



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, 20 ta' Ġunju, 2024.

Numru 12

Rikors numru 122/2024/1

Hitachi Zosen Inova AG – Terna S.A.

v.

**Dipartiment tal-Kuntratti, WasteServ Malta Limited, Paprec
Energies International – BBL Malta u FCC Medioambiente
International S.L.U.**

Il-Qorti:

1. Din hija sentenza dwar appell imressaq minn Hitachi Zosen Inova AG - Terna S.A. (minn issa 'l hemm imsejħin bħala "*Hitachi – Terna*") jew "*il-konsorzju appellanti*") kontra deċiżjoni finali mogħtija mill-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi fit-23 ta' Frar, 2024, wara li fis-seduta tat-22 ta' Novembru, 2023 giet miċħuda talba ta' rikuża ta' żewġ membri

tal-imsemmi Bord. Fis-sentenza finali tat-23 ta' Frar, 2024, il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi kkonferma deċiżjoni meħuda mid-Dipariment tal-Kuntratti illi jagħti l-kuntratt marbut mal-avviż bin-numru CT 2032/2022 lill-konsorzju Paprec Energies International – BBL Malta.

Daħla

2. Fil-11 ta' April, 2022, id-Dipariment tal-Kuntratti ħabbar avviż dwar kuntratt bin-numru CT 2023/2022 imsejjaħ «*Competitive Procedure with Negotiation: Pre-Qualification Questionnaire (PQQ) For the Design, Build/Construction and Operation of a Waste to Energy Facility in Malta in an Environmentally Friendly Manner.*»

3. Ir-raġuni għaliex inħareġ dan l-avviż gie mfisser fil-**klawsola 1.2** b'dan il-mod:

«The Contracting Authority intends to procure a contract for the Design, Build and Operation (DBO) of a Waste to Energy (WtE) facility in Malta to substantially divert waste away from landfill disposal and contribute towards Malta's national compliance with EU targets with respect to recycling and landfill reduction. The WtE facility will produce a substantial amount of green energy and make a significant contribution to the reduction of the Maltese carbon footprint. The technical specifications will involve the relevant Maltese Green Public Procurement (GPP) requirements. In addition, the emission limit values will be in compliance with the latest revised and restrictive BAT/BREF requirements.

The Contracting Authority is seeking to deliver an operational WtE plant with expected contract duration for 20 years of plant operation. Hence, the successful Tenderer will be awarded a DBO contract consisting of a design and build phase of approximately 3 years and a subsequent operation and maintenance phase of approximately 20 years. For more

exact timeline, please see Tender Documents.

It is the intention that the financing of the WtE construction is to be provided by the Government of Malta however, other public funding options may be explored should these be available. The successful Tender will undertake commercial risk during construction, and operation and maintenance. The allocated split of responsibilities and commercial risks will be defined in the tender material.

The WtE plant is expected to incinerate approximately 200 kt pr year feedstock (please see Tender Documents for details) consisting of mainly reject from Materials Recovery Facility (MRF) and Mechanical Treatment Plant (MTP), mixed Municipal Solid Waste (MSW) and smaller fractions of shredded bulky waste and Refuse Derived Fuel (RDF). To facilitate operational flexibility the plant is expected to consist of two independent incinerators based on mass-burn moving grate. The plant is to consist of two lines each with a capacity of approximately 12 tonnes/h MSW, connected to a common steam turbine generator producing power to the national grid.

The purpose of the Competitive Procedure with Negotiation is to allow the individual Candidate to submit an initial tender, which shall be the basis for the subsequent negotiation.»

4. Skont **klawsola 1.5** tal-imsemmi avviż, l-awtorità kontraenti u l-benefiċjarju aħħari wara dan il-proċess kellha tkun WasteServ Malta Limited.

5. Illi kif jixhed l-isem stess ta' dan l-avviż, id-Dipartiment tal-Kuntratti u Wasteserv Malta Limited għażlu li jmexxu din is-sejha bil-proċedura tal-«*Competitive Procedure With Negotiation.*» Din il-proċedura, li bil-Malti hija msejha bħala Proċedura Kompetittiva permezz ta' Negożjar, hija regolata bir-**Regolamenti 123 sa 127 tar-Regolamenti dwar l-Akkwist Pubbliku (Legislazzjoni Sussidjarja 601.03).**

6. Din il-proċedura kompetittiva permezz tan-negożjar tista' tiġi użata

biss bl-approvazzjoni bil-miktub tad-Direttur tal-Kuntratti u f'każ biss li tkun teżisti waħda mill-ħames ċirkostanzi msemmija fir-**Regolament 123**.

7. Ġeneralment sejha bħal din issir permezz ta' avviż dwar kuntratt, li permezz tiegħu operaturi ekonomiċi jiġu mistiedna biex jekk iridu jwieġbu għall-avviż, u dan billi jipprovdu t-tagħrif kollu li jkun qiegħed jintalab mingħandhom skont l-avviż. L-avviż għalhekk għandu jkun fih tagħrif biżżejjed sabiex l-operaturi ekonomiċi jkunu jistgħu jidentifikaw in-natura u l-ambitu tal-akkwist, ħalli b'hekk ikunu jistgħu jiddeċiedu jekk jitolbux li jieħdu sehem f'dik il-proċedura jew le (ara **Regolament 124**).

8. Wara li l-awtorità kontraenti tgħarbel it-tweġibiet hija għandha tagħżel liema għandhom ikunu dawk l-operaturi ekonomiċi li għandhom jiġihallew jissottomettu offerta inizjali (ara **Regolament 126**). Minn hemmekk, l-awtorità kontraenti tibda tinnegozja mal-offerenti dwar l-offerta inizjali tagħhom, u dan sabiex huma jkunu jistgħu jtejbu l-kontenut tal-offerta. B'danakollu r-rekwiżiti minimi u l-kriterji tal-għoti ma jistgħux ikunu soġġetti għal negozjati jew tibdil.

9. Meta mbagħad l-awtorità kontraenti tkun beħsiebha tikkonkludi n-negozjati, hija għandha tgħarraf lill-offerenti li jkun fadal u tagħtihom data ta' għeluq sa meta huma jistgħu jifgħu kwalunkwe offerta ġdida

jew riveduta tagħhom. Din l-offerta għandha tkun finali u minħabba f'hekk din ma tistax tiġi negozjata jew mibdula (ara **Regolament 127**).

10. Lura għall-każ tagħna, jirriżulta li l-proċess kien sewwasew maqsum fi stadji suċċessivi. Fl-ewwel stadju, l-operaturi ekonomiċi kellhom jimlew kwestjonarju msejjaħ bħala *Pre-Qualification Questionnaire* (PQQ).

11. L-għarbiel tat-tagħrif kollu mogħti mill-oblaturi ekonomiċi f'dan il-kwestjonarju twettaq minn bord tal-għażla msejjaħ bħala *Tender Evaluation Committee* (TEC) li kien magħmul minn ħames persuni: (i) Jonathan Scerri bħala President tal-Bord; (ii) Susan Portelli bħala Segretarja tal-Bord; (iii) Branica Xuereb; (iv) Stephanie Scicluna Laiviera; u (v) l-Inġinier Stephen Dimech.

12. B'kollox jidher li kien hemm ħdax-il oblatur ekonomiku li ħadu sehem fih. Minn dawn intagħżlu ħames oblaturi sabiex jifgħu l-offerti inizjali tagħhom. Dan it-tieni stadju tal-proċess ġie msejjaħ *Invitation To Tender* (ITT). Fost l-oblaturi magħżula biex ikomplu għat-tieni stadju kien hemm il-konsorzju appellanti, il-konsorzju Paprec Energies International – BBL Malta u FCC Medioambiente Internacional S.L.U.

13. Wara li nfetħu l-offerti inizjali li ġew mitfugħa mill-oblaturi, l-

awtorità kontraenti bdiet in-negożjati ma' kull wieħed mill-offerenti. Jidher li din il-fażi tan-negożjati tmexxiet minn Richard Bilocca, il-Kap Eżekuttiv ta' WasteServ Malta Limited, flimkien mat-tim tiegħu. It-*Tender Evaluation Committee* (TEC) fuq imsemmi, ma kienx involut f'din il-fażi tat-taħditiet.

14. Il-mod ta' kif kien ħa jitmexxa dan il-proċess ġie mfisser fi **klawsola 1.7** tal-avviż, li taqra hekk:

«*Brief Overview of this Competitive Procedure with Negotiation process*

The intention of this PQQ document is to guide interested Candidates in providing the necessary information for the assessment of their Financial & Economic Standing, Experience, and Competence for the completion of this contract. The information obtained from the submission of the appropriate templates and supporting documentation shall allow the Evaluation Committee to verify and evaluate that a Candidate has adequate financial and other resources and will be in a position to execute the requirements of this procurement procedure.

The Evaluation Committee will review each submission against the short-listing selection criteria provided in Part B. The short-listed candidates will then receive an Invitation to Tender (ITT), wherein each one of them shall be requested to submit an initial tender, which will serve as a platform on which a negotiation with each individual selected Candidate will follow. Please note that the negotiations are likely to be based on a sequence of meetings over approximately five weeks.

When the Contracting Authority concludes the negotiations, it shall set a common deadline for the Candidates to submit a final tender as requested by the Tender Documents. This shall be the final tender, and the bids shall be evaluated by means of Best Price Quality Ratio (BPQR) award criteria.

Please note that the Contracting Authority will not award the contract on the basis of the initial tender. However, for the negotiation it is expected that the Bidders will present an initial tender as complete and final as possible in line with the specifications in the Tender Documents.»

15. Wara li ngħalaq dan l-istadju tan-negozjati, l-oblaturi ekonomiċi ngħataw żmien sabiex jixhtu l-offerti finali tagħhom. Dan wassal għat-tielet stadju tal-proċess imsejjaħ bħala *Best and Final Offer* (BAFO).

16. Mill-ħames oblaturi ekonomiċi li kien għad fadal, kienu biss: (i) il-konsorzju appellanti; (ii) il-konsorzju Paprec Energies International – BBL Malta; u (iii) FCC Medioambiente Internacional S.L.U. li tefgħu l-offerta finali tagħhom.

17. L-għarbiel ta' dawn l-offerti finali sar mit-*Tender Evaluation Committee* (TEC), li kien magħmul mill-istess ħames persuni fuq imsemmija, ħlief għall-Ingġinier Stephen Dimech, li ġie mibdul mill-Ingġinier Charlon Buttigieg.

18. Fit-13 ta' Ottubru, 2023, id-Dipartiment tal-Kuntratti ħabbar li kien qiegħed jiġi rakkomandat li l-kuntratt mertu tal-avviż jingħata lil konsorzju Paprec Energies International - BBL Malta bil-prezz ta' €599,659.00.

19. Il-konsorzju appellanti ma qabilx ma' din ir-rakkomandazzjoni. Għalhekk fit-23 ta' Ottubru, 2023, dan ressaq l-oġġezzjoni tiegħu quddiem il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi, bl-ilmenti ewlenija jkunu dawn: (i) li l-kumitat tal-għażla taħ marki tekniċi inqas milli kien

ħaqqu; (ii) li l-bord tal-għażla għarbel b'mod ħażin l-offerta tal-konsorzju Paprec Energies International – BBL Malta, kemm għaliex dan straħ fuq il-ħiliet ta' ħafna subkuntratturi, kif ukoll għaliex il-prezz tiegħu huwa wieħed modest ħafna meta jitqies id-daqs tal-proġett; u (iii) li kien hemm irregolaritajiet waqt il-proċess għaliex ġie mikxuf il-prezz inizjali ta' kull wieħed mill-oblaturi ekonomiċi li tefgħu l-offerta inizjali.

20. Fit-22 ta' Novembru, 2023, il-konsorzju appellanti ressaq rikors, li permezz tiegħu talab sabiex Kenneth Swain, l-Avukat Vincent Micallef, Lawrence Ancilleri u Stephanie Scicluna Laiviera jkunu skwalifikati milli jkunu membri fuq il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi u dan sabiex jiġu żgurati l-prinċipji tal-indipendenza u tal-imparzjalità, peress li Kenneth Swain u l-Avukat Vincent Micallef jokkupaw karigi oħra ma' entitajiet tal-Gvern; Lawrence Ancilleri għandu bintu taħdem ma' WasteServ Malta Limited; u Stephanie Scicluna Laiviera taħdem hija stess ma' WasteServ Malta Limited.

21. Jidher li għall-bidu l-Bord ta' Revizjoni dwar Kuntratti Pubbliċi kien oriġinarjament magħmul minn Kenneth Swain bħala President u minn Dr Charles Cassar u Lawrence Ancilleri bħala membri permanenti. Ħareġ però mix-xhieda tas-Segretarju tal-Bord, Henry (Harry) Fenech, illi Lawrence Ancilleri astjena milli jibqa' fil-Bord minħabba li bintu tabilħaqq taħdem ma' WasteServ Malta Limited. Minflok għalhekk

dañal l-Avukat Vincent Micallef.

22. Fis-seduta tat-22 ta' Novembru, 2023 il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi kompost minn Kenneth Swain bħala President u minn Dr Charles Cassar u l-Avukat Vincent Micallef ċaħad it-talba għar-rikuża għar-raġunijiet li ġew imfissra hekk:

«Prior to recess, this Board has heard arguments from the appellant that in a nutshell are requesting that two members of this Board are to recuse themselves from continuing to hear this appeal.

This for the reasons outlined by the appellant just now and duly minuted by the Board Secretary.

The Board is hereby conceding the appellant's submission that a request for recusal is to be made in open court and this in line with article 737 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta).

