



QORTI TA' L-APPELL

**ONOR. IMHALLEF
PHILIP SCIBERRAS**

Seduta tad-9 ta' Mejju, 2008

Appell Civili Numru. 29/2007

Aluserv Limited

vs

Awtorita` Marittima ta' Malta

Il-Qorti,

Fl-1 ta' Awissu, 2007, l-Arbitru fic-Centru Malti ta' l-Arbitragg ippronunzja s-segwenti decizjoni fl-ismijiet premessi:-

“Meta wiehed iqies proceduri f’ arbitragg, dawn ghandhom, mill-aspett purament procedurali, necessarjament jixbhu ghal kollox dak li jsir f’ kawza civili quddiem il-Qrati taghna u ghalhekk isegwi illi s-socjeta` Aluserv Limited ghandha titqies li hija ir-rikorrenti, jew kif kien sa ftit zmien ilu jissejjah, l-attur u l-Awtorita` Marittima Maltija

ghandha titqies bhala l-intimat/konvenut. Kwindi jispetta lis-socjeta` rikorrenti tipprova l-allegazzjonijiet taghha.

PREMESSI

Is-socjeta` rikorrenti ippremettiet illi fit-*tender* taghha hija akkludiet diversi dokumenti u cioe dawk li hija ssottomettiet ukoll fl-atti ta' dan l-arbitragg u li gew markati bhala Dokumenti "A" sa "O". Is-socjeta` rikorrenti enfazzizat illi dan it-*tender* kien publikat taht il-procedura specjali ta' "*three envelopes procedure*" u dan skond ma jirrizulta mid-dokument markat 1 esibit.

Is-socjeta` rikorrenti kompliet tippremetti illi wara tmien xhur ta' evalwazzjoni tat-*tender* da parte ta' l-Awtorita` f' liema perijodu saru diversi inkontri bejn rapprezentanti tal-partijiet, din ta' l-ahhar harget l-ittra ta' accettazzjoni tat-*tender*. Is-socjeta` rikorrenti kompliet tispjega li f' dawn l-inkontri l-punt in kontestazzjoni f' dan l-arbitragg lanqas qatt biss ma issemma u ghalhekk is-socjeta` rikorrenti fehmet li l-ispecificazzjonijiet taghha kienu gew accettati.

Is-socjeta` rikorrenti gibdet l-attenzjoni ta' l-Arbitru ghall-fatt illi "*had Aluserv's tender been found not to technically qualify in all respects, Envelope 3, which contained the Financial Bid, would have never been opened. In fact Aluserv's Bid would have been disqualified.*"

Is-socjeta` rikorrenti kompliet tissottometti illi fil-mument tat-*tender* hija kienet ghamlitha cara illi Saint Gobain setghet tipprovdi biss U-glass li seta' jiflah 500Pascals ghal gholi ta' hgieg ta' 4.2metri. Hija tghid li kien ferm wara li gie moghti it-*tender* li l-Awtorita` insistiet illi ghandha tinstab soluzzjoni sabiex il-hgieg ikun jista' jirresisti 1300Pascals. Inzammu numru ta' laqghat biex tinstab soluzzjoni.

Is-socjeta` rikorrenti komplet tissottometti illi kienet l-Awtorita` li talbet modifikazzjonijiet *fit-tender*.

Is-socjeta` rikorrenti ippremettiet ukoll illi Saint Gobain u Pilkington, li huma iz-zewg produttori ewlenin ta' U-Glass fid-dinja, jindikaw car u tond, *fit-Technical Specifications* taghhom illi il-prodott ma setax jiflah pressjoni ta' rih ta' 1300 Pascals ghal ftugh ta' 4 metri. Enfazzizat ukoll illi *t-tender specifications* originarjament talbu ghal 1300 Pascals ghal ftugh ta' 4 metri.

It-technical specifications kemm ta' Pilkington kif ukoll ta' Saint Gobain gew esibiti u markati rispettivament bhala Dokumenti "3" u "4".

Is-socjeta` rikorrenti tippremetti wkoll illi fit-03 ta' Novembru 2005 instabet soluzzjoni billi kien hemm riduzzjoni fil-ftugh ta' l-aperturi (ghall-3660mm) u b'hekk allura seta' jigi ordnat hgieg li jiflah 1300Pascals. F'dan ir-rigward is-socjeta` rikorrenti esibiet id-dokument 7.

B'risultat ta' dan kollu is-socjeta` rikorrenti sofriet danni fl-ammont ta' Lm26,714 skond ma jirrizulta mid-dokument esibit u markat 8.

KONTESTAZZJONI

Min-naha taghha l-Awtorita` intimata qasmet d-dikjarazzjoni ta' kontestazzjoni taghha fi tnejn u cioe l-ewwel bdiet bi *statement of facts supporting the defence* u wara ghamlet *Reply to the points at issue*. Fl-Ewwel parti tad-dikjarazzjoni taghha l-Awtorita` ssottomettiet:

1. Illi fis-27 ta' Awissu 2004 hija ghamlet sejha ghal *tenders*, li ghaliha hija rceviet zewg risposti, b'wahda mis-socjeta` rikorrenti, liema risposti infethu fis-07 ta' Ottubru 2004.

2. Illi kien hemm numru ta' nuqqasijiet fil-kontenut tas-sottomissjonijiet taz-zewg *tenderers* u ghalhekk intalbu sabiex jikkolmawhom.

3. Illi ebda wiehed mit-*tenderers* ma ssana kompletament it-*tender* tieghu u ghalhekk iz-zewg *tenderers* gew mitluba jaghmlu s-segwenti dikjarazzjoni u cioe "*The tenderer herewith binds himself to correct all sample deviations and to fulfill all requests and changes listed in this document in executing any works pertaining to this tender and to perform all tender works to the satisfaction of the architects (ta' l-Awtorita`)*"

4. Illi l-procedura wzata f' dan it-*tender* kienet l-hekk imsejha "*three envelopes procedure*" u ghalhekk bazat fuq id-dikjarazzjoni hawn fuq riportata, setghu jinfethu it-tlett *envelopes* ta-*tenders*.

5. Illi id-dikjarazzjoni tas-socjeta` rikorrenti giet esibita u markata bhala Dokument MMA1.

6. Fit-3 ta' Gunju 2005 (ara Dokument MMA2 esibit fl-atti ta' dawn il-proceduri) l-Awtorita` intimata informat lis-socjeta` rikorrenti li t-*tender* taghha kien l-aktar wiehed vantaggju u ghalhekk gie propost li tinhareg *letter of acceptance* favur is-socjeta` rikorrenti "*subject to the conditions listed in paragraph B below, which letter will constitute the Malta Maritime Authority's written acceptance of your tender submission as per paragraph 6 of the Form of Tender in anticipation of the Malta Maritime Authority and your Company entering into a Formal Agreement as per instructions to tenderer paragraph 22.*"

7. Illi f' paragrafu B tad-Dokument MMA2 wiehed isib, inter alia, is-segwenti:

a. *You are requested to confirm that you shall fully conform to the conditions of contract and specifications at all times during the project; and*

b. *You are kindly requested to confirm that you abide completely to your declaration signed by Mr Mark Vassallo on the part of Aluserv Ltd., dated 16th March 2005 titled "Evaluation of samples - Aluserv/Steel Structures 4th Submission" regarding the correction to sample deviations. "*

8. Illi is-socjeta` rikorrenti accettat dawn il-kondizzjonijiet permezz ta' l-ittra taghha tal-10 ta' Gunju 2005 - esibita fl-atti bhala Dok MMA3.

9. Illi fost *it-Tender Specifications* hemm stipulat illi *"The system must satisfy the following requirements wind resistance - serviceability and safety: 1300 Pascals"* Ghalhekk bl-accettazzjoni tal-kundizzjonijiet imnizzla fl-ittra tat-03 ta' Gunju 2005, is-socjeta` rikorrenti obligat ruhha illi tipprovdi hgieg li jissodisfa *t-tender specifications* kollha, inkluza dik hawn kwotata.

10. Illi meta beda ix-xoghol fl-esekuzzjoni *tat-tender* l-Awtorita` intimata ppretendiet illi kienu ser jitharsu l-ispecificazzjonijiet indikati *fit-tender*.

11. Illi madanakollu is-socjeta` rikorrenti rriteniet illi dan ma kienx possibbli bl-uzu tal-prodotti indikati *fit-tender* taghha u ghalhekk bdew sensiela ta' laqghat bejn il-partijiet sabiex tinstab soluzzjoni ghal problema.

12. Illi l-Awtorita` intimata tallega illi kuntrarjament ghal dak sottomess mis-socjeta` rikorrenti hija kienet sabet illi il-kumpanija Pilkington setghet tipproduci prodott illi jikkonforma mal-ispecificazzjonijiet tas-sezzjoni L3.02 *tat-Tender Specifications* izda is-socjeta` rikorrenti ma kienetx lesta li tikkommissjona ordni ghal dan it-tip ta' "U-Glass."

13. Illi ghalhekk l-Awtorita` intimata kellha taltera l-*elevation layouts* sabiex il-*module height* tigi ridotta - kollox skond ma hu rispekkjat fid-dokumenti MMA4 u MMA5.

14. Illi wara li thejjew dawn id-*drawings*, sar skambju ta' komunikazzjoni bejn il-partijiet u s-socjeta` rikorrenti giet infurmata, inter alia, illi "*Your proposal is being accepted to use Pilkington wired U-Glass K22/60/07 instead of Saint Gobain's wired U-Glass 270/41/6 which was proposed in your tender to fit in the 1300 Pa wind pressure as specified.* "

15. Illi ghalhekk it-talba tas-socjeta` rikorrenti ghal-likwidazzjoni u kundanna tal-ammont ta' Lm26,714 bhala danni ghandha tigi michuda stante li l-Awtorita` intimata ma hijix responsabbli ghall-imsemmija danni reklamati.

Fit-Tieni parti tas-sottomissjonijiet ta' l-Awtorita` insibu illi:

1. L-Awtorita` intimata tikkontesta l-allegazzjoni tas-socjeta` rikorrenti illi hija ssottomettiet is-*samples*, kif minnha pretis.

2. L-Awtorita` intimata tikkontesta illi it-*tender* in kwistjoni gie pubblikat taht it-*three envelope procedure*, u illi, minhabba pressjoni ta' hin, ittiehdet decizjoni illi issir id-dikjarazzjoni indikata fid-dokument MMA, sabiex ikunu jistghu jinfethu l-*envelopes* numri 3 taz-zewg *tenderers*.

3. illi apparte ghall-ittra ta' l-14 ta' Gunju 2005 (Dok 2 esibit mis-socjeta` rikorrenti) il-ftehim ta' bejn il-partijiet kien jikkompreni kemm it-*tender* kif ukoll il-korrispondenza kollha li giet skambjata bejn il-partijiet.

4. illi ghall-Awtorita` intimata jidher car illi l-ftehim bejn il-partijiet kien jikkompreni it-*tender* kif ukoll kull korrisondenza li ssupplimentat u jew immodifikat l-istess *tender*.

5. illi l-Awtorita` intimata tikkontesta u tinnega il-veracita` ta' dak sottomess mis-socjeta` rikorrenti illi "*at no time was the matter now in dispute ever brought up*" - u ghal dan il-ghan esibiet id-dokumenti markati MMA6 sa MMA11.

6. illi fid-dokument MMA8 jirrizulta car illi l-Awtorita` talbet lis-socjeta` rikorrenti. "*to resubmit all samples and technical literature pertaining to this tender. These must be fully in accordance with the drawings and specifications within the tender.*"

7. illi din it-talba giet rikonoxxuta mis-socjeta` rikorrenti a rigward il-"U-Glass" meta saret riferenza ghall-istess U-Glass fis-sezzjonijiet A.3 u A.4 a fol. 4 tad-dokument MMA1.

