



QORTI TAL-APPELL

IMĦALLFIN

**S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF CHRISTIAN FALZON SCERRI
ONOR. IMĦALLEF JOSETTE DEMICOLI**

Seduta ta' nhar il-Ħamis, 30 ta' Novembru, 2023.

Numru 6

Rikors numru 430/23/1

Melchior Dimech

v.

- 1. Ministeru għall-finanzi u Xogħol;**
- 2. Floorpul Co. Limited (C-37550)**
- 3. Direttur Ġenerali tal-Kuntratti għan-nom u in rappreżentanza tad-Dipartiment tal-Kuntratti**

Il-Qorti:

- 1. Din hija sentenza dwar appell imressaq minn Melchior Dimech kontra deċiżjoni mogħtija mill-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi fl-**

24 ta' Lulju, 2023: (i) fejn ġew miċħuda l-ilmenti tiegħu dwar il-kontenut tal-offerta tiegħu; (ii) fejn ġew imħassra r-riżultat tal-aġġudikazzjoni u l-ittri tat-twarrib tal-offerti; u (iii) fejn ġie ordnat biex l-awtorità kontraenti terġa' tagħmel għarbiel mill-ġdid tal-offerti, wara li titlob lill-oblaturi ekonomiċi kollha biex iġeddu l-offerti tagħhom skont l-**Artikolu 8.3 tal-General Rules Governing Tenders**.

Daħla

2. Fit-22 ta' Settembru, 2022, id-Dipartiment tal-Kuntratti ħabbar sejha pubblika bin-numru ta' riferenza 2321/2022 għal min kien interessat jipprovdi servizzi ta' tindif fil-Ministeru Għall-Finanzi u f'dipartimenti oħrajn għal żmien ta' sitta u tletin (36) xahar, b'jedd li l-awtorità kontraenti ttawwal il-kuntratt għal tnax-il (12) xahar ieħor.

3. Skont l-**Artikolu 3**, f'paġna 4 tad-dokument tas-sejha, din is-sejha kienet maqsuma f'sitt lottijiet differenti u kull lott kien meqjus bħala kuntratt għal rasu, b'dana li kull offerent seta' jitfa' offeriti għal kull wieħed minn dawn is-sitt lottijiet.

4. L-appell tal-lum jolqot biss l-ewwel lott, li għandu x'jaqsam mat-tindif fil-Ministeru Għall-Finanzi u Xogħol, li kellu valur stmat ta' €628,277.52.

5. Illi skont l-**Artikolu 4.5** tar-Raba' Taqsima, f'paġna 38 tad-dokument tas-sejħa:

«The contents of this procurement document complement the latest version of the General Rules Governing Tenders applicable on the date of the publication of this tender, the Terms of Use and the Manual for Economic Operators applicable to Government's e-Procurement Platform (available from the Resources section of www.etenders.gov.mt).»

6. Meta tħabbret din is-sejħa f'Settembru 2022, l-aħħar verżjoni tal-**General Rules Governing Tenders** li kienet fis-seħħ, kienet il-**verżjoni 4.5 ta' Lulju, 2022**.

7. L-**Artikoli 8 u 19.1** ta' dawn ir-regoli kienu jaqraw hekk:

«Period of Validity of Tenders

8.1 Tenders must remain valid for a period of 90 days after the deadline for submission of tenders indicated in the contract notice, the procurement document or as modified in accordance with Clause 10.1. Any tenderer who quotes a shorter validity period will be rejected.

8.2 The Director General Contracts/Sectoral Procurement Directorate/Head of Contracting Authority may consider cancelling the tender in line with what is established in Regulation 15 of the Public Procurement Regulations (2016).

8.3 In exceptional circumstances, the Tender Evaluation Committee, if approved to internally through the Contracting Authority, may request that tenderers extend the validity of tenders [without the need to extend the validity of the Tender Guarantee (Bid Bond) (as being referred to in Article 9.2 of these General Rules)] for two further periods of four (4) weeks each. Such requests and the responses to them must be made in writing through the ePPS in the form of a clarification, with the prior consent of the relevant authority, namely the DCC/SPD or CGA as applicable. A tenderer may refuse to comply with such a request without forfeiting his tender guarantee (Bid Bond). However, his/her tender will no longer be considered for award. If the

tenderer decides to accede to the extension, he/she may not modify his/her tender.

8.4 Following the further extension by eight (8) weeks, the non-conclusion of the evaluation process may lead to the cancellation of the tender.

8.5 The recommended bidder must maintain his/her tender for a further 60 days from the date of notification of award.

8.6 Once the recommendation has become definitive the recommended bidder is obliged to accept the offer through Government's e-procurement platform.

...

19.1 Prior to the expiration of the period of validity of the offers, the Central Government Authority / Sectoral Procurement Directorate / Contracting Authority will notify the successful tenderer in writing, that his/her submission has been recommended for award, pending any appeal being lodged in terms of the Public Procurement Regulations.»

