



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, 17 ta' Ġunju, 2024.

Numru 2

Rikors numru 23/2024/1

Cardona Engineering Works (TID-187139)

v.

- 1. *Central Procurement & Supplies Unit;***
- 2. *Malta Red Cross Society;***
- 3. *Dipartiment tal-Kuntratti;***
- 4. *Leone Grech***

1. Dan huwa appell ta' *Cardona Engineering Works* ["*Cardona*" jew "l-appellanti"] minn deciżjoni tal-5 ta' Jannar 2024 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-appellanti kontra deciżjoni li tintlaqa' offerta ta' *Malta Red Cross Society* ["*MRCS*"] wara sejha għal offerti magħmula mis-*Central Procurement and Supplies Unit* ["*CPSU*" jew "l-awtorità kontraenti"] għal kuntratt pubbliku. Il-fatti rilevanti huma dawn:

2. Fit-8 t'Awissu 2003 CPSU ħarġt sejha għal offerti għal "*negotiated procedure for the leasing of non-emergency ambulances plus drivers and porters for the non-emergency ambulance garage*". L-offerti kellhom isiru sas-16 t'Awissu 2023. Il-kriterju tal-għażla kellu jkun il-prezz u s-sejha tgħid illi l-awtorità kontraenti tistenna illi l-kuntratt ikun jiswa madwar miljun, mija u wieħed u sittin elf, ħames mija u tmenin euro (€ 1,161,580), mhux magħduda t-taxxa fuq il-valur miżjud. Tefgħu offerti Cardona, bil-prezz ta' miljun mija u tlieta u tletin elf, seba' mija u tmienja u erbgħin euro (€ 1,133,748), u MRSC, bil-prezz ta' sitt mija u erbgħa u sebgħin elf, mitejn u erbgħa u tmenin euro (€ 674,284).
3. Hemm kontestazzjoni bejn il-partijiet dwar meta Cardona kienet mgħarrfa bid-deċiżjoni li MRCS titqies l-oblatur preferut: CPSU tgħid illi l-avviż ingħata bil-posta elettronika (*email*) fil-5 ta' Settembru 2023 waqt li Cardona tgħid illi ma ngħatat ebda avviż kif irid ir-reg. 272 tal-L.S. 601.03. Li jirriżulta huwa illi b'ittra tas-27 ta' Settembru 2023 l-awtorità kontraenti għarrfet lil Cardona illi l-kuntratt effettivament ingħata lil MRCS.
4. Cardona ressqet oġġezzjoni quddiem il-Bord ta' Revizjoni b'ittra tat-28 ta' Settembru 2023. Ir-raġunijiet tal-oġġezzjoni kienu illi l-offerta rakkomandata kienet baxxa wisq, li ma ħarsitx il-kondizzjonijiet kollha tas-sejha, u illi l-proċess tal-għażla tmexxa ħażin.
5. Bid-deċiżjoni tal-5 ta' Jannar 2024 il-Bord ta' Revizjoni ċaħad l-oġġezzjoni tal-appellanti, għalkemm ordna illi d-depożitu minnha mħallas biex setgħet tressaq l-oġġezzjoni jintraddilha.

6. Il-Bord ta' Revizjoni ċaħad l-oġġezzjoni għal raġunijiet li fissirhom hekk:

»The board ... having noted the objection filed by *Cardona Engineering Works* (hereinafter referred to as the appellant) on the 29th September 2023, refers to the claims made by the same appellant with regard to the tender ... whereby, the appellant contends that:

»a) 1st grievance – The price of the recommended bidder is abnormally low

»In accordance with article 234(1) of the Public Procurement Regulations (PPR), contracting authorities are required to investigate wheresoever an economic operator has submitted an abnormally low tender: "Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services". Whilst it is unclear if any investigation has been undertaken by the contracting authority, failure shall render it to be in breach of article 234 of the PPR, and as confirmed in the PCRB case 1614 (dated 6th August 2021) it shall lead to the cancellation of the award and the revaluation of the offers. It is hereby additionally imperative to investigate further provision 243(2)(f) of the PPR, which specifically deals with "the possibility of the tenderer obtaining State aid", since this would automatically distort competition. The recommended tenderer, which is a voluntary organization setup through its statute, but acknowledged as such through Chapter 359 of the Laws Malta – which status renders it eligible for public funding – a matter which should have been investigated by the evaluation committee in accordance with article 234 of the PPR.

»b) 2nd grievance – The doctrine of self-limitation

»The tender document in provision 9.13, the contracting authority requested that the economic operators submit a copy of logbooks, as per hereunder: "Copy of logbooks are to be presented at tendering stage". To satisfy the requirement, the economic operators must: a) either "be the owner of the vehicles requested and thereby submit a copy of their logbooks" or "in accordance with article 235 of the PPR, rely on the capacities of third parties, and in the process submit confirmation that the resources shall be available to the economic operator throughout the duration of the agreement". For clarities (*sic*) sake, sub-contracting is not permissible in the context under review, since it would exceed the permitted percentage of sub-contracting. It is the position of the appellant that the recommended bidder did not produce any of the above, and thereby the award is in breach of the technical specifications.

»b) 3rd grievance – Procedural faults

»As will be shown throughout the PCRB sitting, the evaluation process is marred by breaches of the PPR. The evaluation procedural faults include:

»i. failure to provide a recommendation notice; instead a contract award notice has been published (a contract

award can only be confirmed after the lapse of the appeal period);

- »ii. an email communication received from CPSU that the economic operator shall commence operations on the 2nd October 2023;
- »iii. a recommendation which is included in the ePPS¹, which recommendation is dated 23rd August 2023, however the document is blank.

»This board also noted the contracting authority's reasoned letter of reply filed on 9th October 2023 and its verbal submission during the hearings held on 19th October 2023 and 23rd November 2023, in that:

»a) First preliminary plea – Application is *fuori termine*

»From the drafting of the application, but especially from the requests, it is amply clear that the objector's application is one in terms of regulation 270 of the Public Procurement Regulations. Regulation 270 in fact states: "... by any decision taken including a proposed award in obtaining a contract, a rejection of a tender ...". Regulation 271 furthermore states that: "The objection shall be filed within ten calendar days ...". Although the VEAT² notice and notification period was not part of the Department of Contract's authorisation, the objector was still informed by means of an email dated 5th September 2023, that the contract was recommended for award to a cheaper compliant offer. The email was sent by a representative of the contracting authority to the email address used by the objector and therefore in terms of regulation 271 of the PPR; the appeal period should have started to run from that particular day, ending on the 15th of September 2023. The time frame set in regulation 271 of the PPR is a clear time frame and in the opinion of CPSU a peremptory period and inherently linked to the preservation of public order.

»Now that it is clearly proven that the rules of procedure, particularly that relating to appeal periods, are of a peremptory nature, therefore cannot be extended in any way, CPSU will proceed to dissect Regulation 271 to prove its applicability to the case in question.

»The first criteria [*recte*, criterion] is that "the objection shall be filed within ten calendar days". This is clear and not subject to any other interpretation.