8. illi l-Awtorita` tikkonesta wkoll il-fatt illi kien biss wara li gie moghti t-*tender* lis-socjeta` rikorrenti illi hija insistiet illi tinstab soluzzjoni sabiex il-U-Glass tirresisti pressjoni ta' 1300Pa.

9. illi l-Awtorita` qablet mas-socjeta` rikorrenti illi kieku kien hemm bzonn ta' xi modifikazzjonijiet fit-*tender* dawn kellhom jingiebu a konjizzjoni tat-*tenderer* waqt il-process ta' l-evalwazzjoni. Hekk fil-fatt gara.

10. Illi l-Awtorita` ssottomettiet illi fit-tehid tad-decizjoni li tigi ridotta s-superfici ta' l-aperturi li kellha titghatta bil-hgieg hija usufruwit minn dak sancit fil-klawsola 51.1 tal-Kondizzjonijiet tal-Kuntratt.

11. illi ghalhekk gialadarba s-socjeta` rikorrenti ma pprovdiex dak rikjest u dak li obligat ruhha li

tipprovdi, l-istess socjeta` rikorrenti ghandha tbaghti l-konsegwenzi tal-varjazzjoni maghmula ai termini tal-klawsola 51.1 tal-kondizzjonijiet tal-kuntratt u fi kwlaunkwe kaz, izda minghajr pregudizzju ghall-premess, gie sottomess ukoll illi kwalunkwe varjazzjoni ghandha tigi stmata ai termini tal-klawsola 51.2, haga li ma tirrizultax li sehhet u konsegwentement dan il-punt ma jstax jitqajjem quddiem dan il-Bord.

12. Illi fi kwlaunkwe kaz l-ammont pretis huwa esagerat u lanqas ma hija konformi ma' dak kontenut fil-formula ppresentata fil-22 ta' Frar 2006.

13. illi ghalhekk l-Awtorita` ma kkawzatx ebda danni lis-socjeta` rikorrenti u t-talbiet taghha ghandhom jigu rigertati bl-ispejjes.

PROVI

In sostenn tat-tezijiet rispettivi taghhom il-partijiet ressqu lir-rappresentanti taghhom kif ukoll lix-xhieda taghhom, apparte li esibew dokumenti.

Is-socjeta` rikorrenti pproduciat lil **Edwin Fiott**, li kien (u ghadu) jokkupa il-kariga ta' *project manager* tas-socjeta` rikorrenti li qal illi it-tender li harget l-Awtorita` intimata imliha hu u din kellha specifikkazzjonijiet dwar kemm jiflah il-hgieg u cioe il-pressjoni tar-rih u r-rikjesta taghhom (bazat fuq dik ta' l-Awtorita`) kienet li kellu jsostni rih ta' forza 1300 pascals.

Spjega wkoll li huma marru ghand Saint Gobain biex tissupplixxi l-hgieg, ghax hija wahda mid-ditti ewlenin tad-dinja li tissupplixxi hgieg.

Meta marru ghandhom dawn tawhom x'jissupplixxu huma. Dan kien hgieg partikolari u cioe f' forma ta' "U". Ix-xhud spjega li l-prodott ta' Saint Gobain huwa prodott ta' qies wiehed tal-"U" u li hemm

differenza huwa il-mod ta' assemblacc u cioe huwiex *single* jew *double glazing*. L-ohra li hemm hija li jista' jkun hemm certi *safety features* go fih, jekk wiehed jordnah hekk.

It-tender kien jitlob forma ta' *double glazing* u il-*wire inserts*. Ix-xhud spjega li San Gobain qalulhom li fl-gholi ta' 4.2 metres, u cioe l-gholi tat-tieqa ta' l-Awtorita` intimata, l-aktar li kienet tiflah kien 500 Pascals.

Ix-xhud spjega li allura, fit-tender li ta lill-Awtorita` intimata, huwa ssottometta kemm l-ispecificazzjonijiet tal-prodott kif ukoll fir-*write up* tieghu nizzel li jiflah il-500 Pascals li semmew Saint Gobain.

F'dan ir-rigward ix-xhud ghamel riferenza ghad-dokument li hemm esibit fl-atti ta' dawn il-proceduri li huwa indika bhala pagna 9 tad-Dokument "A" taht l-intestatura *Technical Specifications*. Partikolarment ghamel riferenza ghall-paragrafu immarkat "B" li espressament jghid li "*As indicated in the standard literature the composition of U Glass requested will withstand a wind pressure of 50N/m² for a height of 4.2 metres.*"

Ghamel ukoll riferenza ghal pagna 16 tad-dokument C, li huma l-ispecificazzjonijiet ta' Saint Gobain, fejn jghid li f' gholi ta' 4.2 metres huma indikaw li l-aktar li jista' jilqa' bhala pressjoni ta' rih huwa 500 Pascals.

Ix-xhud spjega li huma kienu konxjentement qeghdin jittenderjaw bi prodott li jiflah anqas mit-tender, imma li f' cirkostanzi jista' jkun bizzejjed.

Ix-xhud kompla jispjega li wara li tefghu it-tender, jaf li l-periti ta' l-Awtorita` evalwaw it-tender taghhom u fuq is-*samples* li tawhom talbuhom

sabiex jimmodifikaw certi dettalji. Fis-*sample* li tawhom kien hemm il-hgieg tal-500 Pascals.

Ix-xhud spjega li hemm differenza notevoli bejn il-hgieg ta' 500 u 1300 Pascals u din tikkonsisti fil-fatt li l-hxuna tat-truf tal-hgieg minn 40mm titla' ghal 60mm u l-hxuna tal-profil tal-hgieg minn 6mm. titla' ghal 7mm.

Ma' l-ewwel darba li ssottomettew it-*tender* ircevw minghand l-Awtorita` intimata risposta li kopja taghha esibixxa u giet markata bhala Dokument JS1.

Dan id-dokument jikkonsisti fil-kummenti tal-periti ta' l-Awtorita` intimata u gibed l-attenzjoni ta' l-arbitru partikolarment ghall-paragrafu markat C.2.2 fejn qalulhom li bhala hgieg is-*sample* kien zghir. Il-periti kkummentaw mhux li l-hgiega ma kienetx tajba izda li xtaqu jaraw izjed minn *unit* wahda hdejn xulxin.

Ix-xhud ghamel riferenza wkoll ghall-parti intitolata "*TECHNICAL SPECIFICATIONS*" fejn qalulhom li kienet kompleta apparti l-informazzjoni dwar il-hadid.

Ix-xhud ghamel riferenza wkoll ghad-dokumenti markati JS2 sa JS4 u qal li fejn hemm indikat "53.4" dawn huma l-hgieg tal-hxuna ta' "50" pero` jinkludu l-hxuna ta' l-*aluminium* u ghalhekk qal li ma tbiddel xejn minn dak li kienu ssottomettew bhala *tender*.

Sa dan l-istadju l-periti ta' l-Awtorita` qatt ma kienu rrimarkawlhom li l-hgieg mhux tajjeb jew li kellhom ibiddluh.

Ix-xhud kompla jispjega li wara li baghtu it-*tender* taghhom ircevw minghand l-Awtorita` intimata erba' rapporti, li jinsabu inseriti fir-risposta li

nghatat ghal dan l-arbitragg, (markati bhala Dokument MMA7 sa MMA10).

Ix-xhud ippuntwalizza illi l-Awtorita` intimata semmiet fejn is-*samples* ma kienux dak li riedu, esempju *rubber-seals, bolts* twal izzejjed - pero dwar il-hgieg, per se, qatt ma ikkumentawhom fuqhom. Ghalhekk ix-xhud spjega li huwa fehem li l-hgieg gie accettatat ghax la darba ghamlu reklami fuq affarijiet anke zghar u hallew barra l-hgieg huwa fehem ghalhekk li dwar il-hgieg kienu kuntenti, speċjalment meta qed jghidu "*technical specifications complete.*"

Dwar id-dokument MMA1 ix-xhud jallega li s-socjeta` rikorrenti mxiet skrupolosament ma' dan id-dokument meta esegwew ix-xoghol. Il-*workshop drawings* jaqblu perfettament mad-*drawings* li hemm fit-*tender*. F'dan id-dokument ma kien hemm xejn imsemmi dwar il-hgieg.

Ghamel riferenza ghall-pagna enumerat 4 ta' l-istess dokument li jirreferi ghall-hgieg u fih hemm erba' punti u qal li ma hemm xejn dwar il-hxuna tal-hgieg.

L-ewwel darba li saru jafu bil-*complaint* ta' l-Awtorita` kien meta huma ippreparaw il-*workshop drawings* u ghaddewhom lill-perit ta' l-Awtorita`. Dan saqsihom jekk il-hxuna tal-hgieg kienetx tiflah il-*loading* li huwa mitlub fit-*tender*. Dan kien xi disa' xhur wara li ssottomettew it-*tender*.

Huma wiegbu li fit-*tender* kienu ghamluha cara li l-hxuna tal-hgieg kienet li kienet u cioe li tiflah 500 pascals. Il-perit talab izjed dettalji u x-xhud ikkontattja lis-*supplier* u dan irrifera lix-xhud ghad-dettalji li kienu gew sottomessi mat-*tender*.

Ix-xhud kompla jghid li l-perit talbu jekk is-*supplier* setax jipprovdi hgieg li jiflah izjed u San Gobain

qalulu li ma setghux ghax dak kien il-prodott taghhom.

Il-perit rega' saqsa jekk setghux imorru ghand *supplier* iehor, partikolarment Pilkington, li huwa manifattur tal-hgieg, anzi l-uniku iehor, li seta' jissupplixxi u s-socjeta` rikorrenti kkontattjat il-fergha taghhom ta' Glasgow li ma tawx risposta u ghalhekk marru fil-fergha l-ohra li qeghda l-Germanja u dawn eventwalment taw id-dettalji tal-prodott taghhom, li gew mghoddiya lill-perit.

F'dan ir-rigward ix-xhud ghamel riferenza ghad-dokument 3 li jinsab fl-ahhar ta' l-inkartament taghhom. Ix-xhud ipprecisa li huma qatt ma kienu hadmu ma' din id-ditta.

Dawn qalu li l-aqwa prodott li ghandhom f' gholi ta' 4.2 metres hgieg, jiflah 1000 pascals. Ghalhekk bdew jaraw x'setghu jaghmlu biex jirrinforzaw il-hgieg ghall-1300 pascals kif xtaqet l-Awtorita`. Hawn ix-xhud irrimarka li l-prodott li esigiet fit-tender l-Awtorita` ma kienx jesisti ghax la ma kellhomx dawn iz-zewg *suppliers* principali tad-dinja, din kienet haga li ma kienetx tesisti.

Ix-xhud kompla jispjega li huma gharrfu b'dan lill-perit ta' l-Awtorita` u l-alternattiva kienet li jinbidel id-disinn. Proprijament kienet l-Awtorita` stess li bdiet timmodifika d-disinn.

Kien hemm hafna diskussjonijiet bejn il-partijiet u fl-ahhar gie decis illi jigi mnaqqas l-gholi tal-hgieg minn 4.2 ghal 3.6 metres biex b'hekk il-hgieg seta' jigi jiflah il-1300 pascals. Hekk attwalment gie installat. F'dan ir-rigward ix-xhud gibed l-attenzjoni ta' l-arbitru ghad-dokument 7 ta' l-inkartament taghhom li minnu jirrizulta l-konkluzjoni li waslu ghaliha flimkien.

Ix-xhud kompla jghid li ma kien hemm ebda alternattiva ohra oltre ghal dan u fil-fatt l-Awtorita`

ma ssuggeriet ebda *supplier* iehor. Fil-fatt skond l-istess xhud lanqas ma setghet tissuggerixxi ghax ma hemm ebda *supplier* iehor fid-dinja.

Il-modifikazzjonijiet li ghamlu kienu kollha a spejjes tas-socjeta` rikorrenti, li huma kollha elenkati fid-dokument 8 ta' l-inkartament taghhom fl-ammont ta' Lm26,714.

