



QORTI TAL-APPELL

IMĦALLFIN

**S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF ANTHONY ELLUL**

Seduta ta' nhar it-Tlieta, 16 ta' Lulju, 2024.

Numru 3

Appell numru 209/2024/1

**Saviour Galea, Joseph Galea u Christian Galea
f'isimhom u f'isem *Galea Cleaning Solutions JV***

v.

**Kunsill Lokali Ħal Lija u
*WM Environmental Limited (C-53505)***

1. Dan huwa appell ta' Saviour Galea *et* ["*Galea JV*" jew "l-appellanti"] minn deċiżjoni tat-2 ta' April 2024 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku ["L.S. 601.03"], li ċaħad oġġezzjoni tagħha kontra deċiżjoni tal-Kunsill Lokali ta' Ħal Lija ["l-awtorità kontraenti"] li ma tagħtihx tagħrif li talab wara illi l-istess kunsill qatagħha illi kuntratt pubbliku jingħata lil *WM Environmental Ltd* ["*WM*" jew "l-oblatur magħżul"].

2. Il-fatti relevanti seħnew hekk: kienet saret sejha mill-awtorità kontraenti għal offerti għal “*street sweeping services in the locality of Hal Lija*”. Il-kriterju tal-għażla kellu jkun “*the best price quality ratio*”. Tefgħu offerti, fost oħrajn, l-appellanti u WM. B’ittra tas-7 ta’ Frar 2024 l-awtorità kontraenti għarrfet lill-appellanti illi kienet sejra tintgħazel l-offerta ta’ WM.
3. B’ittra elettronika tat-8 ta’ Frar 2024 l-avukat tal-appellanti talab illi l-awtorità tibgħat:
 - »a. a copy of the evaluation report such that my client can understand the points awarded;
 - »b. a copy of the successful bidder’s bid, except in so far as this contains confidential information. In this respect, reference is made both to regulation 40 of the Public Procurement Regulations and the judgement of the European Court in Polska (C-54/21), to the effect that such information must be provided under the conditions set forth in both the regulation and the judgement.«
4. Dan it-tagħrif intalab sabiex l-appellanti jkunu jistgħu jhejju l-appell tagħhom mid-deċiżjoni illi l-kuntratt jingħata lil WM. L-awtorità wiegħbet fid-9 ta’ Frar 2024: tat lill-appellanti parti biss mill-*evaluation report* u ma tathiex kopja tal-offerta rebbieha “*since that is confidential*”.
5. B’ittra tas-16 ta’ Frar 2024 l-appellanti ressqet oġġezzjoni quddiem il-Bord ta’ Reviżjoni u talbet lill-bord “*to annul the decision of the contracting authority and to order the contracting authority to provide the information requested, as well as to provide such other remedies deemed fit*”. Id-deċiżjoni li l-appellanti riedet li titħassar ma kinitx biss dik tad-9 ta’ Frar 2024 li ma jingħatalhiex it-tagħrif kollu mitlub, iżda wkoll dik tas-7 ta’ Frar 2024 illi l-kuntratt jingħata lil WM.

6. Il-Bord ta' Revizjoni bid-deċiżjoni tat-2 ta' April 2024 li minnha sar dan l-appell ma laqax l-oġġezzjoni tal-appellanti, u kkonferma d-deċiżjoni li l-kuntratt jingħata lil WM, għal raġunijiet li fissirhom hekk:

»The board ... having noted the objection filed by *Galea Cleaning Solutions JV* (hereinafter referred to as the appellant) on 16th February 2024, refers to the claims made by the same appellant with regard to the tender ... whereby, the appellant contends that:

- »a) The contracting authority has failed to comply with its obligations on a number of counts;
- »b) firstly, the rejection letter sent to the appellant does not provide sufficient information to allow the bidder to understand the assessment made by the contracting authority; it does not even indicate the total score obtained by the appellant or the successful bidder. On this basis alone, the decision taken by the contracting authority is null and void;
- »c) additionally, the contracting authority's behaviour after the decision did nothing to rectify this gross failing. From the email correspondence with the contracting authority, it is clear that the contracting authority labours under the completely erroneous misapprehension that it is not obliged provide the information that was requested of it. It should be clear that almost all – if not all – of the information submitted by the successful bidder is not confidential and does not constitute a trade secret. This notwithstanding, the contracting authority refused to disclose any information, merely providing a generic excuse to the effect that the information is confidential.