8. B'ittra tal-14 ta' Marzu, 2023, id-Dipartiment tal-Kuntratti bagħat jgħarraf hekk lil Melchior Dimech:

I regret to inform you that the offer submitted by your company was found to be technically non-compliant since it failed the following mandatory criteria:

C2 Written Contract of Employment	<i>No mention of payment of Credit Transfer and payslip clauses in the given contract of employment</i>
C2 Implementation Service Quality Standards	<i>No ISO Certifications were submitted</i>

9. Fl-istess ittra, Melchior Dimech ġie mgħarraf li l-kuntratt b'rabta ma' dan il-lott ġie rakkomandat li jingħata lil Floorpul Co Ltd bil-prezz ta' €606,871.82 mingħajr Taxxa fuq il-Valur Miżjud.

10. Melchior Dimech ma qabilx ma' din id-deċiżjoni u għalhekk fit-22 ta' Marzu, 2023 huwa ressaq oġġezzjoni quddiem il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi msejsa fuq dawn ir-raġunijiet: (i) li s-sejha kellha tiġi mħassra għaliex l-għarbiel tal-offerti sar fi żmien itwal minn 90 jum, l-oblaturi ekonomiċi ma ġewx mitluba biex iġeddu l-offerti tagħhom kif imsemmi fl-**Artikolu 8.3 tal-*General Rules Governing Tenders*** u r-riżultat tal-aġġudikazzjoni ġie mħabbar wara li għalaq il-perjodu ta' validità tal-offerti bi ksur tal-**Artikolu 19.1 tal-*General Rules Governing Tenders***; u (ii) li f'kull każ, mhux minnu li l-offerta tiegħu mhijiex teknikament konformi ma' dak mitlub fis-sejha.

11. B'deċiżjoni mogħtija fl-24 ta' Lulju, 2023, il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi, iddeċieda l-każ hekk:

«1. On the Payment of Wages through Credit Transfer

a. Reference is made to the Tender Dossier Section 1 –Instructions to Tenderers, subsection 6.3 'Evaluation Grid' -C2 'Employment Conditions'. Within this section (C2), part 'iii' requested that Employees have a written contract of employment that corroborates with clauses C2(i) and C2(ii).

b. It is to be noted that the Appellant duly submitted a copy of the agreement he holds with his bankers in relation to credit transfer of wages whereby 'all costs are borne by the contractor'. This is in line with requirement C2(i) of the Evaluation Grid.

c. It is also to be noted that the Appellant duly submitted a copy of a payslip as issued to his employees. This is in line with requirement C2(ii) of the Evaluation Grid.

d. With reference to criterion C2(iii), the Appellant duly submitted a copy of a contract agreement which is used between the contractor and his employees. However, this Board agrees with the findings of the Evaluation Committee that although this document was duly submitted, it did not corroborate the requirements of criteria C2(i) and C2(ii).

i. In reference to C2(iii)(a), what the tender dossier required was a specific clause, in the contract agreement, showing that the wages will be paid and transferred to the employee through the agreement as referred to in C2(i). By just listing the IBAN number, in the contract agreement, there would have been no obligation on the contractor to transfer the wages by credit transfer.

ii. In reference to C2(iii)(b), similar to above, there is no mention in the contract agreement, that the employee will be furnished with a payslip at the end of the payroll period, be it monthly, fortnightly etc. From a simple review of the contract agreement, it can be stated that the word 'payslip' does not feature in such a document.

e. This Board, therefore, agrees with the statement made by witness Mr Jonathan Bugeja, under oath, that "what the Authority wanted was confirmation that the credit transfer and payslip were stated on the contract of employment". This in line with criterion C2(iii) of the Evaluation Grid. Since these were not present and / or corroborated, this Board does not uphold this grievance of the Appellant.

2. On the Implementation Services Quality Standards / ISO certificates

a. With reference to this point, 2 different 'grievances' were raised by the Appellant. Initially, that the documents presented by the preferred bidder referred to another entity. Secondly, that the authority rejected the declarations issued by an engineer in favour of the Appellant.

b. On the documents presented by the preferred bidder -

i. It is hereby being noted that the preferred bidder duly submitted the necessary ISO certificates in accordance with Evaluation Grid criterion C2(vii). The 'ambiguity', if any, was created when the name on the ISO certificates state "Floorpul (Malta) Co. Ltd", whereas the name on the ePPS system states "Floorpul Co. Ltd". This is an immaterial difference, since as has been shown, the

company's original name was in fact Floorpul Co. Ltd (as per the ePPS system). This was eventually changed during 2017, through proper channels and procedures with the Malta Business Registry, to Floorpul (Malta) Co. Ltd. Same issue happened with the registered address of the company which was changed during 2016. It is crucial to state that the Company (C) number stated on the Malta Business Registry and documents submitted in this tender procedure is the same.

c. On the declarations submitted by the Appellant -

i. Criterion C2(vii) makes reference to Terms of Reference Article 8 which states "The bidder is to provide the necessary official documentation in order to confirm that the service provision shall be in accordance with the following standards (or equivalent): a) SM EN ISO 9001: 2015 (or equivalent) b) SM EN ISO 14001:2015 (or equivalent) c) SM EN ISO 45001: 2018 (or equivalent)" It is this Board's opinion that such a requirement (submission of ISO certificates) was to be provided at bidding stage. As per Section 2 - Terms of Reference "..... However, it will be the responsibility of the respective bidders, at tendering stage, to prove that the standards..... they quoted are equivalent to the standards requested by the Contracting Authority" Therefore, documents submitted do not fulfil tender requirements.