»According to regulation 271 the 10 days shall run from "the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means" gives the information. The medium of communication thus is only specified in the sense that it should be an electronic means. In the case at hand this information was given by means of an email, which is surely an electronic means, therefore this element was clearly satisfied.

¹ *electronic Public Procurement System*

² *voluntary ex ante transparency notice*

»The third element is the information given. According to regulation 271 this should be “its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period”. It is hereby being emphasized that the word “or” is used, thus the information that is to be communicated electronically is either their “proposed award decision” or “the rejection of a tender” or “the cancellation of the call for tenders”. By informing the contractor that the contract was recommended for award to a cheaper compliant offer, the objector was clearly informed that his offer was rejected, thus this element is also satisfied.

»What was not satisfied was the filing of the objection within the peremptory period of 10 days from when the rejection was communicated electronically. Regulation 271, and the following regulations, do not provide for any exceptions to the 10 day rule and thus the appeal should be declared null and void since it is *fuori termine*.

»b) Second preliminary plea – Unsustainable requests

»The objector was well aware that the contract was already concluded between CPSU and the Malta Red Cross Society for two reasons. The first reason is that CPSU informed the objector that the new operator was starting its operations on the 2nd of October 2023, and this by means of an email dated 25th September 2023. The second reason is the very fact that a contract award notice has been issued and sent to the objector on the 27th of September 2023. As its name clearly states, this is issued when the contract has been awarded. The objector is not new to public procurement procedures and thus is well aware that the contract award notice is issued after a contract has been concluded. Moreover it is also established by law that the contract award notice is issued after the contract is concluded, as regulation 43(1) of the PPR provides that: “(1) Not later than thirty days after the conclusion of a contract or of a framework agreement, following the decision to award or conclude it, the authority responsible for the tendering process shall send a contract award notice on the results of the procurement procedure”. For the above reasons and since the requests to this board are unsustainable, this board should abstain from giving a decision on the merits.

»c) First Grievance of the objector – Abnormally low offer

»CPSU, without prejudice to its preliminary pleas to which it holds firm, is presenting a reply on the merits of the objector's grievances, the first one being the claim of an abnormally low offer. CPSU submits that the estimated contract value was calculated on previous contracts values and the incumbent operator happens to be the objector who was giving the service on the basis of a direct order, and thus comparing the objector's offer to the estimates contract value would be comparing the objector's price with the objector's price. Although the Red Cross Society is a voluntary organisation, and the price submitted was a very competitive price, they provided detailed costings which to the satisfaction of the evaluation committee were sufficient to

justify the price by which they were bidding. CPSU submits that the primary aim of the public procurement legislation regime in Malta and throughout the European Union is that the state and, ultimately, the general public obtains a service or supplies which are up to the required standards and specifications and at the best price possible. This general principle is fine tuned with other safeguards such as that against abnormally low tenders; however such safeguards should only be triggered in the general public interest, and where the price is low without justification. The evaluation committee also confirms that the costings provided by Red Cross Society did not factor in any state aid.

- »d) Second grievance of the objector – The doctrine of self limitation
 - »The objector in this part of the objection claims that the evaluation committee did not abide with the principle of self limitation, since, according to the objector, Red Cross Society did not produce a copy of the log books. The claims in paragraph 2.3 of the objection letter are merely suppositions or an extended interpretation of the objector, intended only to further this grievance which does not exist. The principle of self limitation is that the evaluation committee should limit its discretion to the conditions written in the call, only. The conditions simply requested a copy of the log book at tendering stage, with no additional condition or qualification at all. The log books were presented to the satisfaction of the evaluation committee and thus this condition has been satisfied and the evaluation committee strictly adhered to the principle of self limitation.
- »e) Third grievance of the objector – Procedural fault
 - »This third grievance has been addressed and justified in the preliminary pleas and exposition of facts.
 - »This board also noted the preferred bidder's reasoned letter of reply filed on 9th October 2023 and its verbal submission during the hearings held on 19th October 2023 and 23rd November 2023, in that:
- »a) First preliminary plea – Appellant's second demand is inadmissible
 - »The appellant's first part of its second demand is inadmissible at law and must be rejected by this board. This is without prejudice to the contracting authority's first 2 preliminary pleas. The appellant is requesting the board to: "now therefore, whilst reserving the right to put forward further submissions, the appellant hereby requests (...) ii. to declare that the offer by Malta Red Cross Society is (...) a. Abnormally low (...)". This board can never make a finding and declare that Malta Red Cross's financial offer is abnormally low. At most, and upon an aggrieved bidder's specific and express request, this board may decide whether Malta Red Cross's financial offer appears to be abnormally low, and, if so, decide whether the contracting authority should give Malta Red Cross an opportunity to explain in further detail the economic rationale of its purportedly

abnormally low tender in line with regulation 243 of the Public Procurement Regulations.

»The Courts of Justice of the European Union have consistently held that a bidder, whose financial offer appears to be abnormally low, cannot be automatically excluded from the competitive tender process before it is given the opportunity of explaining the economic rationale of its tender. This board has conformed to this position in past decisions. Therefore, the appellant's grievance on Malta Red Cross's purportedly abnormally low offer and its consequent demand are simply inadmissible and cannot be considered by this board. Given the inadmissibility of the appellant's third demand ..., this board is barred from considering the first ground of appeal. If this board considers and decides this first ground of appeal it would issue a decision which exceeds the appellant's demands *extra* and, or *ultra petita*.

- »b) First ground – Malta Red Cross's financial offer is not abnormally low

»Without prejudice to the first preliminary plea, Malta Red Cross's financial offer is not abnormally low, but simply one which was more competitive than the appellant's. The burden of proof rests with the appellant to prove that Malta Red Cross's financial offer is abnormally low. The appellant's exorbitantly high financial offer is certainly not a relevant metric for this exercise. Malta Red Cross can attest that the financial offer can be explained in further detail, confidentially to the contracting authority, with reference to the economics of the services provided, and that Malta Red Cross complies and will continue to comply with all relevant labour, social and environmental laws in terms of regulations 13(m) and 16(k) of the PPR. Malta Red Cross can also attest that the only financial support it receives from the Government of Malta is a yearly grant with which Malta Red Cross pays the annual contribution fees to International Committee of the Red Cross; and International Federation of Red Cross and Red Crescent Societies (including EU Office Membership contribution).

»In 2022, this yearly grant did not exceed €20,000 and it was all utilised to cover these contribution fees. Malta Red Cross's Director General is also seconded from the Government of Malta. However, the Director General will have no tangible role in the management and performance of the contract resulting from the negotiated procedure.