»This board also noted the contracting authority's reasoned letter of reply filed on 20th March 2024 and its verbal submission during the hearing held on 25th March 2024, in that:

- »a) the rejection letter included all the information that is standard;
- »b) appellant had all the required information as to how and why they were deducted points, and hence they had information on what to base their appeal.

»This board also noted the preferred bidder's reasoned letter of reply filed on 20th February 2024 and its verbal submission during the hearing held on 25th March 2024, in that:

- »a) as rightly pointed out by the Hal Lija Local Council in its reply dated 9th February 2024, the evaluation report is an internal document belonging to the local council which cannot be shared and is solely intended for the use of the local council. To this extent appellant was furnished with a limited version of the evaluation report showing the points awarded to appellant by evaluators. This matter has already been dealt with by the Court of Appeal (Inferior Jurisdiction) in the case Roberto Ragonesi v. il-Kummissariju għall-Infommazzjoni u l-Protezzjoni tad-Data, (Appeal 65/2018) decided on the 11th October 2019 whereby the court noted:

»“Min-natura tiegħu *evaluation report* jidhol fid-dettal tat-*tender* inkluż l-informazzioni kummerċjalment sensitiva mogħtija fl-ispeċifikazzjonijiet annessi mal-istess. Din il-qorti tikkonferma, kif fuq kollox ikkwotat mill-istess tribunal, illi huwa l-kuntratt bejn il-partijiet li jitlef il-kunfidenzjalità u mhux neċessarjament l-ispeċifikazzjonijiet u informazzioni annessa mal-istess. Il-qorti ssibha wkoll diffiċli biex tifhem kif it-tribunal wasal għall-konkluzjoni li għandu jingħata kopja tal-*evaluation report* mingħajr ma l-ewwel għarbel kif seta’ jiġi evitat li informazzioni kummerċjalment sensitiva u *trade secrets* li jinsabu msemmija fl-istess rapport bħala parti mill-*evaluation* ma jiġux noti lit-terzi kompetituri. Fiċ-ċirkustanzi l-qorti tqis li la darba l-*evaluation report* imsemmi ma jikkwalifikax bħala l-ftehim finali redatt bejn il-partijiet u li huwa dan tal-aħħar li litlef il-kunfidenzjalità f’partijiet biss minnu, ukoll minħabba l-biża’ reali li tinkixef informazzioni kummerċjalment sensitiva, hija għandha tilqa’ wkoll dan l-aggravju u tikkonferma d-deċiżjoni tal-kummissarju appellat.

»“Dwar ir-*Request D* din il-qorti, fl-analiżi tagħha tal-aggravji tal-*Enemalta plc* suesposti, għa’ waslet għall-konkluzjoni li t-tribunal kien skorrett meta ddeċieda li jilqa’ din it-talba *in parte* u jordna li tingħata l-informazzioni mitluba *cioè* kopja tal-*evaluation report* tal-*EMC* iżda mingħajr it-*technical specifications*. Abbażi tar-rapunament ta’ din il-qorti aktar ’il fuq, li l-qorti qed tagħmel tagħha wkoll f’dan l-aggravju, il-qorti ser tgħaddi sabiex tiċhad ukoll din il-parti tal-aggravju tal-appellant Ragonesi fl-appell 65/1”.

