

# QORTI TAL-APPELL

IMHALLFIN

S.T.O. PRIM IMHALLEF MARK CHETCUTI  
ONOR. IMHALLEF GIAENNINO CARUANA DEMAJO  
ONOR. IMHALLEF ANTHONY ELLUL

Seduta ta' nhar it-Tnejn 24 ta' Ġunju 2024

Numru 5

Rikors numru 175/2024/1

*Polaris Marine Services Co. Ltd (C-48840)*

v.

1. Awtorità għat-Trasport f'Malta
2. Direttur Ĝenerali Dipartiment tal-Kuntratti

1. Dan huwa appell ta' *Polaris Marine Services Co. Ltd* [“Polaris” jew “l-appellanti”] minn deċiżjoni tal-20 ta’ Marzu 2024 tal-Bord ta’ Reviżjoni dwar Kuntratti Pubblici [“il-Bord ta’ Reviżjoni”], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [“L.S. 601.03”], li čaħad oġżejjoni mressqa mill-appellant kontra deċiżjoni tal-Awtorità għat-Trasport f’Malta [“l-Awtorità għat-Trasport” jew “l-awtorità kontraenti”] li ma tipproċedix bl-ġhoti ta’ kuntratt pubbliku lill-appellant wara li kienet intgħażlet l-offerta ta’ din. Il-fatti relevanti huma dawn:

2. L-Awtorità għat-Trasport ġarġet sejħa għal “*tender for the removal and delivery of old buoys to TM stores and the supply, delivery, installation and maintenance of new fairway buoys at Xemxija for a period of three years*”. Fost oħrajin tefgħet offerti *Polaris*, u b’ittra tat-29 ta’ Lulju 2023 l-Awtorità għat-Trasport għarrfitha illi “*the recommendation for award of the above-captioned procurement has been accepted in your favour for the price of €259,700.00 excluding VAT*”.
3. Fis-7 t’Awissu 2023 is-soċjetà *Sammut Marine Limited* [“*Sammut*”], li wkoll kienet tefgħet offerta għall-istess kuntratt ressqt ogħżejjoni quddiem il-Bord ta’ Reviżjoni kontra l-għażla ta’ *Polaris*. Fl-24 t’Ottubru 2023 saret seduta quddiem il-bord u dakħinhar l-awtorità kontraenti ivverbalizzat hekk:
- ».... Transport Malta declares that the authority shall not be proceeding with the contract award envisaged by the tender SPD-6/2023/026 and shall be taking steps formally to revoke the award and the tender within twenty (20) days from the revocation of the tender. The authority no longer requires the service of the subject matter requested by the tender.«
4. Fid-dawl ta’ din l-istqarrija mill-awtorità kontraenti, *Sammut* irtirat l-ogħżejjoni tagħha u l-Bord ta’ Reviżjoni fit-3 ta’ Novembru 2023 iddeċieda hekk:
- »The board concludes and decides that:
- »a) contracting authority is formally to revoke the award and the tender within twenty (20) days from the revocation of the tender;
  - »b) .... the deposit paid by the appellant is reimbursed.«
5. B’ittra tat-30 ta’ Jannar 2024 l-awtorità kontraenti għarrfet lil *Polaris* illi:
- »this procurement procedure is being cancelled in line with article 18.3 of the General Rules governing Tenders<sup>1</sup> which states that cancellation may occur where this is not commercially feasible.«

---

<sup>1</sup> »18.3 Cancellation may occur where:

6. Fit-8 ta' Frar 2024 *Polaris* ressjet oġgezzjoni quddiem il-Bord ta' Reviżjoni kontra din id-deċiżjoni tal-awtorità kontraenti, iżda l-bord ċaħad l-oġgezzjoni għal raġunijiet li fissirhom hekk:

»The objection refers to the claims made by the same appellant against Transport Malta (herein after referred to as the contracting authority) regarding the tender SPD 6/2023/026 listed as case No. 1977 in the records of the Public Contracts Review Board.

»The board also noted the contracting authority's letter of reply filed on the 16<sup>th</sup> February 2024 and its verbal submissions during the hearing on 14<sup>th</sup> March 2024, as well as the testimony of Mr Konrad Muscat cited by the appellant.

»The board also took note of the submissions made ... on behalf of the Department of Contracts.

»Finally, the board took into consideration the decision of the PCRБ case 1929 dated 3<sup>rd</sup> November 2024.