The relevant regulation challenged by the appellant emanates from the public procurement regulations i.e. regulation 85(1) which reads as follows:

«The chairman or other members of the Review Board shall be disqualified from hearing a case in such circumstances as would disqualify a judge in a civil suit, and in any such case the chairman or member shall be substituted by another member on the panel.»

Since reference is made to the disqualification of a judge in a civil suit, what now becomes relevant is article 734 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta).

This Board has gone through all the grounds mentioned for the challenge or abstention of a judge (in this case board members of the PCRB) and finds absolutely no instance which should make a member of this Board to recuse himself.

It must also be pointed out that members of the legal team of the appellant have, in the past (not so long ago), resorted before this same Board, as now composed, on appeals where the Ministry, departments and/or authorities fell under the remit of the same Minister responsible for Wasteserv Malta Ltd. This point which was brought up today, was never ever raised. It begs the question of why now?

It is moreover, important to also mention that this Board takes the recusal of any of its members from any appeals in a very responsible manner. In fact, and it is no secret that for example, I as Chairman of this Board, also hold a directorship within Enemalta Plc. I can solemnly declare that I have never chaired any appeal whenever Enemalta plc was involved. Same goes for the other members making up this Board.

Therefore this Board's decree is that from a purely legal and technical point of view it is fully capable of continuing to hear this appeal in its entirety and finds no legal base at all and at law which allows for such recusal or abstention.

That said, reference is also made to article 39(2) of the Constitution of Malta which states that "Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

Therefore, the dictum "Justice must not only be done, but must also be seen to be done" becomes also relevant.

Once this Board has decreed that technically and lawfully there is no reason for some of its members to recuse themselves, what must now be analysed is that 'justice must also be seen to be done'.

*To this end, reference is now being made to **the Case of Campbell and Fell v. The United Kingdom (Application no 7819/77; 7878/77)** before the European Court of Human Rights, based in Strasbourg with Judgement delivered on 28 June 1984.*

With regards to the issue raised on the 'Independence' of the tribunal the court stated the following.

«Para 77.

Mr. Campbell alleged that the Board of Visitors which heard his case was not an "independent" tribunal, within the meaning of Article 6 para. 1 (art. 6-1). He contended that Boards were mere "cyphers", were not seen by prisoners to be independent and were, in practice, an arm of the executive: as regards many of their functions, they were under the control of the prison authorities and had to accept the Home Secretary's directions. In particular, it was submitted that they were not independent in exercising their role. The Commission, whilst recognising that Boards were under a legal obligation to act independently and impartially, stated that this was not of itself sufficient: to be truly "independent" the body concerned must be independent of the executive in its functions and as an institution, such independence ensuring, notably, that justice is seen to be done. In the Commission's view, a Board did not possess the necessary institutional independence: firstly, its members were appointed

for limited periods by the Home Secretary and did not appear to be irremovable; secondly, although a Board was not part of the administration, its other functions were such as to bring it into day to day contact with the officials of the prison in such a way as to identify it with the management of the prison. This conclusion was contested by the Government. They maintained, inter alia, that a Board was not part of the management structure of the prison: it was independent of the prison administration locally and nationally and, in discharging its administrative role, did not act on behalf of the executive.”

Para 78

“In determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the case, the Court of Human Rights has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.»

Therefore it established four (4) separate tests.

With regards to the manner of appointment of its members, the ECHR stated that:

Members of Boards are appointed by the Home Secretary, who is himself responsible for the administration of prisons in England and Wales. The Court does not consider that this establishes that the members are not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not "independent". Moreover, although it is true that the Home Office may issue Boards with guidelines as to the performance of their functions, they are not subject to its instructions in their role.

In this context, the Board submits that in the same manner as the Prime Minister of Malta appoints members to this Board on the advice of the Minister For Finance, this similarly does not impact on the Board's independence.

With regards to the second test, duration of their term of office, the ECHR stated that:

Members of Boards hold office for a term of three years or such less period as the Home Secretary may appoint. The term of office is admittedly relatively short but the Court notes that there is a very understandable reason: the members are unpaid and it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer. The Court notes that the Rules contain neither any regulation governing the removal of members of a Board nor any guarantee for their irremovability. Although it appears that the Home Secretary could require the resignation of a

member, this would be done only in the most exceptional circumstances and the existence of this possibility cannot be regarded as threatening in any respect to the independence of the members of a Board in the performance of their judicial function.

In this context, it must be noted that the term of office of this Board is exactly the same, i.e. for a three year period. However, in the present case it must be noted that other than this, the removal of members of this Board is covered by regulation 82 of the PPR whereby apart from the term of office, the removal of members is similar to that of judges and magistrates as opposed to the ECHR concern cited above. Therefore, it does offer security of tenure.

With regards to the third and fourth tests, existence of guarantees against outside pressures and the question whether the body presents an appearance of independence” the ECHR stated that:

The impression which prisoners may have that Boards are closely associated with the executive and the prison administration is a factor of greater weight, particularly bearing in mind the importance in the context of Article 6 of the maxim "justice must not only be done: it must also be seen to be done". However, the existence of such sentiments on the part of inmates, which is probably unavoidable in a custodial setting, is not sufficient to establish a lack of "independence". This requirement of Article 6 (art. 6) would not be satisfied if prisoners were reasonably entitled, on account of the frequent contacts between a Board and the authorities, to think that the former was dependent on the latter however, the Court does not consider that the mere fact of these contacts, which exist also with the prisoners themselves, could justify such an impression.

In the light of the foregoing, the Court sees no reason to conclude that the Board in question was not "independent", within the meaning of Article 6 (art. 6).

Similarly, in the given context, the mere fact that certain members of this Board hold NON Executive roles on other Boards does not in this Board's view mean that this Board is not Independent.

With regards to the test regarding the 'Impartiality of the tribunal' the ECHR stated the following.

«Mr. Campbell further contended that the Board of Visitors which heard his case was not an "impartial" tribunal. The Government contested this allegation.

Para 84.

The personal impartiality of members of a body covered by Article 6 (art. 6) is to be presumed until there is proof to the contrary. In the cited case,

the applicant has adduced no evidence to give the Court any cause for doubt on this score..... The Court, therefore, perceives nothing in the actual organisation of the adjudication that would reflect adversely on the Board's objective "impartiality". There remains the fact that Mr. Campbell might not have seen the Board as being totally free from bias. However, for reasons similar to those given in paragraph 81 above, the Court does not consider that, in the particular context, this suffices to establish that this requirement of Article 6 (art. 6) was not satisfied.»

Having noted that the main point of concern, inter alia, seems to be that Enemalta would eventually benefit from the award of the contract this Board submits that should this be the case Enemalta would likewise benefit from such award indiscriminately and independently of who is awarded the tender. There is definitely no interest at risk in this context. This is even for the sake of saying that the appellant wins successfully this bid the terms and conditions stipulated in the power purchase agreement would still become binding on the appellant company should that be the case.

This Board also submits that the alleged grievance raised in terms of Article 734(1)(e) does not hold water precisely because it fails deliberately to specify that the Members Mr Kenneth Swain and Dr Vincent Micallef have indeed any direct or indirect interest with any of the bidders appearing before this Board as duly constituted. As regards the mention of Article 734(1)(a) whereby appellant mentioned the challenge or abstention of any of the Members if they are related to any of the parties by consanguinity or affinity the Appellant can clearly notice that no such member of the Board as duly constituted are those mentioned by that same appellant.

Therefore, this Board submits that from an independence and impartiality point of view it can also serenely state that notions of independence and impartiality are fully and will remain fully observed. Application is therefore decided.

Therefore, this Board is finally inviting the appellant to start initial submissions on the grievances listed in its letter of appeal.»

23. Aktar tard dakinhar, il-konsorzju appellanti ġie awtorizzat mill-Bord ta' Revizjoni dwar Kuntratti Pubbliċi sabiex iressaq ilment addizzjonali. B'dan l-ilment addizzjonali, il-konsorzju appellanti sostna li seħħ ksur tar-**Regolament 86 tar-Regolamenti dwar l-Akkwist Pubbliku** għaliex skontu Stephanie Scicluna Laiviera ma setgħetx tkun membru tal-

kumitat tal-għażla li għarbel l-offerti, peress li hija maħtura fil-lista tal-membri tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi.

24. Fis-seduta tal-24 ta' Novembru, 2023, il-konsorzju appellanti talab biex jithalla jressaq bħala xhud lil Professur Albert Sanchez-Graells bħala espert fil-qasam tal-liġi tal-Unjoni Ewropea dwar l-akkwist pubbliku. Din it-talba iżda ġiet miċhuda mill-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi, wara li kien hemm oġġezzjonijiet mill-partijiet l-oħra.

25. Il-konsorzju appellanti ressaq rikors sabiex il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi jqis mill-ġdid din id-deċiżjoni tiegħu, iżda fis-seduta tal-14 ta' Diċembru, 2023, il-Bord tenna d-deċiżjoni tiegħu li ma ma jhallix lil Professur Albert Sanchez-Graells jixhed fil-kawża.

26. Fl-istess seduta tal-14 ta' Diċembru, 2023, il-konsorzju appellanti aċċenna għall-fatt, li l-Inġinier Charlon Buttigieg, membru ieħor tal-kumitat tal-għażla ma setax ukoll joqgħod fil-kumitat minħabba kunflitt ta' interess. Ir-raġuni mogħtija mill-konsorzju appellanti kienet li dan l-Inġinier Charlon Buttigieg kien qiegħed għaddej minn proċeduri kriminali dwar inċident fejn hemm involuti WasteServ Malta Limited u wieħed mill-membri tal-konsorzju rakkomandat.

27. Din id-darba l-partijiet l-oħra oġġezzjonaw għal dan l-ilment ġdid

peress li dan ma ġiex imqanqal fl-ittra tal-oġġezzjoni oriġinali.

28. Eventwalment b'deċiżjoni mogħtija fit-23 ta' Frar, 2024, il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ċaħad l-ilmenti kollha tal-konsorzju appellanti. Ir-raġunijiet tal-Bord ġew imfissra hekk:

«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.

a) 1st grievance - Wrong evaluation of the appellant bid –

i. Inadmissibility claims – No Utility

The Board initially agrees with arguments brought forward by the Department of Contracts and the Contracting Authority whereby, prima facie, the grievance of the appellant is of 'no utility' to them. This since, even if a higher technical score was afforded to the appellant (even a perfect technical score of 100%), such score would not have changed or impinged on the ranking and / or recommendation as issued in the Notice of Award.

However, the aforementioned should not be seen and considered by this Board in isolation from another substantial and important plea raised by the appellants, since another grievance has also been filed on the financial aspect of the bid of the recommended bidder. This inevitably could potentially alter the financial score obtained by them. That said, in the interest of transparency and full disclosure, this Board will proceed to decide on the merits presented for this grievance.

ii. Merits – Higher Score

▪ *The Board notes that the Contracting Authority has been very meticulous in the way it proceeded in this evaluation. The number of experts which have been appointed to assist it, can be described as being a novelty in the local public procurement arena. This indicates the serious manner in which the Contracting Authority proceeded in dealing with this procurement process.*

▪ *Before going into further detail, this Board is somewhat perplexed at the request of the appellant when on the one hand appellant is requesting the Board "to appoint experts inter alia in accordance with article 90(1) of S.L. 601.03" (reference to the 1st request in the letter of appeal) on the basis of the fact that there were mistakes in the evaluation process, whereas on*

the other hand the same appellant, during the final submissions, concludes that: [quoting verbatim] “most of the points on which the appellant has been damaged are not technical”. Needless to say, this line of argumentation is intrinsically a contradiction in terms. It is as if the appellant somehow is trying to use all the arrows available to it in its quiver in the hope that some of the appellant’s arguments stick.

▪ *The above runs counter to the interpretation and considerations of the Court of Appeal. To this effect, the Board refers to the judgement in the names **Executive Security Services Ltd v. Aġenzija Servizz.Gov et** (Appeal no 205/2021/1, decided on 7th March 2022) whereby it was stated that “Qabel xejn tajjeb li minn issa issir referenza għall-prinċipju kardinali f’materja simili illi fejn l-evalwazzjoni li jkun għamel kumitat tal-għażla kienet **raġonevoli**, allura bord jew tribunal tat-tieni istanza m’għandux jissostitwixxi d-diskrezzjoni tiegħu għal dik tal-kumitat” (bold & underline emphasis added). Therefore, according to this judgement, what becomes imperative is to establish whether a manifest error of assessment was present throughout the process.*

▪ *The Board in substantiating its position does hereby refer to the testimony under oath of Mr Jeppe Rasmussen, wherein the contrary clearly appears in his testimony:*

• *“Hitachi’s appeal missed the key detail provided in the evaluation report on the raw gas pollutants composition causing concern to the evaluators. The appeal includes misrepresentative information.”*

• *“when it was pointed out to the Appellant that there was the need to comply with the waste throughput, Hitachi came back stating that it would be dangerous and would not be possible to operate in the area. When such key detail was missing in Appellant’s design it was unjustified to claim a higher technical score.”*

• *“There was no actual design for roads and weighbridge. Areas vital to Wasteserv were missed out and needed to be designed again in several instances.”*

▪ *Moreover, this position was also once again reaffirmed during the cross examination of Mr Markus Reinhard. The Board recalls that Mr Reinhard was repeatedly subjected to clarify the process in relation to the use of SPAVCs. The witness, ex admissis, confirmed under oath that there were two (2) missing concerns in the SPAVCs on two (2) specific items. Therefore, as a consequence, the appellants could not be allocated more than eight points in terms of score.*

▪ *Therefore, this Board opines that considering the evaluation methodology used, combined with the use of numerous experts, such eliminated all subjectivity risks and the appellant failed to prove that there existed a manifest error of assessment as highlighted in caselaw. The Board, therefore, finds no legitimate reason to disturb the workings of the evaluation committee.*

iii. Merits – Missing Information / Clarifications

- From the testimonies produced before this Board, more specifically during the testimony under oath of Mr Yoannis Nousis, it clearly emerged that the appellant did not fully conform with the ‘cross referencing instructions’ as issued by the Contracting Authority in the tender document.
- Once the Board was satisfied that the Contracting Authority afforded the same and equal level of treatment to all economic operators participating in this tender process, to the fullest adherence to the content of the tender document, (reference to clause 44.3 of the BAFO document), the Board rejects the arguments raised by the appellant.

iv. Merits – Parameters which were not part of the tender document

- With respect to this argument raised by the appellant, this Board notes that the content of the appeal application (vide paragraph 1.10), the ‘quote’ provided therein is nothing but a misrepresentation and reformulation of the textual content of the rejection letter aimed to fit a specific purpose. This is clearly and unambiguously illustrated in the COWI presentation (vide page 18) provided by Mr Jeppe Rasmussen.
- To the contrary, both Paprec and FCC clearly understood what was duly required in this specific part of the tender and complied with such requirement.