Dak li waslu ghalih kien resultat tal-fatt li l-Awtorita` baqghet tinsisti fuq il-1300 pascals. Kellhom bil-fors inaqqsu l-gholi tal-hgieg u dan bi qbil ma' l-Awtorita` u l-perit taghhom.

Fil-kuntratt li gie ffirmat wara li t-*tender* gie milqugh, is-socjeta` rikorrenti inkludiet it-*technical specifications* tal-U-glass bil-500 pascals.

In kontro-esami x-xhud spjega li huwa kien involut fil-mili ta' dan it-*tender* u qal li ghandu esperjenza bizzejjed vasta fil-mili ta' *tenders* in generali. Qal li kien jaf li l-prodott taghhom ma kienx jissodisfa ir-rikjesti tat-*tender*.

Mistoqsi ghalfejn, bhala bniedem b'esperjenza fil-mili ta' *tenders* u wara li qara l-*invitation to tender* ghal dan it-*tender* in partikolari, xorta ghazel illi jaghmel *bid* bi prodott li mhux konformi ma' dak indikat fit-*tender*, ix-xhud irrisponda li hu kellu prodott wiehed u ma kellux varjazzjoni ta' prodotti u ghalhekk ma setax jaghzel bejn prodott u iehor u jaghzel wiehed minnhom. Kemm il-darba kien hemm *tenders* li ntalbu certu *specifications* imbaghad gew accettati wara bi prodotti ohra. Kien ghalhekk li hu ssottometta t-*tender* bi prodotti inferjuri ghal dawk rikjesti.

Li hass li huwa importanti kien li jispecifica dak li offra. Dan ghamlu billi fil-kitba tieghu rrefera kemm felah il-prodott tieghu u cioe 500 u mhux 1300pascals. Issottometta l-letteratura tal-

kumpanija, provda stampa tal-prodott li kien qed jaghmel u provda *sample*, kif kien rikjest.

Mistoqsi, b'riferenza ghall-klawsola 21 ta' l-*instructions to tenders* intitolata "*Alternative Offers*" li fih jinghad x'ghandu jsir f' kas ta' devjazzjoni mit-*tender* ghala ma mexiex skond dak rikjest f'din il-klawsola billi provda a *fully priced conforming tender* kif ukoll *an alternative offer*, liema *alternative offer* biss seta' jiddevvja minn dak rikjest fit-*tender*, ix-xhud irrisponda illi, kif kien qed jinghad dak kien japplika f'kas ta' *alternative offer* li taghti zewg prezzijiet - huwa, fil-fatt, prezz wiehed ta. B'dak li ghamel huwa hass li ssodisfa dak li tghid din il-klawsola.

Huwa spjega li huwa familjari mad-dokument immarkat AX4. Kien involut fid-decizjoni ta' meta kellu jigi ffirmat. Ghamlu l-*undertaking* li hemm imnizzel fil-paragrafu (1) ta' l-istess dokument u cioe illi jese gwixxu ix-xoghlijiet *in conformity with the tender documents*, meta fil-fatt kienu jafu li prodott minn daw k li offrew ma kienx konformi ma' l-istess *tender document* billi qal li mat-*tender* kien hemm is-sottomissjonijiet taghhom li kienu jiformaw parti mit-*tender* u l-prodott taghhom kien konformi mas-sottomissjonijiet li kienu ghamlu fit-*tender*.

Mistoqsi jekk fil-*form of tender* kellhiex issir referenza ghall-*conditions of contract, specific conditions of contract, instructions to tenders, drawings, specifications, bills of quantities and addenda* u li kien abbazi ta' daw id-dokumenti biss li sar dan l-*undertaking*, ix-xhud irrisponda illi kellu jispecifika ghal kull devjazzjoni u hu hass li hekk ghamlu.

Ix-xhud kompla jispjega illi meta inghataw l-ispecifikazzjonijiet u intqal li jista' jiehu biss 500 Pascals, l-Awtorita` messha indunat b'dak li kien hemm imnizzel u allura la ma qalu xejn ifisser li

huma accettaw. Ix-xhud qal li kien car f' dak li qal u kien evidenti ghal kullhadd. Huwa spjega d-devjazzjonijiet tieghu.

Ma saritx *alternative bid*. Ix-xhud ghamel riferenza ghall-klawsola 21 ta' l-*instructions to tenders* u dan b'riferenza li seta' jipprovdi *bid*.

Ix-xhud sahaq li huwa mela *tender* u fejn iddevvja nizzel fejn ghamel hekk. Iddevvja ghax ma kellu xejn x'jzommu ghal kuntrarju.

L-erba' rapporti li rceva minghand l-Awtorita` kienu fuq is-*samples*. Taw erba' sottomissjonijiet ta' *samples* godda, izda fil-U-Glass kollox baqa' l-istess u kull darba rega' issottometta li il-U-Glass jiflah 500 Pascals.

Dwar ir-rikjesta tal-16/12/04. qal illi huwa rega' rrepetta dak li kien gia ghamel u cioe indika li l-U-Glass jiflah 500 Pascals.

Ix-xhud insista li aktar ma gibdulu l-attenzjoni ghat-tibdiliet fis-*samples* u in vista li ma qalulu xejn dwar il-U-Glass aktar ikkonvinca ruhu li ghar-rigward tal-U-Glass kien kollox accettat.

Ix-xhud ippreciza li l-ispecificazzjonijiet tal-U-Glass wiehed jista' jghid illi hija l-unika haga li qatt ma tbiddlet.

Ix-xhud spjega li skond hu fid-dokument MMA1 ma hemm imkien fejn jinghad li huma kellhom ibiddu l-U-Glass. B'riferenza ghall-paragrafu (2) ta' pagna (1) ta' dan id-dokument qal illi zammew lill-perit kuntent ghax biddlu dak kollu li qallhom.

Ix-xhud kompli jispjega li l-kumpliment ta' dan id-dokument jitratta biss is-*samples*. Dan id-dokument elenka l-affarijiet fejn huma ma kienux konformi, izda il-U-Glass ma issemmietx. Huma accettaw li jissodisfaw daww il-punti u b'risultat ta'

din l-accettazzjoni seta' jidhol fit-tielet fazi tieghu u jinfetah it-tielet *envelope* tat-*tender*. Dawn kienu il-punti unici li kienu qed izommuhom milli jigu konsidrati li kienu konformi mat-*tender*.

Wara certu zmien, ix-xhud gie in kuntatt mal-perit Bruenslow. Ix-xhud qal li ma jafx li l-perit qatt qalilhom li l-prodott ta' Pilkington jiflah 1300 Pascals.

L-gholi ta' l-aperturi kien u baqa' 4.2 metri imma l-qies tal-hgieg tnizzel minn 3.92 metres ghal 3.65 metres. Ghalkemm tidher li hemm differenza zghira, fil-fatt spjega li hemm 33% differenza.

Mal-kuntratt gew inkluzi is-*samples* ta' San Gobain u mhux ta' Pilkington.

Is-socjeta` rikorrenti pproduciat ukoll lil **MARK VASSALLO**, li jokkupa il-kariga ta' direttur manigerjali tas-socjeta`, li qal li Edwin Fiott kien il-persuna teknika taghhom li mela u issottometta it-*tender*.

Spjega li kienet saret laqgħa fis-06 ta' Jannar 2005 bejn il-partijiet, bl-Awtorita` debitament assistita minn tlett rappresantanti ta' Architectural Projects, li kienu l-konsulenti tagħha, u hemm gie diskuss il-kampjonatura u affarijiet ohra izda mhux il-hgieg.

Fis-17 ta' Frar 2005 rega' sar inkontru iehor u regghu gew diskussi l-kampjonatura u intalbu, mill-gdid, sabiex jagħmlu xi agġustamenti u l-U-Glass rega' ma ssemmiex, sia pure li l-kampjun tal-U-Glass rega' intuza l-istess wiehed, izda f' daqs akbar.

Fil-11 ta' Marzu 2005 iffirma ir-raba' rapport tekniku li ma fih xejn in kwantu jirrigwarda l-mertu ta' l-arbitragg, u b'hekk sussegwentement l-Awtorita` setghet tiftah it-tielet *envelope* u cioe il-

pakkett finanzjarju u fit-03 ta' Gunju 2005 huma rcevew il-*letter of intent* li rebhu it-*tender* huma.

Ix-xhud spjega li bil-kliem "*Sample deviations*" li hemm imnizzla fid-dokument MMA1 huwa fehem li l-Awtorita` kienet qed tirreferi ghas-seba' faccati allaccjati ma' dak id-dokument billi hemm il-kliem "*and to fulfil all requests and changes listed in this document.* "

Hekk kif kellhom il-konferma tar-rebha tat-*tender* huwa, flimkien ma' Fiott, marru ghand Saint Gobain u bdew jiddiskutu d-dettalji. Kien hawn meta nqalghet il-problema li huwa l-mertu ta' l-arbitragg.

Fuq rakkomandazzjoni tal-periti ta' l-Awtorita` huma qabbd u ma' Pilkington u dan ta' l-ahhar ghamilha cara li ma setax jigi prodott hgieg ta' gholi ta' 4.2 metri b'1,300 Pascals - ara Dokument MVI esibit.

Ghalhekk flimkien mal-periti ta' l-Awtorita` nstabeb soluzzjoni fis-sens li l-apertura iccekknet minn 4.2m ghal 3.66m dawl, u allura dan seta' jkollu hgieg ta' 1300Pascals.

In kontro-esami l-istess Mark Vassallo, mistoqsi x'jifhem dwar l-ewwel paragrafu tal-*Form of Tender* qal illi wara li esamina il-kondizzjonijiet tal-kuntratt fehem il-kondizzjonijiet tieghu u specifika x'qed joffri. Qal:

"Jien b'ebda mod ma iffirmajt b'xi ingann ghaliex jien, flimkien ma' dak it-*tender*, specifikajt bil-miktub x'qed noffri."

Mistoqsi hemmx kontradizzjoni bejn dak li ddikjara u ffirmat fil-*form of tender* u cioe "*we the undersigned offer to execute and complete such works in conformity with the tender documents*" u dak sottomess f' parti ohra mit-*tender bid* tieghu,

huwa rrisponda fin-negattiv u illi tant mhuwiex minnu illi l-azjenda li huma staqsew ghall-prodott in kwistjoni specifikat illi fuq tul ta' 4.2m. ma jlahhaq xejn hlief 500pascal. Minhabba f'hekk huma specifikaw, bis-sincerita` kollha, l-informazzjoni li giet lilhom moghtija, u ghalhekk ghax-xhud ma kien hemm l-ebda kontradizzjoni.

Wara li rceva l-ittra (Dok MM8) ix-xhud qal li mexa esattament kif kien diga` ssottometta, cioe l-U-Glass, ghaliex il-kampjun li ta tal-U-Glass l-Awtorita` ma oggezzjonatx ghalih u t-*technical specifications* tal-U-Glass in kwistjoni anzi affermaw li huwa ezatt ghalihom.

Meta ssottometta kollox hu kien infurma lill-Awtorita` anke bil-*graph* tal-pressjoni li jifflah - ara Dokumenti A u D ta' l-inkartament esibit mis-socjeta` rikorrenti.

Mistoqsi jekk specifikax illi kien jkun impossibbli biex tilhaq 1300 Pascals, ix-xhud irrisponda illi specifika illi 4.2metri ilahhaq 500 Pascals. Ma qalx li ma jlahhaqx 1300Pascals pero hass li meta qal li jlahhaq 500 Pascals kien jinftiehem li ma jlahhaqx 1300 Pascals.

Ma ghamel l-ebda indagini ma' ebda manifattur iehor jekk setax jintlahaq il-1300 Pascals. Huma dejjem uzaw lil San Gobian u d-ditta ghandha is-*suppliers* taghha, pero` sa telghu Milan biex jitkellmu wicc m'wicc ma' San Gobain pero` baqghu sa 500 Pascals.