Following the above analysis, this Board does not uphold this grievance, "On the Implementation Services Quality Standards / ISO certificates", of the Appellant.

3. On the Validity Period –

a. The timeline of events was duly ascertained during the hearing (reference to the minutes)

b. Before proceeding to the actual merits of this grievance, this Board must indicate its disapproval to argumentation brought forward by legal representatives of the Contracting Authority when they stated "... the delay was relatively one of days unlike the case quoted which involved years". Rules are rules and have to be followed! The Public Procurement Regulations ("PPR") and General Rules Governing Tenders on various occasions make reference to timelines which are mandatory in nature. These have to be observed.

c. On the other hand, the power vested in this Board as per PPR 90(3) to cancel the tendering process, as is being requested by the Appellant, needs to be exercised only if it is in the best overall interest of the situation. If other courses of action are more

justifiable, reasonable and proportional, this power should not be the tool of choice and has always been the practice of this Board a tender should be saved whenever possible.

d. While this Board notes and agrees with Appellant that article 8.3 of the General Rules Governing Tenders should in this circumstance have been applied, since the 90 days period as per article 8.1 had elapsed, this does not necessarily mean that the tender procedure should automatically be cancelled.

e. If one were to 'allow' for the "two further period of four (4) weeks" extension, such timeframe (from date of closing of the call for tender to recommendation of award), as referred to in the minutes, would not have elapsed.

f. Moreover, article 8.4 of the General Rules Governing Tenders (GRGT) is not making the cancellation of the tender mandatory.

g. A number of tests needs to be applied first. Initially, one needs to ascertain the "exceptional circumstances" as per article 8.3 of GRGT. Even though it is true that it is the same Contacting Authority that decided how a tender is drafted and issued, one needs also to take into consideration the number of lots and bidders taking part in the tendering process. Moreover, even if the GRGT makes no reference to the Christmas recess, as mentioned by the witness Mr Jonathan Bugeja, it is to be noted that such recess is part and parcel of the procurement process in Malta. Notices in this regard are even issued by the Department of Contracts!

h. Therefore, since it is this Board's opinion that all of this would fall within the remit of 'exceptional circumstances' and therefore the timeframe would not have elapsed, the most proportionate course of action would be to send the process back to re-evaluation for the evaluation committee to exercise its duty as per article 8.3 of the General Rules Governing Tenders and ascertain if the tenderers are willing to extend the validity of their offer.

Therefore, this Board upholds this grievance of the appellant in part by sending the tender process back to re-evaluation as per paragraph (h) above and does not uphold the request to cancel the tender procedure.

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 5:

a) Does not uphold Appellant's Letter of Objection and contentions in relation to the grievances: i) On the Payment of Wages through Credit Transfer and ii) On the Implementation Services Quality Standards / ISO certificates;

b) To partially uphold the Appellant's concerns and grievance in relation to the Validity Period as per paragraph (h) of the Board's considerations;

c) To cancel the 'Notice of Award' letter dated 14th March 2023;

d) To cancel the Letters of Rejection dated 14th March 2023;

e) To order the contracting authority to re-evaluate the bids received for Lot 5 with specific reference to article 8.3 of the General Rules Governing Tenders as per paragraph (h) of the Board's considerations;

f) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant in view of the grievance regarding the validity period.»

12. Melchior Debono appella minn din is-sentenza fit-8 ta' Awwissu, 2023 u talab biex din il-Qorti tħassar dawk il-partijiet tad-deċiżjoni tal-Bord fejn sab nuqqasijiet fl-offerta tiegħu u fejn bagħat l-atti lura lill-awtorità kontraenti sabiex din terġa' toħroġ riżultat ġdid, wara li titlob lill-oblaturi ekonomiċi kollha biex iġeddu l-offerti tagħhom skont l-**Artikolu 8.3** tal-**General Rules Governing Tenders**. Minflok huwa talab lil din il-Qorti sabiex tiddikjara li l-offerta tiegħu hija valida u/jew tħassar is-sejħa dwar Lott 5 u/jew tagħtih il-kuntratt.

13. Iż-żewġ aggravji mressqa minn Melchior Dimech huma dawn: (i) li s-sejħa għandha tiġi mħassra għaliex ma ġewx imħarsa l-**Artikoli 8** u **19.1** tal-**General Rules Governing Tenders**; u (ii) li l-offerta tiegħu kienet konformi mal-ħtiġijiet tas-sejħa.

14. Il-Ministeru Għall-Finanzi u d-Direttur Ġenerali tal-Kuntratti wieġbu għal dan l-appell fil-31 ta' Awwissu, 2023 u fit-tweġiba tagħhom huma fessru l-għala l-appell ta' Melchior Dimech għandu jiġi miċhud. Floorpul Co. Limited ma daħlitx risposta tal-appell u fis-seduta tad-9 ta' Novembru, 2023, l-avukat tagħha ddikjara li huwa m'għandu xejn xi jżid.