Once this Board has given due consideration to all the above, it cannot but reject the appellant’s first grievance.

b) 2nd grievance - Wrong evaluation of the Recommended Bid - Reliance on capacities of third parties –

i. The Board notes that with regards to this grievance, apart from arguments on the merits, two further pleas have been raised as to the inadmissibility of such grievance.

ii. 1st inadmissibility claim – Application filed ‘late’

As stated under oath by various witnesses who gave their testimony during the hearings, it has been duly ascertained that after the ‘short listing’ performed at the end of the PQQ stage, in accordance with article 3.5.3 of the PQQ document, the economic operators involved in this tender process, were duly afforded the opportunity to appeal the decision made by the Contracting Authority in terms of regulation 270 of the PPR.

Considering that the ‘reliance documents’ were a requirement in terms of article 2.3.5 of the PQQ document, and not a new requirement which was imposed at BAFO stage, this Board agrees with the arguments advanced

by both the Department of Contracts and the Contracting Authority indicating that any remedy to this effect, should have been sought at the end of PQQ stage.

iii. 2nd inadmissibility claim – grievance is unclear and therefore breaches regulation 270 of the PPR

Reference is made to Regulation 270 of the PPR which clearly states that “..... shall contain in a very clear manner the reasons for their complaints.”

This Board agrees with the arguments brought forward by both the Department of Contracts and the Contracting Authority. It was argued that the appeal application skims through relevant aspects / sections of the PQQ document and requested the Board to establish the compliance status of the recommended bidder.

Article 2.1.4 of the application states “In view of the aforesaid, the review before the PCRB must ascertain that the appropriate reliance documentation have been provided, and that the appropriate confirmations and commitments have also been provided by all the third party entities on whose capacities the recommended bidder has been relied [sic];”

The Board notes that the Contracting Authority effectively forwarded the relevant information requested by the appellant during the standstill period. Therefore, the appellant should have been in a position to clearly state the reasons for their complaints in a very clear manner and in a timely fashion.

This Review Board is certainly not competent and is indeed legally precluded from allowing fishing expeditions of any sort without having true cause for the grievance being filed in terms of Regulation 270 of the PPR.

Even though this Board is hereby upholding these two inadmissibility claims, and therefore such grievance should be rejected at this stage, the Board will nonetheless proceed with dealing with the merit of such grievance and this in the interest of transparency.

iv. On the merits –

Article 2.3.5 of the PQQ document states the following:

*“A candidate may, where appropriate and for a particular contract, rely on the capacities of other entities regardless of the legal nature of the links which it has with them. It must in that case prove to the Contracting Authority **that it will have at its disposal** the resources necessary, for example, by producing an undertaking by those entities to that effect. Where a Candidate relies on the capacities of other entities with regard to*

criteria relating to economic and financial standing, the other entity/entities shall together with the Candidate and its partners be jointly liable for the execution of the Contract.” (bold & underline emphasis added).

From the testimonies heard and documents presented, this Board is very serene in stating that the evaluation conducted, and the documents submitted by the recommended bidder, met all the requisite requirements of the above-mentioned article.

The emphasis made on “... that it will have at its disposal...” clearly shows that the reliance is not required as at present but only if and when the contract is eventually awarded to any given economic operator. The documents submitted by the Recommended Bidder, in the Board’s opinion, duly meet said requirement.

This Board will therefore reject this grievance also on its merits.

c) 3rd grievance – Wrong Evaluation of the Recommended Bid – The Technical Solution (Abnormally Low) –

i. With regards to this specific grievance, this Board will deal with both the inadmissibility claims as well as the merits since the line of argumentation brought forward by all parties is somewhat similar in nature.

ii. Important numerical facts to establish before moving on to further analysis, are the following:

- *Estimated Procurement Value – Eur549,000,000*
- *Global Contract Value of Recommended Bidder – Eur599,659,900*
- *Global Contract Value of Appellant – Eur781,512,463*
- *Global Contract Value of Interested Party – Eur830,665,087*

iii. Other important factors to ascertain are that:

▪ *The Estimated Procurement Value was known to all economic operators at the outset of this procedure. Therefore, it was known even at PQQ publication stage when a ‘Remedies before closing date of a call for competition’ in terms of Regulation 262 of the PPR was readily available to all economic operators participating in this tender procedure.*

▪ *No economic operator resorted to the aforementioned Regulation, therefore, all economic operators invariably ‘accepted’ or ‘acquiesced’ to the Estimated Procurement Value as published.*

iv. It is this Board’s opinion that a challenge to the Estimated Procurement Value, if any, could only and exclusively have been challenged and/or raised on the basis of Regulation 262(1)(a) of the Public Procurement Regulations in cases where “..... which are proven to be impossible to perform;”

v. This Board initially agrees with the appellant's arguments that economic operators are under no obligation to contest the estimated procurement value because such is not a mandatory requirement. However, it is also true that once it has not been contested, at the appropriate juncture, no further remedies are from then on available to scrutinize it any further.

vi. This Board also agrees with the appellant's arguments that there is no provision for 'capping', i.e. the Estimated Procurement Value is not a 'top ceiling' whereby any offers higher than it will be discarded, however it is also true that if the appellant felt that the Estimated Procurement Value was on the 'low side', economic operators would then run the risk that the Contracting Authority would reject their respective bids as being too high. It is pretty evident, to this Board, that the appellant arrived at the conclusion that the Estimated Procurement Value is on the 'low side' (Eur549,000,000) on the basis of the fact that with regards to the financial bid of the recommended bidder (Eur599,659,900) the appellant's stated the following: "cannot sustain such a price with the mandatory technical requirements specified within the tender, alternatively it will sustain the price, but by offering a solution not compliant to the tender specifications".

vii. The above mentioned is also crystallised in the judgment of **X Clean Limited v. Dipartiment għall-Anzjanità Attiva u Kura fil-Komunità et** (appeal no. 126/2021/1, 31 August 2021, para 14) where it was stated that "..... Il-prezz stmat huwa bażat fuq riċerka dwar il-kundizzjonijiet tas-suq u għandu għalhekk jitqies realistiku." (underline emphasis added). This Board notes that during this tendering process, it was established that the Contracting Authority engaged experts in the field who assisted it throughout the entire process, including at the PQQ stage when the estimate procurement value was considered and eventually established. Therefore, this Board sees no reason to doubt the reliability of the Estimated Procurement Value in the absence of anything proven to the contrary.

viii. Once the estimated procurement value has not been contested, it should therefore be used as the main yardstick to establish whether any offers 'appear' to be abnormally low or otherwise. This was also stated in the very recent judgement **Star Fuels Limited v. Wasteserv Malta Limited u Ph. Borg Limited** (appeal no. 450/2023/1, 22 January 2024) when it was held that "Għidna illi kriterju rilevanti għal dan il-għan jista' jkun li tqabbel il-prezz ma' dak ta' offerti oħra validi u, partikolarment, mal-prezz stmat mill-awtorità kontraenti billi dan, għalkemm biss indikattiv, huwa bażat fuq riċerka dwar il-kundizzjonijiet tas-suq u għandu għalhekk jitqies realistiku; kriterju ieħor hu li tqabbel il-prezz offert ma' kemm jiswa l-prodott għall-oblatur biex tara jekk il-prezz huw iekonomikament fattibbli, jekk iħallix telf flok qligħ." (bold & underline emphasis added)

ix. Reference is now made to regulation 243 (1) of the Public Procurement Regulations which states that "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.” (bold & underline emphasis added). 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 / are suspect** to be abnormally low. The answer to this will be dealt with in the following paragraph.

x. This Board notes that the financial bid of the recommended bidder is more than Eur50 million (9.2%) over and **above** the Estimated Procurement Value, which firstly was based on market research and secondly as already stated, has not been challenged by **any** economic operator. Once it was also established, during the testimony under oath of Mr Jeppe Rasmussen, that the appellant’s showed a higher percentage profit figure (8%) to that of the recommended bidder (5.9%), it is incomprehensible to this Board how one can come to the conclusion that the bid as submitted by the recommended bidder is to ‘appear’ to be abnormally low. The calculus as deduced by the appellant by making comparison to FCC’s bid and stating that FCC’s bid was more akin to the appellant’s bid, finds no traction at all and is deemed to be immaterial, in the circumstances, when compared to all the aforementioned factors.

xi. This Board deems the report presented by Mr Dimitrius Nektarius of Deloitte as highly nebulous. This for the reason that according to his own testimony, he stated that “Economies of scale were not taken as factors and that the three (projects) are not representative of the whole market or represent the whole spectrum.” and that “.... All three Greek projects have no incineration facilities....” Taking these factors in the Board’s considerations serve to reduce the credibility of such report and findings rather than substantiating any form of credibility.

Hence, this Board cannot but reject this grievance of the appellant.

d) 4th grievance - Irregularities in the procedure –

i. The Board notes that with regards to this grievance, apart from arguments on the merits, two further pleas have been raised as to the inadmissibility of such grievance.

ii. Inadmissibility claims –

The Board agrees with arguments brought forward by the appellant in that “if a tender is not submitted it is difficult to show that one has an interest”. Moreover, it is noted that the appellant is in fact filing this grievance at the first instance according to law.

Hence this Board will now proceed to decide on the merits of such grievance.

iii. On the merits –

Reference is made to article 13(2) of the BAFO document which states that cancellation may occur where “there have been irregularities in the procedure, **where these have prevented fair competition**” (bold & underline emphasis added) In its letter of appeal, filed on 23rd October 2023, the appellant states that “.... as will be shown throughout the proceedings, the irregularity in rendering public the financial offer value..... has had a negative impact on the procurement procedure itself.....”

After having heard all the testimonies under oath and thoroughly analysed both written and verbal submissions, this Board is no doubt that what is stated in article 13.4 of the Department of Contracts reasoned letter of reply is the most relevant to the facts at issue - “Not only did the opening of the initial prices not have anti-competitive effects, but it had pro-competitive effects”.

In fact, it must be stated that at the initial offers stage, i.e. non-binding financial bids, the appellant’s financial offer was clearly and unambiguously much less competitive than its own final and binding offer. The latter was indeed considerably lower, and hence became much more competitive and more realistically in line with the Estimated Procurement Value of the tender.

Moreover, it must be stated that in its ‘Request for Information’ dated 19th October 2023, the appellant is requesting “.... a breakdown of the key financial figures, as per the tender financial forms..... which comprise the total contractual value.” In the same document the appellant states that “The JV understands that the information requested is not confidential, neither sensitive nor privileged, and thus the JV expects that its request is upheld by the department;”

Whilst it is true that this request was made post financial negotiations, contrary to the details of the appellant’s grievance that is during the tendering process, it must nonetheless be argued that the Contracting Authority has abided by the principle of equal treatment thereby retaining a level playing field and thus it is difficult to understand on what grounds the appellant’s grievance is built upon.