».... . . . .

»The appellant contended that:

»A. the cancellation of the tender was outside the terms set by the Public Contracts Review Board i.e. way in excess of the 20 days stipulated;

»B. the cancellation of the award states that it was carried out under GR 18.3 but the reason quoted in the rejection letter – “not commercially feasible” – is not listed as a specific reason for cancellation of a tender in the GRs and not in line with the Public Procurement Regulations.

»The contracting authority contended that:

---

»(a) the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all;

»(b) the economic or technical parameters of the project have been fundamentally altered;

»(c) exceptional circumstances or force majeure render normal performance of the project impossible;

»(d) all technically compliant tenders exceed the financial resources available;

»(e) there have been irregularities in the procedure, in particular where these have prevented fair competition;

»(f) the duration of the evaluation has exceeded the stipulated time limit in article 8 of general rules governing tendering.

»In no circumstances will the Contracting Authority be liable for damages, whatever their nature (in particular damages for loss of profits) or relationship to the cancellation of a tender, even if the Contracting Authority has been advised of the possibility of damages. The publication of a contract notice does not commit Contracting Authority to implement the programme or project announced.«

- »A. though the 20 days imposition by the PCRБ was not met this was not made conditional and that claim therefore has no validity;
  - »B. the applicability of regulation 15.1 was being looked at too restrictively by the appellant. The GR 18.3 states “that cancellation may also occur” which widens the grounds for cancellation.
- »After the board considered the arguments and documentation from both parties, and the testimony of the witness, the board’s view is that:
- »A. though the 20 day imposed by the PCRБ was not made conditional, the fact that the cancellation was effected as late as the 30<sup>th</sup> January 2024. showed a certain lack of respect to the board and to the parties concerned;
  - »B. the contracting authority’s letter of rejection was clear enough in the reasons for cancellation in line with General Rule 18.3.
- »The board therefore concludes and decides that:
- »a) does not uphold the appellant’s letter of objection;
  - »b) upholds the contracting authority’s decision to cancel the tender;
  - »c) directs that the deposit paid by the appellant be reimbursed bearing in mind the delay by the contracting authority in following the directions of the board.«

7. *Polaris* appellat b’rikors tad-9 ta’ April 2024 u talbet illi din il-qorti tiddikjara illi l-awtorit  kontraenti “ma kinitx  ustifikata fid-deci joni tagħha ta’ kancellament tat-tender u li per konsegwenza l-kuntratt *de quo* għandu jingħata lis-soċjet  appellanti”. Id-Dipartiment tal-Kuntratti wieġeb fit-30 ta’ April 2024 u l-Awtorit  dwar it-Trasport wieġbet fit-2 ta’ Mejju 2024.

8. L-ewwel aggravju tal-appell huwa msejjes fuq l-argument illi l-avviż ta’ tkhassir tal-kuntratt ma ngħatax fi żmien għoxrin jum, u ġie mfisser hekk:

- »Avviż tal-kanċellament ma nhariġx fi żmien għoxrin jum
- »Fid-deci joni tal-Bord ta’ Revi joni tat-3 ta’ Novembru 2023, il-bord kien ikkonċeda żmien għoxrin jum lill-awtorit  sabiex fiha toħroġ l-avviż tal-kanċellament u dan in segwit u ta’ dak li kien ġie verbalizzat mill-awtorit  kontraenti stess fis-seduta tal-24 ta’ Ottubru 2023.
- »Minkejja dan, l-awtorit  naqset għal kollex milli taderixxi ma’ dan it-terminu *stante* li mhux talli l-avviż tal-kanċellament tas-sejħa ma ħariġx fi żmien għoxrin jum mid-data tad-deci joni tal-bord, iżda talli l-avviż ġareg aktar minn xahrejn wara li kienet ngħataat id-deci joni tal-bord.

»Fid-deċiżjoni tiegħu l-Bord ta' Reviżjoni jistqarr li t-terminu ta' għoxrin jum ma' kienx kundizzjonat (*conditional*) iżda juri biss nuqqas ta' rispett mill-awtorità lejn il-bord u l-partijiet konċernati. ... . . . it-terminu ta' għoxrin jum (kif suġġerit mill-awtorità kontraenti nnifishal) kien kundizzjonat fuq il-fatt li jiġu rtirati l-proċeduri ossia l-appell intavolat mill-oblatur Sammut Marine Ltd f'liema appell l-appellant kellha interess dirett li ssegwi u tirribatti.

