



## QORTI TAL-APPELL

### IMĦALLFIN

**S.T.O. PRIM IMĦALLEF MARK CHETCUTI**

**ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO**

**ONOR. IMĦALLEF ANTHONY ELLUL**

**Seduta ta' nhar it-Tnejn, 8 ta' April 2024**

**Numru 6**

**Rikors numru 632/2023/1**

***Luxury Living Technologies Limited (C-74593)***

**v.**

- 1. Ministeru għall-Ambjent, l-Energija u l-Intrapriża;**
- 2. *Melita Solar Limited (C-91316)*;**
- 3. *Lufthansa Technik Malta*;**
- 4. *San Niklaw Farm***

1. Dan huwa appell ta' *Luxury Living Technologies Limited* ["*Luxury Living*" jew "l-appellanti"] minn deċiżjoni tat-13 ta' Novembru 2023 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbliku ["L.S. 601.03"], li ċaħad oġġezzjoni mressqa mill-appellanti kontra deċiżjoni li titwarrab offerta tagħha wara sejha għal offerti magħmula mill-Ministeru għall-Ambjent, l-

Energija u l-Intrapriża [“il-ministeru” jew “l-awtorità kontraenti”] għal kuntratt pubbliku. Il-fatti rilevanti huma dawn:

2. Il-ministeru ħareġ sejha għal offerti għal kuntratt pubbliku. Fost il-kondizzjonijiet tal-offerta, dawk rilevanti għal dan l-appell iġiddu hekk:

»15.1.4.1 – Permit-related documents

»The bidder shall submit one of the following documents, as applicable:

»(a) For solar photovoltaic installations:

»(i) where the bidder is not yet in possession of an appropriate development permission, a screening letter issued by the Planning Authority shall be submitted ... ..

»... ..

»17. Period of validity of bids

»17.1 Bids must remain valid for a period of ninety (90) days after the deadline for submission of bids ... .. Any bid indicating a shorter validity period will be rejected.

»17.2 The contracting authority may consider cancelling the ITB<sup>1</sup> in the event that the evaluation process has not been concluded by the end of the validity period of the submitted bids.

»17.3 In exceptional circumstances the contracting authority may request that bidders extend the validity of bid. Such requests and the responses to them must be made in writing. A bidder may refuse to comply with such a request, in which case the bid will no longer be considered for award.

»32. Notification of award, contract clarifications

»32.1 Prior to the expiration of the period of validity of bids, the bidding process administrator will notify by email any bidder/s whose bid has/have been recommended for award ... ..

»... ..«

3. L-offerti kellhom isiru sat-30 ta' Mejju 2023 u d-disgħin jum imsemmija fil-klawsola 17.1 għalhekk għalqu fit-28 t'Awissu 2023. L-appellanti tefgħet l-offerta tagħha fis-7 ta' Mejju 2023.
4. FI-1 ta' Settembru 2023 – u għalhekk wara d-disgħin jum imsemmija fil-klawsola 17.1 – l-awtorità kontraenti għarrfet lill-appellanti illi kien hemm xi

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<sup>1</sup> *Invitation to bid*

nuqqasijiet – fosthom xi dokumenti nieqsa – fl-offerta taħgha. L-appellanti sewwiet in-nuqqasijiet kollha ħlief għal wieħed, għax baqgħet ma ipprezentatx *screening letter* mill-Awtorità tal-Ippjanar kif trid il-klawsola 15.1.4.1(a)(i) għax l-awtorità kontraenti kienet tal-fehma illi d-dokument illi ipprezentat l-appellanti ma kienx *screening letter* kif riedu l-kondizzjonijiet tas-sejha.

5. Għalhekk, b'ittra tas-26 ta' Settembru 2023 l-awtorità kontraenti għarrfet lill-appellanti illi:

»Following the clarifications/rectifications request sent on the 1<sup>st</sup> September 2023 a reply was granted; however with respect to the requirement under Clause 15.1.4.1 – permit-relation [*sic*] documents, a screening letter is required to be submitted as per point 12 – specific declarations under the bidder's declarations in the bid form – the submitted document is not a screening letter but merely an acknowledgement of a complete screening request; therefore not the required documentation.