15. Inżamm smiġh fid-9 ta' Novembru, 2023 u minn hemmhekk il-kawża tħalliet biex tingħata s-sentenza llum.

Konsiderazzjonijiet:

16. Fl-**ewwel aggravju** tiegħu, Melchior Dimech jgħid li l-kumitat tal-għażla u l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi applikaw hażin l-**Artikoli 8.1, 8.3 u 19.1** tal-**General Rules Governing Tenders** fuq riprodotti. Huwa jsostni li l-għarbiel tal-offerti ma sarx fi żmien disgħin jum minn meta għalaq iż-żmien għat-tfiġh tal-offerti; li ma kinux jeżistu raġunijiet straordinarji biex jittawwal iż-żmien tal-għarbiel tal-offerti; u li f'kull każ ma saritx talba biex l-oblaturi ekonomiċi jgeddu l-offerti tagħhom. Jagħlaq billi jgħid li l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ma setax jaħfer dawn in-nuqqasijiet tal-kumitat tal-għażla billi jordna li ssir aġġudikazzjoni ġdida, wara li l-oblaturi ekonomiċi kollha jintalbu jgeddu l-offerta tagħhom skont l-**Artikolu 8.3** tal-**General Rules Governing Tenders**. Dan jsihqu għaliex fil-fehma tiegħu t-talba għall-estensjoni tal-

offerti ma tistax issir wara li l-offerti jkunu ġa skadew.

17. Illi jirriżulta bħala stat ta' fatt, li skont l-**Artikolu 2** tad-dokument tas-sejħa, l-offerenti kellhom żmien sal-25 ta' Ottubru, 2022 biex jixhtu l-offerti tagħhom. Skont l-**Artikolu 8.1** tal-**General Rules Governing Tenders** l-offerti kellhom jinżammu validi sa żmien disgħin jum mid-data tal-għeluq tas-sejħa. F'dan il-każ għalhekk l-offerti kellhom jibqgħu jgħoddu sat-23 ta' Jannar, 2023.

18. John Bugeja, wieħed mill-membri tal-kumitat tal-għażla, xehed quddiem il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi, li l-kumitat ma laħaqx għarbel l-offerti kollha sat-23 ta' Jannar, 2023 u dan peress: (i) li għal-lottijiet kollha l-kumitat kellu b'kollox iqis madwar sebgħin offerta; (ii) li xi offerenti kellhom jirrettifikaw l-offerti tagħhom; u (iii) li ma seta' jsir xejn bejn it-23 ta' Diċembru, 2022 u l-4 ta' Jannar, 2023 minħabba l-ferjat tal-Milied.

19. L-istess xhud qal li r-rapport tal-evalwazzjoni ġie mgħoddi għall-iskrutinju tad-Dipartiment tal-Kuntratti fl-20 ta' Frar, 2023 sabiex dan ikun jista' jagħmel il-verifiki tiegħu. Wara li saru dawn il-verifiki, ir-riżultat tal-aġġudikazzjoni tal-lottijiet kollha ġew imħabbra mid-Dipartiment tal-Kuntratti fl-14 ta' Marzu, 2023.

20. Bejn il-25 ta' Ottubru, 2022 u l-14 ta' Marzu, 2023 għaddew 140 jum, jiġifieri, 50 jum iktar mid-90 jum imsemmi fl-**Artikolu 8.1** tal-**General Rules Governing Tenders**.

21. Issa skont l-**Artikolu 15(2)(a)** tar-Regolamenti dwar l-Akkwist Pubbliku (Legislazzjoni Sussidjarja 601.03), li jagħmel riferenza għalih l-**Artikolu 8.2** tal-**General Rules Governing Tenders**, id-Direttur tal-Kuntratti jista' jiddeċiedi li jikkancella xi proċedura tal-offerti, jekk proċess ta' evalwazzjoni ma jkunx intemm sat-tmiem tal-perjodu ta' validità tal-offerti.

22. Il-fatt li l-liġi tuża' hawnhekk il-kliem «*jista' jiddeċiedi li jikkancella*» u mhux il-kliem «*għandu jikkancella*», neċessarjament ifisser li d-Direttur tal-Kuntratti jgawdi minn diskrezzjoni dwar jekk għandux iħassar is-sejha għar-raġuni li l-proċess tal-evalwazzjoni ma jkunx laħaq intemm sakemm għalaq iż-żmien tal-validità tal-offerti. Fi kliem ieħor, għalhekk il-kancellament tas-sejha mhijiex waħda awtomatika imma tiddependi fuq jekk id-Direttur tal-Kuntratti jkunx iddeċieda li jħassar dik is-sejha jew le.

23. Fil-każ tagħna, id-Direttur tal-Kuntratti ma ħareġ l-ebda deċiżjoni taħt l-**Artikolu 15(2)(a)** tar-Regolamenti dwar l-Akkwist Pubbliku li biha ħassar is-sejha inkwistjoni. Anzi f'dan il-każ, id-Direttur tal-Kuntratti qiegħed jinsisti li din is-sejha għadha valida.

24. Għad iżda li d-Direttur tal-Kuntratti ma tax deċiżjoni li biha ħassar is-sejha inkwistjoni, dan ma jfissirx li s-sejha ma tistax tiġi mħassra minn ħaddiehor. Kemm hu hekk, il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi skont l-**Artikolu 90(3) tar-Regolamenti dwar l-Akkwist Pubbliku** u l-Qorti tal-Appell skont l-**Artikolu 286(3) tar-Regolamenti dwar l-Akkwist Pubbliku** għandhom is-setgħa bil-liġi li jħassru sejha jekk dawn jidhrilhom li din hija l-aqwa soluzzjoni fiċ-ċirkostanzi tal-każ.