»Għalhekk, kien żbaljat il-bord fil-motivazzjoni tiegħu fir-rigward ta' dan l-aggravju. F'dan ir-rigward, l-appellant ssostni li la darba l-awtorità kontraenti ma aderixxiet mat-terminu impost mill-bord, ma kellhiex dritt li tikkancella s-sejħa in kwistjoni wara l-iskadenza tat-terminu t'għoxrin jum spċifikatament dedott fis-sentenza tal-Bord ta' Reviżjoni. Huwa bil-wisq ċar u manifest illi fil-mument illi skada dan it-terminu ta' għoxrin jum, entro liema l-Awtorità għat-Trasport f'Malta kellha toħroġ l-avviż tal-kanċellament, l-awtorità ma kinitx għadha f'posizzjoni skond il-liġi li toħroġ tali avviż ta' kanċellament, u din ma kinitx sempliċernent kwistjoni ta' nuqqas ta' rispett lejn il-bord.«

9. Qabel xejn din il-qorti ma tistax ma tosservax illi diffiċli tifhem x'ried igħid il-Bord ta' Reviżjoni fid-deċiżjoni tat-3 ta' Novembru 2023 meta idderieġa lill-awtorità kontraenti “*to revoke ... the tender within twenty days from the revocation of the tender*”. Effettivament qiegħda tiddheriġi lill-awtorità tagħmel xi ħaġa fi żmien għoxrin jum minn meta tkun għamlet dik il-ħaġa: it-terminu biex titħassar is-sejħa kellu jibda minn dakħinhar li s-sejħa tkun tħassret, li jfisser illi effettivament it-terminu ma bediex igħaddi. X'aktarx illi l-bord ried igħid illi s-sejħa kellha titħassar fi żmien għoxrin jum minn dakħinhar tad-deċiżjoni tiegħu, iżda mhux hekk qal.
10. Barra minn hekk, biex awtorità kontraenti tkun tista' tħassar sejħa għal offerti, li hu meħtieġ hu li tkun seħħet xi waħda mill-kondizzjonijiet imsemmija fil-klawsola 18.3 tal-*General Rules governing Tenders*, u mhux meħtieġ ukoll il-kunsens tal-Bord ta' Reviżjoni. Ukoll mela jekk jitqies illi ż-żmien mogħti mill-Bord ta' Reviżjoni fid-deċiżjoni tat-3 ta' Novembru 2023 beda minn dakħinhar tad-deċiżjoni, il-fatt illi laħaq għadda dak iż-żmien qabel ma tħassret is-sejħa ma jolqotx il-validità tat-ħassir.

11. L-aggravju huwa għalhekk miċħud.
12. Fit-tieni aggravju *Polaris* tgħid illi d-deċiżjoni l-Bord ta' Reviżjoni tal-20 ta' Marzu 2024 – id-deċiżjoni appellata – ma hijex motivata. Fissret l-aggravju hekk:

»Jibda biex jingħad li r-raġuni komunikata lis-soċjetà appellanti u li dwarha saret l-oġgezzjoni kienet proprju is-segventi: “*this procurement procedure is being cancelled in line with article 18.3 of the General Rules governing Tenders which states that cancellation may occur where this is not commercially feasible*”.

»F'dan ir-rigward, l-appellanta ssostni li r-raġuni mogħtija fl-avviż tal-kanċellament ma kinitx waħda suffiċjenti u ben motivata li tirrispekkja dak li hemm stipulat fir-regolament 15(3) tar-Regolamenti dwar l-Akkwist Pubbliku u čjoè:

»“15. (3) Id-deċiżjoni li twassal għall-kanċellament tas-sejħa trid issir bil-miktub u jrid ikun fiha s-sejbiet u r-raġunijiet li wasslu biex din tkun inħarġet.”

»Għalhekk, il-fatt li l-awtorità tgħid li s-sejħa qegħda tiġi kkanċellata għaliex m'għadhiex “*commercially feasible*” ġertament ma’ tinkwadrax bħala raġuni suffiċjenti f'dak li jeħtieg il-fuq čitat regolament 15(3).