»Hence, for this reason your bid has been found to be not compliant.«

6. L-appellanti ressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta' Reviżjoni b'ittra tad-9 ta' Ottubru 2023. L-oġġezzjoni kienet tolqot kemm id-deċiżjoni illi l-appellanti naqset milli tippreżenta d-dokument li riedet il-klawsola 15.1.4.1(a)(i) u kemm il-fatt illi l-avviż lill-oblatatur rakkomandat li ntgħażlet l-offerta tiegħu ma ngħatax “*prior to the expiration of the period of validity of bids*” kif trid il-klawsola 32.1 għax ingħata wara d-disgħin jum imsemmi fil-klawsola 17.1.
7. Bid-deċiżjoni tat-13 ta' Novembru 2023 il-Bord ta' Reviżjoni ċaħad l-oġġezzjoni tal-appellanti u ordna illi d-depożitu minnha mħallas biex setgħet tressaq l-oġġezzjoni ma jintraddx lilha.
8. Il-Bord ta' Reviżjoni ċaħad l-oġġezzjoni għal raġunijiet li fissirhom hekk:

»The board ... having noted the objection filed by *Luxury Living Technologies Limited*, (hereinafter referred to as the appellant) filed on the 9<sup>th</sup> October 2023, refers to the claims made by the same appellant with regard to the tender ... whereby, the appellant contends that:

»a) 1<sup>st</sup> grievance - The appellant has complied with the requirements under clause 15.1.4.1

»The ITB expressly stated under clause 15.1.4.1 – Permit Relation Documents – that a screening letter issued by the Planning Authority has to be submitted. From months before, the appellant had already been in the process of obtaining such screening letter from the Planning Authority and this purports [*sic*] the fact that the appellant's intentions were always in good faith to satisfy all the requirements of the ITB. The site in Mqabba where the screening letter by the Planning Authority was pending is of a sizeable portion, to be specific 26,000 sqm, and as one may understand such process by the Planning Authority as well as the architects involved can take time. The application process with the Planning Authority for the screening letter has been completed by the appellant on the 14 August 2023 by paying the requested application fee. This means that it has been completed, approved, and that no further recommendations, submissions, requests, and/or consultations were necessary for this application. From thereon, it meant that it was merely a matter of time until such screening letter is issued by the Planning Authority, something which the appellant had no control on. The delay in issuing a screening letter was solely attributed to the fault of another government authority and it shall not punish the appellant for the shortcomings of a third-party by completely disqualifying it from the ITB. The MEEE<sup>2</sup> should have accepted the acknowledgement of a complete screening request as it knows that the issuance thereof of the letter is merely a certain eventuality, as in fact happened on the 3<sup>rd</sup> October 2023.

»b) 2<sup>nd</sup> grievance - MEEE failed to honour the period of validity of bids

»The MEEE had failed to honour the period of validity of bids which must remain valid for a period of ninety (90) days after the deadline for the submission of bids. The period of days being referred to above is that calculated in calendar days, and by the day of the deadline for the submission of bids, that is 30<sup>th</sup> May 2023, to the actual email sent by the MEEE to the appellant requesting clarifications and/or rectifications, that is 26<sup>th</sup> September 2023<sup>3</sup>, the period of days is actually that of one-hundred and nineteen (119) days. By acting outside the period of validity of bids, the MEEE has acted *ultra vires* and beyond its allowable granted period of time in order to assess the compliance of a bid or otherwise. The MEEE has applied two weights two measures and is literally applying double standards when not accepting the acknowledgement of a complete screening request and not recognizing that it was merely a matter of

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<sup>2</sup> Il-ministeru

<sup>3</sup> L-ittra biex l-appellanti ssewwi n-nuqqasijiet hija dik tal-1 ta' Settembru 2023; l-ittra tas-26 ta' Settembru 2023 kienet biex tgħarraf lill-appellanti illi l-offerta tagħha twarrbet.

time for the other government authority to issue the screening letter following its completion on 14<sup>th</sup> August 2023.