25. Il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi rraguna fis-sentenza tiegħu li s-soluzzjoni tat-tħassir tas-sejha hija waħda estrema u tali soluzzjoni għandha tintuża biss jekk wieħed ma jkunx jista' jdur fuq alternattivi oħra li huma aktar ġustifikati u xierqa fiċ-ċirkostanzi tal-każ. Sewwasew f'dan il-każ il-Bord qal li għalkemm l-evalwazzjoni tal-offerti ma saritx fi żmien 90 jum, madankollu l-evalwazzjoni ntemmet qabel ma lahaq għalaq il-massimu ta' 146 jum imsemmi fl-**Artikolu 8.3 tal-General Rules Governing Tenders**.

26. L-istess Bord kompli billi jgħid li f'dan il-każ kien hemm raġunijiet eċċezzjonali taħt l-**Artikolu 8.3 tal-General Rules Governing Tenders** għaliex kellu jkun hemm estensjoni tal-perjodu ta' evalwazzjoni għal aktar minn 90 jum u dan minħabba li kien hemm numru kbir ta' offerti li kellhom jiġu evalwati u minħabba li f'dan il-perjodu kien hemm il-ferjat tal-Milied.

Għalhekk il-Bord ikkonkluda li l-aqwa soluzzjoni f'dan il-każ ma kellhiex tkun dik li tiġi mħassra s-sejha, iżda l-aqwa soluzzjoni kellha tkun li r-riżultat tas-sejha jinħareġ mill-ġdid, wara li l-operaturi ekonomiċi jintalbu jekk għandhomx interess li jestendu l-validità tal-offerta tagħhom.

27. Din il-Qorti wara li xtarret sew l-aggravju tal-appellant u l-pożizzjoni tal-appellati, qiegħda tasal għall-fehma li s-soluzzjoni milfuqa mill-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi hija l-aktar waħda fejjeda fiċ-ċirkostanzi ta' dan il-każ.

28. Għalkemm huwa minnu dak li jgħid l-appellant li ż-żminijiet imsemmija fl-**Artikolu 8** tal-**General Rules Governing Tenders** qiegħdin hemm biex jiġu mħarsa u mhux biex jiġu mwarrba mill-awtoritajiet kompetenti, madankollu l-istess regoli ma jgħidux li s-sejha għandha awtomatikament tiġi mħassra jekk jgħaddi ż-żmien tal-validità tal-offerti. Kemm hu hekk, fl-**Artikolu 8.2** u **8.4** insibu l-frażijiet, «*The Director General Contracts/Sectoral Procurement Directorate/Head of Contracting Authority may consider cancelling the tender*» u «*the non-conclusion of the evaluation process may lead to the cancellation of the tender.*»

29. Tassew kontra dak li jsostni l-appellant, ir-regoli nfushom jipprospettaw sitwazzjoni, li sejha xorta waħda tista' tibqa' meqjusa bħala

valida minkejja li jkunu għaddew iż-żminijiet imsemmija fl-**Artikolu 8** tal-**General Rules Governing Tenders**.

30. Kif ingħad aktar kmieni, l-evalwazzjoni fil-każ tal-lum saret fi żmien 140 jum, li huwa iktar mid-90 jum imsemmi fl-**Artikolu 8.1** tal-**General Rules Governing Tenders** li fih l-offerti għandhom jinżammu fis-sehħ; iżda li huwa inqas mill-146 jum li huwa l-massimu taż-żmien li skont l-**Artikolu 8.3** tal-**General Rules Governing Tenders** jistgħu jiġu estiżi l-offerti.

31. L-appellant jgħid iżda fl-appell tiegħu li ma kienx hemm raġunijiet eċċezzjonali skont l-**Artikolu 8.3** tal-**General Rules Governing Tenders** biex ikun hemm estensjoni tal-offerti għal aktar minn 90 jum.

32. Din il-Qorti ma taqbilx iżda mal-appellant li f'dan il-każ ma kienx hemm raġunijiet eċċezzjonali biex ikun hemm estensjoni tal-validità tal-offerti.

33. Għad li din il-Qorti mhux bilfors taqbel mal-Bord ta' Reviżjoni li l-ferjat tal-Milied hija raġuni straordinarja biex tingħata l-estensjoni u dan għaliex daqskemm skont l-**Artikolu 289** tar-**Regolamenti dwar l-Akkwist Pubbliku** l-ferjat tal-Qrati msemmija fir-**Regoli dwar il-Prattika u l-Proċeduri tal-Qrati u l-Bon Ordni** m'għandhomx iżommu

milli jinstemgħu fiż-żmien tal-ferjat appelli mressqa taħt ir-regolamenti, daqstant ieħor allura dawn il-ferjat m'għandhomx iżommu lill-kumitat tal-għażla milli jtemm l-evalwazzjoni tal-offerti; b'danakollu din il-Qorti taqbel perfettament mal-Bord ta' Reviżjoni li n-numru kbir ta' offeriti li kellhom jiġu eżaminati mill-kumitat tal-għażla f'dan il-każ (madwar 70 għal-lottijiet kollha), jikkostitwixxi raġuni straordinarja u imprevedibbli li tiġġustifika l-estensjoni tal-offerti b'żewġ perjodi ta' erba' ġimgħat kull wieħed skont l-**Artikolu 8.3 tal-*General Rules Governing Tenders***.