»*Oltre minn hekk, l-appellanta ssostni li l-aggravji l-oħra fl-oġġeżżjoni tagħha ma ġewx indirizzati. Dan qiegħed jingħad għaliex il-fatt li ma ngħatawx raġunijiet għal-kanċellament tas-sejħa kien biss wieħed mill-aggravji li ressqa l-appellanta quddiem il-bord. Minkejja dan, il-bord però injora għal kollex dawn l-aggravji u rrefera biss għal wieħed minnhom billi jgħid “The contracting authority letter of rejection was clear enough in the reasons for cancellation in line with general rule 18.3”.*

»Kif għà ngħad, fl-avviż tal-kanċellament li ġie komunikat lill-appellanta, ngħad li s-sejħa qegħda tigħi kkanċellata “*in line with article 18.3 of the General Rules governing Tenders which states that cancellation may occur where this is not commercially feasible*”.

»Jekk wieħed jara l-General Rules governing Tenders, partikolarmen ir-regola 18.3, imkien ma jsib illi tali regoli jikkontemplaw sitwazzjoni fejn sejħa għal offerti tista' tiġi kkanċellata jekk ma' tkun *commercially feasible*. Infatti, l-klawsola 18.3 tikkontempla biss dawn is-sitwazzjonijiet<sup>2</sup>:

»“... . . . . .

»Jirrizulta biċ-ċar li, kuntrajament għal dak li ġie komunikat fl-ittra tal-kanċellament, ma hemm l-ebda baži li fuqha *tender* jista' jiġi kkanċellat għaliex ma' jkunx *commercially feasible*. Dan qiegħed jingħad ukoll speċjalment minhabba l-fatt li l-avviż speċifikament jgħid illi l-klawsola 18.3 tistipula (*states*) illi *tender* jista' jiġi kkanċellat minħabba din ir-raġuni.

---

<sup>2</sup> Ara fn 1, supra.

»Di più, l-appellanta ssostni wkoll li mhux talli r-raġuni mogħtija mill-awtorità għall-kanċellament ma tirriflettix dak li hemm fir-regoli suċċitati, iżda lanqas issib riskontru fir-regolament 15(1) tar-Regolamenti dwar l-Akkwist Pubbliku, li jgħid:

»"Id-Direttur tal-Kuntratti għandu d-dritt li jħassar għotja ta' kunk-tratt f-kull waqt tal-proċess tas-sejħa jew kwotazzjonijiet ukoll wara li jkun ġie mħabbar l-offerent magħżul u jkun ukoll għaddha ż-żmien biex jitressqu lmenti quddiem il-Bord ta' Reviżjoni jew Qorti, jekk jinstab illi l-għotja ta' dak il-kuntratt tkun saret bi ksur ta' dawn ir-regolamenti jew tkun ingħatat b'mod li jiddiskrimina bejn l-operaturi ekonomiċi."

»Għalhekk jirriżulta biċ-ċar illi r-raġuni mogħtija mill-awtorità kontraenti lanqas ma hi kkontemplata f'dan ir-regolament bħala baži għall-kanċellament tas-sejħa.

»Dakinhar tas-seduta, minflok ma l-awtorità appellata iddefendiet u spjegat din id-deċiżjoni tal-kanċellament fil-parametri tagħha hekk kif ikkomunikata lill-appellata, hija ressqet numru ta' argumenti li fil-fehma tal-esponenti i) ma jinkwadrawx taħt id-deċiżjoni appellata u ii) fil-mertu huma kollha kemm huma infondati.

»Infatti, huwa utli jiġi rimarkat ukoll illi, waqt is-seduta li nżammet quddiem il-Bord tar-Reviżjoni, partikolarmen waqt ix-xieħda ta' Konrad Muscat, ħareġ biċ-ċar illi s-sit in kwistjoni fejn kien ser jiġu pprovduti s-servizzi mitlubin fis-sejħa għall-offerti kien sugġett għal-litigazzjoni u proċeduri legali, liema proċeduri kien ilhom għaddejjin sa mill-2009! Infatti, kif gie spjegat fid-deċiżjoni tal-Bord ta' Reviżjoni, in sintesi, Konrad Muscat qal hekk:

»"Witness stated that GR 18.3b refers to technical parameter changes which is exactly the situation here as the project is no longer feasible and the tender could not be proceeded with due to outstanding court proceedings. The fairway could not be decided whilst there are outstanding matters. In 2020 after agreement out of court had been reached with the parties involved the contracting authority decided to proceed but *Beach Haven* contested the decision. The tender was issued in anticipation that the court will have reached a decision."