- »c) Second ground: Malta Red Cross complied with all tender conditions

»Malta Red Cross refutes the appellant's allegation that its offer was not compliant with the technical specifications of the negotiated procedure. The negotiated procedure, on this specific issue, simply requested that "copy of logbooks is to be presented at tendering stage", with which Malta Red Cross complied. Malta Red Cross submits that the deployment of the ambulances remains a performance condition and it would have been disproportionate and contrary to genuine competition to

interpret it otherwise. The logbooks were expressly required by the Contracting Authority to verify that the proposed ambulances comply with the technical specifications, in particular, that the year of manufacture was 2014 or after and that the classification was EURO 5 or better. As a matter of fact, the ambulances offered by Malta Red Cross did comply with the technical specifications. As at present, and pursuant to the public contract resulting from the second RfQ³, Malta Red Cross has, amongst other resources, deployed 4 ambulances which are under its ownership. Therefore, Malta Red Cross submits that this second ground of appeal ought to be rejected for these reasons and others that might be brought in due course.

- »d) Third ground: the alleged “procedural faults” do not render the contracting authority’s decision illegal

»Malta Red Cross submits that it is for the contracting authority to address this last final ground for it has conducted the evaluation of the offers submitted. Malta Red Cross reserves the right to make further submissions in writing after it is in receipt of the contracting authority’s reply. Having said that, the alleged procedural faults cited in the appeal are not related to the evaluation process but the publication of the conclusion of the evaluation process. These procedural faults would typically have an impact on an aggrieved bidder’s right to a rapid and effective remedy in terms of the Remedies Directive (Directive 1989/665/EEC, as amended). In this case, these alleged “procedural faults” did not harm the appellant and its right to an effective judicial remedy before this board.

- »e) Second preliminary plea: appellant’s fourth demand is inadmissible

»The appellant’s fourth demand is inadmissible at law and must be rejected by this board. The appellant is requesting this board to: “now therefore, whilst reserving the right to put forward further submissions, the appellants hereby requests: (...) iv. if appropriate, to order that the offer of the appellants is fully compliant with the tender specifications and thus order, instruct or in any other manner that the appellant company should be awarded the tender (...)”.

»This demand cannot be upheld by this board since it exceeds its competence and powers. This board, as its name implies, is a review board which reviews whether decisions taken by a contracting authority are legal or otherwise. This board considers “appeals” made by aggrieved bidders in terms of regulation 270 of the PR against a specific decision taken by a contracting authority, such as the rejection of a bid or a recommended award. This board’s assessment is limited to “accede or reject the appeal” which has to be strictly an application for the review of the contracting authority’s decision after closing of bids – see regulation 276(h) of the PPR – and it cannot evaluate bids and award public contracts since the responsibility of evaluation of bids, and, quite frankly, the

³ Request for Quote

expertise and competence, lies with the evaluation committee and not with this board.

»Exceptionally, this board may cancel a procurement procedure if it is “the best solution in the circumstances of the case”. However, that power is expressly and statutorily provided for in the law, specifically, regulation 90(3) of the PPR. Incidentally, the same power is reserved to the Court of Appeal when reviewing decisions of this board. The Court of Appeal similarly cannot evaluate bids or award public contracts.

»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. It is noted that the appellant has raised three separate and distinct grievances in relation to this appeal. On the other hand, the contracting authority and preferred bidder have both submitted arguments on the merits of these grievances. However, on the grievance entitled “procedural faults”, the contracting authority has also submitted two preliminary pleas and another has been submitted by the preferred bidder. On the grievance entitled “The price of the recommended bidder is abnormally low”, another preliminary plea has been submitted by the preferred bidder. The board will now proceed to analyse and decide on these.

»a) 1st grievance – The price of the recommended bidder is abnormally low

»On the preliminary plea of the preferred bidder

»This board makes reference to the request of the appellant, being, “To declare that the offer by Malta Red Cross Society is:
a. Abnormally low ...”

»The board, without delving too much into the matter, agrees *in toto* with the comments of the first preliminary plea of the preferred bidder in that thisb can never, itself, declare a bid to be abnormally low. Nonetheless, this board will analyse and decide on the merit of the grievance of the appellant, but limited to whether the bid of the preferred bidder *appears* to be abnormally low.

»On the merits

»At the outset it must be stated that there is a material difference between the two bids received by the economic operators participating in this procedure. The bid submitted by the appellant resonates more with the published estimated procurement value whilst that of the preferred bidder is *prima facie* substantially lower.

»The appellant is arguing that the contracting authorities are required to investigate wheresoever an economic operator has submitted an abnormally low tender.

»This as per regulation 234(1) [*recte*, 243(1)] of the Public Procurement Regulations (“PPR”). Regulation 243(1) of the PPR states the following:

»“Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where

tenders appear to be abnormally low in relation to the works, supplies or services.”

»Therefore, this board opines that the “obligation” to investigate, whilst it is there and the law uses the word “shall”, such obligation is only to be imposed where tenders appear to be abnormally low. Therefore, since there are no mathematical hard and fast rules on what constitutes an abnormally low offer, this board must analyse how and why the offer as submitted by MRCS did not appear to be abnormally low to the evaluation committee.

»As already mentioned, *prima facie*, the bid of MRCS does appear to be abnormally low. This due to the material percentage difference when compared to the estimated procurement value.

»However, reference is made to the testimony under oath of Mr Ramon DeBattista who amongst many statements, stated “... that since there was complete and fully detailed information in the financial bid on hours, man hours, usage, there was no need to ask for further information. The TEC did not see the need to query the submission as a full breakdown of all aspects was given”.

»When this information is correlated to the testimony under oath of Ms Bernice Gauci who confirmed that the tender estimated value was based on the last contract awarded to the appellant, one can understand that the reliance that can be made on the estimated procurement value is limited at best. Even though the estimated procurement value is the main tool that is to be used to ascertain if a bid appears to be abnormally low or not, it certainly isn't the only tool available and that must be used! At this point, this board points out to all contracting authorities that when the criteria of a present tender procedure are materially different to the past issues of a similar service which is being acquired (in this specific procedure being that the tender was now open to two economic operators rather than one as used to happen in the past), more research and due diligence need to be done on publishing a more reasonable estimated procurement value.

»Bearing in mind that the offer of MRCS was already submitted in thorough detail, such explanation of Mr Ramon DeBattista, does suffice to provide comfort that the contracting authority did have enough information at its disposal to determine that the financial bid, as submitted, did not appear to be abnormally low, or that the evaluation committee has enough information at its discretion to determine that the bid was financially compliant.

»Therefore, this board does not uphold the first grievance of the appellant.

»b) 2nd grievance – The doctrine of self limitation

»On the preliminary plea of the preferred bidder

»This board makes reference to the request of the appellant, being, “if appropriate, to order that the offer of the appellants is

fully compliant with the tender specifications and thus order, instruct or in any other manner that the appellant company should be awarded the tender”.

»The board, again without delving too much into the matter, agrees *in toto* with the comments of the second preliminary plea of the preferred bidder in that if this board would uphold such a request, it would exceed its competences and powers. This board can never award public contracts as it would be acting *ultra vires*. Nonetheless, and in the interest of expediency, it will delve into the merits and ascertain if any conditions have been breached and decide accordingly within its powers as emanating from the PPR.

»On the merits

»Pertinent to this grievance is specification 9.13 which was requested from economic operators. It only stated “Copy of logbooks are to be presented at tendering stage”.

»There was no specific requirement of the economic operators to be the owner of the vehicles *a priori*.