Having regard to all aforementioned considerations the Board finds it difficult to fathom the statements made by the appellant’s. On the contrary, not only fair competition has not been prevented, but it is perfectly correct that article 13(2) of the BAFO should not have been invoked by the Contracting Authority and / or the Department of Contracts. Hence this grievance of the appellant cannot be upheld and is hereby being rejected.

e) 5th grievance – Composition of the Evaluation Committee – Ms Stephanie Scicluna Laiviera

i. The basis of this grievance revolves around regulation 86 of the PPR which states “The members of the Review Board shall not be precluded from the exercise of their respective **profession**, however, during the term of their appointment they shall be precluded from the exercise of their profession in cases before the Review Board.” (bold & underline emphasis added)

ii. It must be noted that by participating and being a member of an evaluation committee, one is not automatically deemed nor considered to be the exercising one’s ‘profession’. Throughout the proceedings, the appellant had the opportunity to examine Ms Stephanie Scicluna Laiviera on this point.

iii. The Board recalls the appellant’s counsel asking and requiring information about Ms Scicluna Laiviera’s employment details, where she clearly stated under oath that she is (even at the time of the evaluation process of this tender) an employee of the Water Services Corporation on secondment to Wasteserv Malta Limited. Moreover, the witness confirmed that her “salary” is paid by the Water Services Corporation and the salary is subsequently reimbursed by Wasteserv Malta Limited. Being on a payroll of an entity, clearly excludes and militates against any presumption indicating that the witness is, in some shape or form, practising a “profession” within the meaning and within the purview of the Public Procurement Regulations.

iv. The Board interprets this as to mean that members of the Review Board may continue to exercise the profession but shall be precluded from the exercise of the profession in cases before the Review Board. It is in this Board’s opinion that Ms Scicluna Laiviera was at no stage and at no point in time exercising a profession within the meaning of this Regulation.

v. The Board also refers to the submissions made by the Contracting Authority’s legal counsel when referring to the appellant’s plea of *nemo iudex in causa propria* where the defence submitted that in the case of Ms Scicluna Laiviera there is (a) no *iudex*; and (b) no *causa propria*.

vi. Furthermore, and without prejudice to the aforementioned, it is this Board’s due consideration that should the legislator intended to exclude members of the Review Board from sitting on evaluation committees, it would have done so, similarly to what the law is stating in relation to the exercise of one’s profession in Regulation 86 and this in line with the Latin maxim *ubi lex voluit dixit, ubi noluit tacuit*. Henceforth, the Board is of the view that any reference to a possible breach of Regulation 86 is unfounded and is hereby being discarded.

vii. Furthermore, and on top of all the above, the Board also notes that the appellant fails to prove that any harm was ‘suffered’ and as a consequence this grievance also lacks the requisite causal nexus (the indispensable juridical link between “cause and effect”) which could lead

to the grievance to be upheld.

viii. Moreover, all members of the Board have declared their potential conflicts *ab initio* and at the very outset of their respective nomination and appointment to the Board and even before presiding at the very first appeal proceedings in their adjudicating roles.

ix. Likewise and as clearly stated in her testimony under oath, Ms Stephanie Scicluna Laiviera, upon her nomination as a substitute member of the PCRB in November 2021, immediately advised the Board that she would not preside over any cases instituted against Wasteserv and/or Water Services Corporation. In fact, she was not a presiding member of the Review Board during the present appeal. Henceforth, she does not have any influence whatsoever on the decision-making process of this current Board as composed.

x. Finally, this Board refers to paragraphs 14.6 and 14.7 of the Department of Contract's letter of reply to this grievance, dated 23rd November 2023, whereby the Department of Contract referred to a judgment on this point in the names **L-Onor. Imħallef Dottor Anna Felice et v. L-Avukat Dr Mark A. Mifsud Cutajar pro** decided by the First Hall of the Civil Court on the 25th July 2013, whereby in a similar situation a judge was party to a case which case was decided by her peer, another judge.

Hence, this Board rejects the grievance raised by the appellant.

f) 6th grievance – Composition of the Evaluation Committee – Mr Charlon Buttigieg

i. The substance of the grievance as filed by the appellant, is being understood as being that Mr Charlon Buttigieg was 'conflicted' as soon as he was appointed to the evaluation committee of this tender procedure.

ii. Initially, this Board notes that Mr Charlon Buttigieg formed part of the evaluation committee and therefore this information was available to the appellant only on the 1st sitting, i.e. the 22nd November, 2023.

iii. This was in fact confirmed under oath by Ms Branica Xuereb, when called to testify by the same appellant. The Board also notes that the details of both the criminal proceedings and civil proceedings referred to by the appellant in substantiating the grievance relating to a conflict of interest by Mr Charlon Buttigieg are in the public domain, and this despite the fact that the appellant's legal counsel tried to portray a situation where knowledge of these facts were available to them "only" on the date of the sitting following a specific question posed to the witness. It was clearly evident to the Board that the Appellant was very well prepared when at the 3rd sitting, held on 14th December 2023, the appellant's legal counsel immediately asked Mr Charlon Buttigieg whether there were any proceedings pertinent to some incident involving an injury to an employee

at the site known as 'Tal-Kus'.

iv. Therefore, this Board opines that such grievance should have been filed, at the latest, by 2nd December 2023. Therefore, the grievance raised by the appellant was filed fuori termine but this Board, for the sake of transparency and for the sake of reckoning the fullest of details of this appeal, will nonetheless proceed with determining the merits in connection with this grievance.

v. The Board will now proceed with considering and determining the point raised by the appellant's legal counsel in the context of a "conflict of interest" of Mr Charlon Buttigieg claiming that the witness stands accused before the Courts of Magistrates (Gozo) on a matter relating to involuntary bodily harm caused to an employee wherein one of the parties of the joint venture comprising the preferred bidder is allegedly also a defendant/respondent in a civil case stemming from the same facts which case is being entertained by the Italian Courts.

vi. The appellant's defence argued that since there are court proceedings involving both an entity part of the preferred bidder and the Wasteserv employee and such court proceedings are connected, therefore Mr Buttigieg has an inherent interest (even if a mere conflict of interest arises), in such case a declaration should have been made. Given that such a declaration was not made, therefore the appellant's counsel contended that that constitutes a conflict of interest. Quoting: "the moment there is a conflict, the case is made".

vii. Whilst this Board, prima facie, concurs with the appellant's contention, nonetheless it is the duty of this Board to determine whether this situation gave rise to any actual or potential conflict of interest.

viii. The witness confirmed as well that he is being charged in the Courts of Malta in its criminal competence whereas a party forming part of the preferred bidder's consortium is being civilly sued in a civil Court in Italy. The academic question that this Board should ask is whether the institution of separate proceedings against the two may in one way or another influence the decision of the evaluation committee by having Mr Charlon Buttigieg forming part of that evaluation assessment and whether such impinges on the concept of independence and impartiality.

ix. It is this Board's opinion that no such conflict is remotely present. First of all, the parties are not even parties to the same judicial proceedings since one party is being sued civilly before the civil Courts in Italy, whereas the other party is being charged criminally before the Courts of Magistrates in Gozo, albeit on the same facts. The resulting effect of a judgement in one case or another would neither have any impact nor be rightfully construed as giving rise to any form of a conflict. The question to be asked by this Board is what could have influenced Mr Charlon Buttigieg in his deliberations during evaluation committee stage which had or could have influenced the outcome via a direct or indirect,

financial, economic or personal manner – as defined according to Regulation 2 of the Public Procurement Regulations?

x. The Board although given the impression of such a “remote relationship” sees, however, no connection at all tying in some shape or form the two parties to a conflicting relationship, thereby tainting the integrity and transparency of the decisions of the evaluation committee. At a minimum, the appellant failed to substantiate their claim through concrete evidence. The very fact that there are two judicial processes emanating from one and the same fact does not in itself and automatically translate itself into proving the requisite elements giving rise to a conflict of interest. To this effect, the Board is hereby rejecting this ground.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant’s Letter of Objection, contentions and subsequent grievances raised;*
- b) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender;*
- c) Directs that the deposit paid by Appellant not to be reimbursed.»*

29. Il-konsorzju Hitachi - Terna appella minn din is-sentenza fl-14 ta’ Marzu, 2024. Fil-qosor il-ħames aggravji li ġew imressqa minnu jistgħu jingabru kif ġej: (i) li Kenneth Swain u l-Avukat Vincent Micallef kellhom kunflitt ta’ interess u għalhekk dawn ma setgħux joqogħdu fuq il-Bord ta’ Revizjoni dwar Kuntratti Pubbliċi; (ii) li Stephanie Scicluna Laiveria u l-Inġinier Charlon Buttigieg ma setgħux ikunu fuq il-bord tal-għażla li għarblu l-offerti, l-ewwel waħda għaliex hija fil-lista tal-membri li jpoġġu fil-Bord ta’ Revizjoni dwar Kuntratti Pubbliċi u t-tieni wieħed għaliex huwa involut fi proċeduri kriminali li jinteressaw lil wieħed mill-membri tal-konsorzju rakkomandat; (iii) li l-proċess tmexxa b’mod irregolari għaliex fost affarijiet oħra ġie mikxuf il-prezz tal-offerta inizjali tal-oblaturi

ekonomiċi u f'dan is-sens il-konsorzju appellanti jikkritika d-deċiżjoni tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi li ma ħallihx iressaq lil Professur Albert Sanchez-Graells b'ħala xhud biex jispjega dwar dan il-punt; (iv) li l-konsorzju magħżul kellu jiġi mwarrab min'ħabba li dan ma pprovdie x kif huwa kien beħsiebu jistrieħ fuq il-ħiliet ta' terzi biex iwettaq il-proġett; u (v) li l-offerta tal-konsorzju appellanti kienet baxxa wisq b'mod mhux normali.

30. Paprec Energies International – BBL Malta, magħmul minn Paprec Energies International u Bonnici Bros. Services Ltd, wiegħbu għal dan l-appell fil-5 ta' April, 2024 u fessru għalfejn dan l-appell għandu jiġi miċħud.

31. WasteServ Malta Limited wiegħbet fit-8 ta' April, 2024, filwaqt li d-Dipartiment tal-Kuntratti wiegħeb fid-9 ta' April, 2024. Fit-twegibiet rispettivi tagħhom huma spjegaw għaliex dan l-appell huwa ħażin. Fir-risposti tagħhom, id-Dipartiment tal-Kuntratti u WasteServ Malta Limited qajmu wkoll għadd ta' preġudizzjali dwar is-siwi proċedurali tal-appell. Fl-ispeċifiku huma saħqu: (i) li l-appell ġie ppreżentat mingħajr mandatarju speċjali li huwa preżenti fiżikament f'Malta; (ii) li l-appell ma jistax jissokta 'l quddiem min'ħabba li dan ma ġiex indirizzat kontra l-membri individwali li jiffurmaw parti mill-konsorzju rakkomandat iżda tressaq biss kontra l-isem tal-konsorzju li m'għandux personalità

ġuridika; u (iii) li l-appell għandu jiġi ddikjarat bħala deżert għaliex ma ġewx notifikati l-membri individwali tal-konsorzju rakkomandat.

32. B'nota tal-11 ta' April, 2024, FCC Medioambiente International S.L.U. iddikjarat li hi m'għandhiex interess f'dan l-appell u għalhekk hi la kienet ħa twieġeb għalih u lanqas ma kienet sejra tidher jew tiegħu sehem fis-seduti ta' quddiem din il-Qorti.

33. Inżamm smiġħ fit-30 ta' Mejju, 2024 u minn hemmhekk il-kawża tħalliet biex tingħata s-sentenza llum.

Konsiderazzjonijiet:

34. Qabel kull ħaġa oħra, din il-Qorti jeħtigilha tibda billi tindirizza t-tliet preġudizzjali, li WasteServ Malta Limited u d-Dipartiment tal-Kuntratti qajmu fir-risposti tagħhom kontra l-appell imressaq mill-konsorzju appellanti. Dan għaliex jekk imqar waħda minn dawn il-preġudizzjali tirriżulta li hija mistħoqqa, allura l-appell tal-konsorzju appellanti jieqaf hemm minħabba li ma jkunx jista' jiġi mistħarreg.

35. L-**ewwel preġudizzjali**, li tqajmet biss minn WasteServ Malta Limited, tmiss mal-kwistjoni li l-appell ġie mressaq mill-konsorzju barrani innifsu u mhux minn mandatarju speċjali li jinsab f'Malta kif trid il-liġi.

WasteServ Malta Limited issostni li persuna assenti minn Malta ma tistax tippreżenta appell, jekk fil-mument tal-preżentata tal-appell, hija ma taħtarx persuna li tinsab fiżikament f'Malta sabiex tidher għaliha. Tispjega li skont l-**Artikolu 180 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**, persuna li qiegħda tidher f'isimha, tista' biss tippreżenta att ġudizzjarju sakemm hija tkun preżenti f'Malta, b'dana li jekk tali persuna tkun nieqsa minn Malta, allura hija tkun trid taħtar persuna f'Malta sabiex tippreżenta l-att ġudizzjarju f'isimha. Sewwasew f'dan il-każ, WasteServ Malta Limited targumenta li billi l-konsorzju appellanti huwa magħmul minn żewġ kumpaniji barranin, waħda minn Żvizzera u l-oħra mill-Greċja, allura l-konsorzju appellanti kellu bilfors jaħtar mandatarju Malti sabiex jippreżenta l-appell f'ismu. La dan m'għamlux, allura hija tgħid li l-appell tal-konsorzju appellanti għandu jitqies bħala wieħed li huwa irritu u null.

36. Fil-fehma tal-Qorti din il-preġudizzjali ma hija fejjieda xejn. Dan hu hekk għaliex skont it-timbri li hemm jidhru fl-aħħar żewġ paġni tal-appell, jirriżulta li l-appell ġie ppreżentat mill-Prokuratur Legali P. Sammut. Skont l-**Artikolu 180(1)(b) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**, il-preżentata tal-iskritturi tista' ssir ukoll minn prokuratur legali. Jiġi b'hekk, li WasteServ Malta Limited ma tgħidx sew li l-appell ma joqgħodx ma' dak li jiddisponi l-**Artikolu 180(1) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili** (ara f'dan is-sens *Mary*

Brightwell v. Jane Pisani pro et noe deċiża mill-Qorti tal-Appell fit-3 ta' Novembru, 2009, fejn ġiet miċċhuda preġudizzjali dwar in-nullità tar-rikors tal-appell ta' persuna assenti minn Malta sewwasew għaliex l-appell kien ġie ppreżentat minn prokuratur legali).

37. Minbarra dan, jirriżulta li l-appell tal-konsorzju appellanti ġie ffirmat mill-Avukat Matthew Paris u mill-Prokuratur Legali P. Sammut. Għalhekk il-Qorti qiegħda tifhem li għall-għanijiet tal-**Artikoli 178 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili** huma ffirmaw dan l-appell fuq l-istruzzjonijiet tal-konsorzju appellanti. U billi skont il-liġi ma hemmx bżonn li din l-awtorizzazzjoni ssir bil-miktub, allura fin-nuqqas ta' provi li juru xort'oħra, il-Qorti qiegħda tifhem li meta l-Avukat Matthew Paris u l-Prokuratur Legali P. Sammut iffiraw dan l-appell huma għamlu dan mhux f'isimhom stess iżda f'isem il-konsorzju appellanti skont l-**Artikolu 180(1)(a) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili** (ara **Etienne Merlevede pro et noe v. Attorney General et** deċiża mill-Qorti Kostituzzjonali fid-19 ta' April, 2017, fejn l-avukat li ffirmaw u ppreżentaw l-appell ġie meqjus bħala l-prokuratur tal-appellant għall-għanijiet tal-**Artikolu 180(1)(a) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**).