»Huwa evidenti għalhekk li, għalkemm l-awtorità kontraenti kienet ben konsapevoli tad-diffikultajiet li kien hemm fis-sit in kwistjoni, xorta waħda għaddiet sabiex tippubblika s-sejħa, u dan għaliex l-awtorità anticiptat illi l-proċeċluri fil-qorti kien ser jiġu konklużi! Ċertament dan m'hux il-mod illi kellhom jitmexxw l-affarijiet speċjalment meta tikkunsidra li, wara li l-awtorità tippubblika s-sejħa, l-operaturi, f'dan il-kaz l-appellanta, ikunu investew sabiex ikunu jistgħu jipprovdū dan is-servizz biex imbagħad l-awtorità taqbad u tirtira is-sejħa.

»Huwa proprio għalhekk li l-general rules u r-regolamenti jillimitaw l-istanzi fejn u meta awtorità kontraenti tkun tista' tikkanċella sejħa u dan sabiex ma thallix diskrezzjoni wiesgħa fidejn l-awtoritajiet li jikkant sejħiet mingħajr baži u/jew raġunijiet, kif propju ġara f'dan il-każ-

»L-ispjega mogħtija minn Konrad Muscat, jekk xejn, ixnejjen ir-raġuni mogħtija mill-awtorità fl-avviż tal-kanċellament, *stante* li s-sejħa ma setgħetx tibqa' għaddejja mhux għaliex il-proġett ma kienx "commercially feasible" iżda fil-verità għaliex hemm proċeduri l-qorti li

stultifikaw l-għoti ta' din is-sejħa. Evidently I-ebda waħda minn dawn ir-raġunijiet ma tikkonfigura fir-raġuni mogħtija lis-soċjetà appellanti u għalhekk il-Bord ta' Reviżjoni qatt ma seta' jilqa' dawn il-kunsiderazzjonijiet bħala r-raguni ta' kanċellament.

»Għalhekk isegwi illi I-Bord ta' Reviżjoni kien tenut li jilqa' l-appell u mhux jiċħdu *stante* li r-raġunijiet mogħtija waqt is-smigħ kienu kompletament differenti minn dawk li minnhom saret l-oġgezzjoni.

»Dwar dan u b'analoġija ssir referenza għad-deċiżjoni tal-Qorti tal-Appell (Sede Inferjuri) tal-4 ta' Dicembru 2013 fl-ismijiet Frans Mamo v. L-Awtorità a' Malta dwar I-Ambient u I-Ippjanar, fejn intqal proprju hekk: "It-tribunal hu marbut jeżamina l-mertu tal-appell strettament ma' dak mitlub u mhux jiddipartixxi mill-kweżi u jassumi fuqu poteri li ma għandux".

»Ma hemmx dubju illi anke b'applikazzjoni tan-normi tal-liġi ewropea f'dan il-qasam, ossija *public procurement*, li l-awtoritajiet kontraenti għandhom jiżguraw trasparenza sħiħa anke f'każ ta' deċiżjoni ta' kanċellament ta' proċeduri ta' *tender* u li l-qrati / tribunali nostrana għandhom il-fakultà jissindikaw il-legalità ta' kwalsiasi deċiżjoni meħudha mill-awtoritajiet kontraenti, inkluż deċiżjoni ta' kanċellament ta' *tender*.

»Issir referenza għad-deċiżjoni tal-Qorti Ewropea tal-Ġustizzja fil-każ numru C-92/00 fl-ismijiet Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien (18 ta' Ĝunju 2002), li kienet tittratta proprju l-obbligu tat-tribunal / qrati nazzjonali li jistħarrġu l-legalità o *meno* ta' deċiżjonijiet ta' kanċellament ta' proċeduri ta' *tenders*:

»“48. Since the decision of a contracting authority to withdraw an invitation to tender for a public service contract is subject to the relevant substantive rules of Community law, it has to be concluded that it also falls within the rules laid down by Directive 89/665 in order to ensure compliance with the rules of Community law on public contracts.