- »b) 3<sup>rd</sup> grievance - the disqualification of MEEE is still not final since an appeal is permitted to be lodged before this board

»The MEEE has on the 29<sup>th</sup> September 2023 published and announced the final and approved list of bidders of the above-mentioned ITB and replaced the appellant's bid and allocated it to 4 bidders. This has been executed when the MEEE is well cognizant that the period of appeal is still valid till the 9<sup>th</sup> October 2023. By replacing the appellant's bid and allocating it to 4 different bidders, the MEEE has denied itself (and the general public who will benefit from such) the benefit of the cheapest offer by rejecting the appellant's bid on this basis in terms of bid price per kWh in Euro and allocating it to a higher and more expensive bidder. This discrepancy would reflect an overpayment of *circa* €1,000,000 should the appellant's bid be rejected. Since the disqualification of the appellant is still not in force pending the final decision by this board, by publishing the final and approved list of bidders the MEEE has once again acted abusively and contrary to the ITB requirements. During appeal stage it shall be permitted to an appellant to present new evidence, whether orally or documentary. This legal remedy is well enshrined in local legislation regulating procedural matters. In this case, the reason is that should the acknowledgement of a complete screening request is not accepted as the required document as per clause 15.1.4.1. - Permit-Relation Documents, as perhaps the required final document could not be obtained during the evaluation of the ITB, the appellant shall be permitted to present the screening letter issued by the Planning Authority on 3<sup>rd</sup> October 2023.

»This board also noted the contracting authority's reasoned letter of reply filed on 17<sup>th</sup> October 2023 and its verbal submission during the hearing held on 7<sup>th</sup> November 2023, in that:

- »a) 1<sup>st</sup> grievance - Compliance of the Appellant's Bid

»As clearly stated in the invitation to bid documents Volume 1, Section 1, clause 15.1.4. 1(a)(i), bidders for solar photovoltaic installations, who are not yet in possession of an appropriate development permission, shall submit a screening letter issued by the Planning Authority. The appellant failed to submit the aforementioned mandatory screening letter with its initial offer to the contracting authority and submitted instead a 'screening initial submission requirements' document outlining the requirements which the appellant had to satisfy for the Planning Authority to consider its application for a screening letter complete, which document is clearly not the screening letter required by the aforementioned clause 15.1.4.1(a)(i). Pursuant to clause 15.2 of the ITB documents Volume 1, Section 1, the tender evaluation committee issued a request for clarification /rectification to the appellant clearly requesting it to *inter alia* submit the screening letter required by the above-mentioned clause 15.1.4.1(a)(i). The Appellant failed to submit the screening letter required by the above-mentioned clause 15.1.4.1(a)(i) in its reply to the above-mentioned request for clarification /rectification and submitted instead an 'acknowledgement of

complete screening request' which again is clearly not the screening letter required by the aforementioned clause 15.1.4.1(a)(i). The appellant's offer was subsequently rejected on this basis. Furthermore, in its objection the appellant confirmed that it completed the planning authority's process for the screening letter on the 14<sup>th</sup> day of August 2023 and this when it could have easily done so immediately on and/or after the 17<sup>th</sup> day of February 2023 given that the ITB document was published on the latter date. As such, the appellant had ample time to obtain the required screening letter and its failure to submit the said screening letter is only attributable to its carelessness. Moreover, the contracting authority submits that the abovementioned clause 15.2 clearly states that the bidders' failure to comply to any clarification/rectification request/s shall result in the bidders offer not being considered any further. Having already given the appellant the opportunity to submit the required screening letter, the tender evaluation committee could not simply ignore the fact that the appellant failed to submit the required screening letter or request a fresh rectification /clarification without infringing the tender terms in breach of the principle of self-limitation.

