jiġġustifika d-deċiżjoni tiegħu l-bord, filwaqt li jwarrab dak kollu fuq espost bhala irrelevanti, jistrieħ interament fug l-klawsola 16.4 ta' *section 2 (Special conditions)*, liema klawsola ukoll issaħħaħ is-sottomissjonijiet tal-appellant tant illi l-istess klawsola tgħid hekk:

“The minivans to be used during the duration of the contract must be compliant with the criteria set in the Terms of Reference, Section 3. In the case that other vehicles are used other than those proposed and indicated in the offer, these must be of the same standards”

»Imma din id-dikjarazzjoni wkoll kienet irrelevanti għall-bord!

»L-istess artikolu li fuqu strieħ il-bord biex jiġġustifika d-deċiżjoni tiegħu wkoll qed tagħmilha ċara daqs il-kristall li mal-offerta kellhom

jiġu offruti vetturi li jissodisfaw il-kriterji tekniċi stabbiliti f'*section 3 (Terms of Reference)*, inkluż ir-rekwiżit tekniċu tal-emissjonijiet stabbilit fil-klawsola 2.2 ta' *section 3 (Terms of Reference)*;

»Izda l-opinjoni tal-bord dwar dina s-sottomissjoni kienet:

»“this board opines that this applies in cases where in the course of the contract the contractor would be in need of changing the vehicles being used.”

»Wieħed ma jistax jifhem kif anke l-kliem ċar u inekwivoku fis-sejha ġie għal kollox skartat biex tiġi ġustifikata deċiżjoni infondata għal kollox daqslikieku l-kliem “*other than those proposed and indicated in the offer*” ma kinux jeżistu u ġew injorati għal kollox.

»Hija preokkupanti ferm deċiżjoni bħal dika appellata u l-konsiderazzjonijiet magħmula biex tiġi ġustifikata l-istess.

»Huwa paċifiku li *South Lease* ma kinitx tissodisfa r-rekwiżiti tekniċi tal-emissjonijiet fil-mument li saret l-offerta u anċas waqt l-evalwazzjoni u għalhekk wieħed ma jistax jifhem kif setgħet qatt titqies bħala valida l-offerta ta' *South Lease* meta, b'zieda ma' dak fuq ingħad, l-istess sejha għal offeriti tistabilixxi fil-*General Rules Governing Tenders*, speċifikatarnent fl-artikolu 16.3 tgħid is-segwenti:

»“Without prejudice to the possibility of requesting rectifications vis-à-vis literature, if the literature submitted with the technical offer does not corroborate the offer submitted, the tenderer shall be disqualified”

»Kif ingħad l-offerta ta' *South Lease* ma issodisfatx ir-rekwiżiti tas-sejha u konsegwenzament il-letteratura li ġiet sottomessa ma tikkorborax id-dikjarazzjonijiet magħmula. Dan kellu jġib miegħu l-konsegwenza tal-iskwalifika ta' *South Lease stante* li kif qalet ben tajjeb din il-qorti fis-sentenza mogħtija fis-6 ta' Frar 2015 fl-ismijiet *SR Environmental Solutions Limited v. Dipartiment tal-Kuntratti* (rikors nru 433/2014):

»“Għandu jingħad in prinċipju li kull min huwa involut jil-proċess ta' sejha pubblika, inkluż ukoll dawk li huma mgħobbija bl-oneru li jiġġudika s-sejha, huma kollha marbutin bil-kundizzjonijiet li jkun imniżżla fid-dokumentazzjoni tas-sejha.”

»... .. iddur fejn iddur, il-konkluzjoni li wieħed jista' loġikament jasal għaliha hija waħda u *cioè* li kemm bis-saħħa tal-liġi u kemm bis-saħħa ta' dik stipulat fis-sejha għall-offerti, kull oblatur ekonomiku kellu l-obbligu li jissodisfa r-rekwiżiti tekniċi tal-emissjonijiet fil-mument li issottometta l-offerta tiegħu, u fin-nuqqas kellu jiġi meqjus bħala “*technically not compliant*”.

»B. Impjegati biżżejjed biex tissodisfa r-rekwiżiti tas-sejha għall-offerti

»... .. l-esponenti tirreferi għall-argumenti magħmula preċedement rigward ir-regolamenti 62(1) u 239(6) u tapplikahom għal dan l-argument. L-esponenti jissottometti li galadarba *South Lease* lanqas għad għandha l-vetturi li għandha bżonn ftit [wisq (?)] inqas għandha l-impjegati neċessarji sabiex issuq tali vetturi, Konsegwentement kien jinkombi fuq il-kumitat ta' evalwazzjoni li jivverifika jekk l-oblatur li kienu għażlu kellux biżżejjed impjegati sabiex jaqdi l-obbligi li daħal għalihom fil-mument li ssottometta l-offerta tiegħu.