Il-periti kienu jsaqsu dak li hemm miktub. Ma qabilx ma' dak li gie suggerit lilu li l-affarijiet innizzlin fid-dokument MMA1 ma humiex ta' natura teknika u dan peress li kien qed jitkellem ma' periti u enginiera. Dawk l-erba' affarijiet innizzlin fl-isemmi dokument huma ta' natura ta' assemblacc.

Dak li ffirma ghalih fid-dokument MMA1 qabel mieghu u gibed l-attenzjoni ta' l-arbitru ghall-kliem; "*the tenderer herewith binds himself to correct all sample deviations and to fulfil all requests and changes listed in this document...*" u huwa fehem li peress li r-rappresentanti ta' l-Awtorita` ma qalulu xejn fuq il-UGlass din kienet accettabbli ghalihom. Dan qalu b' *hindsight* billi ghalih dak li ta kien accettat.

Ix-xhud qabel illi fl-ahhar parti ta' l-istess dikjarazzjoni huma intrabtu li jaghmlu x-xoghol kollu skond it-*tender* a sodisfazzjon tal-perit. L-ispecificazzjonijiet tax-xhud huma validi daqs l-ispecificazzjonijiet ta' haddiehor ghax ma gewx irrifjutati.

Il-*graph* ta' San Gobain jindika l-*windload*. Huma ma tkellmux fuq l-gholi u ftugh mal-konsulenti ta' l-Awtorita`, u dan nonostante li ffirma d-dokument a fol 4. ghax il-qisien kienu qeghdin hemm.

Mistoqsi jinghadx sew li dwar il-*windload* tal-U-Glass minkejja l-fatt li fix-xhieda tieghu jinghad li qatt ma tkellmu dwarhom dan kien indikat fl-*invitation to tender* u gie ripetut fid-dokument MM8 fejn jinghad illi "*all samples and technical literature must be fully in accordance with the drawings and specifications within the tender*", ix-xhud irrisponda fl-affermattiv u cioe li jaf bihom u ssottometta mill-gdid ghat-tieni darba l-ispecificazzjonijiet taghom u accenna wkoll illi f'*tender* bhal din kellhom jirrifjutaw it-*tender* kollu.

Is-soluzzjoni ghall-pressjoni tal-U-Glass instabet, wara hafna tahdidiet mal-perit Drago (ta' l-Architectural Projects) u il-perit Bruenslow fejn gew analizzati possibilita` li jitqeghdu *cables* tal-hadid b'forma ta' salib fil-fetha u possibilitajiet ohra li ebda wahda ma irnexxiet u fl-ahhar gie propost illi l-punti ta' twahhil jitressqu '1 fuq min-naha ta' isfel u jitressqu '1 isfel min-naha ta' fuq u peress

illi xorta sa dal-punt bil-prodott il-gdid ta' Pilkington ma intlaħaqx il-1300Pascals gie decis illi jiddaħħal tubu tal-ħadid ta' hames centimetri isfel u fuq u wkoll gie decis illi l-qies tal-U-Glass jigi meqjus fid-dawl tieghu u mhux fl-gholi kollu - b'hekk biss instabet is-soluzzjoni ta' 1300Pascals.

Ix-xhud enfasizza illi bl-gholi ta' 4.2 metri, bil-*windload* ta' 1300Pascals ma jesistix U-Glass.

Mistoqsi ghala hemm differenza bejn l-ammont indikat fir-referenza għall-arbitragg (Lm16,000) u dak li gie dikjarat fid-dokument 8 ta' l-inkartament tagħhom, ix-xhud irrisponda illi huwa minnu illi il-*claim* hija ta' Lm16,000 izda kif induna li halla xi affarijiet barra saqsa lic-Centru ta' l-Arbitragg jistax jemenda t-talba tagħhom, gie infurmat li seta' u b'hekk meta ssottometta d-dokument nizzel il-figura ta' Lm26,714 abbazi tad-dokumenti annessi magħha. Ma setax jghid f' hiex esattament tikkonsisti din id-differenza pero` mid-dokumenti annessi għandu johrog car f' hiex tikkonsisti.

Ix-xhud spjega li wasal għall-*net extra input cost* abbazi ta' items (a) (b) u (c) tad-dokument 8 ta' l-inkartament tagħhom (cioe l-ewwel faccata) jammontaw għall-616 il-kilo ta' *aluminium* u dan intuza bhala l-bordura tal-fetha. F'dan id-dokument anness hemm it-tliet tipi ta' *profiles* li ntuzaw. Minn dawn il-qisien jista' johrog il-piz. Il-piz nizzlu hu f' pagna 3 tad-dokument 8.

F'pagna 4 ta' l-istess dokument (immarkat item D) issottometta kopja tal-fattura ta' l-*aluminium* illi nxtara għal dan il-progett fejn fih jindika l-prezz ta' Euro 3 il-kilo. Għalhekk items (a) (b) u (c) hadimhom abbazi ta' Euro 3 per kilo.

Imbagħad hemm items (e) u (f) - fl-ewwel pagna ta' Dokument 8 - li huma il-*plastic profiles* li jidhlu fl-*aluminium profiles* biex joholqu *lining* bejn l-

aluminium profile u l-hgieg per se - il-prezz ta' dan il-*plastic* (PVC) huwa muri f'pagna 5 tad-dokument 8; b'total ta' Euro 576 ghall-item (e) u Euro 348 ghall-item (f).

Item (g) huwa l-metracc ta' hgieg li kien hemm bzonn bil-prezz ta' Euro 9.50 il-metru kwadru u f'pagna 6 ta' l-istess inkartament hemm id-dokument tal-kwotazzjoni.

Ebda wiehed mill-prodotti elenkati fl-items (a) sa (g) ma ntuzaw fil-progett.

Fuq pagna 6 item (g) tad-dokument 8 fl-e-mail minghand San Gobian juri bic-car li kienu qed jitkellmu fuq *section* ta' 4 metri u 20 cm. filwaqt illi x-xoghol li gie ordnat mill-Pilkington, li hija l-pagna ta' warajha, juri bic-car li l-profili kienu ta' 3.66m cioe differenza ta' .55cm fl-gholi. Dan gara minhabba li l-prodott ta' Pilkington, f' 4.2m ma ilahhaqx 1300Pascals u rega' tenna li dak li gie rikjest fit-*tender* ma jesistiex fid-dinja.

Qal ukoll illi f'pagna 5 ta' l-istess dokument 8 gie miftiehem ix-xiri ta' 2000m.k. ma' San Gobain u fil-fatt xtraw 1585 m.k. Din id-differenza giet mill-fatt illi l-Awtorita` naqqset id-daqsijiet ta' kull apertura.

Ix-xhud ikkonferma wkoll li l-prodotti kollha fid-dokumenti (h) (i) u (j) intuzaw kollha f' dan il-progett u l-ordni kienet specifika wkoll u ghalhekk lanqas ma jistghu jintuzaw post iehor.

Fid-dokument (h) hemm affarijiet ohra barra l-hgieg u dawn huma l-profili li nxtraw minghand Pilkington u li ntuzaw kollha fil-progett mertu ta' dan l-arbitragg.

Qal ukoll illi huwa ma fittex imkien izjed ghajr ghand il-Pilkington ghall-profili li semma u dan minhabba illi fuq 55,000 Euro xoghol, 11,000 minnhom kienu ghall-profili u ghalhekk ma kienx

sejjer ikun hemm xi differenzi partikolari kieku fittex band'ohra.

Ix-xhud ippreciza wkoll illi apparti minn hekk hemm bzonn li jigi apprezzat li l-hin kien qiegħed jagħfas u għalhekk ma kellux zmien ifittex.

Il-*labour costs* li hemm indikati fid-dokument 8 ammontanti għall-Lm955 huma għaliex f'pagna 1 tad-dokument 8 (l-ahhar tliet linji) wieħed isib illi hemm riferenza għall-*sheet K* li hija pagna 10 tad-dokument 8 u *sheet L* li hija pagna 11 ta' l-istess dokument fejn f' pagna 10 jindikaw il-wisgħa tal-profil ta' 270mm. u pagna 11 tindika wisgħa ta' 232mm. Din id-differenza tammonta għall-15% tas-*surface area*, li għalhekk il-*labour* li gie kalkolat fit-*tender* kien ta' 1.25 minuta għal kull metru kwadru u għalhekk hadem matematikament kemm iquom izjed biex installa l-prodott differenti minn dak li kien sar it-*tender* għalih.

Dwar l-item (m) - *extra sealer* - qal illi uza aktar *sealer*, pero` hadem abbazi tal-15% li semma qabel minhabba li l-kanali zdiedu abbazi tas-*surface area* zejda li kellu.

Ix-xhud kompli jispjega illi dwar l-item (n) - *extra iron works* - din giet ikkwotata qabel ma saret l-ordni tal-hgieg għaliex mument minnhom, peress illi Pilkington ma kienx ilahhaq il-*windload* rikjest mill-Awtorita` il-konsulenti arkitetti (AP) qalulhom biex inaqqsu l-gholi b' 10 cm. u minhabba f'hekk kellhom idahhlu tubu tal-hadid ta' 5 cm. isfel u fuq. L-istima li nghataw minghand Steel Structures Limited għaddiha lill-perit Papagercopolo. Gie approvat id-disinn kollu izda ma giex approvat, *expressis verbis*, li jintnefqu l-Lm1000 zejda.

As a whole dawn it-tibdiliet kollha ma gew qatt approvati mill-*project manager*, il-perit Papagercopolo.

Fid-dokument 8 hemm *contingencies* li jammontaw ghal Lm880 - qal li fix-xoghol taghhom huma jikkalkolaw certu persentagg (4.8%) li mhux dejjem l-istess fejn jikkompensa ghal xi ksur jew hsarat li jistghu jinqalghu waqt ix-xoghol.

Dawn il-*contingencies* ittiehdu minn qabel ukoll ghax dawn huma il-persentagg fuq it-total.

Il-mark-up ta' 20% ammontanti ghal Lm3773 huwa l-qliegħ nett tas-socjeta` rikorrenti.

Ix-xhud esibixxa zewg dokumenti li gew immarkati bhala dokument IV1 u IV2 rispettivament.

L-Awtorita` intimata ressqet bhala l-ewwel xhud taghha lil **Alfred Xuereb** li jokkupa l-kariga ta' *Capital Projects Department Manager* ma' l-Awtorita` u li esibixxa, skond kif kien miftiehem, dokument (markat AX1) mahrug minn Calibre Industries Limited, li kienu l-unici kompetituri tas-socjeta` rikorrenti, li minnu rrizulta l-ispecifikazzjonijiet li kienu qeghdin jissottomettu bhala U-Glass li kellu jigi installat fic-centru ta' l-Awtorita`.

Ix-xhud spjega li x-xoghol tieghu jikkonsisti li jaghmel moniteracc fi kwalunkwe fazi ta' progett jigifieri fil-fazi ta' l-istudju, fil-fazi ta' *tendering* u fil-fazi ta' l-esekuzzjoni ta' kull *tender* li tohrog il-Malta Maritime Authority.

Hu kien il-persuna li pprepara t-*tender* mill-parti amministrattiva tieghu, ghax mill-parti teknika giet ippreparata mill-konsulenti ta' l-Awtorita` u cioe minn Architectural Projects.

Ghal dak li ghandu x'jaqsam mal-hgieg, l-ispecifikazzjonijiet jigu ppreparati mill-konsulenti ta' l-Awtorita`. Dawn l-ispecifikazzjonijiet jirrizultaw fit-*tender document* taht l-intestatura "*U-Profile Glazing System*", li huma minn pagna 21 sa 25.