34. L-appellant però jisħaq li anke jekk stess kien hemm raġunijiet straordinarji biex ikun hemm l-estensjoni tal-offerti, l-awtoritajiet kompetenti naqsu milli jitolbu lill-offerenti biex jestendu l-offerti tagħhom skont l-**Artikolu 8.3 tal-*General Rules Governing Tenders*** u skontu dan in-nuqqas ma setax jiġi msewwi mill-Bord ta' Reviżjoni billi jordna li din it-talba ssir b'mod retrospettiv. Dan hu hekk għaliex skont l-**Artikolu 19.1 tal-*General Rules Governing Tenders*** ir-riżultat tas-sejħa jrid joħroġ qabel u mhux wara li jiskadu l-offerti.

35. Din il-Qorti tapprezza ħafna l-argument tal-appellant u tħoss li l-Ministeru appellat u d-Dipartiment tal-Kuntratti naqsu mil-lat amministrattiv meta ma talbux lill-oblaturi ekonomiċi jgeddu l-offerti tagħhom skont il-proċedura indikata fl-**Artikolu 8.3 tal-*General Rules Governing Tenders***, malli ntebħu li huma ma kinux ħa jilħqu jtemmu l-

evalwazzjoni fi żmien 90 jum minn meta għalqet is-sejha. B'daqshekk però dan ma jfissirx li għaliex l-awtoritajiet kontraenti kienu traskurati f'dan l-aspett, allura jeżistu l-estremi biex is-sejha tiġi mħassra għalkollox.

36. M'hemmx dubju li huwa importanti ħafna li sejhiet pubbliċi jiġu pproċessati fi żmien xieraq u mhux jithallew imdendla. Dan huwa meħtieġ mhux biss biex l-oblaturi ekonomiċi ma jibqgħux fil-limbu dwar jekk hijiex ha tiġi aċċettata l-offerta tagħhom, iżda anke biex jiġi evitat ir-riskju ta' tfixkil tal-kompetizzjoni billi s-sejha tiġi mtawla għal t'apposta, bil-għan li oblaturi ekonomiċi ma jibqgħux aktar interessati fis-sejha u b'hekk l-awtoritajiet kontraenti jkunu jistgħu jiffirmaw mal-oblaturi ekonomiċi preferuti tagħhom.

37. Minkejja dan kollu però, xorta jibqa' l-fatt li kif tajjeb ingħad minn din il-Qorti fis-sentenza **Sandro Caruana v. Il-Kunsill Lokali Marsa et** deċiża fil-25 ta' Frar, 2021, l-**Artikolu 8.1** tal-**General Rules Governing Tenders** huwa maħsub biex fl-aħħar mill-aħħar joħloq obligazzjoni fuq l-oblatur li ma jiħux lura l-offerta tiegħu qabel ma jkunu għaddew id-disgħin jum mid-data tal-għeluq tal-offerti.

38. It-talba għall-estensjoni tal-offerta mbagħad hija meħtieġa sabiex l-awtoritajiet kontraenti jkollhom moħħhom mistrieħ li l-oblaturi ekonomiċi ha jibqgħu marbuta bl-offerta tagħhom minkejja d-dewmien fil-proċess

tal-għarbiel tal-offerti.

39. Għalkemm fil-kuntest tar-**Regolament tal-Kunsill Numru 1605/2002** dwar ir-Regolament Finanzjarju applikabbli għall-baġit ġenerali tal-Komunitajiet Ewropej, jgħodd ħafna dak li qalet il-Qorti tal-Ġustizzja tal-Unjoni Ewropea fis-sentenza **European Dynamics Luxembourg SA et v. European Joint Undertaking for ITER and the Development of Fusion Energy** deċiża fit-2 ta' Diċembru, 2015 illi:

*«the purpose of the validity period of tenders is to ensure that a tenderer does not vary his tender during the evaluation stage and that compliance with that period is not a condition sine qua non for the signature of contracts at the end of the award procedure (judgment in **Evropaiki Dynamiki v Commission**, cited in paragraph 23 above, EU:T:2012:127, paragraph 40).*

It follows from that case-law that the applicants may not regard evaluation of the tenders during their validity period as a condition of the validity of the tender procedure, and that their claim that the principles of transparency, sound administration and equal treatment between tenderers preclude a contract from being concluded when one or more tenders is no longer valid must be rejected.

Moreover, in so far as the applicants claim that F4E should have officially requested the first applicant to extend the validity of its tender when it realised that the period in question was not long enough to complete the evaluation phase, it should be stressed that, whilst it is true that the contracting authority is entitled to request an extension of the validity period of tenders, it is not required to do so under any of the applicable provisions.

As F4E correctly notes, the only consequence that may arise from that provision for the contracting authority is that it cannot oblige a tenderer whose tender has expired to sign and perform a contract based on the conditions set out in that tender.»