- »b) appellant was provided with the part of the evaluation report limited to the awarding of points by each evaluator in respect of his bid. This satisfied its request submitted in the above-mentioned email so that it “*can understand the points awarded*”. In respect of the second request, *i.e.* the provision of a copy of the successful bidder’s bid except in so far as this contains confidential information, would be tantamount to a breach of confidentiality as per the quoted judgment (even if the technical specifications are excluded). Hence the contracting authority was justified in refusing the latter request.

»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 witness duly summoned, will now consider appellant’s grievances.

»On the rejection letter –

- »a) Initially, it must be noted that the rejection letter sent out to *Galea Cleaning Solutions JV* on 7th February 2024 did not include all the ‘standard’ information as is normally the case when the criterion for award is based on the Best Price Quality Ratio (BPQR) offer. As a minimum, the rejection letter should have included a table summarising the total technical and financial scores obtained by the economic operator to whom the rejection letter is being sent, in this case *Galea Cleaning Solutions JV*, and of the preferred bidder.

- »b) However, following an email sent by same *Galea Cleaning Solutions JV*, on the 8th February 2024 to the contracting authority, the relevant information in respect of these two bids was eventually provided. This information was provided on the 9th February 2024.
- »c) It is however important to point out that the way the information was presented was not in accordance with the 'standard' prescribed format. All the relevant information such as price of the successful bidder and area/s where points of a technical nature were deducted from the appellant evaluation grid have however been provided. In the opinion of this board, the information available to *Galea Cleaning Solutions JV* as of 9th February 2024 was sufficient enough for them to be able to lodge an appeal should have they wished to proceed in this prescribed manner
- »On the evaluation report & successful bidder's bid –
- »d) The board notes the argumentation brought forward by the appellant and agrees with what is stated in Antea Polska (case C-54/21) that "... the principle of the protection of confidential information must be reconciled with the requirement of effective judicial protection ... That **balancing** exercise must take account of ..." (bold & underline emphasis added).
- »e) It is exactly the word '**balancing**' which in the opinion of this board is crucial. This was also very evidently stated in the case Varec SA v Etat Belge (case C-450/06) whereby it was affirmed that
- »"It follows that, in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle **does not mean that the parties are entitled to unlimited and absolute access to all of the information** relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.
- »"The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, case C-438/04 Mobistar [2006] ECR I-6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial." (bold & underline emphasis added)..
- »f) In the opinion of this board, this 'balancing exercise' can in this specific case be achieved by following what is stated in regulation 270 of the Public Procurement Regulations where it is stated that "... may file an appeal by means of an objection before the Public Contracts Review Board, **which shall contain**

in a very clear manner the reasons for their complaints”
(bold & underline emphasis added).

- »g) Therefore, while blanket statements that all information is confidential are certainly not to be entertained, this board cannot on the other hand uphold the requests of the appellant which on the other extreme part of the spectrum is requesting “a copy of the evaluation report” (presumably in full and not redacted) and “a copy of the successful bidder’s bid” without the appellant having even explained in a very clear manner the reason for their complaints and / or request for information.
- »h) It can be argued that without such information it would be difficult to ‘find out reasons’; however a balancing exercise cannot result in having complete evaluation reports and whole successful bidder’s bids sent out to economic operators in the hope of finding a possible grievance on which to appeal. This would, in the opinion of this board lead to anarchy in the public procurement sector with economic operators losing faith in the process.
- »i) Finally, if plausible reasons are brought forward as to why certain information is being requested, and reasons provided why such information is not of a confidential nature, contracting authorities should do well to analyse such requests in detail. However, they should not entertain requests which would only serve as a fishing expedition.

»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 and contentions,
- »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 be reimbursed.«

7. *Galea JV* appellat b’rikors tad-19 ta’ April 2024. L-awtorità kontraenti wieġbet fis-6 ta’ Mejju 2024 u *WM* wieġbet fil-15 ta’ Mejju 2024.