»Therefore, the principle of self-limitation would have to be considered “breached” only if the evaluation committee proceeded to act as is being requested by the appellant.

»It is clear to this board that this was and remains a performance condition.

»From testimony and submissions made, this board is more than comfortable that the evaluation committee duly assessed such requirements as it was obliged to do.

»Therefore, this board does not uphold the second grievance of the appellant.

»c)3rd grievance – Procedural faults

»Reference is made to the testimony under oath of Ms Bernice Gauci who clearly and unequivocally stated that:

- »i. “In this case a blank document on the outcome had been uploaded on the website ...”;
- »ii. “CEW would not have known the outcome of the bid had it not enquired ...”;
- »iii. “Neither one of the bidders had been notified” (of the award decision);
- »iv. “Up to date the website information was still blank as the system does not allow changes”;
- »v. “... ware of the requirement in regulation 272 to communicate decisions to parties – in the case of CEW this was not done”.

»Even though it was only on the 25th September that Emergency Malta wrote back to CPSU, after the 5th September email this board cannot by any means treat this appeal of the appellant as being *fuori termine*, considering that it was the same contracting

authority that grossly erred in the procedures it had to follow to adhere to regulations 271 and 272 of the PPR.

»Considering that the appellant was provided with the opportunity to present its case before this board, as decreed verbally in the initial stages of the first hearing and therefore proceeded to make its case on the other two grievances, namely the one on abnormally low and the second on the doctrine of self-limitation, which have not been upheld by this board (see above), it is to be considered that even though the appellant is right in that there were procedural faults, once it has been granted the opportunity to present its case, no prejudice can be considered suffered by the same appellant.

»In line with the principle of proportionality (also as confirmed recently by the court of appeal on 30th November 2023 in the case Melchior Dimech v. Ministeru għall-Finanzi u Xogħol et al (rikors number 431/23/1), the most opportune decision is to declare this grievance upheld with deposit paid to be refunded to the appellant, but once the other two grievances having not been upheld, this board confirms the decision of the award to the preferred bidder.

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

- »a) does not uphold appellant's first and second grievances; and
- »b) upholds in part appellant's third grievance but only in so far as the refund of the deposit since no prejudice has been suffered by said appellant;
- »c) upholds the contracting authority's decision to award the procedure to the Malta Red Cross Society;
- »d) after taking all due consideration of the circumstances and outcome of this letter of objection, directs that the deposit be refunded to the appellant.«

7. *Cardona* appellat b'rikors tas-26 ta' Jannar 2024. *CPSU* wiegħbet fis-26 ta' Frar 2024; Leone Grech wiegħeb fid-29 ta' Frar 2024 biex iġid biss li "ma għandu ebda interess f'dawn il-proċeduri"; u *MRCS* wiegħbet fil-11 ta' Marzu 2024. Id-Dipartiment tal-Kuntratti ma wegħibx.

8. Qabel ma nqisu l-meritu tal-appell jeħtieġ li nqisu żewġ eċċezzjonijiet preliminari mressqa minn *MRCS*. L-ewwel eċċezzjoni preliminari tgħid illi *Cardona* "ma għandhiex *locus standi*" biex tressaq l-appell, u għiet imfissra hekk:

»Ir-rikors tal-appell huwa irritu u null peress li “*Cardona Engineering Works*” ma għandhiex personalità ġuridika distinta u għalhekk ma għandhiex interess ġuridiku u *locus standi* sabiex iddaħħal rikors tal-appell f’isimha biss *ai termini* tar-regolament 284 tal-PPR.

»Il-liġi tgħid li “kull parti” u “*any party*” għandha l-jedd li tappella minn deċiżjoni tal-PCRB permezz ta’ rikors tal-appell intavolat fir-reġistru fi żmien 20 ġurnata.

»Peress li “*Cardona Engineering Works*” mhux il-“parti” jew il-“*party*” li għandha *locus standi* tappella *ai termini* tar-regolament 284 tal-PPR, effettivament, u minn ottika ġuridika, l-ebda appell ma daħal fit-terminu prefiss mil-liġi. Għalhekk, ir-rikors tal-appell odjern huwa null u d-deċiżjoni tal-PCRB għaddiet in ġudikat.

»*Inoltre* jirriżulta mill-atti quddiem il-PCRB, senjatament, ix-xhieda tas-sur Philip Cardona, li “*Cardona Engineering Works*” mhux xi kumpannija b’responsabilità limitata jew xi soċjetà oħra kummerċjali imma semplicement ditta jew *trade name*. L-istess Cardona stqarr li huwa wieħed mis-sidien, preżumibilment tan-negozju in kwistjoni, u dan mingħajr ma speċifika min huma s-sidien l-oħra.

»Il-prinċipju tal-proċedura ċivili Maltija tal-integrità tal-ġudizzju wkoll irid li l-persuna u l-persuni, ġuridikament rikonoxxuti bħala “persuna” – kemm jekk hux naturali jew legali – li lkoll għandhom il-jedd ta’ azzjoni in kwistjoni jridu jkunu eżercitaw dak il-jedd, f’dan il-każ id-dritt t’appell *ai termini* tar-regolament 284 tal-PPR flimkien u fit-terminu prefiss mil-liġi.

»Għal dawn ir-raġunijiet ... l-appellata tgħid li jekk tintlaqa’ din l-eċċezzjoni preliminari din il-qorti tista’ tiċċad ir-rikors tal-appell u tiegħaf milli tkompli tisma’ l-kaz.».

9. Dan l-aggravju huwa x’aktarx fieragħ. “*Cardona Engineering Works*” hija, appuntu kif tgħid MRCS, ditta, jew l-isem li bih huwa magħruf negozjant jew entità kummerċjali. *Cardona* hija entità magħrufa mill-awtorità kontraenti, tant illi tatha *tender ID* u ħallietha titfa’ offerta li, veru, ġiet imwarrba iżda mhux għax saret minn persuna li ma teżistix. Anzi, fit-tweġiba għall-oġġezzjoni quddiem il-Bord ta’ Reviżjoni l-awtorità kontraenti stqarret illi *Cardona* hija l-“*incumbent operator*”, li jfisser li tagħraf il-personalità tagħha tant li f’okkażjoni oħra daħlet f’kuntratt magħha. Anke l-art. 4(e) tal-Att dwar l-Interpretazzjoni [“Kap. 249”] igħid illi “l-espressjoni ‘persuna’ tinkludi korp jew għaqda oħra ta’ persuni sew jekk dak il-korp

jew dik l-għaqda jkunu persuna ġuridika, skont id-disposizzjonijiet tat-Tieni Skeda tal-Kodiċi Ċivili, sew jekk le”.

10. L-eċċezzjoni hija għalhekk miċħuda

11. It-tieni eċċezzjoni preliminari tgħid hekk:

»Permezz tat-tielet talba ... l-appellanti qed titlob li din il-qorti għandha “tiegħu dawk l-azzjonijiet u deċiżjonijiet kollha u necessarji sabiex l-offerta ta’ *Cardona Engineering Works* għas-sejha tiġi aċċettata”.