Partikolari ghal kaz in esami hija l-pagni 21 fejn jinghad li l-*wind resistance serviceability and safety* ghandu jkun ta' 1300 pascals.

Ix-xhud kompla jispjega li meta tohrog *tender* dan jigi regolat mis-sezzjoni msejha "*Instructions to tender*". Huwa gibed l-attenzjoni ta' l-arbitru illi waqt it-*tendering process*, kawsola 17 tghid car li ma jista' jsir ebda emendi minghajr l-approvazzjoni ta' l-Awtorita`. Hu qal li sa fejn jaf hu l-Awtorita` qatt ma giet mitluba sabiex taghmel emendi ta' l-ispecifikazzjonijiet.

Ix-xhud ghamel riferenza wkoll ghall-klawsola li ggib in-numru 21, li kopja taghha esibixxa u giet markata bhala Dokument AX2 u AX3 rispettivament. Ix-xhud spjega li t-*tenderer* mhux suppost qatt u taht l-ebda cirkostanzi jibdel l-ispecifikazzjonijiet - biss il-klawsola 21 taghti l-mezz kif it-*tenderer* jista' jaghmel *alternative offer*, fejn tghid illi kull *deviation* mit-*technical specifications* trid tigi murija separata mit-*tender*, specjalment fil-parti finanzjarja. Jigifieri t-*tenderer*, meta jrid jaghmel xi *alternative offer*, ghandu jimla il-*bill of quantities* fejn qieghed jissottometti l-oggett *in accordance to specifications* u l-alternattiva ghandha tkun separata, li generalment tkun turi vantagg monetarju lill-klijent u cioe lil Awtorita`. F'dan il-kaz din ma dehrinx.

Ix-xhud kompla jispjega li kull meta tinfetah il-parti finanzjarja ta' kull *tender* huwa obbligu taghhom li jfittxu dak il-hin stess dawn l-*alternative offers* biex dawn jigu miktuba fuq in-*notice board*. Fil-fatt f'din it-*tender submission* ma kienx hernm u allura ikkonkludew li ma kienx hemm *alternative offer* u ghalhekk ikkonkludew li t-*tenderer* kien qieghed joffri dak li kienu xtaqu.

Generalment meta jkun hemm *alternative offers* dawn jigu kkonsidrati b'kawtela ghaliex jaghtu svantagg lill-kompetituri.

Hemm formula li hija Form A1, imsejha "*Form of Tender*" fejn il-kuntrattur jerga' jiddikkjara li x-xoghol se jigi esegwit skond dan it-*tender document*. F'dan ir-rigward esibixxa kopja li giet markata bhala Dokument AX4, u gibed l-attenzjoni ta' l-arbitru ghall-klawsola mmarkata bin-numru wiehed.

Parti mis-sottomissjonijiet li huma fit-*tender* bhala dokument il-kuntrattur kellu jissottometti wkoll *samples* ta' dawk l-*items* li kellu jesegwixxi u wahda minn dawn l-*items* kienet il-U-Glass.

Ix-xhud kompli jispjega li meta dawn is-*samples* gew evalwati mill-konsulenti, ma kienux *up to specifications* u allura ghal diversi drabi huma pruvaw, anzi inkoraggew lill-kuntrattur *to come in line*. Ghalhekk kellha tigi ffirmata dikjarazzjoni - dik markata bhala dokument MMA1 - biex jigu kkoregguti u b'hekk seta' jinfetah l-*envelope* finanzjarju li huwa t-tielet stadju tat-*tendering*.

Id-dokument MMA1 giet imhejjija sabiex in-nuqqasijiet li kienu indikaw jigu rrangati.

Ix-xhud gibed l-attenzjoni ukoll ghall-fatt li l-Awtorita` dejjem kienet tipprowa ggieghel lill-kuntrattur *to come in line* - fil-fatt fl-ittra tas-16/12/2004 (Dok MMA8) jinghad specifikatament "*that these must be fully in accordance with the drawings and specifications within the tender.*"

Wara li giet iffirmata dik id-dikjarazzjoni nfethet it-tielet stadju tat-*tender*.

Wara li nfethu l-aspetti kollha tat-*tender*, l-Awtorita` harget ittra lil Aluserv Ltd bhala l-*letter of intent* li hija esibita u markata bhala Dok MMA2.

Ix-xhud spejga wkoll illi l-*Letter of intent* hija a *conditional acceptance*, jigifieri l-Awtorita` kienet

qed taghti *t-tender* bil-kondizzjoni li jigu esegwiti numru ta' kondizzjonijiet elenkati fl-istess ittra.

L-Awtorita`, biex zgur isserrah rasha li se tigi offruta dak li talbet, fi klawsola 12 titlob *lit-tenderer* biex jikkonferma illi jikkonforma mat-*tender*, il-*letter of acceptance* harget ghax l-Awtorita` kellha mohha mistrieh li l-kuntrattur kien sejjer jimxi mal-kondizzjonijiet tat-*tender*.

L-Awtorita` kienet konxja biss illi l-kuntrattur se jese gwixxi dak li kienet talbet. Kieku *t-tenderer* ma baghtx dik il-konferma, id-diskussjonijiet kienu jieqfu.

Wara li harget il-*letter of acceptance* gie ffirmat ukoll il-kuntratt fil-23/02/2006.

Ix-xhud esibixxa estratt (Dok AX 5) fejn hemm definizzjoni tal-kelma *SPECIFICATION*. Ix-xhud ippreciza li ghalhekk il-klawsola 51 ghadha ma gietx in vigore ghaliex ma kienx hemm tibdil fl-ispecifikazzjonijiet ghax ma kienx hemm approvazzjoni ta' tibdil, ghax tibdil ma sarx. Fil-fatt l-aperturi tat-twieqi ghadhom l-istess u l-uniku tibdil li sar mhux fuq il-qis ta' l-aperturi imma kif jigu mmontati il-hgieg.

Specifikament dwar il-problema li hemm bejn il-partijiet ix-xhud jaf illi l-kuntrattur baqa' jsostni illi ried jaghmel hgieg li jiflah 500 pascals, li ma kienx accettabbli ghall-Awtorita`, u huma, bl-ghajnuna tal-konsulenti taghhom, sabu *supplier* iehor u b'mod ta' kif jigu mmontati li jiffittjaw fl-ispecifikazzjonijiet li huma kienu talbu.

Ix-xhud spjega li l-hgieg illum jinsabu installati fl-istess aperturi li kien hemm qabel ma nfethet it-*tender* u kkummenta li kif instabet soluzzjoni wara li nxehtet it-*tender*, is-soluzzjoni messha nstabet waqt it-*tendering stage* u mhux wara u dan kien komputu tat-*tenderer* u mhux ta' l-Awtorita`.

Ix-xhud ipprecisa li jigi preparat *budget* ta' kull progett, li jaghmel 10% *contingency* u li dan jaghmluh il-periti tal-Awtorita` u cioe AP Architects.

Ix-xhud spjega ukoll li r-ruol tieghu kien ukoll ta' *project manager during the tendering phase* u l-periti kienu konsulenti taghhom u huma ma kienux *monitoring* mill-parti amministrattiva.

Ix-xhud spjega li hu ma kienx jaf illi kemm l-Aluserv Ltd kif ukoll il-kompetitur taghhom ma kellhomx il-U-Glass *up to the required specifications*. Kienu l-periti li kellhom jaraw dan.

Sar jaf l-ewwel darba li ma kienx hemm bizzatej U-Glass wara li kien gie *awarded it-tender* u x-xoghol kien gia beda. Hadd mill-konsulenti ta' l-Awtorita` ma informa lix-xhud li ma kienx hemm il-U-Glass *up to the required specifications*.

Ix-xhud esibixxa dokument li gie mmarkat AF1 li huwa *Evaluation of submitted tenders* u b'riferenza ghall-pagna 9 ta' l-istess fejn gie markat bl-isfar u cioe para C.1.1, qal li dan gie ppreparat minn AP Architects.

Ix-xhud gie avzat illi s-*samples* sottomessi minn Calibre Industries Ltd kienu gew accettati u kienu se jigu mizmuma, izda f' dak l-istadju ma kienx jaf illi Calibre Industries Ltd kellu l-istess tip ta' hgieg bhal Aluserv Limited u cioe li kienu *below the requested specifications*.

Ix-xhud qal ukoll illi dwar il-Calibre Industries Ltd il-konsulenti qalulu li ma kien hemm xejn x'jiffirmaw ghax *is-samples* kienu accettabbli.

Ix-xhud qal li gie infurmat li s-*samples* tal-Calibre Industries Limited kienu accettabbli permezz tar-rapport.

L-Awtorita` ressqet ukoll bhala xhud taghha lil **John J Papagiorcopulo** li kien jokkupa l-kariga ta' *project manager* tal-finituri u servizzi (u mhux tal-binja) tal-progett in kwistjoni.

Dan ix-xoghol kien jikkonsisti f' li kien jeseqwixxi l-istruzzjonijiet/disinji tal-konsulenti tal-progett u cioe taz-zewg periti Martin Farrugia u Architectural Projects kif ukoll tal-enginiera Scicluna & Associates. Dan kien ifisser li wara li jigi mahtur tali kuntrattur jaghmel *follow-up* bejn il-partijiet koncernati - ko-ordinazzjoni u *follow-up in terms of time-frame*.

Waqt it-*tendering stage* ma kienx involut fil-bidu nett. Ftit qabel ma nghata t-*tender* kien attenda l-ahhar laqgha meta kienu qed jzaminaw il-kampjuni.

Wara, kien involut b'mod permanenti u meta gie infurmat li Aluserv Ltd gew maghzula, ghamel laqghat preliminari magghom fejn iddiskutew b'mod generali l-logistika ghax-xoghol, flimkien mat-talba ghall-*programme of works*. Zied jghid illi l-kuntrattur beda jkollu laqghat mal-konsulenti fejn gieli attenda ukoll - pero` kien jiehu hsieb li jsiru dawn il-laqghat.

Dwar il-U-Glass seta' jghid illi l-kuntratt tal-Aluserv Ltd kien ghall-aperturi u *shading screens* ghall-bini kollu. Meta gew ghall-U-Glass hu, bhala *project manager*, insista mal-periti u mal-kuntrattur li dak li hemm fl-ispecifikazzjonijiet ghandu jigi mwettaq. Ghalhekk ghalih ma kienx hemm problema.

Hu gie infurmat mill-periti u mill-kuntrattur li kien hemm problema fuq il-U-Glass u meta gie infurmat b'dan huwa kompla jinsisti li ghandhom jimxu ma' l-ispecifikazzjonijiet u cioe li jkun hemm 1300 pascals.

Ix-xhud ipprecisa li s-socjeta` rikorrenti kienet qalet li l-hgieg ma setax jiflah 1300 pascals.

Ix-xhud kompla jispjega li l-periti infurmawh li kien hemm laqghat ghaddejjin mas-socjeta` rikorrenti fuq dan il-problema u huwa attenda laqghat magghom it-tnejn - id-decizjoni tieghu, pero` kienet u baqghet li l-ispecificazzjonijiet kellhom jigu onorati, partikolarment meta sar jaf li hemm hgieg li jiflah 1300 pascals.

Ix-xhud spjega li ghalih il-fatt li 1300 Pascals kienu qeghdin fl-ispecificazzjonijiet, ghalih jesisti tali hgieg, u dan qalu wara li kien ikkonsulta ruhu mal-periti ta' l-Awtorita`. Kompla jispjega li dwar dan jirrispondu bl-aktar dettal il-periti imma huwa insista illi d-disinn, kif hareg mill-periti, inkluz il-kambjamenti li saru wara, jibqa' integralment l-istess u ghalhekk il-kuncett tad-disinn jibqa' integralment kif kien antecipat u ghalhekk li l-U Glass kellu jiflah 1300 pascals.

Jaf li soluzzjoni instabet pero` ma kienx presenti ghall-laqgha meta instabet, u ghalhekk ma jafx jekk din is-soluzzjoni kienetx wahda teknika.