38. Fl-aħħar nett, il-kumpanija Terna S. A., li hija reġistrata fil-Greċja u li hija parti mill-konsorzju appellanti, ma tistax titqies bħala kumpanija

assenti. Dan għaliex il-Greċja tiffirma parti mill-Unjoni Ewropea u għalhekk tali kumpanija titqies li toqgħod fl-ispazju ġudizzjarju Ewropew (ara **Simon Grech v. Dominic Humphreys** deċiża mill-Qorti tal-Appell fil-25 ta' Ottubru, 2023).

39. L-ewwel preġudizzjali qiegħda għalhekk tiġi miċħuda.

40. It-**tieni preġudizzjali**, li ġiet imressqa biss mid-Dipartiment tal-Kuntratti, hija li l-appell tal-konsorzju appellanti huwa wieħed improponibbli għaliex dan ġie indirizzat kontra Paprec Energies International – BBL Malta, li hija biss ditta li m'għandhiex personalità ġuridika u għalhekk la tista' tħarrek u lanqas tista' titħarrek. Id-Dipartiment tal-Kuntratt jispjega li l-appell kellu minflok jiġi indirizzat lill-membri li jiffurmaw parti mill-konsorzju, jiġifieri lil Paprec Energies International u lil Bonnici Bros Services Ltd.

41. Illi skont ir-**Regolament 285 tar-Regolamenti dwar l-Akkwist Pubbliku**, ir-rikors tal-appell għandu jkun indirizzat kontra; (i) l-awtorità responsabbli għat-tmexxija tas-sejha; (ii) l-awtorità kontraenti; (iii) l-offerent rakkomandat, jekk ikun hemm; u (iv) kull parti oħra involuta fil-proċeduri quddiem il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi.

42. Fil-każ tal-lum, din il-Qorti jkollha tistqarr li qajla qiegħda tifhem

għaliex id-Dipartiment tal-Kuntratti qiegħed joġġezzjona għall-fatt li l-appell ġie indirizzat kontra Paprec Energies International – BBL Malta, meta jirriżulta li kien id-Dipartiment tal-Kuntratt stess li ħabbar lil Paprec Energies International – BBL Malta bħala l-offerent rakkomandat. Mexa tajjeb għalhekk il-konsorzju appellanti li indirizza l-appell kontra Paprec Energies International – BBL Malta, ladarba kienet din id-ditta li ġiet meqjusa bħala l-offerent rakkomandat.

43. Din il-Qorti jkollha tgħid ukoll, li hija tinsab kemxejn sorpriża kif id-Dipartiment tal-Kuntratti qiegħed jgħid li Paprec Energies International – BBL Malta hija ineżistenti minħabba li m'għandhiex personalità ġuridika. Id-Dipartiment tal-Kuntratti suppost jaf li skont ir-**Regolament 56 tar-Regolamenti dwar l-Akkwist Pubbliku**, «*offerent jista' jkun jew persuna fiżika jew persuna ġuridika jew entità pubblika jew grupp ta' tali persuni u, jew entitajiet.*»

44. Minbarra dan, ir-**Regolament 58(1) tar-Regolamenti dwar l-Akkwist Pubbliku** jgħid ċar u tond li gruppi ta' operaturi ekonomiċi, inklużi assoċjazzjonijiet temporanji, jistgħu jipparteċipaw fil-proċeduri tal-akkwist u li dawn m'għandhomx jintalbu li jkollhom forma legali speċifika mill-awtoritajiet kontraenti sabiex jipprezentaw offerta jew talba ta' parteċipazzjoni. Huwa biss meta dak il-grupp ta' operaturi ekonomiċi jingħata l-kuntratt, li l-awtorità responsabbli għat-tmexxija tas-sejha tista'

skont ir-**Regolament 58(4) tar-Regolamenti dwar l-Akkwist Pubbliku** teħtieġ lil dak il-grupp ta' operaturi ekonomiċi biex jassumu forma ġuridika speċifika, kemm-il darba tali forma tkun meħtieġa għat-twettiq sodisfaċenti tal-kuntratt. Dan ir-**Regolament 58** fuq imsemmi huwa meħud mill-**Artikolu 19 tad-Direttiva 2014/24/UE dwar l-akkwist pubbliku**.

45. Billi fil-każ tagħna, il-proċess tal-għoti tal-kuntratt għadu ma ntemmx minħabba li għad hemm pendenti dan l-appell, allura għall-għanijiet tar-**Regolamenti 56, 58 u 285 tar-Regolamenti dwar l-Akkwist Pubbliku**, il-konsorzju Paprec Energies International – BBL Malta bħala offerent jista' jitqies bħala parti li jista' jħarrek u jiġi mħarrek quddiem il-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi u quddiem din il-Qorti tal-Appell fi proċeduri marbuta mal-proċess tal-avviż bin-numru CT 2032/2022 u dan minkejja li l-imsemmi konsorzju għadu sal-lum ma assumiex forma ġuridika speċifika.

46. Anke din it-tieni preġudizzjali għalhekk qiegħda tiġi mwarrba.

47. L-**aħħar preġudizzjali**, li tressqet kemm mid-Dipartiment tal-Kuntratti, kif ukoll minn WasteServ Malta Limited, tgħid li l-appell għandu jiġi ddikjarat bħala deżert skont ir-**Regolament 285 tar-Regolamenti dwar l-Akkwist Pubbliku** għaliex l-offerent rakkomandat

(i.e. il-kumpaniji individwali Paprec Energies International u Bonnici Bros Services Ltd) ma ġewx notifikati fi żmien ġimagħtejn mill-preżentata tal-appell.

48. Kif rajna iżda waqt li kienet qiegħda tiġi mistħarrġa t-tieni preġudizzjali, l-offerent rakkomandat f'dan il-każ huwa l-konsorzju Paprec Energies International – BBL Malta, kif ħabbar id-Dipartiment tal-Kuntratti stess. Dan il-konsorzju mhux talli ġie notifikat kif imiss, iżda talli anke daħħal twegiba għall-appell.

49. Ta' min josserva wkoll li f'din ir-risposta tal-appell ġie mniżżel iswed fuq l-abjad, li din ir-risposta kienet qiegħda ssir mill-konsorzju Paprec Energies International – BBL Malta magħmul minn Paprec Energies International u minn Bonnici Bros. Services Limited. Ifisser għalhekk li anke l-membri individwali tal-konsorzju jafu b'dan l-appell.

50. Thares minn fejn thares għalhekk anke din l-aħħar preġudizzjali hija ħażina.

51. Hekk li ġew imwarrba l-preġudizzjali kollha li tqanqlu mill-appellati, din il-Qorti tista' issa tixhet l-attenzjoni tagħha fuq il-mertu tal-appell imressaq mill-konsorzju appellanti.

52. L-ewwel aggravju tal-konsorzju appellanti huwa dirett lejn żewġ membri li poġġew fil-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi. Skont il-konsorzju appellanti Kenneth Swain u l-Avukat Vincent Micallef ma kellhomx joqogħdu fuq dan il-Bord.

53. Fil-każ ta' Kenneth Swain, li kien il-President tal-Bord, il-konsorzju appellanti jgħid li dan ilu jokkupa l-kariga ta' direttur tal-Enemalta plc sa mill-10 ta' Ġunju, 2020. Illi fit-28 ta' Frar, 2023, Enemalta plc iffirmit ftehim mal-awtorità kontraenti WasteServ Malta Limited, imsejjaħ *Power Purchase Agreement*, li permezz tiegħu Enemalta plc intrabtet li tixtri l-enerġija kollha li kienet ħa tiġi ġġenerata mill-proġett mertu tal-avviż bin-numru CT 2032/2022. Il-konsorzju appellanti jsostni li dan il-*Power Purchase Agreement* huwa indikat bħala wieħed mid-dokumenti li jiffurmaw parti mid-dokumenti tal-avviż bin-numru CT 2032/2022. Għalhekk il-konsorzju appellanti jisħaq li Kenneth Swain bħala direttur ta' Enemalta plc, li għandha interess dirett fil-mertu tal-avviż bin-numru CT 2032/22, kellu jwarrab milli jpoġġi fuq il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi f'dan il-każ.

54. B'żieda ma' dan, il-konsorzju appellanti jargumenta wkoll li wieħed mill-azzjonisti ta' Enemalta plc huwa l-Malta Government Investments Limited. Din Malta Government Investments Limited hija wkoll azzjonista fil-kumpanija WasteServ Malta Limited. Għalhekk skont il-

konsorzju appellanti tmiss fejn tmiss, wieħed ma jistax ma josservax interessi diretti u indiretti.

55. Sa fejn imbagħad jolqot lill-Avukat Vincent Micallef, il-konsorzju appellanti jsostni li dan ukoll kellu joqgħod lura milli jpoġġi fil-Bord ta' Revizjoni dwar Kuntratti Pubbliċi, peress li dan huwa direttur ta' ClearFlowPlus p.l.c., li bħal Enemalta plc u WasteServ Malta Limited għandha lil Malta Government Investments Limited bħala azzjonist tagħha.

56. Il-konsorzju appellanti jtemm jgħid li Kenneth Swain u l-Avukat Vincent Micallef kellhom jastjenu milli jpoġġu fil-Bord ta' Revizjoni dwar Kuntratti Pubbliċi bħalma għamlu Lawrence Ancilleri u Stephanie Scicluna Laiveria. Lawrence Ancilleri astjena għaliex bintu taħdem ma' WasteServ Malta Limited, filwaqt li Stephanie Scicluna Laiveria kienet iddikjarat meta ġiet maħtura bħala membru tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi li hija ma tistax toqgħod f'kawżi li jinvolvu lil WasteServ Malta Limited u lil Water Services Corporation, peress li hija impjegata mal-Water Services Corporation iżda preżentement mislufa lil WasteServ Malta Limited biex taħdem hemm bħala *Procurement Manager*.

57. Min-naħa tagħhom, id-Dipartiment tal-Kuntratti u WasteServ Malta

Limited jitolqu billi jsostnu li dan l-aggravju huwa inammissibbli minħabba li skont l-**Artikolu 738 tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili** ma jistax isir appell minn deċiżjoni dwar rifjut ta' rikuża.

58. Fil-mertu, u magħhom hawnhekk jingħaqad ukoll il-konsorzju Paprec Energies International – BBL Malta, it-tliet appellati jsostnu li ma kien hemm l-ebda raġuni valida taħt l-**Artikolu 734 tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili** u taħt id-dispożizzjonijiet tal-jedd tas-smiġħ xieraq għalfejn Kenneth Swain u l-Avukat Vincent Micallef kellhom jaċċettaw ir-rikuża tagħhom.

59. Fil-qosor huma lkoll jargumentaw li Kenneth Swain huwa biss direttur mhux eżekuttiv tal-Enemalta plc, li mhuwiex parti mill-*Board of Management* tal-istess kumpanija. Jgħidu wkoll li mbilli Enemalta plc ser tirċievi l-enerġija mañluqa mill-impjant suġġett tal-avviż bin-numru CT 2032/2022, b'danakollu dan ma jfissirx li Kenenth Swain għandu xi inċentiva li jiddeċiedi l-każ b'mod jew ieħor. Dan għaliex Enemalta plc għandha l-obbligu li takkwista tali enerġija irrispettivament mill-proċess tal-akkwist u irrispettivament mill-identità tal-offerent rebbieħ. Iżidu li lanqas ma ntwera li Kenneth Swain kien b'xi mod involut f'dan il-*power purchase agreement*.

60. Dwar l-Avukat Vincent Micallef, l-appellati ma jmerux li dan huwa

direttur ta' ClearFlowPlus plc, li hija kumpanija sussidjarja tal-Water Services Corporation. Lanqas ma jmeru l-fatt li Malta Government Investments Limited hija azzjonist komuni ta' WasteServ Malta Limited, ta' Enemalta plc u ta' ClearFlowPlus plc. Madankollu huma jsostnu li ClearFlowPlus plc m'għandha x'taqsam xejn mal-mertu tal-avviż bin-numru CT 2032/2022. Fuq kollox jingħad minnhom li l-fatt illi hemm azzjonist komuni f'dawn il-kumpaniji ma jxellifx b'daqshekk l-indipendenza u l-imparzjalità tal-membri, speċjalment meta wieħed iqis li dawn jokkupaw karigi ta' diretturi mhux eżekuttivi.

61. Naturalment din il-Qorti trid titlaq billi tiddeċiedi l-ewwel jekk il-konsorzju appellanti setax iressaq dan l-ewwel aggravju minħabba dak li jgħid **l-Artikolu 738 tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili**.

Dan l-artikolu tal-liġi jaqra hekk:

«738.(1) Meta l-qorti hija kkostitwita minn imħallef wieħed u kontra dan l-imħallef tiġi mogħtija l-eċċezzjoni ta' rikuża, għandu jiddeċiedi huwa nnifsu fuq ir-raġunijiet tal-eċċezzjoni, u kontra din id-deċiżjoni ma jingħatax appell, u, jew jastjeni ruħu u jiddigrieta li hemm lok għas-surroga ta' mħallef ieħor, inkella jissokta jisma' l-kawża, skont kif ikun iddeċieda.

(2) Fil-każijiet li fihom il-qorti hija kkostitwita b'izjed minn imħallef wieħed, l-imħallfin kollha, u fosthom l-imħallef irrikużat, jiddeċiedu fuq l-eċċezzjoni ta' rikuża, u meta hemm dubju jekk ir-raġuni miġjuba għall-astensjoni hix tajba jew le, l-imħallfin kollha, fosthom l-imħallef li jkun għieb dik ir-raġuni, jiddeċiedu fuq ir-raġuni ta' rikuża jew ta' astensjoni.»