40. Mexa tajjeb għalhekk f'dan il-każ il-Bord ta' Revizjoni, meta mħabbat b'sitwazzjoni fejn l-awtoritajiet kompetenti naqsu milli jitolbu l-

estensjoni tal-offerti, huwa ma ħassarx is-sejha iżda talab lill-awtoritajiet kompetenti jerġgħu joħorġu riżultat ġdid, wara li jagħti l-fakultà lill-oblaturi ekonomiċi biex jekk iridu jestendu l-validità tal-offerta tagħhom. B'dan il-mod il-proċess jiġi konformi ma' dak mitlub fl-**Artikolu 19.1** tal-**General Rules Governing Tenders**, viz. li l-aġġudikazzjoni ssir fil-perijodu ta' validità tal-offerti.

41. Fi żgur, mhijiex indikattiva s-soluzzjoni proposta mill-appellant li s-sejha għandha tiġi mħassra kollha kemm hi. Soluzzjoni b'hal din twassal biex jiġi mfixkel il-proċess tal-kompetizzjoni minħabba li llum il-prezzijiet tal-oblaturi ekonomiċi huma mikxufa u għalhekk l-oblaturi jafu x'inhu l-prezz tal-oblaturi l-oħra u b'hekk ikunu jistgħu ibiddu l-offerta tagħhom jekk kemm-il darba ssir sejha ġdida.

42. Mod ieħor, biex titħares il-*par condicio* (i.e. it-trattament indaqs) tal-offerti, hija aktar xierqa u aktar proporzjonata s-soluzzjoni li ħareġ biha l-Bord ta' Reviżjoni, li mhux iħassar is-sejha iżda li jħassar ir-riżultat tal-aġġudikazzjoni u jordna li din l-aġġudikazzjoni ssir mill-ġdid, wara li l-oblaturi ekonomiċi jiġu mitluba biex jekk iridu jestendu l-offerti tagħhom. Jekk l-oblaturi ekonomiċi jestendu l-validità tal-offerti tagħhom, allura l-offerta tagħhom tibqa' l-istess kif kienet oriġinarjament u b'hekk kull oblatur jibqa' fl-istess qagħda li kien fiha meta tefa' l-offerta tiegħu. Min-naħa l-oħra min ma jkunx irid jestendi l-offerta, dan ikun ħieles li jagħmel

dan mingħajr ma jbati ebda konsegwenzi.

43. L-ewwel aggravju tal-appellant marbut mat-tħassir tas-sejħa għalhekk qiegħed jiġi miċħud.

44. Fit-**tieni aggravju** tiegħu, l-appellant jgħid li mhux veru li l-offerta tiegħu ma kinitx toqgħod ma' dak mitlub fis-sejħa.

45. Kif rajna aktar kmieni f'paragrafu 8 ta' din is-sentenza, l-offerta tal-appellant tqieset bħala mhux konformi għal żewġ raġunijiet: (i) fl-ewwel lok, għaliex huwa naqas milli jnewwel abbozz ta' kuntratt ta' impjeg li jispeċifika fih li l-impjegati tiegħu kienu sejrjn jithallsu bi trasferiment ta' kreditu u li huma kienu ħa jingħataw *pay slip*; u (ii) fit-tieni lok, huwa naqas milli jgħaddi ċ-ċertifikati tal-ISO.

46. Illi **klawsola C2 (i), (ii) u (iii)** f'paġna 13 tad-dokument tas-sejħa kienet taqra hekk:

«(i) Wages are paid by credit transfer where all costs are borne by the contractor (Mandatory)

Proof is to be provided either Agreement with a Bank or Written communication between bidder and Bank confirming direct credit settlement of wages.

(ii) Employees are provided with a payslip (Mandatory) (Copy of a payslip to be provided)

(iii) Employees have a written contract of employment that corroborates with clauses:

a. *C2(i) payment by credit transfer and*

b. *C2(ii) pay slip.*

A copy of a contract agreement between the bidder and an employee is to be provided. (Mandatory).»

47. Issa jirriżulta mill-atti li għalkemm l-appellant ippreżenta ftehim li huwa kellu mal-bank biex iħallas il-pagi tal-ħaddiema permezz ta' *credit transfer* u anke ppreżenta abbozz ta' *pay slip*, madankollu l-istess appellant ippreżenta abbozz ta' kuntratt ta' impjieg, li ma kienx fih klawnsoli speċifiċi dwar il-ħlas bil-*credit transfer* u l-għoti tal-*pay slip*.

48. Skont il-klawsola fuq imsemmija, l-oblatur iżda, ma kellux obbligu biss li jippreżenta l-ftehim tiegħu mal-bank u jippreżenta l-kopja tal-*pay slip*, imma kellu obbligu mandatorju li jippreżenta wkoll abbozz ta' kuntratt tax-xogħol li jikkorrabora li huwa kien tabilhaqq ħa jħallas lill-ħaddiema tiegħu bil-*credit transfer* u li kien ħa jagħtihom l-*pay slip*.

49. L-appellant iżda ma pprovdix abbozz ta' kuntratt tax-xogħol b'dawn l-affarijiet kif imsemmi fi **klawsola C2(iii)**. Jiġi b'hekk, li l-kumitat tal-għażla u l-Bord ta' Revizjoni qalu sewwa li l-offerta tiegħu ma kinitx konformi mal-ħtigijiet tas-sejħa minn dan l-aspett.