Il-konsulenti ta' l-Awtorita` infurmaw lix-xhud li kienet instabet is-soluzzjoni li attwalment giet applikata - sabu ukoll is-*supplier* tal-hgieg. Jaf illi bhala resultat tas-soluzzjoni li instabet naqsu l-elementi fuq il-faccata.

Kien qabel ma infetah it-tielet *envelope* li huwa attenda l-ahhar laqgha biex esaminaw is-*samples*.

Ix-xhud kompla jispjega li kien presenti ghall-laqgha meta esaminaw is-*samples* pero` ma kellu ebda partecipazzjoni f' dan l-aspett.

F'dik is-seduta, ix-xhud kompla jispjega, li ma ssemmiet ebda riferenza dwar il-fatt li l-U-Glass ma kienx konformi mat-*tender* - issem mew, anzi

gew murija lill-kuntrattur, diversi affarijiet ohra izda mhux il-U-Glass, bhal per esempju dwar il-*frames*, hxuna tal-hgieg relattivament mar-*rubber*.

Meta attenda din il-laqgha x-xhud ma kienx ghadu gie ingaggat formalment izda b'mod informali kien diga` ingaggat. Ma esaminax it-*tender document* u ma kellu ebda involviment ma' dawn is-*samples*.

It-*tenders* harguom il-konsulenti u x-xhud ma kellu l-ebda involviment fihom, u sar jaf l-ewwel darba bil-problema wara li t-*tender* kien gia gie moghti (awarded). Dahal *project manager* qabel ma gie moghti t-*tender*.

Wara l-laqgha preliminari u qabel ma gie moghti t-*tender* kellu laqghat mal-periti konsulenti pero` mhux in konnessjoni mal-kuntrattur - anzi qal li kien fuq it-*tenderers* in generali u l-periti qatt ma qalulu xejn dwar in-nuqqasijiet allegati fil-hxuna tal-hgieg tal-kuntrattur, hlief il-bzonn li qabel ma jaslu biex jifthu t-tielet *envelope* is-socjeta` rikorrenti kellha tiffirma dikjarazzjoni fuq punti teknici dwar dak kollu li kienu ghaddew minnu ta' l-affarijiet li kienu neqsin.

F'dan ir-rigward ix-xhud gie muri d-dokument MMA1 u qal li kien sar jaf bih meta, fuq rakkomandazzjoni tal-periti/konsulenti, hadu l-approvazzjoni tat-*tendering and purchasing committee* ta' l-Awtorita` biex jiprocedu u jlestu dan id-dokument ghall-accettazzjoni tas-socjeta` rikorrenti.

Id-decisjoni f' dak l-istadju kienet jifthux it-tielet *envelope* jew le u qabel ma sar dan issottomettew ghad-diskussjoni d-dokument MMA1 li kien ghadu mhux iffirmit mis-socjeta` rikorrenti.

Mas-socjeta` rikorrenti kien ghad hemm *issues* teknici; mat-*tenderer* l-iehor ma kien hemm ebda *issues* ta' xejn u ghalhekk ma inghatax dokument

simili biex jfirmah ghax *all technical issues were cleared*. Dan sar fuq rakkomandazzjonijiet tal-periti/konsulenti.

Mistoqsi jekk f'dan il-kumitat u qabel ma nfetah it-tielet *envelope* kienx jaf li l-kompetitur tal-kuntrattur kien qieghed ukoll jittenderja b'500Pascals, ix-xhud irrisponda illi hu ma kienx jaf u li dan il-fatt ma qamx in diskussjoni.

L-Awtorita` ressqet bhala l-ahhar xhud taghha lil perit **Jens Bruenslow**, li, fil-lingwa ingliza, (u ghall-iskop ukoll tal-konsiderazzjonijiet ta' l-arbitru sejrin jibqghu fl-istess lingwa), qal illi huwa kien "employed with Architectural Projects in the capacity of Senior Architect."

Qal illi hu kien "a member of the team which produced and adjudicated the tender in question we were confronted with three envelopes of tenders which basically means [a] that the first envelope contains bidbond insurance and other matters, [b] the second envelope contains documents which are requested to be supplied, adjudication of samples and so on i.e. all the technical details of the tender, [c] and the third envelope contains the actual bill of quantities which we check arithmetically.

As regards the technical specifications we check on the completeness of the documents and specifically we emphasize on the samples which are requested.

The scope of having the details is so that finally we have the product which is envisaged to fulfil the requirements of the building.

There is a procedure for an addendum to be issued when there are variations from the tender. There is also an obligation on the tenderer to raise such an issue. In this regard I make specific

reference to the last paragraph of Clause 7 of the instructions to tenderers Volume 1, part 2 page 10 of 18, copy of which I am exhibiting and is being marked as Document JB1. As far as I am aware Aluserv Ltd did not avail itself of this clause.

We had several problems with the supply of samples - we checked on the completeness of the document and we found it complete. As regards the samples we asked for re-submissions and Aluserv Ltd complied.

I am being shown Document MMA7 and I was involved in looking at the samples but I was not involved in the drafting of this document.

With reference to page 3 of the said document where there is stated that the technical specifications complete it is there to check that it is complete and there was no need to go into the details of every document.

After the fourth submissions of samples these were still not fully satisfying and therefore since the whole process took a lot of time already we followed the request of our clients to find a way how to speed up the process since the project faced draw-backs in time. Considering that this tender entails the closing off the building against the weather and other elements, so we proposed to the client to draw up a document stating "issues which still had to be rectified" to combine this with the clause that the tenderer would follow all specifications and requests to our satisfaction. The tenderer submitted this document -vide Doc MMA1 in this respect.

It would have been to the architect's satisfaction if the final product will follow all specifications and requirements stated in the tender document.

The other outstanding issues covered in this declaration were shortcomings in the samples submitted by Aluserv which were listed in the document attached.

We asked for samples since the building, as designed, does not follow a general building type as executed in Malta - therefore we had to ensure that tenderer would be able to manufacture and achieve what we had in mind.

Once we had the declaration in hand (Doc MMA1) the tendering process could proceed and the third envelope could be opened.

In the third envelope there is the bill of quantities and I refer particularly to Bill C, copy of which I am exhibiting and being marked as Document JB2, which contains a note to the effect that "Refer to and abide by all specification clauses with particular attention to Sections J, H, K."

After the letter of acceptance was issued a problem arose as to the U-Glass. This basically was that we made the contractor aware that he has, together with the installation, had to submit documents which show that the product have been tested and in fact comply with all technical specifications indicated in the tender.

The contractor informed us that his product would not comply with the requested specification.

To address this problem we had several meetings to see what could be done and we advised the contractor to go back to his supplier to approve or not to verify whether it could be possible for them to provide a product according to the requested specifications. However we as well made the contractor aware of an alternative product which forms part of the system which would have been

more suitable to achieve the specifications required.

We found a U-Glass product which had higher specifications from the one which the contractor was going to use.

I contacted Pilkington and tried to convince them to supply the glass which was contracted and I also spoke about technical matters. I basically asked them what their table indicating allowable wind pressures refers to. I was told that the table I was referring to is a general document for guidance which refers to conditions in Germany - however following these tables would be enough if the requirements would be achieved under these conditions. For further requirements specific tests and calculations would be executed to relate the product to the actual conditions of installation.

I made Aluserv Ltd aware of this. I basically established the contact for them; they had their own contact and from then on at one point the contractor came back to me stating that even this Pilkington product according to standard table the requirement of the specification would not be achieved. I obviously did not agree with that because I felt that it would be their responsibility to adjust the system or execute specific calculations to achieve the product required.

Their reaction to this was neutral, the contractor was not ready to operate on the basis of specific calculations for the Pilkington product but instead issued a redesign based on his original offered product which was not in compliance with our architectural requirements.

Eventually on the basis of this alternative offer, we had a further meeting with the contractor when we offered to assist in the adjustment of the design to fit requested needs. We proposed those changes

and pre-checked them in our structural engineering department.

I speak of adjustment in design. The original active length of the glazing is 3.9metres. To fulfil specifications requirements by bypassing specific calculations and making use of the standard performance mentioned in the Pilkington table the active height in the adjusted design was reduced to 3.65 metres. This was achieved by reducing the height of the entire system and extending the supporting frames so that both measures sound up to the required reduction of active length whilst the architectural approach of the building was not effected.

By active height I mean the height which the glass spans and therefore the actual visible glazing within the frame.

The full system height would come to almost 4.2 metres. This means even the part of the glass which is within all the frames and beyond.

The pressure of 1300 pascals means the loads onto which the system had to be tested.

In kontro-esami ix-xhud qal: My qualifications are of a diploma engineer in architecture in March 2001 - qualified in Germany. Civil engineering is a different course in Germany. I am 35 years old and have worked in Malta for five years and I have always worked with AP Architects. Six months after that I qualified I came to work in Malta.

I was involved in the preparation of the tender which was concluded in 2004. The estimate of this tender was that of Lm486,777. 28.

I have not drawn up the estimate because it was drawn up by other members of the team. I do not

know whether any member of the team consulted with Pilkington about the glass.

In the drafting of this document we have put in an estimate for the U-Glass, but I do not know now what is the amount which was attributed to the U-Glass. Even if I know I would not be able to give this information unless I am authorized to do so by my clients. I was involved in the adjudicating process of this and other tenders.

I am being referred to a page of the report presented by Architect Drago and more particularly para C.I.I, and on being asked why Calibre's samples were acceptable when his U-Glass were not to the required specifications I answer that [1] it seems that there is some misunderstanding because we do not refer to a single element of the tender discussed as not to specifications or otherwise but to the entire system, [2] the samples were only requested to control and check the ability of the workmanship of the tenderer to achieve the product requested. In fact neither for Aluserv we questioned the used material in the sample but we pointed out several shortcomings in the quality of the assembling of the samples.

On being asked why Aluserv and Calibre were not told that their sample (U-Glass) was well below the required specification while Aluserv were told to amend and Calibre were not told to amend I state that the samples were not there to judge the specifications - in fact and I repeat samples were mock-ups to judge on workmanship and nothing else.

I cannot see any deficiencies in the products produced by Calibre and Aluserv and this in so far as the loading issue is concerned.

On being asked the question: Are you aware that both Calibre as well as Aluserv in their technical specifications submitted to the tender they were not in a position to achieve your requirements, i.e. height and wind load. Why were they not told anything about it?, ix-xhud irrisponda illi "I understand the question and I have to state that this statement is incorrect because we have not been provided with any statement which would be valid according to instructions to tender of their possibility to achieve the requested specifications. In connection to this I like to draw the attention of the arbiter to the Instructions to Tender Volume 1, Part 2, Point 5. In the second paragraph we find that tenders are to be strictly in accordance with specifications. The next point I would like to draw up is to be found under Point 7 of the same Volume and part. A further point is found in point 21 of the same Volume and part."

Moreover I would like to add that considering all these points in adjudicating the tender we do not check the issued specifications on content but on completeness. You will find that Aluserv had missed in its submission of the tender specifications for the steel members of the system. However we do not judge the correctness of specifications by the document specifying just one element of a whole system.

I would like to draw the attention to clause L4 of the Technical Specifications.

Lastly whereas the loads in discussion referring and are stated in point L3 STANDARDS and are referring to loads which require a specified test.

Before the third phase I am not aware that both Calibre and Aluserv submitted samples and written submissions that their U-Glass with the windload were not what we requested. The reason for this is that I don't know to date that the

specifications would not be achieved because the specifications asking for calculations drawn up on local requirements have not been adhered to. Loads which are discussed here are test requirements. No test results have been issued to us.