»b) 2<sup>nd</sup> grievance - Period of Validity of Bids

»In its second grievance, the appellant is arguing that the evaluation committee failed to honour the period of validity of bids, and thus breached the doctrine of self-limitation. The principle of self-limitation is seen as a corollary to the principles of equal treatment and transparency and was given its due importance during the evaluation, such that the evaluation committee adhered to the terms of the ITB document. The case law of the General Court of the Court of Justice of the European Union [*sic*] defines clearly that the doctrine of self-limitation cannot be read without reference to the principle of equal treatment of economic operators:

»"It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations."

»Therefore, the objective of the doctrine of self-limitation is to enforce the principle of equal treatment, *inter alia*, in accordance with regulation 39(1) of the Public Procurement Regulations (S.L. 601.03) so that all tender conditions apply to all bidders equally. It is clear according to the above-cited case law that, even if for the sake of the argument it is to be accepted that the contracting authority has not honoured the period of validity of bids, this omission does not alter the tender requirements. The bidders were still bound by the same tender requirements, and, therefore, no bidder was disadvantaged and a level playing field

was maintained. Therefore, given that there is no doubt that all bidders had been treated equally there could have been no breach of the principle of self-limitation.

»c) 3<sup>rd</sup> grievance: Appeal before the PCRB

»Contrary to what the appellant is alleging in its objection, on the 29<sup>th</sup> day of September 2023 the contracting authority published the recommendations for award in line with the Invitation to Bid documents Volume 1, Section 1, clause 32.4. The contracting authority reminds the appellant that once an appeal has been lodged in terms of regulation 270 of the Public Procurement Regulations (S.L. 601.03) the award process is suspended *ipso jure* by operation of regulation 275 of the same Regulations, and pursuant to the ITB documents Volume 1, Section 1, clause 32.3 the list of bidders recommended for award will only be formally finalised following the outcome of this appeals process. Moreover, the contracting authority submits that it is a basic principle of administrative law that the board cannot substitute its discretion for that of the administrative authorities. Contrary to the appellant's expectations, the board cannot, therefore, issue an award decision itself or otherwise declare that a bidder is compliant or not or accept the appellant's tardy screening letter as if it were the tender evaluation committee.

»This board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider appellant's grievances in their entirety.

»a) 1<sup>st</sup> grievance – screening letter

- »i. Relevant to this grievance is section 15.1.4.1 Permit-related Documents of the ITB which states "The bidder shall submit one of the following documents, as applicable: (a) For solar photovoltaic installations: where the bidder is not yet in possession of an appropriate development permission, a screening letter issued by the Planning Authority shall be submitted (applicable for solar photovoltaic installations only); ... .."
- »ii. Also relevant is Mr Jonathan Orlando's testimony under oath when questioned on the various letters presented by the appellant during this appeal, in relation to section 15.1.4.1, that "The actual screening letter is the document dated 3<sup>rd</sup> October 2023 and no other previous documents issued were such".
- »iii. This board notes that what the ITB requested was clear and unambiguous. If the economic operator was opting for the first option provided by section 15.1.4.1 of the ITB, it had to mandatorily present a 'screening letter'. Reference is made to section 15.1.4.1(i) by the use of the word "shall".
- »iv. However, with its initial submission, the appellant submitted a 'screening initial submission requirements' which is certainly not what the ITB requested. This was also corroborated during the testimony of Mr Jonathan Orlando.