62. Huwa minnu li r-**Regolament 85(1) tar-Regolamenti dwar l-Akkwist Pubbliku** jgħid li *ċ-Chairman* (bil-Malti ngħidu President) jew il-membri l-oħra tal-Bord ta' Reviżjoni għandhom ikunu skwalifikati milli

jitrattaw kawża f'dawk iċ-ċirkostanzi li jiskwalifikaw imħallef f'kawża ċivili. B'daqshekk iżda dan ma jfissirx li għaliex il-membri tal-Bord jistgħu jiġu skwalifikati milli jpoġġu fil-Bord għall-istess raġunijiet li jistgħu jiġi skwalifikati mħallfin milli jpoġġu f'kawżi ċivili, allura d-deċiżjonijiet meħuda mill-Bord dwar l-iskwalifika jew ir-rikuża tal-membri tiegħu huma regolati bid-dispożizzjonijiet tal-**Artikolu 738 tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili**.

63. Fejn ried il-leġislatur semma fir-**Regolamenti dwar l-Akkwist Pubbliku** fejn għandhom jgħoddu d-dispożizzjonijiet tal-**Kodiċi tal-Organizzazzjoni u Proċedura Ċivili** (ara bħala eżempji r-**Regolament 90(6)** fejn il-Bord ingħatawlu s-setgħat kollha li huma vestiti fil-Prim'Awla tal-Qorti Ċivili bil-**Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**; ir-**Regolament 93(5)** li jgħid li deċiżjoni finali tal-Bord ta' Reviżjoni toħloq titlu eżekuttiv u għalhekk tista' tiġi eżegwita skont l-**Artikolu 273 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**; u r-**Regolament 209(3)** li jgħid li atti dwar proċeduri ta' *black listing* jistgħu jiġu notifikati skont il-mod imsemmi fl-**Artikolu 187 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**).

64. Fil-każ tagħna mkien ma nsibu mniżżel fir-**Regolamenti dwar l-Akkwist Pubbliku**, li deċiżjonijiet li għandhom x'jaqsmu ma' talbiet dwar skwalifiki tal-membri tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi huma

soġġetti għar-regoli msemmija fl-**Artikolu 738 tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili**. Fis-skiet tal-leġislatur, din il-Qorti għalhekk qiegħda tqis li l-**Artikolu 738 tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili** ma jgħoddx għal deċiżjonijiet ta' skwalifika tal-membri deċiżi mill-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi (ara f'dan is-sens ukoll ***Support Services Limited v. Aġenzija Support et*** deċiża mill-Qorti tal-Appell fit-12 ta' Lulju 2023 fejn ingħad li ladarba r-**Regolamenti dwar l-Akkwist Pubbliku** ma jikkellmu xejn dwar il-possibbiltà li jistgħu jingħataw sentenzi parzjali, kuntrarjament għal dak li nsibu fil-**Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**, allura wieħed ma jistax ħlief jikkonkludi li ma japplikawx ir-regoli dwar l-appelli minn sentenzi parzjali f'dan il-qasam tal-kuntratti pubbliċi).

65. Terġa' u tgħid, ir-**Regolament 284 tar-Regolamenti dwar l-Akkwist Pubbliku** jgħid li kull parti li tħoss ruħha aggravata minn deċiżjoni meħuda mill-Bord ta' Reviżjoni tista' tappella quddiem il-Qorti tal-Appell. Ma jidherx li dan ir-regolament joħloq xi limitazzjonijiet dwar x'tip ta' deċiżjonijiet jistgħu jiġu appellati. Anzi mill-mod ta' kif inhu mfassal dan ir-regolament jidher li kull deċiżjoni tal-Bord tista' tiġi appellata, inkluż ukoll kull deċiżjoni li l-Bord jagħti dwar l-iskwalifika tal-membri tiegħu.

66. Jinżel b'hekk, li d-Dipartiment tal-Kuntratti u WasteServ Malta

Limited m'għandhomx raġun jgħidu li l-konsorzju appellanti ma setax iressaq dan l-aggravju.

67. Din il-Qorti tista' tissokta għalhekk billi teżamina l-mertu tal-ewwel aggravju.

68. Illi skont ir-**Regolament 81 tar-Regolamenti dwar l-Akkwist Pubbliku**, il-Bord ta' Reviżjoni huwa magħmul minn *Chairman* u żewġ membri permanenti, li wieħed minnhom jaġixxi bħala Deputat *Chairman*. Dawn kollha jiġu maħtura mill-Prim Ministru fuq il-parir tal-Ministru responsabbli għal Finanzi għal żmien ta' tliet snin bil-possibbiltà li jerġgħu jinħatru. Il-Prim Ministru għandu wkoll jahtar għal perjodu ta' tliet snin bil-possibbiltà ta' ħatra mill-ġdid, elenku ta' membri sostituti biex jieħdu post il-membri permanenti, fl-eventwalità li wieħed jew aktar mill-membri permanenti ma jkunux jistgħu jieħdu sehem f'xi każ partikolari. Skont ir-**Regolament 83 tar-Regolamenti dwar l-Akkwist Pubbliku**, il-membri tal-Bord ta' Reviżjoni għandhom jirċievu dik ir-rimunerazzjoni li l-Prim Ministru jista' jiddetermina.

69. Imbagħad ir-**Regolament 85 tar-Regolamenti dwar l-Akkwist Pubbliku** jitkellem dwar l-iskwalifika tal-President u l-membri l-oħra tal-Bord. Dan ir-regolament jaqra hekk:

85.(1) Iċ-chairman jew il-membri l-oħra tal-Bord ta' Reviżjoni jkunu skwalifikati milli jittrattaw kawża f'dawk iċ-ċirkostanzi li jiskwalifikaw

imħallef f'kawża ċivili, u f'każ bħal dan iċ-chairman jew membru għandu jiġi mibdul minn membru ieħor mill-elenku.

(2) Persuna tkun skwalifikata milli tinħatar jew tkompli sservi bħala membru tal-Bord ta' Revizjoni jekk tkun membru tal-Kamra tad-Deputati, jew tal-Parlament Ewropew jew ta' Kunsill Lokali jew ta' xi bord amministrattiv ieħor jew tribunal jew jekk ikollha xi interess finanzjarju jew interess ieħor li x'aktarx jippreġudika t-twettiq tal-funzjonijiet tagħha bħala membru tal-Bord ta' Revizjoni.

(3) Kull membru tal-Bord ta' Revizjoni li jista' jkollu interess dirett jew indirett f'xi kuntratt li jsir is-sugġett ta' lment għandu jinforma liċ-chairman bil-miktub dwar dak l-interess, f'liema każ il-membri jkun prekluz mill- jieħu aktar sehem fis-smiġħ tal-ilment.»

70. Minn qari ta' dan ir-regolament joħroġ ċar li r-raġunijiet ta' skwalifika tal-President u tal-membri l-oħra tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi mhumiex ristretti għal dawk iċ-ċirkostanzi biss fejn imħallef huwa bil-liġi skwalifikat milli joqgħod f'kawża ċivili. Kemm hu hekk ir-**Regolament 85(2)** isemmi ċirkostanzi oħra fejn persuna għandha tkun awtomatikament skwalifikata milli tinħatar jew tkompli sservi bħala membru tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi. Fosthom hemm imsemmija ċ-ċirkostanza fejn il-membri tal-Bord ikollu xi interess finanzjarju jew xi interess ieħor li x'aktarx jippreġudika t-twettiq tal-funzjonijiet tiegħu bħala membru tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi. Huwa sewwasew minħabba f'hekk li skont ir-**Regolament 85(3)**, kull membru ta' dan il-Bord, li jista' jkollu interess dirett jew indirett f'xi kuntratt li jsir is-sugġett ta' ilment, għandu jinforma liċ-*Chairman* bil-miktub dwar dak l-interess, f'liema każ il-membri jkun prekluz mill- jieħu aktar sehem fis-smiġħ tal-ilment.

71. **Ir-Regolament 85 tar-Regolamenti dwar I-Akkwist Pubbliku** fuq imsemmi ma jfissirx eżattament x'jikkostitwixxi interess finanzjarju jew x'jikkostitwixxi interess ieħor li x'aktarx jippreġudika t-twettiq tal-funzjonijiet ta' persuna bħala membru tal-Bord ta' Reviżjoni. B'danakollu din il-Qorti qiegħda tifhem li dawn l-interessi għandhom jiġu meqjusa fid-dawl tat-tifsira ta' «*kunflitti ta' interess*», li nsibu fil-ġabra ta' tifsiriet fir-**Regolament 2 tar-Regolamenti dwar I-Akkwist Pubbliku**. Skont dan ir-regolament:

«"kunflitti ta' interess" għall-inqas tfisser kull sitwazzjoni fejn persuna, inklużi membri tal-persunal tal-awtorità kontraenti jew ta' fornitur ta' servizzi li jaġixxu f'isem l-awtorità kontraenti, li huma involuti fit-tmexxija tal-proċedura ta' akkwist jew jistgħu jinfluwenzaw ir-riżultat ta' dik il-proċedura, li għandhom, direttament jew indirettament, interess finanzjarju, ekonomiku jew interess personali ieħor li jista' jitqies li jikkomprometti l-imparzjalità u l-indipendenza tagħhom fil-kuntest tal-proċedura ta' akkwist.»

72. M'hemmx dubju li l-President u l-membri tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi huma persuni li bid-deċiżjonijiet tagħhom jistgħu jinfluwenzaw ir-riżultat ta' proċedura ta' akkwist. Għalhekk biex dawn ikunu jistgħu jiddeċiedu każ bħala parti mill-Bord ta' Reviżjoni dwar Kuntratti jeħtieġ li dawn ukoll ma jkunux milquta minn kunflitt ta' interess kif imfisser f'dan ir-regolament. L-istess jgħodd ukoll għall-Imħallfin li jpoġġu fil-Qorti tal-Appell, f'każ li jkun qiegħdin jisimgħu xi appell magħmul taħt ir-**Regolamenti dwar I-Akkwist Pubbliku**.

73. Ta' min jgħid li din it-tifsira ta' «*kunflitti ta' interess*» ġejja mill-

Artikolu 24 tad-Direttiva 2014/24/UE dwar l-akkwist pubbliku.

74. Ingħad mill-Qorti Ġenerali fil-*kawża T-415/10, Nexans Franza v. Impriza Kongunta Ewropea għall-ITER u l-Iżvilupp tal-Energija mill-Fużjoni* deċiża fl-20 ta' Marzu 2013, illi l-kunċett ta' kunflitt ta' interessi għandu natura oġġettiva u sabiex dan jiġi determinat għandhom jiġu injorati l-intenzjonijiet tal-persuni kkonċernati, b'mod partikolari r-rieda tajba tagħhom. Biss però s-sitwazzjoni ta' kunflitt ta' interessi trid tkun waħda reali u mhux waħda sempliċement ipotetika (ara l-*Kawża T-403/12, Intrasoft International SA v. Il-Kummissjoni Ewropea* deċiża fit-13 ta' Ottubru, 2015).

75. Fil-*Kawża T-160/03, AFCon Management Consultants and Others v. Commission of the European Communities* deċiża fis-17 ta' Marzu, 2005 ġie mtenni li hemm każ ta' kunflitt ta' interess jekk membru tal-kumitat tal-għażla kien jaħdem ma' kumpanija sussidjarja ta' wieħed mill-membri li jiffirma parti minn konsorzju li ħa sehem f'sejha.

76. Illi minkejja li dawn is-sentenzi fuq imsemmija ma ngħatawx fil-kuntest tat-tifsira ta' «*kunflitti ta' interess*», kif misjuba fl-**Artikolu 24 tad-Direttiva 2014/24/UE dwar l-akkwist pubbliku**, din il-Qorti xorta waħda tqis li dawn il-prinċipji mnissla minn dawn is-sentenzi huma ta' rilevanza dwar kif hija għandha tħares lejn din it-tifsira.

77. Il-Qorti qiegħda żżomm f'moħħha hawnhekk ukoll illi xilja ta' kunflitt ta' interess fi proċeduri ta' akkwist pubbliku għandha tiġi mistħarrġa b'reqqa liema bħalha, peress li huwa magħruf li l-qasam tal-akkwist pubbliku huwa meqjus bħala waħda mill-aktar attivitajiet ta' Gvern, li huma l-aktar vulnerabbli għall-ħela, għall-abbuż, għall-frodi u għall-korruzzjoni. Dan aktar u aktar meta fil-każ tal-lum, il-proċess mertu ta' dan l-appell jinvolvi proġett kbir li saħansitra jiswa aktar minn nofs biljun ewro.

78. Issa l-liġi tgħid li hemm kunflitt ta' interess jekk persuna jkollha direttament jew indirettament, xi interess finanzjarju, ekonomiku jew interess personali ieħor li jista' jitqies li jikkomprometti l-imparzjalità u l-indipendenza tagħhom fil-kuntest tal-proċedura ta' akkwist.

79. F'dan il-kuntest din il-Qorti tqis li jgħodd ħafna dak li qalet il-Qorti Kostituzzjonali fis-sentenza **Lawrence Grech et v. L-Avukat Ġenerali et** deċiża fis-7 ta' Marzu, 2017, jiġifieri, li għalkemm dak li tħoss jew taħseb jew tibża' parti f'kawża dwar il-parzjalità jew imparzjalità tal-ġudikant huwa wkoll rilevanti, dan però mhuwiex il-kriterju determinanti. Dak li hu tabilhaqq determinanti hu jekk dik il-biża' jew dik il-perċezzjoni humiex imsejsa fuq konsiderazzjonijiet oġġettivi, hekk li persuna raġonevoli u mingħajr preġudizzji tagħha tasal biex hi wkoll ikollha dubji

dwar l-imparzjalità tal-ġudikant. L-apparenzi wkoll jistgħu jkunu konsiderazzjonijiet oġġettivi li joħolqu dubji. Ukoll jekk ma hemmx rabtiet ġerarkiċi bejn ġudikant u parti fil-kawża, jekk l-apparenzi huma tali li persuna raġonevoli tista' wkoll mingħajr wisq tiġbid taħseb li hemm dawk ir-rabtiet, id-dubju ta' dik il-persuna dwar l-imparzjalità tal-ġudikant jista' jkun dubju ġustifikat.