8. L-appellanti fissret l-aggravju hekk:

»Għandu jkun paċifiku li sentenzi tal-Qorti tal-Ġustizzja għandhom isibu applikazzjoni sħiħa fis-sistema legali Maltija in kwantu hija l-Qorti tal-Ġustizzja li għanda l-ġurisdizzjoni esklussiva li tinterpreta Regolamenti u Direttivi tal-Unjona Ewropea. L-ebda bord jew qorti f’Malta ma jista’ jinjora sentenza tal-Qorti tal-Ġustizzja meta din is-sentenza tinterpretata liġi Maltija – f’dan il-każ ir-Regolamenti dwar l-Akkwist Pubbliku (“ir-Regolamenti”) – li timplimenta Direttiva tal-Unjoni Ewropea.

»Ir-Regolamenti (u d-Direttiva li l-istess Regolamenti jimplementaw) jipprovdu illi awtorità kontraenti trid tagixxi “with transparency” u li partecipant f’*tender* pubbliku għandu dritt għal rimedju effettiv sabiex

jikkontesta l-eżitu ta' *tender* pubbliku. Ir-Regolamenti (u d-Direttiva li l-istess Regolamenti jimplementaw) jipprovdu ukoll li awtorità kontraenti trid tiproteġi informazzjoni kunfidenzjali mogħtija lilha minn partecipant f'*tender*.

»Bejn dawn il-prinċipji jista' jkun hemm xi ftit tensjoni, in kwantu, sabiex partecipant f'*tender* verament ikollu rimedju effettiv, hafna drabi jkun neċessarju li jkollu aċċess għal informazzjoni relatata mal-offerta li jkun tefa' min ikun rebaħ it-*tender*, u l-mod dwar kif din l-offerta tkun għet evalwata mill-awtorità kontraenti. Għalhekk, awtorità kontraenti xi kultant issib ruħha f'pożizzjoni fejn minn naħa tkun obbligata li tagħti din l-informazzjoni sabiex tiggarrantixxi rimedju effettiv, imma minn naħa oħra ma tkunx tista' tagħtiha għaliex dik l-informazzjoni tkun kunfidenzjali.

»Fil-kawza ta' Antea Polska, gew stabbiliti numru ta' prinċipji li jir-regolaw il-kompartament ta' awtorità kontraenti f'dawn iċ-ċirkustanzi:

- »a. Filwaqt illi informazzjoni li hija kunfidenzjali trid tiġi protetta "madanakollu, il-prinċipju ta' protezzjoni tal-informazzjoni kunfidenzjali għandu jiġi rrikonċiljat mar-rekwiżiti ta' protezzjoni għudizzjarja effettiva. Għal dan l-għan, il-projbizzjoni stabbilita fl-artikolu 21(1) tad-Direttiva 2014/24 għandha tiġi bbilanċjata mal-prinċipju ġenerali ta' amministrazzjoni tajba, li minnu jirriżulta l-obbligu ta' motivazzjoni. Dan l-ibbilanċjar għandu b'mod partikolari jjeħu in kunsiderazzjoni l-fatt li, fl-assenza ta' informazzjoni suffiċjenti li tippermettilha tivverifika jekk id-deċiżjoni tal-awtorità kontraenti dwar l-għoti tal-kuntratt hijiex ivvizzjata minn żbalji jew illegalitajiet possibbli, offerent eskluż ma jkollux il-possibbiltà, fil-prattika, li jinvoka d-dritt tiegħu għal rimedju effettiv ..."¹
- »b. Rinfaccjata b'rikjesta għal informazzjoni, awtorità kontraenti "... ma tistax tkun marbuta bis-sempliċi allegazzjoni ta' operatur ekonomiku li l-informazzjoni traimessa hija kunfidenzjali ..."2; "Barra minn hekk, sabiex jiġi osservat il-prinċipju ġenerali ta' amministrazzjoni tajba u sabiex tiġi rrikonċiljata l-protezzjoni tal-kunfidenzjalità mar-rekwiżiti ta' protezzjoni għudizzjarja effettiva, l-awtorità kontraenti għandha mhux biss timmotiva d-deċiżjoni tagħha li tipproċessa ċerta data bħala kunfidenzjali, iżda għandha wkoll tikkomunika f'forma newtrali, sa fejn ikun possibbli u sa fejn tali komunikazzjoni tkun ta' natura li tippreserva n-natura kunfidenzjali tal-elementi speċifiċi ta' din id-data li għaliha protezzjoni hija ġustifikata f'dan ir-rigward, il-kontenut essenzjali tagħha lil offerent eskluż li jitlobha, u b'mod iktar partikolari l-kontenut tad-data li tikkonċerna l-aspetti determinanti tad-deċiżjonijiet tagħha u tal-offerta magħżula ..."3
- »ċ. L-iżvelar ta' informazzjoni trasmessa lill-awtorità kontraenti fil-kuntest ta' proċedura ta' għoti ta' kuntratt pubbliku ma jistax jiġi rrifjutat jekk din l-informazzjoni, filwaqt li tkun rilevanti għall-proċedura ta' għoti inkwistjoni, ma jkollha l-ebda valur