- »v. This board notes that the contracting authority duly issued a rectification request whereby, again, the appellant did not regularise its position.
- »vi. Arguments by appellant that the evaluation committee had to delve into and analyse S.L. 552.13 article 3(5) are not entertained by this board as it is the Planning Authority the only responsible authority that is to issue this type of document (*i.e.* screening letter) after all the due processes are vetted and concluded. Any analysis into this matter by the evaluation committee, as is being requested by the appellant, and conclusion that documents submitted by appellant could somehow replace the actual document which was clearly requested by the ITB would without a shadow of a doubt constitute a breach in the principle of self-limitation which the evaluation committees are bound to observe.
  - »Therefore, this grievance of the appellant is strongly rejected.
- »b) 2<sup>nd</sup> grievance – Validity Period
  - »i. Relevant to this grievance is paragraph 17 of the ITB document and it is only with respect to what is listed therein that this grievance is to be decided upon.
  - »ii. Paragraph 17.1 mainly states that the bids are to remain valid for a period of ninety (90) days. This was not breached by either party.
  - »iii. Paragraph 17.2 states that “The contracting authority may consider cancelling the ITB in the event that the evaluation process has not been concluded by the end of the validity period of the submitted bids”. It was duly ascertained through the testimony of the chairperson of the evaluation committee that no such consideration was discussed and / or considered. Therefore, in the eyes of the evaluation committee the evaluation process was to proceed ahead.
  - »iv. Paragraph 17.3 states that “In exceptional circumstances the contracting authority may request that bidders extend the validity of bid. Such requests and the responses to them must be made in writing. A bidder may refuse to comply with such a request, in which case the bid will no longer be considered for award”.
  - »v. From all of the above, this board concluded that A) the contracting authority ‘may’ consider cancelling the ITB, *i.e.* it is not mandatorily obliged to. Such a decision (to cancel) was not taken by the evaluation committee; B) the exceptional circumstances debate comes only into force if and when the bidders are requested to extend the validity of their bids. This request was also never issued by the evaluation committee and hence is deemed irrelevant to proceedings.
  - »vi. Once that the bidders were not requested to extend the validity of their bids (*vide* paragraph 17.3) and the evaluation committee did not decide on the cancellation of the process (*vide* paragraph 17.2), this board concludes



that, on the expiration of the 90 days period, the bidders were no longer liable for damages should they not accept to proceed to the signing of the contract should they be recommended for award.

»vii. On the other hand, paragraph 17.2 leaves it in the hands of the evaluation committee / contracting authority to decide on whether to cancel the process or otherwise.

»viii. Once a decision to cancel has not been made and a request to extend the validity of bids was also not made, this board opines that the evaluation process could continue but the bidders would no longer be liable for damages should they not accept to proceed to the signing of the contract should they be recommended for award.

»Therefore, this grievance of the appellant is not being upheld.

»c) 3<sup>rd</sup> grievance – Disqualification

»On the 29<sup>th</sup> September 2023, the contracting authority published the recommendation for award in line with established protocol. Within such letter it is duly stated that “Right of Recourse: Bidders are informed that any objection to the decisions listed above must reach the office of the Public Contracts Review Board at Notre Dame Ditch, Floriana, by not later than 9<sup>th</sup> October 2023, 12:00 *p.m.* (noon), against a deposit of €20,000 (twenty thousand euro)”. Once the contracting authority has only issued a recommendation for award, provided a right of recourse and not proceeded to sign any contracts with recommended bidders, it is this board’s opinion that regulation 275 of the Public Procurement Regulations which states “The Department of Contracts, the Sectoral Procurement Directorate or the contracting authority involved, as the case may be, shall be precluded from concluding the contract during the period of ten calendar days allowed for the submission of appeals. The award process shall be completely suspended if an appeal is eventually submitted”, has been fully adhered to.

»Therefore, this grievance, even by the appellant’s own initial submissions during the hearing, is thereby exhausted and does not merit any further comments.

»The board, having evaluated all the above and based on the above considerations ...:

- »a) does not uphold appellant’s letter of objection and contentions;
- »b) upholds the contracting authority’s notice of award;
- »c) directs that the deposit paid by appellant not be reimbursed. «

9. *Luxury Living* appellat b’rikors tal-4 ta’ Diċembru 2023. Il-ministeru wiegħbet fid-22 ta’ Diċembru 2023; *Melita Solar Limited* ukoll wiegħbet fid-5 ta’ Jannar 2024; u *Lufthansa Technik Malta Limited* wiegħbet fid-19 ta’ Jannar 2024.