On being asked the question: "I refer you to Volume 12 ATTACHMENTS, Addendum One et seq. - have you ever seen these documents before phase 3?", ix-xhud irrisponda illi: "I can confirm for sure that someone in the office has seen them before Phase 3, but I cannot vouch that I had seen them as well, before Phase 3. I have certainly seen them before to-day. The person who most likely would have seen them could be Franz Zahra. I was not informed by Mr Zahra of his findings because, as I believe, the documents do not state that our specifications cannot be achieved. They can be achieved as soon as one submits the tender and binds himself to the specifications issued within the tender. I know for a fact and this is not a conclusion of mine that Mr Zahra or anybody else is able to inform me of something which would refer to specifications which are not there."

Mistoqsi: "Who submitted to Aluserv the four requests in MMA1 et seq for detailed changes by way of example the bolts used on lock-nuts, U-Glass does not have propriety inserts, and to other requests?" ix-xhud irrisponda: " The team of AP Architects, of whom I formed part, made these requests."

Mistoqsi unljterjorment: "If before you said that the samples are just a submission and that it is up to the tenderer to satisfy the requirements, why were these minor details asked to be changed?", ix-xhud irrisponda illi "All the mentioned adjustments refer to visual impacts on the samples."

When there is a reference to "washers in the bolts" this refers to workmanship. The same refers the fact that the U-Glass does not have proprietary inserts. There is nothing which does not have any technicality in it.

I did not tell Aluserv to change the U-Glass and I never did.

I did examine the sample. I did not request the thickness of glass and hence I could never have told them anything about its thickness. I did not notice that the glass was thin.

On being asked whether Calibre was asked to make any changes in its sample on the third submission, the witness replied that: "Calibre was asked three times to resubmit its samples and their samples were found acceptable after their third submission, as stated in the Evaluation of Submitted tenders (Dok API)".

On being asked further whether he was aware at that time that Calibre had submitted U-Glass which was not to the required specifications, the witness replied that: "We had not put any specifications for the U-Glass but those specifications were for the entire system."

The sample of Calibre was accepted in its third submission.

The witness was asked what is the difference between the sample and the system, and he replied that: "The sample represents a specified corner of the system only to enable within the adjudication the judgment of workmanship. The entire system varies in size but however is an entire glazing component on the facade which we did not ask to be provided as a sample".

Mistoqsi: "Calibre and Aluserv submitted this identical graph provided by San Gobian showing their limitations on the U-Glass - why didn't you disqualify either of them when in the system they both had shortcomings?" ix-xhud irrisponda illi "The submission of specification do not indicate the shortcoming to our specifications since our specifications asking for calculations of the system therefore we rely on good faith that the tenderer only submits specifications of element of the system which he thinks will perform in the entire final system."

There were no submissions in writing.

Ix-xhud kien mistoqsi ukoll: "Do you know what Calibre submitted in their technical specifications for U-Profile Glazing System?" u hu irrisponda li ma kienx jaf.

Ix-xhud gie ukoll mistoqsi: "Calibre and Aluserv informed you in writing that the U-Glass they could provide for 4.2m could withstand a wind pressure of 500 Pascals and not the required 1300 Pascals. This is in accordance with Documents AX1 and AX2 exhibited and Doc A that U-Profile Glazing System which forms part of the documents exhibited by Aluserv - did this bother you?" u huwa irrisponda illi "Both tenderers provided a graph indicating model based windload resistance which does not leave enough information for a conclusion of the non-performance of the system - moreover I would like to refer to my first statement specifically to the last four paragraphs thereof of the third page."

Ix-xhud gie mistoqsi wkoll: "Why didn't you stop them before they proceeded if there was this doubt?" and hu rrisponda: "We did not stop anybody. There was no doubt. We acted in good faith and we drew the attention of the tenderers."

Mistoqsi wkoll: "Why after and not before? In other words if the tenderers are telling you that they could only achieve 500 Pascals why did you award the tender and not stop the process to clear this major problem? Where is your good faith?" ix-xhud irrisponda: "Because nobody told me that the system cannot comply with the technical specifications as issued in the tender document."

When I said that I did not notice any deficiencies in the products of Aluserv and Calibre in so far as the loading issue is concerned I meant that I cannot judge deficiencies in specifications as regards to loading issues from samples which were meant to be mock-ups to judge workmanship and execution of detail.

The samples did not have any relevance as to whether the pressure of 1300 Pascals could be withstood in terms of the tender specifications.

The reference to the system and not to class comes pursuant to point L3 and L4 of the technical specifications included in the tender and exhibited as document N in the submissions of Aluserv Limited. This system is made up of steel frame component, aluminium component and the glazing itself and have been set out in the tender document to guide the tenderer to a product appearing as required for the context of the building. For final details, calculations and workshop drawing were requested.

Active load is the actual glass which is outside of the frame and therefore which is exposed to the elements when it is exposed to the elements.

In ri-esami x-xhud qal illi "When I talk of the system, I mean that it includes everything, not just the exposed glass.

At the end of the day it is the glass which had to withstand a certain pressure of the wind within the system.

The purpose of the aluminium frame work is to keep the glass in place and define its perimeter. The purpose of the iron work is to defer the loads of the glazing system to the structure of the building. The iron work affects the windload on the glass in the sense that the steel frame has to transmit whichever load has an impact on the glazing part of the system finally to the building.

The glass is fixed to the aluminium frame which in its turn is fixed to the steel structure. The system fails at its weakest point.

Mistoqsi "Which is the most important for windloads, is it the glass or the iron framework?" ix-xhud irrisponda illi "We do not qualify single elements of the system."

Mistoqsi ukoll: "If the glass was SOOPascals was it weak to the system and to your specifications?" ix-xhud irrisponda illi: "I cannot judge on that since calculations and testing reports would have to be submitted to whatever was executed on site."

KONKLUZJONIJIET:

L-ewwel haga li ghandu jigi decis huwa jekk fil-fatt dak li talbet l-Awtorita` intimata setax jigi esegwit. Jekk jirrizulta li l-Awtorita` talbet xi haga li ma setax jigi esegwit, allura certament illi is-socjeta` rikorrenti, sa certi parametri, ma tistax tigi ritenuta illi hija naqset, b'xi mod, minn dak li hija dahlet ghalih, partikolarment jekk f' dak li ssottomettiet hija ghamlitha cara mill-ewwel x'kienet qed tissottometti.

Il-partijiet qablu illi l-produtturi ewlenin, fid-dinja, tal-hgieg mertu ta' dan l-arbitragg huma Pilkington

u Saint Gobain. Fil-fatt il-partijiet ghamlu anke Verbal fis-sens illi Saint Gobain huwa wiehed mill-fornituri ewlenin tal-hgieg fid-dinja. Waqt il-gbir tal-provi, intqal anke illi jekk ma kienux kapaci jfornu il-hgieg rikjest dawn iz-zewg fornituri, certament li ma kien hemm hadd izjed li seta' jfornih.

Dak li riedet l-Awtorita` intimata kien illi l-hgieg, fil-kobor li gie kommissjonat u cioe 4.2 metri, jkun jiflah 1300 Pascals. Dak hu li kellhom jipprovdu t-tenderers.

Irrizulta li ebda wiehed miz-zewg tenderers, meta ssottometta t-tender tieghu, ma ssodisfa dan ir-rekwizit u filwaqt li in kwantu ghas-socjeta` rikorrenti, l-Awtorita` baqghet titlob diversi kjarimenti, ghat-tenderer l-iehor jidher li s-sample tieghu kien accettat, sia pure li fit-tielet sottomissjoni, pero` fil-kas tieghu, bla ebda riservi jew kjarimenti.

Meta s-socjeta` rikorrenti rat ir-rekwiziti tat-tender, hija immedjatament qabdet mal-fornitur taghha u cioe mas-socjeta` Saint Gobain u infurmatha b'dak li kellu jigi supplit u din baghtet e-mail lis-socjeta` rikorrenti (ara Dokument MV1) li fiha, bla tlaqlieq ta' xejn, qalet li ma setghetx tissupplixxi tali hgieg, fil-kobor mitlub, biex ikun jilqa' 1300 Pascals. Is-socjeta` San Gobain testwalment qalet "*As explained, this installation length can only be achieved up to a windload of 1,0KN/m2; **in case of a windload of 1.3KN/m2 this would not be possible.** Please check whether this length can be reduced.*"

Jekk wiehed jesamina d-dokument A a fol 9 tieghu wiehed isib car fil-profile glazing system li l-hgieg huwa ta' 50n/m for a height of 4.2 metres. Hekk ukoll jghid id-dokument C a fol 16 li jakkompanjah.

Kwindi Saint Gobain kien kategoriku u bla tlaqlieg - dak li kien mitlub mill-Awtorita` intimata, fil-kobor tal-hgieg li riedet, ma kienx possibbli li jigi esegwit.

Jekk wiehed jezamina, imbaghad, id-dokument 3, minnu jirrizulta li Pilkington ma setghux jipprovdu hgieg ta' 1300 Pascals.

L-Awtorita` intimata, meta giet rinfaccjata bil-problema, pruvat issolvi s-sitwazzjoni billi kkomunikat ma' Pilkington u jidher li dawn kienu ta' l-istess opinjoni ta' Saint Gobain u cioe` illi, ghall-aperturi li riedet l-Awtorita` ma setax il-hgieg ikun jirresisti 1300 Pascals. Infatti l-partijiet fittxew u sabu soluzzjoni sabiex filwaqt li l-hgieg jibqa' jiflah 1300 Pascals, l-aperturi, per se, iccekknu fis-sens illi minn 3.9 metri nizzlu ghal 3.65 metri - ara f' dan ir-rigward dak li xehed il-perit Bruenslow.

Kieku kien hemm il-possibilita` li Pilkington tipprovdi hgieg li jifilhu rih qawwi ta' 1300 Pascals minghajr ma jigu imcekkna t-twieqi, sia pure li l-*architectural design* ma giex affett bil-modifika li saret, certament li l-Awtorita` kienet tesigi, u dan kien ikun perfettament korrett, illi s-socjeta` rikorrenti tipprovdi il-hgieg minghand Pilkington u mhux minghand Saint Gobain, biex kollox isir a tenur ta' l-ispecifikazzjonijiet tat-*tender*.

Isegwi ghalhekk illi l-Awtorita` tidher li esigiet kondizzjoni fit-*tender* taghha li, fattwalment, ma setghetx tigi onorata ghax ma kienx possibbli li tigi onorata. Kwindi s-socjeta` rikorrenti ma tistax tigi tenuta li naqset mid-doveri taghha, f' dan ir-rigward, ghax hadd ma jista' jigi tenut responsabbli li jaghmel l-impossibbli.

La darba is-socjeta` rikorrenti kienet taf illi hija ma setghetx tonora l-obbligazzjonijiet taghha fit-*tender* hija kienet tenuta, u allura fid-dover, li tinforma b'dan immedjatament lill-istess Awtorita`, u dan

minghajr ebda dewmien ta' xejn. Hekk tghid il-klawsola 21 (Dok AX3).

Huwa minnu illi s-socjeta` rikorrenti ma mxietx metikulosament ma' dak li jiddetta l-artiklu riferit fis-sens li ma ghamlitx *Alternative offer*, wahdu, izda l-kontenut tat-*tender* taghha ma jhalli ebda dubbju dwar dak li kienet qed taghmel is-socjeta` rikorrenti. Ma jidhirx li s-socjeta` rikorrenti hbiet dan il-fatt lill-Awtorita`.

L-Awtorita` f' dan ir-rigward, ghamlet riferenza ghad-Dokument JB1. Bir-rispett kollu l-kondizzjonijiet imnizzla f'dan id-dokument, fil-fehma ta' l-arbitru sottofirmat, ma ghandhom x'jaqsmu xejn mal-punt in kontestazzjoni.