»Meta wiehed jikkunsidra n-numru ta' vetturi li ġew mitluba, u cioè sitta (*minivans*) minn liema wiehed kellhu jkun *tail-lift van*, u meta wiehed jikkunsidra li l-operatur irid iġorr *circa* 25-60 klijent filgħodu u wara nofs in-nhar, il-kumitat tal-evalwazzjoni kellu minn tal-anqas jivverifika jekk bħala fatt *South Lease* kellhiex minimu ta' sitt xufiera, debitament liċenzjati, biex isuqu dawn l-istess vetturi.

»Iżda għal darb'oħra l-kumitat ta' evalwazzjoni ħass li dawn il-verifiki setgħu faċilment jiġu sodisfatti wara l-għoti tal-kuntratt lil *South Lease*.

»... .. id-deċiżjoni tal-bord hawn appellata hija tali li ser toħloq anomalija serja fil-qasam l-akkwisti pubbliċi u dana għaliex tali deċiżjoni ser tippermetti lil persuni li bl-ebda mod ma jkunu jissodisfaw ir-rekwiżiti f'sejha għal offerti, bħal ma hija *South Lease*, li jissottomettu l-offerti tagħhom xorta waħda u fl-eventwalità li jerbħu l-kuntratt jaraw kif jagħmlu sabiex jissodisfaw ir-rekwiżiti mitluba wara li jkunu rebħu tali konkors.

»Jekk mhux assurda tali sitwazzjoni hija ċertament tali li tippregudika serjament dawk l-operaturi li jkunu investew fl-operat tagħhom sabiex ikunu f'posizzjoni li jaqdu l-esiġenzi li jinqalgħu fis-settur tagħhom, inkluż sejhiet pubbliċi, u min-naħa l-oħra jiġu premjati dawk l-operaturi li ma jagħmlu ebda investment u ma jieħdu ebda riskju u jkun biss jekk jingħataw kuntratt li jagħmlu investment.«

14. Il-kwistjoni dwar l-ewwel aggravju – il-vetturi – essenzjalment hija jekk il-ħtieġa li l-oblatur ikollu mill-anqas ħamsa u erbgħin fil-mija (45%) tal-vetturi jaħdmu b'karburant alternattiv kellhiex tkun sodisfatta fil-waqt li jitfa' l-offerta, jew, għall-inqas, fil-waqt li jagħlaq iż-żmien għall-offerti – kif iġid l-appellant – jew fiż-żmien li jagħti l-para. 16.4 tal-*special conditions*, kif tgħid *South Lease*.
15. F'dan il-kuntest l-appellant jagħmel asserzjoni dommatika li iżda ma hijiex korretta. Ma huwiex dejjem illi oblatur "għandu jkun fil-pussess ta' dak kollu neċessarju u mitlub fis-sejha sad-data li jagħmel l-offerta tiegħu": hemm każijiet fejn dan hu meħtieġ⁴ iżda hemm ukoll każijiet fejn ma huwiex⁵: jiddependi mill-kondizzjoniet tas-sejha. Fi kliem ieħor, ma hijiex

⁴ Ara e.g. *Waste Collection Ltd v. Bord tal-Appelli dwar Kuntratti Pubbliċi*, App. 29 ta' Novembru 2013 (rik. nru 158/2013), para. 14.

⁵ Ara e.g. *Davico Ltd v. Princess Operations Ltd et*, App. 26 ta' Jannar 2022, (rik. nru 271/2021), para. 9.

regola ġenerali kif jippretendi li hi l-appellant. Il-kwistjoni hi x'kien meħtieġ fil-każ partikolari tallum.

16. Huwa minnu illi l-kondizzjonijiet tas-sejħa ma humiex għalkollox nieqsa minn ambigwiżà. Minn naħa waħda il-klawsola 2.2 tat-*terms of reference* taħt *specific objectives* trid illi “*The bidder must provide the technical sheets of the vehicles where emission standards are defined*”⁶, li tagħti x'tifhem huwa l-oblatur – *the bidder* – fil-waqt tal-offerta u mhux il-kuntratt wara li jintgħażel illi għandu jippreżenta d-dokumenti tekniċi. Hemm ukoll it-tweġiba ta' kjarifika li tgħid illi l-fatt illi “*the vehicle is using alternative fuel*” għandu jkun “*clearly illustrated during bidding stage*”.
17. Min-naħa l-oħra l-klawsola 16.4 tal-*special conditions*⁷ trid illi l-*logbooks* tal-vetturi jingiebu biss fi żmien erba' ġimgħat wara li l-oblatur magħżul ikun iffirma l-kuntratt, li tagħti x'tifhem illi biżżejjed illi l-vetturi jkunu disponibbli sa erba' ġimgħat wara li jkun iffirmit il-kuntratt.
18. Għandu jingħad ukoll illi l-kondizzjonijiet tas-sejħa jgħidu illi jkun biżżejjed illi vetturi illi meta ħarġu mill-fabbrika ma kinux jaħdmu b'karburant alternattiv ikunu jistgħu jinqalbu għal sistema ta' karburant alternattiv. Il-qorti għalhekk tifhem illi, jekk fost it-*technical sheets* li trid il-klawsola 2.2 jkun hemm – kif jidher li kien hemm fil-każ ta' *South Lease* – ċertifikazzjoni “*by a credible third party*” li l-vetturi jistgħu jinqalbu għal dak is-sistema, dan ikun biżżejjed.