80. Sa ċertu punt l-istess kuncett dwar l-imparzjalità japplika wkoll fil-kuntest tal-prinċipju tal-indipendenza tal-membri li jiformaw parti mill-Bord ta' Revizjoni dwar Kuntratti Pubbliċi. Biex membru jitqies li jkun tabilhaqq indipendenti mhuwiex biżżejjed li dan ikollu s-setgħa legali li jwettaq apprezzament awtonomu, mingħajr indħil ta' hadd, tal-każ li jkollu quddiemu u li jasal għal deċiżjoni li jorbot lill-partijiet li jidhru quddiemu. Hemm bżonn ukoll li dak il-membru ma jkunx f'qagħda ta' sudizzjoni quddiem waħda mill-partijiet jew b'xi mod ikun sugġett għal xi sura ta' kontroll jew influwenza minn waħda mill-partijiet. Dan jista' jiġri pereżempju jekk membru tal-Bord ikun ġerarkikament inferjuri għal waħda mill-partijiet, b'hal meta dak il-membru jkun ukoll membru ta' xi korp organizzat u parti tkun superjuri tiegħu f'dak l-istess korp u għalhekk tkun tista' tiddeċiedi dwar il-kariga jew is-salarju tiegħu. L-istess jista' jiġri wkoll jekk parti jkollha s-setgħa li tiddeċiedi jekk membru tal-Bord jistax jibqa' membru jew le ta' dak il-Bord.

81. Fil-każ tagħna, jirriżulta li l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi kien mitlub biex jistħarreg is-siwi ta' deċiżjoni tad-Dipartiment tal-Kuntratti u tal-kumitat tal-għażla maħtur minn WasteServ Malta Limited bħala l-awtorità kontraenti, li jagħtu kuntratt ta' €599,659.00 lill-konsorzju Paprec Energies International - BBL Malta, b'rabta ma' proġett ta' skala kbira dwar l-istrateġija nazzjonali li għandha x'taqsam mal-ġestjoni tal-iskart.

82. Fil-fatt WasteServ Malta Limited tagħfas ħafna fir-risposta tal-appell tagħha dwar l-importanza kbira wara dan il-proġett. Minn dan kollu joħroġ għalhekk li l-kwistjoni li kellu quddiemu l-Bord kienet waħda ta' natura pubblika għaliex tinvolti proġett nazzjonali kbir, li mhux biss huwa importanti ħafna għal Gvern ta' Malta iżda li jattira wkoll anke l-attenzjoni pubblika. F'ċirkostanzi bħal dawn il-ħtieġa li jiġu mħarsa l-kunċetti ta' indipendenza u ta' imparzjalità tal-ġudikant jassumu karattru aktar oneruż (ara f'dan is-sens ***General Workers' Union v. L-Avukat Ġenerali et*** deċiża mill-Qorti Kostituzzjonali fl-14 ta' Diċembru, 2018).

83. Issa kif inhuwa magħruf l-amministrazzjoni pubblika moderna mhijiex magħmula biss mid-dipartimenti u mill-ministeri tal-Gvern, iżda hija magħmula wkoll minn korpi u organizzazzjonijiet varji li ġew maħluqa fi ħdan dik l-istess amministrazzjoni pubblika. Korpi u awtoritajiet amministrattivi fid-diversi setturi tal-ekonomija pubblika

jikkomponu sewwasew il-komplessità tal-Istat modern (ara ***Direttur Staff Development Organisation v. Carmel Grech*** deċiża mill-Qorti tal-Appell (Kompetenza Inferjuri) fid-29 ta' Mejju, 2009).

84. Dan kollu jassumi aktar saħħa fil-każ tal-lum peress li d-Dipartiment tal-Kuntratti, WasteServ Malta Limited, Enemalta plc, Malta Government Investments Limited, il-Korporazzjoni Għas-Servizzi tal-Ilma u ClearFlowPlus plc, li b'xi mod jew ieħor jissemmew fil-kuntest ta' dan l-ewwel aggravju, kollha kemm huma jinsabu soġġetti għad-dispożizzjonijiet tar-***Regolamenti dwar l-Akkwist Pubbliku*** u/jew ir-***Regolamenti dwar Akkwist Pubbliku ta' Entitajiet li joperaw fis-Setturi tas-Servizzi tal-Ilma, l-Energija, it-Trasport u Postali***; u dana bħala entitajiet li jew jinsabu espressament imnizzla bħala awtorità kontraenti f'dawn ir-regolamenti jew inkella li jaqgħu fit-tifsira ta' awtorità kontraenti minħabba li huma finanzjati, mill-biċċa l-kbira, mill-Istat, jew awtoritajiet reġjonali jew lokali, jew korpi oħra regolati bid-dritt pubbliku.

85. Tassew dak li hemm komuni bejn dawn l-entitajiet huwa l-fatt li b'xi mod jew ieħor hemm l-Istat imdaħħal fihom għaliex jew huma finanzjati minnu jew inkella għaliex huma suġġetti għas-supervizjoni manigerjali ta' persuni li huma maħtura mill-Istat.

86. Fid-dawl ta' dan kollu, din il-Qorti ma tistax tqis li huwa wisq

imgebbed l-argument tal-konsorzju appellanti li Kenneth Swain u l-Avukat Vincent Micallef huma milquta minn kunflitt ta' interess. Dan peress li dawn iż-żewġ persuni minbarra li jokkupaw il-kariga ta' membri tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi, huma jokkupaw ukoll il-kariga ta' diretturi f'entitatijiet oħra li huma regolati bid-dritt pubbliku skont kif imfisser fir-**Regolament 2 tar-Regolamenti dwar l-Akkwist Pubbliku**.

87. Tassew osservatur oġġettiv minn barra jista' raġonevolment ikollu suspetti jew dubji serji dwar l-indipendenza u l-imparzjalità ta' dawn iż-żewġ membri, meta wieħed iqis li dawn jiddeċiedu kwistjonijiet fejn dejjem ikun hemm involuti awtoritajiet kontraenti, li fihom kif ingħad il-Gvern ikun b'xi mod jew ieħor preżenti, u allura dawn iż-żewġ membri jaf ikollhom interess personali li ma jiddeċiedux kontra deċiżjonijiet meħuda minn dawn l-awtoritajiet kontraenti sabiex b'hekk huma jkunu jistgħu jħarsu l-karigi li jokkupaw fi ħdan awtoritajiet kontraenti oħra.

88. F'dan il-kuntest ma tagħmilx wisq differenza jekk il-kariga li dawn il-membri tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi jkunu jokkupaw f'dawn l-awtoritajiet kontraenti humiex ta' natura eżekuttiva jew le. Dan għaliex f'dan il-każ it-theddida fuq l-indipendenza u/jew fuq l-imparzjalità mhijiex relatata mat-tmexxija tal-awtorità kontraenti involuta iżda hija relatata mal-membri nnifsu tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi

li jkun qed jokkupa l-kariga fi ħdan xi awtorità kontraenti, minħabba li dan jista' jiddeċiedi b'ċertu mod sabiex b'hekk ma jipperikolax il-kariga tiegħu jew inkella biex forsi jtejjeb il-kariga tiegħu.

89. Hekk ukoll mhumiex daqstant imġebbda s-suspetti jew il-biża', li membri tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi li jokkupaw karigi oħra f'awtoritajiet kontraenti, jistgħu jiddeċiedu każijiet dwar proġetti nazzjonali kbar b'hal dak tal-lum, b'tali mod biex ma jdarrasx jew ma jimbarazzax lill-Gvern li jkollu ċertu ħerqa jew għaġla biex jissokta bil-proġett. Joqgħod hawnhekk il-qawl Malti li jgħid, «la ddardarx l-għajn li trid tixrob minnha». Tassew huwa dubju tabilhaqq raġonevoli li wieħed jissuspetta dwar l-indipendenza u l-imparzjalità ta' membru tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi, li għandu mnejn jiġbed il-ħabel tal-Gvern f'każijiet li jolqtu proġetti kbar u importanti ħafna fuq skala nazzjonali u li jattiraw aktar l-interess tal-pubbliku b'mod ġenerali, sabiex b'hekk iżomm jew itejjeb il-kariga li huwa jkun qed jokkupa fi ħdan awtorità kontraenti oħra.

90. B'daqshekk il-Qorti mhijiex qiegħda tgħid hawnhekk li f'dan il-każ Kenneth Swain u l-Avukat Vincent Micallef iddeċidew kif iddeċidew biex jiksbu xi vantaġġi personali jew għaliex kellhom f'moħħhom xi għanijiet oħra li ma jmorrux id f'id mal-amministrazzjoni xierqa tal-ġustizzja. B'halma ġie mfiesser aktar kmieni, il-kunċett ta' kunflitt ta' interessi

għandu natura oġġettiva u sabiex dan jiġi determinat għandhom jiġu injorati l-intenzjonijiet tal-persuni kkonċernati, b'mod partikolari r-rieda tajba tagħhom.

91. Mod ieħor, dak li qiegħda tgħid il-Qorti huwa biss, li meta wieħed iqis id-daqs u l-valur enormi tal-proġett mertu ta' dan l-appell, kien xieraq li Kenneth Swain u l-Avukat Vincent Micallef ma jpoġġux fuq il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi u dan appuntu minħabba d-dell tqil li kien hemm jokrob fuq l-indipendenza u fuq l-imparzjalità tagħhom fit-twettiq tal-funzjonijiet tagħhom bħala membri tal-Bord ta' Revizjoni, kif imsemmi fir-**Regolament 85(2) tar-Regolamenti dwar l-Akkwist Pubbliku**.

92. Il-fatt imbagħad li Kenneth Swain huwa direttur tal-Enemalta plc, li ntrabtet permezz ta' *Power Purchase Agreement*, li tixtri l-enerġija li ħa tiġi generata bil-kuntratt mertu tal-avviż CT 2023/2022, ikompli jkabbar aktar il-kunflitt ta' interess tiegħu u jqanqal aktar beżgħat u dubji raġonevoli dwar l-imparzjalità u l-indipendenza tiegħu. Mhijiex raġuni remota jew imġebbda wisq li direttur tal-Enemalta plc, anke jekk mingħajr setgħat eżekuttivi, iżda li għandu s-setgħa li jinfluwenza r-riżultat tal-kuntratt mertu tal-avviż CT 2023/2022 bħala President tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi, jiddeċiedi favur ir-regolarità tal-proċess sabiex b'hekk l-impjant ikun jista' jinbena u l-Enemalta plc

tkun tista' tikseb l-enerġija mingħajr dewmien.

93. Il-Qorti temmen li Kenneth Swain u l-Avukat Vincent Micallef kellhom jimxu fuq l-eżempju ta' Lawrence Ancilleri, li b'mod korrett għażel li jastjeni milli jpoġġi fil-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi minħabba li bintu taħdem mal-WasteServ Malta Limited. Fuq kollox, il-kunflitt ta' interess kien aktar lampanti fil-każ ta' Kenneth Swain u tal-Avukat Vincent Micallef għaliex dan kien jolqot lilhom direttament, milli fil-każ ta' Lawrence Ancilleri li kien jolqtu biss indirettament minħabba bintu.

94. F'dawn iċ-ċirkostanzi għalhekk, mhijiex irragonevoli l-perċezzjoni li hemm kunflitt ta' interess għall-għanijiet tar-**Regolamenti 2 u 85(2) tar-Regolamenti dwar l-Akkwist Pubbliku u l-Artikolu 734(e) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili** minħabba l-fatt li Kenneth Swain u l-Avukat Vincent Micallef ma setgħux joqogħdu bħala membri tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi f'dan il-każ biex jistharrġu oġġezzjoni dwar l-għoti ta' kuntratt ta' importanza nazzjonali, peress li huma jokkupaw karigi fi ħdan awtoritajiet kontraenti, li b'xi mod jew ieħor hemm il-preżenza tal-Gvern fihom.

95. Tali kunflitt ta' interess huwa oġġettivament preżenti, ukoll jekk dak il-kunflitt jista' jkun ma jolqotx l-imparzjalità soġġettiva tal-imħallef

jew ġudikant.

96. Jiġi b'hekk, li dan l-ewwel aggravju qed jinsab li huwa mistħoqq u bħala riżultat is-sentenza tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi sejra tiġi mħassra.

97. Il-Qorti tista' tieqaf hawn imma tqis li jkun aħjar biex ma jkunx hemm ħela ta' żmien, li tqis ukoll it-tieni aggravju tal-konsorzju appellanti, fejn dan qiegħed jilmenta mill-fatt li l-bord tal-għażla li għarbel l-offerti (i.e. t-*Tender Evaluation Committee* (TEC)) kien kompost b'mod irregolari minħabba żewġ persuni li kien hemm fih.

98. L-ewwel persuna hija Stephanie Scicluna Laiveria, li skont il-konsorzju appellanti ma setgħetx toqgħod fuq dan il-bord tal-għażla skont ir-**Regolament 86** tar-**Regolamenti dwar l-Akkwist Pubbliku** minħabba li hija ġiet maħtura fuq il-lista tal-membri li jpoġġu fuq il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi.