¹ » Antea Polska S.A., Pectore-Eco sp. z o.o., Instytut Ochrony Środowiska – Państwowy Instytut Badawczy v Państwowe Gospodarstwo Wodne Wody Polskie, para. 50«

² » *Ibid.* para. 65«

³ » *Ibid.* para 66«

kummerċjali fil-kuntest iktar wiesa' tal-attivitajiet ta' dawn l-operaturi ekonomiċi ...”⁴ u “L-awtorita kontraenti għandha, meta l-aċċess sħiħ għall-informazzjoni jiġi rrifjutat, tagħti lill-imsemmi offerent aċċess għoll-kontenut essenzjali ta' din l-istess informazzjoni, b'mod li jiġi żgurat ir-rispett tad-dritt għal rimedju effettiv”.⁵

»Jidher ċar li, minn dan kollu, il-kunsill appellat ma għamel xejn meta saritlu talba għal informazzjoni mingħand l-appellant; il-kunsill, meta ġie mitlub ċerta informazzjoni, sempliċiment qal li ma huwa ser jipprovi xejn għaliex l-informazzjoni hija kunfidenzjali, u waqaf hemm. Jidher ċar ukoll, mid-deċiżjoni appellata, illi l-bord injora għal kolloxx il-prinċipji enunċjati fis-sentenza ta' Antea Polska, u jidher ċar ukoll li l-bord b'mod żbaljat effettivament iddeċieda li l-kunsill appellat ma kienx obligat li jsegwi l-prinċipji stabbiliti mill-Qorti tal-Ġustizzja fl-istess sentenza.

»Hawn tajjeb li jiġi mfakkar illi l-eżerċizzju ta' rimedju *ai termini* tar-Regolamenti huwa suġġett għal ħlas – da parti minn min jixtieq jappella – ta' depożitu li jvarja skond il-valur tat-*tender* in kwistjoni u li jista' jitle' sa massimu ta' ħamsin elf euro. Dan id-depożitu ma jiġix rifiuż jekk l-appell jintilef.

»L-appellant jifhem li dan il-mekkaniżmu huwa neċessarju sabiex jigu evitati appelli inutili quddiem il-bord li l-għan tagħhom ikun prinċipalment li joħolqu dilungar inutili fil-proċess ta' għoti ta' kuntratti pubbliċi. Però, importanti li jingħad li dan il-mekkaniżmu jista' joħloq ċerti inċentivi li jistgħu ikunu żbaljati, in kwantu dan id-depożitu li jrid jiġi mħallas joħloq *protective barrier* pervers għal awtoritajiet kontraenti li jew huma traskurati f'xogħolhom jew li għal xi raguni oħra – hi x'inhi – ikunu jridu jorkestraw eżitu partikolari fl-għoti ta' kuntratt pubbliku. Dawn l-awtoritajiet jafu illi parteċipant f'*tender* irid jirriskja ammont ta' flus sabiex jfittex rimedju, u li x'aktarx dan mhux ser jagħmlu sakemm ma jkollux provi ċari li l-evalwazzjoni saret b'mod żbaljat.