10. L-ewwel aggravju tal-appell igħid illi d-deċiżjoni tal-Bord ta' Reviżjoni hija msejsa fuq applikazzjoni ħażina tal-paragrafi 17.1, 17.2, 17.3 u 32.1 tal-kondizzjonijiet tas-sejha, speċifikament għax l-avviż lill-oblatur rakkomandat ma ngħatax "*prior to the expiration of the period of validity of bids*". L-appellanti tgħid illi la kien hemm ċirkostanzi eċċezzjonali biex l-awtorità kontraenti setgħet, taħt il-paragrafu 17.2, titlob lill-oblaturi jessendu ż-żmien li matulu l-offerta tagħhom kienet torbot, u f'kull każ lanqas ma għamlet talba bħal dik.
11. Il-qorti tosserva illi l-kwistjoni ma hijiex jekk, meta ngħata l-avviż lill-oblatur rakkomandat, l-offerti kinux għadhom jorbtu iżda jekk l-għażla tal-oblatur tiswiex ladarba l-avviż ingħata wara li l-offerti ma kinux għadhom jorbtu. Għalhekk huma irrelevanti l-argumenti mressqa mill-appellanti dwar jekk kienx hemm ċirkostanzi eċċezzjonali li kienu jiggustifikaw talba mill-awtorità kontraenti biex l-offerti jibqgħu fis-sehħ u dwar jekk fil-fatt sarix talba bħal dik. Ma huwiex kontestat illi, ladarba l-avviż ingħata meta l-offerta ma kinitx għadha torbot, l-oblatur rakkomandat kien ħieles jidholx fil-kuntratt jew le, iżda dan ma jfissirx bilfors illi l-għażla ma tiswiex.
12. Huwa minnu illi l-kondizzjonijiet tas-sejha jridu illi dak l-avviż jingħata "*prior to the expiration of the period of validity of bids*" iżda huwa relevanti wkoll dak li jgħid il-para. 17.2, viz. illi "*the contracting authority may consider cancelling the ITB in the event that the evaluation process has not been concluded by the end of the validity period of the submitted bids*".
13. Dan ifisser illi meta, bħal fil-każ tallum, il-proċess tal-evalwazzjoni ma jkunx intemm sakemm kienu għadhom jorbtu l-offerti, is-sejha ma tit-

ħassarx *ipso facto* iżda biss jekk hekk jidhrilha l-awtorità kontraenti. Il-fatt li l-awtorità baqgħet għaddejja bil-proċess tal-għażla jfisser illi ma għażlitx li tħassar is-sejħa, li, mela, baqgħet tiswa, b'dan iżda li l-oblaturi ma baqgħux marbuta bl-offerta tagħhom.

14. Fil-verità, dan fehmitu l-appellanti għax mhux biss l-awtorità kontraenti qieset illi ma kellhiex tħassar is-sejħa u illi setgħet tkompli bil-proċess ta' evalwazzjoni u għażla, iżda wkoll l-appellanti stess qieset illi l-proċess kien għadu għaddej, tant illi wiegħbet – għalkemm b'mod li tqies mhux għalkollox sodisfaċenti – għall-istedina tal-awtorità kontraenti biex tippreżenta xi dokumenti nieqsa, għalkemm kemm l-istedina tal-awtorità u kemm it-tweġiba tal-appellanti saru meta l-offerti ma kinux għadhom jorbtu.
15. Huwa kontradittorju u inkonsistenti l-atteġġjament tal-appellanti li tqis li l-proċess għadu għaddej meta ipprezentat id-dokumenti bit-tama li l-offerta tagħha tintlaqa' u tqis illi l-proċess kien għà tħassar meta ipprezentat dawk id-dokumenti issa li taf li ntgħażel oblatur ieħor.
16. F'kull każ, iżda, ukoll likieku l-appellanti ma komplietx tieħu sehem fil-proċess ladarba l-offerta tagħha ma kinitx għadha torbortha, il-fatt li għadda ż-żmien li matulu l-offerti baqgħu jorbtu ma jwassalx biex il-proċess ta' għażla jittqies li ma jiswiex<sup>4</sup>.