»Din it-talba teżorbita l-kompetenza kemm tal-*PCRB* kif ukoll ta’ din il-qorti u għalhekk hija inammissibbli u qatt ma tista’ tintlaqa’.

»Il-kompetenza tal-*PCRB* u ta’ din il-qorti, fi ħdan ta’ proċeduri mressqa *ai termini* tar-regolament 270 tal-PPR, hija li tilqa’ jew tiċċad appell minn deċiżjoni li tkun ħadet awtorità kontraenti. Jekk l-appell jiġi milqugħ, id-deċiżjonijiet appellata tiġi revokata.

»Eċċezzjonalment, u fejn jippermettu ċ-ċirkustanzi, il-*PCRB* u din il-qorti għandhom is-setgħa li jhassru l-proċess tas-sejha. Il-leġislatur però ma ta ebda setgħa oħra lill-*PCRB* jew lill-Qorti tal-Appell.

»La l-*PCRB* u lanqas din il-qorti ma għandhom il-kompetenza u s-setgħa li jagħtu l-kuntratti direttament huma u lanqas li jagħtu tali direzzjonijiet lill-awtorità kontraenti. Din is-setgħa hija riżervata biss għall-awtorità kontraenti, u dan wara li l-bord ta’ evalwazzjoni – wieħed ġdid kif *del resto* mitlub fit-tieni talba tal-appell – jagħmel xogħlu u jasal għall-kostatazzjonijiet tiegħu.

»Għal dawn ir-raġunijiet ... irrISPETTIVAMENT mill-eżitu tal-mertu tal-appell din it-tielet talba hija inammissibbli u qatt ma tista’ tintlaqa’ minn din il-qorti. «

12. Dan huwa minnu. L-iżjed li tista’ tagħmel il-qorti hu li tħassar id-deċiżjoni dwar l-għażla u tordna li l-proċess tal-għażla jsir mill-ġdid, iżda mhux li tiddeċiedi hi liema offerta għandha tintgħażel. Dan ma jolqotx il-validità tal-appell iżda biss illi dik it-talba partikolari ma tistax tintlaqa’.

13. Għalkemm ma ressqitx eċċezzjoni f’dan is-sens, *MRCS* fit-tweġiba tagħha għar-raba’ aggravju tal-appell osservat illi:

»L-appellanti ġiet infurmata li n-*negotiated procedure* ġie aġġudikat lil terz u setgħet tintavola l-appell. U fil-fatt, l-appellanti daħħlet l-appell *ai termini* tar-Regolament 270 tal-PPR. Biss, daħħlitu tardivament. «

14. Dwar dan iżda l-Bord ta' Revizjoni ddecieda illi "*this board cannot by any means treat this appeal of the appellant as being fuori termine, considering that it was the same contracting authority that grossly erred in the procedures it had to follow to adhere to regulations 271 and 272 of the PPR*". Ma sar ebda appell, la mill-awtorità kontraenti u lanqas minn MRCS, dwar din il-parti tad-deċiżjoni tal-bord, li għalhekk għandha titqies finali.

15. Ngħaddu mela għall-aggravji tal-appell.

16. L-ewwel aggravju iġid illi l-offerta ta' MRCS ma hijiex konformi mal-kondizzjonijiet tas-sejha, u għie mfisser hekk:

»... .. l-offerta ta' *Malta Red Cross Society* ["MRCS"] ma' hiex *compliant* ma' dik li hija s-sejha, kif ukoll mal-L.S. 601.03.

»Quddiem il-Bord ta' Revizjoni [*Cardona*] stqarret li:

»"The tender document in provision 9.13, the contracting authority requested that the economic operators submit a copy of logbooks, as per hereunder:

»"Copy of logbooks are to be presented at tendering stage.'

»"To satisfy the requirement, the economic operators must:

»"either be the owner of the vehicles requested and thereby submit a copy of their logbooks; or

»"in accordance with article 235 of the PPR, rely on the capacities of third parties, and in the process submit confirmation that the resources shall be available to the economic operator throughout the duration of the agreement.

»For clarities (*sic*) sake, sub-contracting is not permissible in the context under review, since it would exceed the permitted percentage of sub-contracting."

»... ..

»Kif għie stabbilit tul il-process quddiem il-bord, il-log books li għew ippreżentati da parti ta' MRCS jikkonfermaw li dawn huma ta' entitajiet differenti mill-oblatur MRCS, u li ma kien hemm l-ebda konnessjoni bejn it-tnejn, kif gej.

»... ..

»Ġaladarba l-vetturi huma ta' terzi, skatta l-obbligu li *ai terimini* ta' artikolu 235 tal-L.S. 601.03 jingħata komfort fil-forma ta' dokument li

dawk ir-riżorsl li m'għandhiex u li qed tistrieħ fuq terzi għalihom f'każ li jingħata l-kuntratt lilha – liema garanzija la ngħatat u wisq anqas ittiegħdet in konsiderazzjoni fl-evalwazzjoni.

» dwar dan ii-punt, il-Qorti Ewropeja kienet cara ukoll. Fiddeċlżjoni tagħha fl-ismijiet Partner Apelski Dariusz v Zarząd Oczyszczania Miasta (C-324/14) jintqal b'mod car li:

»“... it must be stated, first, that, although it is free to establish links with the entities on whose resources it relies, and to choose the legal nature of those links, the tenderer is nonetheless required to produce evidence that it actually has available to it the resources of those entities or undertakings, which it does not itself own, and which are necessary for the performance of the contract (see to that effect, judgment in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 29 and the case-law cited).

»“Thus, in accordance with Articles 47(2) and 48(3) of Directive 2004/18 a tenderer may not rely on the resources of other entities in order to satisfy in a purely formal manner the conditions required by the contracting authority ...”

»Għalhekk, l-offerta ta' MRCS ma' hiex valida minħabba l-fatt li naqset li turi li ser ikollha għad-disposizzjoni tagħha r-riżorsi (fil-forma ta' vetturi) tul il-perjodu tal-kuntratt. Da parti tagħha, l-awtorità konraenti naqset li tagħmel il-verifki neċessarji u pproċediet mingħajr ma qieset x'kienu l-obbligi legali tal-oblaturi sabiex l-offerta tagħhom tkun waħda valida skont il-liġi.

»Mhux ġust, u żgur mhux ekwu, li l-offerta tingħata lil xi ħadd li m'għandhux ir-riżorsl (fil-każ odjern vetturi) mitluba mis-sejha. Li kieku s-sejha riedet li dawn ir-riżorsi kellhom ikunu disponibbli biss mal-iffirmar tal-kuntratt kien ikun biżżejjed li tingħata sempliċi indikazzjoni, iżda għaladarba s-sejha talbet il-logbooks mas-sottomissjoni tas-sejha, allura kulhadd kellu jiġi ġġudikat b'dan il-mod.