»“49. That finding is corroborated, first, by the wording of the provisions of Directive 89/665. As the Court pointed out in paragraph 35 of its *Alcatel Austria* judgment, the provision in Article 1(1) of that directive does not lay down any restriction with regard to the nature and content of the decisions referred to therein. Nor can such a restriction be inferred from the wording of Article 2(1)(b) of that directive (see, to that effect, *Alcatel Austria*, paragraph 32). Moreover, a restrictive interpretation of the category of decisions in relation to which Member States must ensure the existence of review procedures would be incompatible with Article 2(1)(a) of the same directive, which requires Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities.

»“50. Next, the general scheme of Directive 89/665 requires a broad interpretation of that category, in so far as Article 2(5) of that directive authorises Member States to provide that, where damages are claimed on the ground that a decision by the contracting authority was taken unlawfully, the contested decision must first be set aside.

»“51. To hold that Member States are not required to lay down review procedures for annulment in relation to decisions withdrawing invitations to tender would amount to authorising them, by availing themselves of the option provided for in the provision mentioned in the paragraph above, to deprive tenderers adversely affected by such decisions, adopted in breach of the rules of Community law, of the possibility of bringing actions for damages.

»“52. Finally, it must be held that any other interpretation would undermine the effectiveness of Directive 89/665. As the first and second recitals in its preamble show, that directive is designed to reinforce existing arrangements at both national and Community level for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified, and it is precisely in order to ensure compliance with those directives that Article 1(1) of Directive 89/665 requires the Member States to establish effective review procedures that are as rapid as possible (*Alcatel Austria*, paragraphs 33 and 34).

»“53. The full attainment of the objective pursued by Directive 89/665 would be compromised if it were lawful for contracting authorities to withdraw an invitation to tender for a public service contract without being subject to the judicial review procedures designed to ensure that the directives laying down substantive rules concerning public contracts and the principles underlying those directives are genuinely complied with.

»“54. In the light of the foregoing considerations, it must be held that the decision to withdraw an invitation to tender for a public service contract is one of those decisions in relation to which Member States are required under Directive 89/665 to establish review procedures for annulment, for the purposes of ensuring compliance with the rules of Community law on public contracts and national rules implementing that law.

»“55. The answer to the first question must therefore be that Article 1(1) of Directive 89/665 requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.”

»Għalhekk is-socjetà appellanti tħenni li, mill-assjem tal-atti kollha processwali, dak li rrizulta waqt is-smiġħ quddiem il-Bord ta' Reviżjoni u l-kunsiderazzjonijiet kollha hawn magħmula, jirriżulta bl-izjed mod ċar u manifest illi:

- »(i) ... ... ...;
- »(ii) ir-raġuni miċċuba għall-kanċellament tat-tender, u cioè li ma huwiex “commercially feasible”, mhix legalment sostenibbi għaliex mhix kontemplata la fi klawsola 18.3 tal-General Rules governing Tenders u lanqas fir-regolament 15(1) tar-Regolamenti dwar l-Akkwist Pubbliku; u
- »(iii) mhuwiex minnu illi l-Awtorità għat-Trasport f' Malta kkanċellat it-tender għaliex ma kienx “commercially feasible” iħda għal

raġunijiet kompletament differenti kif irriżulta mill-fuq čitata xieħda ta' Konrad Mucat, uffiċjal għoli tal-awtorità.«

13. Jingħad qabel xejn illi ma huwiex kontestat illi kemm il-Bord ta' Reviżjoni u kemm din il-qorti għandhom is-setgħa li jissindikaw il-validità tad-deċiżjoni tal-awtorità kontraenti li tkhassar is-sejħha, u dak li ngħad fis-sentenza C-92/00 ma jžid xejn ma' dan.
14. L-argumenti f'dan l-aggravju essenzjalment huma tlieta: i. illi l-Bord ta' Reviżjoni ma fissirx għala r-raġuni mogħtija mill-awtorità kontraenti biex tkhassret is-sejħha hija fost ir-raġunijiet imsemmija fil-klawsola 18.3 tal-kondizzjonijiet tas-sejħha; ii. illi, ukoll jekk ir-raġuni hija fost dawk imsemmija fil-klawsola 18.3, xorta ma hijiex raġuni valida taħt ir-reg. 15(1) tal-L.S. 601.03; u iii. illi, ukoll jekk ir-raġuni mogħtija mill-awtorità hija fost dawk imsemmija fil-klawsola 18.3 u tiswa wkoll taħt ir-reg. 15(1), xorta ma hijiex raġuni tajba għax ma hijiex ir-raġuni tassew għala s-sejħha tkhassret.
15. Il-klawsola 18.3 hija kondizzjoni fil-kuntratt preliminari *de ineundo contractu* bejn l-awtorità kontraenti u l-oblaturi li jirregola l-kondizzjonijiet tas-sejħha, u għalhekk għandha s-saħħha ta' ligi bejn il-partijiet. Mela billi raġuni għat-tħassir tas-sejħha ma nsibuhien ukoll fir-reg. 15(1) ma jfissirx illi ma tiswiex, ladarba kull oblatur aċċetta l-patt fil-klawsola 18.3 meta tefaq' l-offerta tiegħi.
16. Nibdew mela billi naraw jekk il-fatt li l-proġett ma baqax kummercjalment fattibbli huwiex fost ir-raġunijiet imsemmija fil-klawsola 18.3 li tagħti lill-awtorità kontraenti s-setgħha li tkhassar is-sejħha.