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<sup>4</sup> Ara e.g. *European Dynamics Luxembourg SA et v. European Joint Undertaking for ITER and the Development of Fusion Energy*, QĠUE, 2 ta' Diċembru 2015 każ T-553/13:

»22 Whilst it is certainly in the interest of the contracting authority to complete its assessment before the expiry of the tenders' validity period, exceeding that time-limit cannot render the procedure unlawful, nor can it constitute a ground for cancellation of the evaluation of the tenders.

»... ..

17. Dan l-aggravju huwa għalhekk miċħud.
18. Fit-tieni aggravju l-appellanti tgħid illi d-depożitu li ħallset biex setgħet tressaq l-oġġezzjoni tagħha quddiem il-Bord ta' Reviżjoni kellu jintradd-ilha.
19. Billi l-meritu ta' dan l-aggravju jiddependi wkoll fuq jekk jintlaqgħux aggravji oħra tal-appellanti, il-qorti sejra tqis dan l-aggravju wara li tkun qieset it-tielet aggravju li jgħid illi l-offerta tal-appellanti ma kellhiex titwarrab għax kienet tiswa.
20. It-tielet aggravju gie m'fisser hekk:

»L-għan ta' dan ir-rekwiżit<sup>5</sup> huwa li l-awtorità kontraenti taċċerta ruħha li s-sit propost għandu u/jew jista' jkollu awtorizzazzjoni neċessarja sabiex jaqdi l-funzjoni mixtieqa.

»Is-soċjetà *LLT* [l-appellanti], apparti li daħħlet it-talba tagħha għal tali konsiderazzjoni, marret pass *oltre* milli jitlob il-proċess ta' *screening*, u ħallset l-ammonti tal-applikazzjoni (għad-differenza ta' xi wħud minn dawk li rebħu s-sejħa). ... ..

»... ..

»Għalhekk il-bord tal-evalwazzjoni kellu l-komfort neċessarju mixtieq fl-istadju tas-sejħa li s-soċjetà *LLT* kienet ser tagħti lill-awtorità kontraenti dak li għandha bżonn – aktar minn hekk mhux neċessarju. Kif kemm-il darba ikkonfermat, in kwantu għal dak li huwa l-esekuzzjoni tal-kuntratti, m'għandux jaqa' fil-mansjoni tal-*evaluation committee*. F'dak l-istadju hemm il-mekkaniżmi kollha sabiex l-awtorità kontraenti tittutela lilha nfisha.«

21. Li riedu l-kondizzjonijiet tas-sejħa hu illi, flimkien mal-offerta – jew għallinqas fiż-żmien mogħti wara li ssir talba mill-awtorità kontraenti biex l-oblatur jagħmel tajjeb għal xi nuqqasijiet fl-offerta – l-oblatur jippreżenta “a *screening letter issued by the Planning Authority*”. L-appellanti ma ppreżentatx dan id-dokument flimkien mal-offerta u ippreżentat biss, minflok,

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»It follows ... that the applicants may not regard evaluation of the tenders during their validity period as a condition of the validity of the tender procedure. ... ..«

<sup>5</sup> Dwar *Permit-related documents*, § 15.1.4.1 tas-sejħa għal offeriti; ara para. 2 *supra*.

“*an acknowledgement of a complete screening request*” li, ovgjament, ma huwiex l-istess ħaġa, u baqgħet ma ipprezentatx id-dokument meħtieġ wara talba għalhekk mill-awtorità kontraenti. Kif sewwa qal il-Bord ta’ Revizjoni, ma kienx fil-kompetenza tal-kumitat tal-għażla li jara jekk it-tagħrif mogħti fil-*complete screening request* ipprezentata mill-appellanti kienx biżżejjed biex tinħareġ *screening letter* kif riedu l-kondizzjonijiet tas-sejħa, għax dak l-eżercizzju seta’ jsir biss mill-Awtorità tal-Ippjanar.