»Is-sistema kif inhi illum – fil-prattika – hija illi l-proċess ta' evalwazzjoni (u r-rizultat ta' dan il-proċess) huwa sostanzjalment mistur, u illi talbiet għal informazzjoni dwar x'offra min jirbaħ *tender* partikolari jiġu awtomatikament rifużati, biex b'hekk persuna li tkun ipparteċipat f'*tender* issibha diffiċli ħafna sabiex suspett qawwi li jkollha tirradikah bi prova konkreta.

»L-appellant jifhem, kif qal iżjed 'ii fuq, li huwa importanti li l-liġi titlob il-ħlas ta' depożitu sabiex isir appell quddiem il-bord; però l-appellant jemmen li din ir-regola meħuda flimkien mal-prassi li qed tiġi adoperata mill-awtoritajiet kontraenti li informazzjoni mitluba ma tingħatax – mingħajr ma jiġu segwiti il-prinċipji stabbiliti f'Antea Polska – joħloq periklu serju ta' abbuz.

»Fil-fehma tal-appellanti, dan il-periklu ta' abbuz jista' jiġi sostanzjalment ridott jekk awtoritajiet kontraenti jkunu obligati li verament jaġixxu b'mod miftuħ u trasparenti kif *def resto* tirrikjedi s-sentenza ta' Antea Polska. Iktar ma jkun trasparenti il-proċess, iżjed hemm ċans li

⁴ »*Ibid.* para. 78«

⁵ »*Ibid.* para. 85«

abbuż jitle' fil-wiċċ; iżjed ma jkun hemm ċans illi abbuż jitle' fil-wiċċ, inqas ikun hemm skop għal abbuż.

» Huwa evidenti illi l-bord mhuwix konxju ta' dan kollu, in kwantu b'mod pjuttost sorprendenti irrimarka illi:

»“f) In the opinion of this board, this ‘balancing exercise’ can in this specific case be achieved by following what is stated in regulation 270 of the Public Procurement Regulations where it is stated that “... may file an appeal by means of an objection before the Public Contracts Review Board, **which shall contain in a very clear manner the reasons for their complaints**” (bold & underline emphasis added).

»“g) Therefore, while blanket statements that all information is confidential are certainly not to be entertained, this board cannot on the other hand uphold the requests of the appellant which on the other extreme part of the spectrum is requesting “a copy of the evaluation report” (presumably in full and not redacted) and “a copy of the successful bidder’s bid” without the appellant having even explained in a very clear manner the reason for their complaints and / or request for information.”

»Huwa evidenti illi l-bord ma fehemx illi l-*balancing exercise* irid isir mill-awtorità kontraenti qabel ma jsir appell quddiem il-bord, u proprju irid isir sabiex jiġi determinat x'informazzjoni għandha tingħata lli appellant prospettiv sabiex l-istess appellant jiddiċiedi jekk għandux bażi sabiex jappella quddiem il-bord jew le. Ukoll, irid jingħad illi filwaqt illi l-bord għaraf illi “*blanket statements that all information is confidential are certainly not to be entertained*”, xorta waħda ħalla lill-kunsill jagħmel hekk, u *cioè* jirrifjuta li jipprovdi kwalunke informazzjoni abbazi ta' *blanket statement* illi l-informazzjoni kienet kunfidenzjali. Żgur mhuwix il-każ illi l-informazzjoni kollha provduta fl-offerta tal-appellata *WM Environmental Ltd* hija kunfidenzjali. Biex jingħata eżempju wieħed biss, dettalji dwar il-vettura li ser tintuża sabiex jingħata s-servizz mertu tat-*tender* żgur li mhuwix kunfidenzjali, partikolarment meqjus il-fatt illi jekk il-kuntratt eventwalment jingħata lil *WM Environmental Ltd* din il-vettura ser tintuża fil-pubbliku, madwar it-toroq ta' Ħal Lija, sabiex jiġi provdut is-servizz in kwistjoni. «