»Meta jiġu użatli parametri differenti minn dawk stabbiliti fis-sejha, allura jkun hemm ksur tal-prinċipju tas-*self-limitation*. Dana l-prinċipju ġie kkonfermat varji drabi, inkluż mill-Qorti Ewropea tal-Ġustizzja, fil-kawża fl-ismijiet Nexans France v. European Joint Undertaking for ITER and the Development of Fusion Energy (T415/10), fejn intqal li:

»“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.”«

17. MRCS wiegħbet hekk:

»... ..

»It-teżi tal-appellanti hija waħda sempliċi – li *n-negotiated procedure* kienet biss miftuħa għal min, bħall-appellanti, kien proprjetarju ta' 7 ambulanzi fit-8 ta' Awissu 2023.

»... .. din it-teżi hija waħda li ma tiskontrax mal-kondizzjonijiet tas-sejha, u, fi kwalunkwe każ, evidentement isservi biss l-interessi tal-appellanti *qua incumbent*.

»L-appellanti kienet l-unika operatur li allegatament kellha fis-sidja tagħha 7 ambulanzi fit-8 ta' Awissu 2023.

»Dan preżumibilment għax, għallinqas sa dak l-istadju, hija kienet l-*incumbent operator* inkontrastata.

»Biss però, id-dokument tas-sejha ma riedx li l-oblaturi jkunu l-proprjetarji tal-ambulanzi mertu tal-kuntratt meta huma jitfgħu l-offerta. Tant hu hekk, li ma kien hemm l-ebda *administrative and selection criterion* li jitlob dan.

»L-unika *selection criteria* kienu s-segwenti:

»“2. 0 Suitability

»“(i) The service provider must be in possession of a National Operator's Licence for the Carriage of Passengers 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.

»“(2) The drivers are to be in a possession of the licence according to the vehicle being driven.”

»Fuq in-naħa l-oħra, id-dokument tas-sejha mkien ma talab li l-ambulanzi għandhom ikunu l-proprjetà tal-oblatur. Id-dokument talab biss, fis-sezzjoni “9.0 Vehicle Specifications and Certifications”, “*copy of logbooks are to be presented at tendering stage*”.

»L-appellata kkonformat ma' din il-kondizzjoni u ppreżentat kopja tal-*logbooks* tas-7 ambulanzi mal-offerta tagħha.

»Għalhekk ... il-PCRB kien korrett meta kkonstata li:

»“a. There was no specific requirement of the economic operators to be the owner of the vehicles *a priori*.

»“b. It is clear to this board that this (*i.e.* the ownership of the ambulances) was and remains a performance condition.

»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 immedjatament dispost is-7 ambulanzi mitlub mill-awtorità kontraenti.

»Ĉertament li l-operatur ekonomiku li jkun ingħata kuntratt preċedenti jkun ivvantagġjat ferm fuq operaturi ekonomiċi oħra li (skont l-appellanti) huma mistennija jkollhom flotta ta' ambulanzi dejjem wieqfa sakemm qed jistennew li tinħareġ sejha għal offerti, xi haġa li qatt ma jistgħu jkollhom garanzija tagħha

» Fuq linja simili, il-QĠUE qalet hekk f' SC NV Construct SRL⁴:

⁴ C-403/21 SC NV Construct SRL (26 ta' Jannar 2023)

»“65. Furthermore, to oblige tenderers to satisfy all the conditions of performance of the contract at the time of submission of their tenders would be to impose an excessive requirement – one which might dissuade economic operators from participating in procurement procedures – and would thus infringe the principles of proportionality and transparency guaranteed by Article 18(i) of that directive (judgment of 8 July 2021, *Sanresa*, C-295/20, EU:C:2021:556, paragraph 62).”

»... ..

»Il-każistika żvilupat ferm aktar wara *Partner Apelski* u fil-fatt re-iterazzjoni aktar ricenti qalet hekk f' C-486/21 SHARENGO mogħtija fl-10 ta' Novembru 2022:

»“99. The first sentence of Article 38(2) of Directive 2014/23 provides for the right of an economic operator to rely on the capacities of other entities, regardless of the legal nature of the links which bind it to those entities, with a view to satisfying the conditions for participation relating both to professional and technical ability and to economic and financial standing set out in paragraph 1 of that provision (see, by analogy, in the field of public procurement, judgments of 10 October 2013, *Swm Costruzioni 2* and *Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29 and 33, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* C-927/19, EU:C:2021:700, paragraph 150). In addition, under the second sentence of that second paragraph, ‘where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing a commitment by those entities to that effect’.

»“100. It is thus apparent that Article 38 of that directive gives an economic operator great latitude to associate itself with other entities which will, in particular, enable it to have at its disposal the abilities which it lacks. On that basis, that provision cannot be interpreted as requiring an economic operator to seek assistance only from entities each of which is capable of pursuing the same professional activity. By definition, an economic operator having recourse to the abilities of other entities seeks either to increase the abilities which it already has but, possibly, in insufficient quantity or quality, or to acquire abilities or skills which it lacks. On that basis, that provision cannot be interpreted as requiring an economic operator to seek assistance only from entities each of which is capable of pursuing the same professional activity.”

»... ..«

18. L-awtorità kontraenti wkoll wiegħbet illi kulma riedu l-kondizzjonijiet tas-sejħa kien li l-oblatatur jipproduċi l-*log books* tal-vetturi, u mhux ukoll juri li l-vetturi huma tiegħu.

19. Iżda ma huwiex korrett dak li tgħid *MRCs* illi jekk tifhem il-kondizzjonijiet tas-sejha kif trid *Cardona* dan ikun ifisser illi s-sejha tkun miftuħa biss għal min għa kelli l-vetturi f'idejh. Dak li tgħid *Cardona* huwa illi l-oblatur juri jew (a) illi huwa sid tal-vetturi jew (b) illi għandu ftehim ma' terzi li jipprovdulu l-vetturi jew l-użu tagħhom fil-każ li jingħata l-kuntratt. Fil-fatt, it-tweġibiet jattakkaw biss l-ewwel asserzjoni ta' *Cardona* – (a) li l-oblatur ikun sid tal-vetturi – u mhux ukoll it-tieni waħda – (b) li l-oblatur juri li jkollu d-disponibilità tal-vetturi, wkoll jekk biss b'rabta ta' terzi għax il-vetturi ma jkunux tiegħu fil-waqt li jitfa' l-offerta.
20. Dan idgħajjed l-argument illi dak li trid *Cardona* hu li jkun vantaġġjat l-*incumbent*. Tassew illi kondizzjoni li tesiġi li oblatur ikollu l-vetturi weqfin jistennew li forsi jingħata l-kuntratt tkun kondizzjoni anti-kompetitiva, iżda li tesiġi li l-oblatur jagħti prova li jkun f'posizzjoni li jwettaq il-kuntratt billi juri li għallinqas għandu d-disponibilità tal-vetturi mhijiex kondizzjoni daqs-hekk oneruża, għalkemm forsi fil-każ tallum ma kinitx tkun tant raġonevoli meta tqis illi s-sejha għal offerti ħarġet fit-8 t'Awissu 2003 u għalqet fis-16 ta' Awissu 2023.
21. Madankollu huwa minnu illi l-kondizzjonijiet tas-sejha jridu biss illi l-oblatur juri l-*logbooks* tal-vetturi li bihsiebu juża jekk jingħata l-kuntratt, u mhux li hu sidhom jew li għandu d-disponibilità tagħhom. Għalkemm ir-reg. 235 tal-L.S. 601.03 irid illi "meta operatur ekonomiku jkun irid jiddependi fuq il-kapaċitajiet ta' entitajiet oħra, dan għandu jagħti prova lill-awtorità kontra-enti li huwa ser ikollu r-riżorsi meħtieġa għad-dispożizzjoni tiegħu", l-awtorità kontraenti, meta talbet biss il-*logbooks*, wriet li kienet tqis dawn

bħala prova biżżejjed tad-disponibilità tal-vetturi, u għalhekk *MRCS* ma għandhiex titqies li ma qagħditx għall-kondizzjonijiet tas-sejħa.