22. Il-fatt jibqa’ illi l-appellanti ma ipprezentatx dak kollu li riedu l-kondizzjonijiet tas-sejħa fiż-żmien li ngħatalha u għalhekk ma jistax jitqies illi l-offerta tagħha kienet tiswa.
23. Dan l-aggravju wkoll għalhekk huwa miċħud.
24. Immorru lura mela għat-tieni aggravju, li essenzjalment igħid illi “l-ministeru kien *de minimis* traskurat, u fil-*peggior ipotesi* ġie jaqa’ u jqum mill-kundizzjonijiet tas-sejħa tiegħu stess” meta kompli l-proċess ta’ evalwazzjoni meta l-offerti ma kinux għadhom jorbtu, u li għalhekk il-Bord ta’ Revizjoni kellu jqis dan in-nuqqas tal-ministeru meta jiġi biex iqis jekk id-depożitu kellux jintradd.
25. Ġà rajna, fil-konsiderazzjonijiet dwar l-ewwel aggravju, illi kienet fis-setgħa tal-ministeru bħala awtorità kontraenti illi jagħzel jew li jħassar il-proċess jekk l-evalwazzjoni tal-offerti ma tkunx intemmet sakemm dawn ikunu għadhom jorbtu, jew ikomplix bil-proċess. Ma ntweriex illi kien minħabba traskuraġni jew xi nuqqas ieħor tal-ministeru illi l-evalwazzjoni ma laħqitx intemmet sakemm kienu jorbtu l-offerti. Rajna wkoll illi l-appellanti baqgħet tiegħu sehem fil-proċess għalkemm setgħet għażlet,

mingħajr konsegwenzi ħżiena għaliha, li ma tiħux aktar sehem ladarba l-offerta tagħha ma baqgħetx torbot.

26. L-appellanti ssemmi s-sentenza mogħtija minn din il-qorti fit-30 ta' Novembru 2023 *in re* Melchiorre Dimech v. Ministeru għall-Finanzi u Xogħol *et*<sup>6</sup> li qasmet l-ispejjeż tal-appell bejn l-awtorità kontraenti u l-appellant għax l-awtorità kontraenti ma kinitx temmet l-evalwazzjoni sakemm baqgħu jorbtu l-offerti u ma talbitx estensjoni taż-żmien. Ukoll, f'dak il-każ il-Bord ta' Revizjoni kien iddeċieda illi *"the deposit be refunded to the appellant in view of the grievance regarding the validity period"*.
27. Għandu jingħad iżda illi fil-każ ta' Dimech il-Bord ta' Revizjoni kien sab – u l-Qorti tal-Appell qablet – illi fiċ-ċirkostanzi ta' dak il-każ il-proċess tal-għażla jsir mill-ġdid għax *"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"*. Fil-każ tallum, iżda, rajna illi l-awtorità kontraenti kellha s-setgħa – u mhux l-obbligu – li tħassar is-sejħa jekk l-evalwazzjoni ma tkunx laħqet saret sakemm għadhom jorbtu l-offerti, u l-fatt li għażlet li tkompli bil-proċess bla ma titlob estensjoni taż-żmien tar-rabta tal-offerti ma wassal għal ebda invalidità; għalhekk ma kienx hemm il-ħtieġa – bħal fil-każ ta' Dimech – illi l-proċess ta' evalwazzjoni jsir mill-ġdid. Iċ-ċirkostanzi tallum huma għalhekk differenti għax ma tqiesx li jkun aktar xieraq illi l-proċess tal-għażla jithassar u jsir mill-ġdid.

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<sup>6</sup> Rikors nru 431/2023

28. Rajna wkoll illi l-aggravju tal-appellanti fil-meritu – viz. illi l-offerta tagħha ma kellhiex titwarrab – ma sfoqqlux li jintlaqa’.
29. Dan l-aggravju wkoll huwa għalhekk miċhud.
30. Għal dawn ir-raġunijiet il-qorti tiċhad l-appell.
31. L-ispejjeż tal-appell tħallashom l-appellanti.

Mark Chetcuti  
Prim Imħallef

Giannino Caruana Demajo  
Imħallef

Anthony Ellul  
Imħallef

Deputat Reġistratur  
SS