99. It-tieni persuna hija l-Inġinier Charlon Buttigieg, li skont il-konsorzju appellanti ma setax ikun parti fil-bord tal-għażla minħabba li kien milqut b'kunflitt ta' interess peress li kien għaddej minn proċeduri kriminali dwar inċident li seħħ f'Għawdex, u li dwar l-istess inċident hemm proċeduri pendenti ġewwa l-Italja kontra WasteServ Malta

Limited u Bonnici Bros. Limited (din tal-aħħar hija azzjonista ta' wieħed mill-membri tal-konsorzju rakkomandat).

100. Din il-Qorti ħa tibda billi tqis dan l-aggravju sa fejn jolqot lil Stephanie Scicluna Laiveria.

101. Ir-**Regolament 86 tar-Regolamenti dwar l-Akkwist Pubbliku** li skont il-konsorzju appellant kien ixekkilha milli toqgħod fuq il-bord tal-għażla jgħid hekk:

«86. Il-membri tal-Bord ta' Reviżjoni ma jkunux prekluzi mill-eżerċizzju tal-professjoni rispettiva tagħhom, iżda, waqt il-perjodu tal-ħatra, ikunu prekluzi mill-eżerċizzju tal-professjoni tagħhom f'każijiet quddiem il-Bord ta' Reviżjoni.»

102. Jidher li hemm qbil bejn il-partijiet li Stephanie Scicluna Lavieira ġiet maħtura bħala membru sostitut tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi b'effett mid-9 ta' Novembru, 2021 skont notifikazzjoni nru. 1488 tal-Gazzetta tal-Gvern publikata fit-12 ta' Novembru, 2021. L-istess Stephanie Scicluna Lavieira xehdet li hi impjegata u tirċievi l-paga mingħand il-Korporazzjoni għas-Servizzi tal-Ilma iżda hija mislufa biex taħdem ma' WasteServ Malta Limited. Fit-30 ta' Mejju, 2022 hija ġiet maħtura fit-*Tender Evaluation Committee* (TEC)) biex tqis l-offerti mertu tal-avviż CT 2032/2022.

103. Il-konsorzju appellant jissottometti fl-appell tiegħu li Stephanie

Scicluna Lavieira ma setgħetx toqgħod fit-*Tender Evaluation Committee* (TEC)) għaliex: (i) membru maħtur biex ipoġġi fuq il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ma jistax ikun involut f'xi proċedura li tista' tiġi esposta għar-revizjoni quddiem dan l-istess Bord; (ii) membru tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ma jistax jeżerċita l-professjoni tiegħu quddiem il-Bord; u (iii) membru ta' dan l-istess Bord ma jistax jesponi ruħu biex jiġi mistħarreġ minn membri oħra li jpoġġu miegħu fuq l-istess Bord. F'dan is-sens il-konsorzju appellant jikkritika lill-Bord ta' Revizjoni dwar Kuntratti Pubbliċi talli dan ta interpretazzjoni wiesgħa tar-**Regolament 86 tar-Regolamenti dwar l-Akkwist Pubbliku** li ma tirreflettix l-ispirtu tal-liġi.

104. Mill-banda l-oħra, l-appellati jsostnu fir-risposti rispettivi tagħhom li dan l-aggravju ma fih sustanza legali ta' xejn minħabba: (i) li r-**Regolament 86 tar-Regolamenti dwar l-Akkwist Pubbliku** huwa maħsub biss biex jipprekludi membru, li jkun ukoll professjonist, milli jeżerċita dik il-professjoni tiegħu f'każijiet quddiem il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi; (ii) li funzjoni ta' evalwatur mhijjex professjoni u lanqas forma ta' impjeg jew forniture ta' servizzi; (iii) li Stephanie Scicluna Lavieira kellha taqdi l-funzjoni ta' evalwatur bħala parti minn dmirha peress li hija impjegata fis-settur pubbliku; (iv) li hi ma nħatritx bħala espert minn xi parti; (v) li l-fatt li l-Bord ta' Revizjoni dwar Kuntratti Pubbliċi kellu jistħarreġ id-deċiżjoni tagħha ma jgibx b'daqshekk xi

irregolarità fil-kompożizzjoni tat-*Tender Evaluation Committee* (TEC)); u (vi) li ma hemm xejn irregolari li membri tal-Bord jistharrġu deċiżjoni ta' kollega tagħha.

105. Din il-Qorti titlaq billi tgħid li meta l-kliem tal-liġi huwa ċar u jftiehem mhux il-każ ta' interpretazzjonijiet tal-liġi li jmorru aktar lil hemm mill-istess kliem tal-liġi. Lanqas ma għandhom ikunu prospettati teoriji ipotetiċi ta' fejn il-kliem tal-liġi jista' jwassal jew ma jwassalx. Tassew jekk il-kliem tal-liġi jagħmlu sens u jinftehm, il-Qorti għandha tapplikahom espressament u mingħajr eżitazzjoni. Li kieku l-Qorti kellha tagħti l-interpretazzjoni tagħha lil dawk id-dispożizzjonijiet tal-liġi fejn id-diċitura hija ċara, hija din tkun qiegħda tikkoreġi dispożizzjoni tal-liġi u tivvjola l-prinċipju legali li «*ubi nulla ambiguitas verborum est, non est facienda voluntatis queastio*», li maqlub għall-Malti jfisser: li fejn ma jkunx hemm ambigwità fil-kliem, m'hemmx bżonn li jitqajmu dubji dwar ir-rieda (ara ***Sullivan Shipping Agencies Ltd v. Ernest Sullivan nomine*** deċiża mill-Qorti tal-Appell fis-6 ta' April, 2006).

106. Sfiq ma' dan, meta l-liġi ma tfissirx speċifikament kelma partikolari, allura wieħed għandu jqis li dik il-kelma għandha tiġi mfissra u interpretata skont l-użu komuni u normali tagħha. Tali tifsir jista' jinkiseb mid-dizzjunarji. Skont ir-raba' **edizzjoni tad-Dizzjunarju Malti u Teżawru ta' Malti Mhaddem** miġbur minn **Mario Serracino-Inglott**,

il-kelma «*professjoni*» tinsab imfissra bħala: għażla; sengħa; rabta reliġjuża; jew ħatra f'xogħol wara studju.

107. Mill-mod ta' kif inhu miktub ir-**Regolament 86 tar-Regolamenti dwar l-Akkwist Pubbliku**, il-Qorti tqis li l-kelma «*professjoni*» żgur li ma ġietx imniżżla sabiex titfisser bħala rabta reliġjuża. Mod ieħor, il-Qorti aktar tmil lejn il-fehma li din il-kelma ġiet imniżżla f'dan ir-regolament sabiex tfisser sengħa jew ħatra f'xogħol wara studju. Rilevanti li fl-imsemmi dizzjunarju l-kelma «*sengħa*» hija mfissra bħala: ħila; arti; kapacià; mestier; maestrija; u professjoni.

108. Il-Qorti għalhekk tqis li bil-kelma «*professjoni*», il-leġislatur qiegħed f'dan ir-regolament jirreferi għal xogħol li jitlob ċertu ħila u kapacià, wara li dak li jkun ikun tgħallem jew ħadem f'dak ix-xogħol. Fil-kuntest tar-**Regolament 86 tar-Regolamenti dwar l-Akkwist Pubbliku**, din il-professjoni trid tkun waħda li b'xi mod tista' tesponi lil dak il-membri tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi għall-kawżi li jinstemgħu mill-istess Bord.

109. Biex wieħed jispjega aħjar, membru tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi li jaħdem bħala avukat, perit, inġinier, kontabbli, inġinier, artist, mastrudaxxa, bennej, kuntattur, negozjant, restawratur eċċ, ma jistax juża l-professjoni tiegħu biex jagħti pariri jew jassisti lill-

oblaturi ekonomiċi jew lill-awtoritajiet kontraenti dwar kuntratti li jistgħu jkunu suġġetti għall-proċeduri ta' sħarriġ quddiem il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi. Ir-raġuni hija ovvja: membru tal-Bord ma jistax juża l-professjoni tiegħu b'mod li tqiegħdu f'kunflitt mal-irwol tiegħu ta' ġudikant fil-Bord ta' Revizjoni dwar Kuntratti Pubbliċi. Dan bħal fil-każ ta' mħallef li fil-mument tal-ħatra tiegħu jieħu ġurament skont l-**Artikolu 10 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**, li huwa direttament jew indirettament, ma jagħmilhiex ta' avukat jew ta' arbitru.

110. Fil-każ tagħna jirrizulta li Stephanie Scicluna Lavieira għandha ħiliet fil-qasam tal-akkwist pubbliku, tant li hija tokkupa l-kariga ta' *Procurement Manager* ma' WasteServ Malta Limited. Il-Qorti tifhem li mhux kulħadd jista' jaħdem ta' *Procurement Manager* għaliex tali xogħol jittlob ċertu tnejnija, studju u esperjenza. Huwa sewwasew għaliex Stephanie Scicluna Lavieira hija tabilhaqq kapaċi f'dan il-qasam tal-akkwist pubbliku, il-Qorti qiegħda tifhem li din kienet ir-raġuni ewlenija għalfejn hija ġiet maħtura mill-Prim Ministru sabiex tkun fuq il-lista tal-membri tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi.

111. Izda ladarba Stephanie Scicluna Lavieira aċċettat li tkun fuq din il-lista, hija ma messhiex aċċettat ukoll li tkompli taħdem bħala *Procurement Manager* u anke toqgħod fuq kumitat tal-għażla tal-offerti, meta skont ir-**Regolament 86 tar-Regolamenti dwar l-Akkwist**

Pubbliku hija tinsab prekluża mill-eżerċizzju tal-professjoni tagħha f'każijiet quddiem il-Bord ta' Reviżjoni.

112. Sewwasew f'dan il-każ bħala membru tat-*Tender Evaluation Committee* (TEC)), li għarblet l-offerti mertu tal-avviż CT 2032/2022, Stephanie Scicluna Lavieira spiċċat biex minħabba l-eżerċizzju tal-professjoni tagħha fil-qasam tal-akkwist pubbliku hija dehret f'kawża quddiem il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi. Dan hu hekk għaliex il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi kellu jistħarreg is-siwi tax-xogħol li hija għamlet fit-*Tender Evaluation Committee* (TEC)).

113. Ifisser għalhekk li Stephanie Scicluna Lavieira aġixxiet bi ksur tar-**Regolament 86 tar-Regolamenti dwar l-Akkwist Pubbliku** għaliex hija ma setgħetx tkun membru tat-*Tender Evaluation Committee* (TEC)), fl-istess waqt li hija kienet ukoll fuq il-lista tal-membri tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi. U la Stephanie Scicluna Lavieira kienet bil-liġi mxekkla billi tpoġġi fit-*Tender Evaluation Committee* (TEC)), ifisser ukoll li l-għamla ta' dak il-kumitat kienet waħda irregolari u bħala konsegwenza kull deċiżjoni mittieħda minnu hija irregolari wkoll.

114. Dan il-parti tal-aggravju tal-konsorzju appellanti għalhekk qed jitqies bħala mistħoqq ukoll.

115. Peress li din il-Qorti qiegħda tiddikjara l-kompożizzjoni tat-*Tender Evaluation Committee* (TEC) bħala irregolari minħabba s-sehem ta' Stephanie Scicluna Lavieira, allura din il-Qorti m'għandiex għalfejn tidħol biex tqis il-parti tal-aggravju sa fejn jolqot lil Charlon Buttigieg. Wara kollox jekk l-awtorità kontraenti jidhrilha li għandha terġa' taħtar *Tender Evaluation Committee* (TEC) biex jerġa' jagħmel l-għarbiel tal-offerti, Charlon Buttigieg ma jistax ikun fih minħabba li dan kien involut f'kumitat li nstab li kien irregolari.

Deċiżjoni

Għaldaqstant għal dawn ir-raġunijiet, il-Qorti wara li tiċhad il-preġudizzjali kollha mressqa mill-appellati dwar is-siwi proċedurali tar-rikors tal-appell, qiegħda **tilqa'** l-appell ta' Hitachi Zosen Inova AG - Terna S.A u bħala riżultat qiegħda tħassar kemm is-sentenza tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi tat-23 ta' Frar, 2024 minħabba li Kenneth Swain u l-Avukat Vincent Micallef kienu milquta b'kunflitt ta' interess biex joqogħdu f'dan il-Bord, kif ukoll qiegħda tħassar ir-rakkomandazzjoni tad-Dipartiment tal-Kuntratti li l-kuntratt marbut mal-avviż bin-numru CT 2032/2022 jingħata lill-konsorzju Paprec Energies International – BBL Malta u dan għaliex dan straħ fuq *Tender Evaluation Committee* (TEC) kompost minn Stephanie Scicluna Lavieira li ma setgħetx toqgħod fuqu minħabba li hija mpogġija fuq il-lista tal-membri

tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi.

Minflok il-Qorti qiegħda tordna li l-atti għandhom imorru lura għand l-awtorità kontraenti sabiex jekk trid din terġa' tagħmel għażla ġdida, wara li taħtar *Tender Evaluation Committee* (TEC) ġdid, b'membri li mhumiex milquta b'xi kunflitt ta' interess u li mhumiex imxekkla bil-liġi li jpoġġu fih.

Il-Qorti tordna wkoll illi d-depożitu mħallas minn Hitachi Zosen Inova AG - Terna S.A biex setgħet tressaq l-oġġezzjoni tagħha quddiem il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi jintradd lura lilha.

Fl-aħħar nett tordna li l-ispejjeż tal-appell għandhom jitħallsu mid-Dipartiment tal-Kuntratti u minn WasteServ Malta Limited.

Mark Chetcuti
Prim Imħallef

Christian Falzon Scerri
Imħallef

Josette Demicoli
Imħallef