9. Il-kwistjoni essenzjalment hija waħda ta' fatt: it-tagħrif mogħti mill-awtorità kontraenti – dak li ngħad fl-ittra tas-7 ta' Frar 2024 u, imbagħad, siltiet mir-rapport tal-evalwazzjoni tal-offerti – kienx biżżejjed biex l-appellanti setgħet tressaq appell motivat sew, jew kienx meħtieġ aktar tagħrif.
10. Ċertament ma jistax jingħad, kif tgħid l-appellanti fir-rikors tal-appell, illi l-awtorità nħbiet wara *blanket statement* ta' kunfidenzjalità biex iċċaħħadha minn kull tagħrif.

11. Fl-ittra tas-7 ta' Frar 2024 l-appellanti kienet mgħarrfa illi l-offerta tagħha ma ntlagħhetx għax:

- »i. the criteria for award were the best price quality ratio (BPQR) for service contract. The contract was awarded to the tenderer who submitted the offer with the best price quality ratio, satisfying the administrative and technical criteria;
- »ii. the successful bidder is *WM Environmental Ltd*;
- »iii. the price of the successful bidder is €96,555.68;
- »iv. with reference to point C2.1⁶, the economic operator submitted an expired collective agreement, 65% as per tender document;
- »v. your offer was not the best price quality ratio (BPQR) offer;«

12. Kienet mgħarrfa wkoll illi:

- »vi. the deadline for filing a notice of objection (appeal) is ten (10) calendar days from the date of this letter;
- »vii. an appeal can be lodged against a deposit of €482.78.«

13. Sussegwentement, wara li fit-8 ta' Frar 2024 talbet aktar tagħrif, l-awtorità kontraenti tatha estratt mir-rapport tal-evalwazzjoni li juri x'kienu l-kriterji tal-għażla, x'kienet l-ogħla marka li setgħet tinkiseb dwar kull kriterju, il-marki li ngħatat dwar kull kriterju minn kull membru tal-kumitat tal-għażla, u l-medja tal-marki li ngħatat dwar kull kriterju.

14. Effettivament l-appellanti ngħatat l-ogħla marka possibbli għal kull kriterju ħlief għal wieħed, dak dwar kondizzjonijiet tal-impieg. Dan kien fih tmien sub-kriterji u l-appellanti ngħatat l-ogħla marka għal sebgha minnhom, u ngħatat 15.6 minn 24 għal wieħed minnhom, billi ma kinitx ipprezentat kopja dwar ftehim kollettiv fis-seħħ mal-impjegati tagħha.

15. Mela l-appellanti kienet taf ovvjament il-prezz tal-offerta tagħha: sebgha u disgħin elf, mija u disgħin euro u tmien centezmi (€97,190.08); kienet taf

⁶ »The economic operator is to submit the required proof indicating ... conditions of employment.«

il-prezz tal-offerta magħżula: sitta u disgħin elf, ħames mija u ħamsa u ħamsin euro u tmienja u sittin ċenteżmu (€96,555.68); u kienet taf – għax ingħatat l-ogħla marka possibbli dwar kull kriterju flief dwar sub-kriterju wieħed – illi l-offerta magħżula setgħet kienet aħjar minn tagħha biss fil-prezz u fis-sub-kriterju dwar il-ftehim kollettiv. Effettivament mela kienet taf id-dettalji ta' x'kienet l-evalwazzjoni tal-offerta magħżula⁷.