⁶ Ara para. 5, *supra*.

⁷ Ara para. 2, *supra*.

19. Il-qorti għalhekk taqbel mal-Bord ta' Reviżjoni illi biżżejjed illi l-konformità tal-vetturi mal-kondizzjoniet tas-sejha tkun tirriżulta mil-*logbooks* illi għandhom jingiebu sa erba' ġimgħat wara li jiġi iffirmit il-kuntratt. Wara kolloxx, l-appellant stess jistqarr illi "*what is required to verify compliance are solely two documents i. the log books of the relative vehicles offered by the preferred bidder; and ii. the list of employees*". Kwantu għall vetturi, mela, dak illi hu meħtieġ huma l-*logbooks* u biżżejjed li dawn jingiebu sa erba' ġimgħat wara li jiġi iffirmit il-kuntratt.

20. Din l-interpretazzjoni hija wkoll konformi mal-ħtieġa illi l-kondizzjonijiet tas-sejha jaġevolaw u mhux joħonqu l-kompetizzjoni. F'dan il-kuntest huwa siewi dak li jgħidu l-awtorità kontraenti u d-Direttur Ġenerali tal-Kuntratti meta fit-tweġiba tagħhom josservaw illi:

»Din hija l-unika interpretazzjoni li tista' tkun fidila lejn il-prinċipju tal-kompetizzjoni ħielsa. Inkella l-akkwist pubbliku jiġi ristrett biss għal dawk l-operaturi ekonomiċi li għa għandhom immedjatement dispost l-ammont ta' vetturi mitlub mill-awtorità kontraenti li diġà jużaw karburanti alternattivi.

»Ġertament li l-operatur ekonomiku li jkun ingħata kuntratt preċedenti jkun ivvantaġġjat ferm fuq operaturi ekonomiċi oħra li (skond l-appellant) huma mistennija jkollhom flotta vetturi, diġà kkonvertiti biex jużaw karburanti alternattivi, dejjem wieqfa sakemm qed jistennew li tinħareġ sejha għal offerti, xi haġa li qatt ma jistgħu jkollhom garanzija tagħha. L-esponenti jissuspettaw li huwa proprju dan l-effett li jrid joħloq l-appellant għall-vantaġġ tiegħu. Dan peress li huwa qiegħed attwalment jipprovdi s-servizz li huwa l-materja tas-sejha għal offerti preżenti.«

21. Għal dawn ir-raġunijiet ma jstax jingħad illi dak li jridu r-regg. 62.(1) u 239(6) tal-L.S. 601.03 ma tħarsux, billi ma ntwerix li *South Lease* ma ipprovdietx id-dokumenti meħtieġa fil-waqt tal-offerta. Il-qorti għalhekk tiċħad l-ewwel aggravju tal-appell.

22. It-tieni aggravju huwa msejjes fuq l-argument illi “galadarba *South Lease* lanqas għad għandha l-vetturi li għandha bżonn fitit [wisq(?)] inqas għandha l-impjegati neċessarji sabiex issuq tali vetturi”. Hekk kif taqa’ l-premessa illi “*South Lease* lanqas għad għandha l-vetturi li għandha bżonn” taqa’ wkoll il-konklużjoni msejsa fuqha illi “fitit inqas għandha l-impjegati neċessarji sabiex issuq tali vetturi”. Ġà rajna, fil-konsiderazzjonijiet dwar l-aggravju ta’ qabel dan, illi l-premessa illi *South Lease* ma għandhiex il-vetturi meħtieġa ma ġietx sostanzjata mill-appellant, u għalhekk il-konklużjoni li jrid jiġbed minnha taqa’ wkoll.
23. L-asserzjoni tal-appellant illi *South Lease* ma għandhiex impjegati biżżejjed tibqa’ għalhekk asserzjoni gratuwita illi l-appellant baqa’ ma issostanzjax bi provi.
24. It-tieni aggravju wkoll huwa għalhekk miċħud.
25. Il-qorti għalhekk tiċħad l-appell.
26. L-ispejjeż ta’ dan l-appell jitħallsu mill-appellant Leone Grech.

Mark Chetcuti
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Deputat Registratur
da