22. L-aggravju huwa għalhekk miċħud.

23. Fit-tieni aggravju *Cardona* tgħid illi l-Bord ta' Revizjoni "naqas li jikkunsidra fis-sustanza l-aggravji kollha" u kompliet tfisser l-aggravju hekk:

»L-appell ta' *CEW* kien ċar ħafna li, fost l-ilmenti tlegħu, l-appellant kien qiegħed iġib l-argument li *MRCS* naqas li juri li għandu għad-disposizzjoni tlegħu r-riżors neċessarji, senjatament li l-vetturi mitluba *ai termini* ta' kriterju numru 9.13 tas-sejħa (ħlief billi ppreżenta numru ta' *logbooks* ta' vetturi rreġistrati barra minn Malta, u li huma rreġistrati f'isem entità oħra).

»Dan il-kriterju seta' biss jiġi milfuq billi:

»l-ewwel jew jistrieħ fuq il-kapaċitajiet ta' terzi sabiex jissodisfa l-kriterju *ai termini* ta' artikolu 235 tal-S.L. 601.03; jew

»it-tieni permezz ta' kuntratt ta' appalt (*sub-contracting*) fejn terz iforni l-vetturi mitluba; jew

»it-tielet permezz tal-fatt li l-oblatur kellu l-vetturi għad-disposizzjoni tiegħu, bħala sid il-vetturi.

»Fl-oġġezzjoni, *CEW* tgħid u tispjega li:

»To satisfy the requirement, the economic operators must:

»"either be the owner of the vehicles requested and thereby submit a copy of their logbooks; or

»"in accordance with article 235 of the PPR, rely on the capacities of third parties, and in the process submit confirmation that the resources shall be available to the economic operator throughout the duration of the agreement.

»"For clarities [*sic*] sake, sub-contracting is not permissible in the context under review, since it would exceed the permitted percentage of sub-contracting."

»Dwar dan ii-punt, il-bord ma qal xejn, b'mod partikolari dwar artikolu 235 tal-L.S. 601.03. Dina l-qorti diġà kellha l-opportunità li tittratta sitwazzjonijiet simili fil-każ fl-ismijiet *General Cleaners Co. Ltd v. Heritage Malta et al*⁵, fejn intqal is-segwenti:

»"Fil-fehma tal-qorti għalhekk ii-Bord ta' Revizjoni għamel nażin illi ma' qiesx l-oġġezzjonijiet kollha tal-appellanti, u din il-parti tal-aggravju għandha tintlaqa' billi l-atti jintbagħtu lura lill-bord sabiex iqis l-oġġezzjonijiet kollha tal-appellanti."

⁵ App. 159/2022, 10 ta' Ottubru 2022

»Għalhekk, huwa l-obbligu tal-bord li jisma', jgħarbel u jixtarr il-punti kollha mressqa mill-partijiet, u wara jasal għall-konklużjonijiet tiegħu. Fil-każ odjern, il-bord naqas milli jippronunzja ruħu dwar ii-punt, u per konsegwenza d-deċiżjoni hija wkoll fallaċi f'dan is-sens.«

24. Ma huwiex minnu illi l-Bord ta' Reviżjoni ma qiesx dan l-argument ta'

Cardona. Fid-deċiżjoni tal-bord jingħad illi:

» Pertinent to this grievance is specification 9.13 which was requested from economic operators. It only stated "Copy of logbooks are to be presented at tendering stage".

»There was no specific requirement of the economic operators to be the owner of the vehicles *a priori*.

»Therefore, the principle of self-limitation would have to be considered "breached" only if the evaluation committee proceeded to act as is being requested by the appellant.«

25. Huwa minnu illi d-deċiżjoni ma tqisx il-parti tal-oġġezzjoni li tgħid "*sub-contracting is not permissible in the context under review, since it would exceed the permitted percentage of sub-contracting*" iżda huwa minnu wkoll illi Cardona ma ressqet ebda prova dwar hekk. Forsi kien ikun aħjar likieku l-bord osserva illi jiċhad din il-parti tal-oġġezzjoni għax ma tressqux provi dwarha, iżda dan in-nuqqas ma jolqotx is-sustanza tad-deċiżjoni

26. L-aggravju huwa għalhekk miċħud.

27. It-tielet aggravju iġid illi l-awtorità kontraenti kisret l-art. 243 tal-L.S.

601.03, u ġie mfisser hekk:

»L-artikolu 243 tal-L.S. 601.03 jesiġi li:

»"L-awtoritajiet kontraenti għandhom jesiġu li l-operaturi ekonomiċi jispjegaw il-prezz jew l-ispejjeż proposti fl-offerta meta l-offerti jkunu jidhru baxxi b'mod mhux normali fir-rigward tax-xogħlijiet, il-provvisti jew is-servizzi."

»Għalhekk huwa tassattiv u mhix prerogattiva tal-awtorità kontraenti li tivverifika l-offerta, fil-mument li tali tkun tidher li hija walida "anormali".

» Dana kien riċentement ikkonfermat, fid-deċiżjoni ta' dina l-qorti fl-isemijiet Star Fuels Limited v. WasteServ Malta Limited et⁶, fejn intqal li:

⁶ 22 ta' Jannar 2024, rik. nru 450/2023

»“Għandu jingħad ukoll illi f’dan l-istadju l-kwistjoni ma hijiex jekk il-prezz huwiex hekk baxx illi l-offerta għandha titwarrab iżda biss jekk huwiex hekk baxx illi jiskatta l-obbligu illi “l-awtoritajiet kontraenti għandhom jesigū li l-operaturi ekonomiċi jispjegaw il-prezz jew l-ispejjeż”. Jekk imbagħad l-ispegazzjoni tkunx tajba u biżżejjed meta tqis il-kriterji tar-reg. 243 ikun ġudizzju li jsir wara li tingħata dik l-ispegazzjoni.”

»Id-deċiżjoni, bħal-liġi, titkellem dwar l-obbligu li tali prezz għandu jiġi mistharreg, u dana billi tingħata spjegazzjoni.

»... ..