16. L-appellanti tista' tgħid illi mhux biżżejjed tkun taf il-marki li ngħataw lill-offerta magħżula, iżda wkoll kienx jistħoqq li jingħataw il-marki li ngħataw, u għalhekk trid taf id-dettalji tal-offerta magħżula. Effettivament trid illi tkun fil-qagħda li tagħmel hi x-xogħol tal-kumitat tal-għażla.
17. Iżda biex tagħmel hekk tkun trid tagħrif dwar il-*working method*, il-*contingency plans*, ir-*risk assessment* u l-kondizzjonijiet tal-impieg tal-impjegati tal-oblatur magħżul, billi dawn kollha kienu kriterji tal-għażla. Iżda kif sewwa osserva l-Bord ta' Revizjoni, dan it-tagħrif għandu valer kummerċjali illi, jekk jinkixef, jagħti vantaġġ lill-kompetituri tal-oblatur magħżul.
18. Madankollu, ir-reg. 40(2)(ċ) tal-L.S. 601.03 igħid illi ma għandhiex titqies bħala kunfidenzjali “dokumentazzjoni sottomessa minn operatori ekonomiċi li tiċċertifika li osservaw il-kriterji tal-għażla”. Din id-dokumentazzjoni

⁷ Għalkemm fl-ittra tal-awtorità kontraenti tad-9 ta' Frar 2024 lill-avukat tal-appellanti jingħad illi “*the council at least agreed to give you part of the report, where you can see how your client was awarded the points by each evaluator*” – u minn dan il-qorti tifhem li l-appellanti ngħatat tagħrif dwar l-evalwazzjoni tal-offerta tagħha biss – madankollu fl-atti hemm kopja wkoll tal-evalwazzjoni tal-offerta ta' WM, mnejn jirriżulta li din l-offerta ngħatat l-ogħla marka possibbli dwar kull kriterju tal-għażla. Fil-fatt hemm ukoll kopja tal-evalwazzjoni tal-offerti tal-oblaturi l-oħra wkoll.

kienet wieħed mill-kriterji tal-evalwazzjoni⁸ u għalhekk din il-parti tal-offerta tal-oblatur magħżul kellha tinkixef, iżda ma nkixfix għax l-awtorità kontraenti qieset l-offerta kollha bħala kunfidenzjali.

19. Madankollu, dan in-nuqqas ma jidherx li hu hekk gravi li jiġġustifika li għalhekk biss titfassar minn issa d-deċiżjoni dwar l-għażla tal-offerta. Effettivament dan il-kriterju jrid biss awto-ċertifikazzjoni u mhux evalwazzjoni ta' dik l-awto-ċertifikazzjoni. Madankollu, billi huwa tagħrif li kellu jingħata lill-appellanti, il-qorti sejra tordna illi tingħatalha d-dokumentazzjoni msemmija fir-reg. 40(2)(ċ) tal-L.S. 601.03 b'dan illi t-terminu biex issir oġġezzjoni ġdida quddiem il-Bord ta' Reviżjoni – imsejsa esklużivament fuq dan it-tagħrif ġdid – jibda għaddej minn dakinhar li tingħata d-dokumentazzjoni msemmija.

20. L-appell safejn jolqot id-deċiżjoni tad-9 ta' Frar 2024 illi lill-appellanti ma jingħatalhiex it-tagħrif kollu mitlub qiegħed għalhekk jintlaqa' dwar id-dokumentazzjoni msemmija fir-reg. 40(2)(ċ) tal-L.S. 601.03. Il-qorti tordna wkoll illi lill-appellanti jintraddilha d-depożitu li ħallset biex setgħet tressaq l-oġġezzjoni tagħha quddiem il-Bord ta' Reviżjoni.

21. L-ispejjeż ta' dan l-episodju tħallashom l-awtorità kontraenti.

Mark Chetcuti
Prim Imħallef

Giannino Caruana Demajo
Imħallef

Anthony Ellul
Imħallef

Deputat Reġistratur
da

⁸ Il-kriterju A fuq l-*evaluation grid* ried "*declaration by the economic operator*" dwar kwalitajiet li għandu jkollhom l-impjegati.