17. Fost ir-raġunijet imsemmija fil-klawsola 18.3 l-eqreb li tidher għaċ-ċirkostanzi tal-każ tallum hija “*the economic or technical parameters of the project have been fundamentally altered*”.
18. Ix-xhud Konrad Muscat, direttur tal-awtorità kontraenti responsabbi mill-portijiet, xehed quddiem il-Bord ta’ Reviżjoni illi l-proġett ma għadux fattibbli għax kien hemm “*technical parameter changes*”, li hija effettivament raġuni tajba taħt il-klawsola 18(3). Fis-silta citata fir-rikors tal-appell kompla jfisser illi “*the project is no longer feasible and the tender could not be proceeded with due to outstanding court proceedings. The fairway could not be decided whilst there are outstanding matters. ... ... ... The tender was issued in anticipation that the Court will have reached a decision*”.
19. Fil-verità, mela, li ġara ma hux illi seħħet bidla fil-parametri, iżda li kien hemm sitwazzjoni li ma ippermettietx illi l-parametri tekniċi jiġu stabiliti u l-bidla antiċipata f'dik is-sitwazzjoni ta’ *impasse* ma seħħitx: mhux seħħet bidla, iżda bidla mistennija ma seħħitx.
20. Effettivament f’sitwazzjoni fejn il-parametri tal-kuntratt ma jistgħux jiġu stabiliti, huwa minnu illi l-kuntratt ma jibqax fattibbli, u ma jagħmilx sens illi l-awtorità kontraenti tiġi mgiegħla tidħol f’kuntratt illi ma jistax jitwettaq. Iżda r-raġuni ma hijex illi nibdlu radikalment (“*fundamentally*”) il-parametri tekniċi; ir-raġuni hi illi hemm ostakolu – litigazzjoni pendent – li kien ježisti meta ḥarġet is-sejħha u baqa’ ježisti wara li ntgħaż-żejt l-offerta tal-appellant, u mhux xi ostakolu li nħoloq wara minħabba xi bdil ta’ cirkostanzi. Dan ifisser illi, għalkemm ma tistax tintlaqa’ t-talba tal-

appellanti illi l-qorti tiddikjara illi l-awtorità kontraenti ma tistax tħassar is-sejħa, madankollu, billi r-raġuni għat-tħassir tas-sejħa ma kinitx fost dawk imsemmija fil-klawsola 18.3, l-awtorità ma tistax tinqeda b'dik il-parti tal-klawsola 18 li teħlisha minn responsabilità għal *culpa in contrahendo*.

21. Dan l-aħħar aggravju wkoll huwa għalhekk miċħud iżda bil-proviso msemmi fil-paragfaru ta' qabel dan.
22. Il-qorti għalhekk tiċħad l-appell u, għalkemm għal raġunijiet differenti, tikkonferma d-deċiżjoni appellata tal-Bord ta' Reviżjoni b'dan iżda illi l-awtorità kontraenti ma tistax tinqeda b'dik il-parti tal-klawsola 18 li teħlisha minn responsabilità għal *culpa in contrahendo*.
23. L-ispejjeż tal-appell jinqasmu bin-nofs bejn l-appellant u l-awtorità kontraenti.

Mark Chetcuti  
Prim Imħallef

Giannino Caruana Demajo  
Imħallef

Anthony Ellul  
Imħallef

Deputat Registratur  
ss