»Għalhekk, naqas il-bord ta’ evalwazzjoni u eventwalment il-Bord [ta’ Reviżjoni] meta ma saret l-ebda talba għal spjegazzjoni fil-mument li ġie ikkonfermat li l-offerta kienet tidher li hija anormali (*abnormally low*) – fil-kuntest odjern, il-fatt li l-offerta ta’ *MRCS* hija *circa 50%* irħas mill-*estimated value*, allura tali obbligu kellu jiskatta immedjatament u l-istħarrlg kellu jsir.«

28. Tassew illi mad-daqqa t’għajn l-offerta ta’ *MRCS* tidher baxxa wisq u għalhekk skatta l-obbligu tal-awtorità kontraenti illi tesigi illi *MRCS* tfisser kif waslet għal offerta hekk baxxa.

29. Mix-xhieda iżda ħareġ illi t-tagħrif li kellha tagħti *MRCS* fil-fatt ingħata u l-awtorità kontraenti kienet sodisfatta bit-tagħrif li kellha li l-prezz kien realistiku. Dan xehdu Ramon Debattista, membru tal-kumitat tal-għażla responsabbli għall-analiżi finanzjarja. Meta xehed quddiem il-Bord ta’ Reviżjoni fid-19 ta’ Ottubru 2023 qal illi:

»Iċċekkja jekk il-figuri, jiġifieri *computation* mil-lat jekk jagħmlux sens, mil-lat jekk il-*market value* hux *feasible*. Ipprovajt nara jekk użawx il-*market value* jew *fair value*. Kelli *full information* fil-*financial bid form*. Il-*financial bid form* kienet *covered* bil-*basic elements* bħalma kien kulhadd, li huwa l-*price* u *volume*«

30. Kompla jixhed fit-23 ta’ Novembru 2023 u qal illi:

»Il-*financial bid* kien hemm kollox spjegat bħala figuri u kif waslu għall-figuri Ahna rajna l-affarijiet u konna sodisfatti li ma kienx hemm anomaliji, li kollox kien komplut u li għamel sens għalina bħala *evaluation committee*.«

31. L-awtorità kontraenti għalhekk imxiet kif trid il-liġi, u, ladarba kienet sodisfatta, bit-tagħrif li ngħatalha, li l-prezz għalkemm baxx kien realistiku u fattibbli, ma kellha ebda raġuni biex twarrab l-offerta għar-raġuni li l-prezz baxx wisq.

32. Dan l-aggravju wkoll huwa għalhekk miċhud.

33. Ir-raba' aggravju huwa dwar irregolaritajiet proċedurali li l-appellanti tgħid ħolqulha preġudizzju. L-aggravju ġie mfisser hekk:

»Din il-proċedura kienet mifnija bi żbalji u ksur tar-regoli da parti tal-awtorità kontraenti, mhux biss għaliex ma' gewx osservati r-regoli ... iżda wkoll għaliex meta *si tratta* proċeduri saru biżibilju żbalji.

»Qabel xejn, *CEW* ma ġietx innotifikata skont artikolu 272, bil-konsegwenza li ma kinitx taf ir-raġuni għar-rifjut tal-offerta tagħha. artikolu 272 tal-L.S. 601.03 iġid u jesiġi li:

»“Il-komunikazzjoni lil kull offerent jew kandidat konċernat tal-għoti propost jew tal-kancellament tas-sejha għall-offerti għandu jkun fiha sommarju tar-raġunijiet rilevanti li jirrigwardaw ir-rifjut tal-offerta kif imfisser fir-regolament 242 jew ir-raġunijiet li għalihom is-sejha għall-offerti qed tiġi kancellata wara li jagħlaq il-perijodu tal-pubblikazzjoni, u permezz ta' dikjarazzjoni preċiża dwar il-perijodu eżatt ta' waqfien.”

»*Inoltre*, il-komunikazzjoni elettronika fuq is-sistema magħrufa bħala *ePPS* kienet ukoll monka! Id-dokument li gie *uploaded* kien wieħed vojta (*blank*) li tkompli ddgħajjef l-pożizzjoni ta' *CEW stante* li la ġiet magħrufa u wisq anqas setgħet tkun taf ir-raġunl tar-rifjut.

»... ..

»Għalhekk, minflok jissana l-evalwazzjoni fqira li saret da parti tal-awtorità kontraenti, il-bord kellu jordna li ssir evalwazzjoni mill-ġdid, u dana sabiex jiġi assigurat li l-proċedura tigi osservata *ad unguem*, u li l-partijiet ikunu trattati b'mod ugwali. *CEW* sofriet preġudizzju, għal darba tnejn, u dana billi n-nuqqas ta' trattament ugwali u trasparenza ġie mmanifestat permezz ta' tgħawwiġ ta' proċedura u ksur ta' regoli, *inter alia* bi ksur lampanti ta' artikolu 39 tal-L.S. 601.03.

»Tant huwa vvizjat il-process li l-awtorità kontraenti nhar is-27 ta' Settembru 2023 ħarġet *contract award notice* bl-intenzjoni li jiġi ffirmat il-kuntratt ma' *MRCs* mingħajr ma tkun ġiet innotifikata *CEW*, u/jew ingħatat l-oportunità li tressaq l-oġġezzjoni tagħha – dana kollu jkompli jikkonferma li dak li sar huwa bla bażi legali.«

34. Huwa minnu illi l-avviż li r-reg. 272 tal-L.S. 601.03 irid li jingħata lill-oblaturi ma ngħatax kif imiss lil *Cardona*. Dan iżda huwa difett ta'

komunikazzjoni tad-deċiżjoni u mhux difett fil-proċess li wassal għal dik id-deċiżjoni. *Se mai* jivvizzja dak li seħħ wara u mhux dak li seħħ validament qabel dan in-nuqqas. Kien ikollu konsegwenzi likieku, minħabba n-nuqqas ta' avviż, *Cardona* ma laħqitx daħħlet l-oġġezzjoni tagħha quddiem il-Bord ta' Reviżjoni, u fil-fatt rajna illi *MRCs* fittxet – iżda ma seħħilhiex – illi tapprofitta ruħha minn din is-sitwazzjoni meta osservat illi “l-appellanti daħħlet l-appell *ai termini* tar-Regolament 270 tal-*PPR*. Biss, daħħlitu tardivament”.

35. Fil-fatt, għalhekk, dan in-nuqqas ta' notifika ma kien ta' ebda preġudizzju għal *Cardona*, li ressqet l-oġġezzjoni quddiem il-bord u dan l-appell quddiem din il-qorti daqslikieku kienet regolarment notifikata kif irid ir-reg. 272. Dan l-aħħar aggravju wkoll huwa għalhekk miċhud.

36. Il-qorti għalhekk tiċhad l-appell.

37. Billi l-eċċezzjoni ta' *MCRS* dwar nuqqas ta' *locus standi* tal-appellanti ma ntlaqgħetx, huwa xieraq li din tħallas sehem mill-ispejjeż ta' dan l-appell, li għalhekk għandhom jinqasmu hekk: sehem minn ħamsa ($\frac{1}{5}$) tħallsu *MRCs* u erba' ishma minn ħamsa ($\frac{4}{5}$) tħallashom l-appellanti *Cardona*.

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Deputat Reġistratur
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