50. Fuq il-ħtieġa l-oħra, **klawsola C2 (vii)** f'paġna 14 tad-dokument tas-sejħa kienet taqra hekk:

«(vii) *Implementation Service Quality Standards (Mandatory Criteria)*

The bidder is to provide the necessary official documentation as per Terms of Reference Article 8, in order to confirm that the service provision shall be in accordance with the following standards (or equivalent):

a) *SM EN ISO 9001: 2015 (or equivalent) – Quality Management System*

b) *SM EN ISO 14001: 2015 (or equivalent) – Environmental Management System*

c) *SM ISO 45001: 2018 (or equivalent) – Occupational Health and Safety Management System.»*

51. L-appellant jgħid fl-appell tiegħu li l-offerta tiegħu hija konformi ma' din il-ħtieġa għaliex huwa ppreżenta dikjarazzjoni tal-Inġinier Luke Desira li kkonferma li s-servizzi tiegħu kienu ħa jkunu skont l-istandards mitluba. Jgħid ukoll li mhux xogħol il-kumitat tal-għażla li joqgħod jistħarreg dwar kif ser jitwettaq il-kuntratt.

52. Din il-Qorti tasal biex taqbel li jekk l-appellant huwiex kapaċi jew għandux l-attribwiti meħtieġa biex iwettaq il-kuntratt, huwa immaterjali fil-mument tal-evalwazzjoni u l-aġġudikazzjoni tal-offerti. Dan għaliex kif tajjeb intqal mill-Qorti Suprema tal-Kanada fis-sentenza ***Double N Earthmovers Limited v. Edmonton (City), 2007 SCC 3*** deċiża fil-25 ta' Jannar 2007, imsemmija minn din il-Qorti fis-sentenza ***Joe Micallef & Son Express Skip Services Limited v. Id-Direttur tal-Anzjani u Kura fil-Komunità et*** mogħtija fis-27 ta' Ġunju, 2014, «*To impose a duty on owners (contracting authorities) to investigate whether a bidder will*

comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties.»

53. Kompla jiżdied jingħad fl-istess sentenza, «*There is no reason why the parties would expect an owner (contracting authority) to investigate whether a bidder will comply, when each bidder is legally obliged to comply in the event its bid is accepted. Whether or not the bidder is, at the time of tender, capable of performing as promised is irrelevant in light of the bidder's legal obligation to do so once its bid is accepted.»*

54. Dejjem fuq it-tagħlim ta' din is-sentenza, «*The best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information.»*

55. Tassew kif ħa jġi mwettaq dan il-kuntratt meta dan jingħata mhux kwistjoni li jrid jidħol fiha l-kumitat tal-għażla (ara ***Cherubino Limited v. Dipartiment tal-Kuntratti et*** deċiża mill-Qorti tal-Appell fl-4 ta' Ottubru, 2017).

56. Fil-każ tagħna iżda n-nuqqas li sab il-kumitat tal-għażla ma kellu x'jaqsam xejn mal-mod kif ħa jitwettaq il-kuntratt, darba li dan sejjer jingħata. Mod ieħor in-nuqqas li sab il-kumitat tal-għażla kien li l-

kundizzjonijiet tas-sejha kienu jitolbu li l-offerent jippreżenta dokumenti uffiċjali li juru li huwa għandu SM EN ISO 9001: 2015, SM EN ISO 14001: 2015 u SM ISO 45001: 2018 jew l-ekwivalenti tagħhom, iżda l-appellant minflok ippreżenta dawn id-dokumenti uffiċjali, huwa ppreżenta biss dikjarazzjoni soġġettiva ta' inġinier.

57. Bir-raġun għalhekk li l-kumitat tal-għażla u l-Bord ta' Reviżjoni sabu li l-offerta tal-appellant ma kinitx tħares lanqas din il-ħtieġa. Jekk ir-regoli tas-sejha kienu jimponu l-preżentata ta' ċertu dokumenti, allura l-offerent għandu jagħti dak id-dokument u mhux jippretendi li l-awtorità taċċetta dokument ieħor li ma jkunx dak li jkun ġie mitlub.

58. Għalhekk anke dan it-tieni aggravju qiegħed jiġi miċħud kollu kemm hu.

Deċiżjoni

Għaldaqstant għal dawn ir-raġunijiet, il-Qorti qiegħda tiċċad l-appell ta' Melchior Dimech.

L-ispejjeż kollha tal-appell għandhom jitħallsu nofs bin-nofs mill-appellant Melchior Dimech fuq naħa u mill-Ministeru Għall-Finanzi u Xogħol u d-Direttur Ġenerali tal-Kuntratti flimkien bejniethom fuq in-naħa l-oħra u dan

għaliex għalkemm instab li l-offerta ta' Melchior Dimech ma kinitx konformi mal-ħtiġijiet tas-sejha, madankollu l-Ministeru u d-Direttur appellati jaħtu wkoll f'dan il-każ għaliex naqsu milli jsegwu l-proċedura msemmija fl-**Artikolu 8.3 tal-*General Rules Governing Tenders***.

Mark Chetcuti
Prim Imħallef

Christian Falzon Scerri
Imħallef

Josette Demicoli
Imħallef

Deputat Reġistratur
da