Il-kondizzjoni numru 7 mnizzla fl-imsemmi dokument tapplika fil-kaz ghal min qieghed johrog it-*tender*, f'dan il-kaz l-Awtorita` li jkun irid ibiddel xi kondizzjoni fit-*tender*. L-Awtorita`, f'dik l-eventwalita` kienet obbligata timxi skrupolosament ma' l-imsemmija kondizzjoni sabiex kull *tenderer* jibqa' jkun trattat egwalment u ma jsirux preferenzi ma' hadd. Hekk titlob is-serjeta` u certament li l-Awtorita`, bhala organu serju, ma kienetx sejra tfalli f' dan l-obbligu taghha.

In kwantu jirrigwarda t-*tenderer*, pero` huwa kellu jimxi mat-tielet paragrafu ta' l-imsemmija kondizzjoni u mal-klawsola 21 (Dok AX3). It-*tenderer* kien fid-dover li iressaq *queries about any aspect of the tender documents* lill-Awtorita` intimata, mhux aktar tard minn ghaxart ijiem qabel l-gheluq tat-*tender*. Dan jidher li s-socjeta` rikorrenti ma ghamlitux.

Ad onor del vero, fil-fatt, dak li kellha s-socjeta` rikorrenti ma tantx jista' jitqies bhala *query*. Bil-kelma *query* wiehed jippresupponi li ghandu domanda x'jaghamel. Ghas-socjeta` rikorrenti ma kien hemm ebda domanda x'issir lill-Awtorita`

intimata - kien hemm l-istat ta' fatt li l-hgieg, kif mitlub mill-Awtorita` ma setax jigi supplit.

Jinghad illi s-socjeta` rikorrenti infurmat b'dan mill-ewwel lill-istess Awtorita`. Ghalhekk jekk wiehed kellu jinterpreta t-tielet paragrafu tal-kondizzjoni numru 7 differentement mill-Arbitru, l-Arbitru ihoss li similmement l-Awtorita`, hekk kif kienet rinfaccjata bil-kontenut ta' l-istess dokumenti tat-*tender* tas-socjeta` rikorrenti, kellha l-ozzjoni jew li tirrifjuta t-*tender* tas-socjeta` rikorrenti jew li tibghat ghas-socjeta` rikorrenti biex tiddiskutiha - pero` certament kienet fid-dover li taqraha, u, fl-opinjoni ta' l-esponenti, ma hemmx dubbju li l-Awtorita` intimata hekk ghamlet u cioe qrat u fliet it-*tender document* sottomess mis-socjeta` rikorrenti.

La darba l-Awtorita` intimata qrat u fliet il-kontenut tat-*tender* tas-socjeta` rikorrenti, ghax f'dan ir-rigward l-esponenti jhoss li s-socjeta` rikorrenti onorat bizzejjed dak li hu sancit fil-kondizzjoni 21 (*Alternative offers*), hija messha indunat li, kwantu ghall-punt in disamina, is-socjeta` rikorrenti, mill-bidu nett kienet cara li hija ma setghetx tforni hgieg ta' 1300 Pascals.

L-Awtorita` intimata messha wkoll indunat illi t-*tenderer* l-iehor kien fl-istess dilemma u impossibilita` u cioe li ma setax iforni hgieg ta' 1300 Pascals u offra, bhas-socjeta` rikorrenti, hgieg ta' 500 Pascals.

Ghal xi raguni jirrizulta illi l-Awtorita` intimata ma sabet xejn hazin f' dan in kwantu jirrigwarda l-kompetitur tas-socjeta` rikorrenti izda sabet oggezzjoni ghas-socjeta` rikorrenti. Dan mhux sewwa ghax b'hekk, jista' jigi argumentat li, ghal xi raguni, iz-zewg *tenderers* ma gewx trattati bl-istess tip ta' ingwanti. Kull *tenderer* kellu jigi trattat daqs u bhall-iehor u minghajr ebda preferenzi ta' xejn.

Jidher illi peress illi l-Awtorita` intimata ma kienetx kompletament kuntenta bit-*tender* tas-socjeta` rikorrenti, wara li kienu nzammu diversi tahtidiet, fis-16 ta' Dicembru 2004, l-Awtorita` intimata deherlha li ghandha titlob lis-socjeta` rikorrenti "*to resubmit ALL samples and technical literature pertaining to this tender. These must be fully in accordance with the drawings and specifications within the tender.*" - ara f' dan ir-rigward id-dokument esibit u markat bhala Dok MMA8.

Illi nonostante din ir-rikjesta, finalment gie ffirmat il-kuntrart ta' bejn il-partijiet. Meta gie ffirmat l-imsemmi kuntratt certament illi l-Awtorita` kienet, jew almenu messha kienet, konsapevoli ta' kollox u ta' kull diffikolta` li kien hemm in konnessjoni mal-punt li huwa in disamina f' dawn il-proceduri.

L-esponenti jhoss li l-Awtorita` intimata kienet konsapevoli ta' kollox hekk kif iddecidiet li tiftah it-tielet *envelope*, ghax dan ma setax jinfetah jekk mhux wara li kienu kompletati a soddisfazzjon ta' l-Awtorita` l-ewwel zewg stadji tat-*tender*. Kwindi hekk kif gie decis li jinfetah it-tielet u l-ahhar *envelope*, isegwi illi l-Awtorita` kienet kompletament kuntenta bl-informazzjoni li kellha sa dak il-hin.

Fis-sottomissjonijiet taghha, u tul il-kors tas-smiegh ta' l-arbitragg, l-Awtorita` tistrih hafna fuq id-dokument MMA1, li gie ffirmat fil-11 ta' Marzu 2005. Dan jghid testwalment hekk:

This document lists the pending matters to be resolved in the tender samples submitted by Aluserv relating to the tender for aluminium and steel façade shading screen and general glazing at the Malta Maritime Trade Centre.

The tenderer herewith binds himself to correct all sample deviations and to fulfil all requests and changes listed in this document in executing any

works pertaining to this tender and to perform all tender works to the satisfaction of the architects.

Dan id-dokument, skond ma qal ix-xhud *project manager* Xuereb, gie redatt mill-periti konsulenti ta' l-Awtorita` minghajr ma kkonsultaw ruhhom mieghu. Skond ma xehed l-istess xhud Xuereb. prodott mill-Awtorita` intimata, l-ahhar *envelope* - u cioe dak li jikkoncerna l-pakkett finanzjarju tat-*tender* - infetah wara li giet iffirmata din id-dikjarazzjoni. Skond ix-xhud Papagercopolo id-dikjarazzjoni msemija saret qabel ma infetah l-ahhar *envelope*. Skond ix-xhud Bruenslow, huwa jaqbel ma' dak li qal Papagercopolo.

Isegwi ghalhekk illi dan id-dokument gie redatt mill-periti/konsulenti ta' l-Awtorita` intimata fil-konsapevolezza li s-socjeta` rikorrenti kienet mankanti f' dak li jirrigwarda il-U-Glass, ghax la darba qraw sewwa l-kontenut tat-*tender* messhom indunaw b'din il-mankanza. Fil-fehma ta' l-arbitru l-kontenut ta' din id-dikjarazzjoni jimplika li l-Awtorita` kienet taf li kien hemm xi nuqqas da parte tas-socjeta` rikorrenti. Forsi kien ghalhekk li saret din id-dikjarazzjoni, ghax biha ffirmata f' idejhom, huma hassew li, b'hekk, is-socjeta` rikorrenti kienet marbuta li taghmel dak kollu necessarju ghas-sodisfazzjon taghom.

Il-perit Papagercopolo jghid illi wara l-laqgha preliminari u qabel ma gie moghti t-*tender* kellu laqghat mal-periti konsulenti u dawn qatt ma qalulu xejn dwar in-nuqqasijiet allegati fil-hxuna tal-hgieg tal-kuntrattur, hlief il-bzonn li qabel ma jaslu biex jifthu t-tielet *envelope* is-socjeta` rikorrenti kellha tiffirma dikjarazzjoni fuq punti teknici dwar dak kollu li kienu ghaddew minnu ta' l-affarijiet li kienu neqsini.

F'dan ir-rigward ix-xhud gie muri d-dokument MMA1 u qal li kien sar jaf bih, meta, fuq rakkomandazzjoni tal-periti/konsulenti, hadu l-

approvazzjoni tat-*tendering and purchasing committee* ta' l-Awtorita` biex jipprocedu u jlestu dan id-dokument ghall-accettazzjoni tas-socjeta` rikorrenti.

Id-decisjoni, f' dak l-istadju, kienet jifthux it-tielet *envelope* jew le u qabel ma sar dan issottomettew ghad-diskussjoni d-dokument MMA1 li kien ghadu mhux iffirmit mis-socjeta` rikorrenti.

Huwa ghalhekk li l-esponenti arbitru jhoss li l-periti/konsulenti kienu kuntenti bl-attwazzjoni tal-hsieb taghom u cioe li jobbligaw lill-kuntrattur jiffirma dikjarazzjoni, qabel ma jinfetah l-ahhar *envelope*, ghax b'hekk huma fehmu u hassew li kwalsiasi mancanza da parte tieghu setghet u kellha tigi mimlija mill-istess kuntrattur qabel ma seta' jigi konsidrat li l-kuntrattur qeda' d-dmirijiet tieghu.

Id-dokument MMA1 suppost li elenka l-punti kollha li kellhom x'jaqsmu mas-*samples*. Fil-fatt meta wiehed isib il-U-Glass hemm imnizzel illi kellu jinghata *a fully assembled corner mockup* u li *the tenderer is to provide manufacturer's technical literature, brochures, instructions etc. for all proprietary materials or products that will be used in these works*. Nonostante ghalhekk illi kienu diga inqalghu d-diffikultajiet kollha dwar il-1300 Pascals tal-U-Glass, l-Awtorita` intimata deherlha li ma kellha ssemmi xejn, fid-dikjarazzjoni, dwar dan l-aspett u tibqa' ghaddejja bhallikieku xejn.

Dwar il-fatt li l-U-Glass *profiles* ma kellhomx *the proprietary inserts as requested but rely on silicon*, hemm imnizzel. Mhux biss izda hemm imnizzel ukoll, f'dan ir-rigward illi *we are still awaiting the tenderer to submit confirmation from the manufacturer (San Gobain) they certify the sections to be assembled without profiles for the heights and spans requested*.

Mela fejn dehrilha, l-Awtorita` intimata ghamlet ir-riservi taghha, u sewwa ghamlet, u fejn ma deherlhiex ma ghamlet xejn. Wara li ma ghamlet xejn, ghax deherlha li ma kienx hemm bzonn, sussegwentement illi s-socjeta` rikorrenti ma setghetx taghti dak mistenni dwar il-1300 Pascals ghall-U-Glass, qajmet kjass shih. Bil-fatt li l-Awtorita` ma semmiet xejn f' dan id-dokument in kwantu jirrigwarda il-U-Glass ta' 1300 Pascals, izda inseriet id-dikjarazzjoni, hasset li hija koperta ghal mija fil-mija.

Forsi, u x'aktarx, li l-periti konsulenti ta' l-Awtorita` strahu fuq it-tieni paragrafu tad-dikjarazzjoni msemmija fid-dokument MMA1. Fi kliem iehor il-periti/konsulenti ta' l-Awtorita` intimata hassew li b'dik id-dikjarazzjoni iffirmata l-Awtorita` kienet f' postha.

Illi ma hemmx dubbju li din id-dikjarazzjoni ghandha l-validita` taghha u trid tigi interpretata. Pero` in kwantu dak li jikkoncerna l-mertu ta' dan l-arbitragg u cioe l-hxuna tal-hgieg, jidher li l-partijiet baqghu pjuttost fluidi u dan in vista tal-fatt illi f' pagna 4 ta' l-istess dokument wiehed isib illi "*we are still awaiting the tenderer to submit confirmation from the manufacturer (San Gobain) they certify the sections to be assembled without profiles for the heights and spans as requested.*"

Meta wiehed iqies tant id-dikjarazzjoni hawn fuq riportata a fol 1 tad-dokument MMA1 kif ukoll id-dikjarazzjoni riportata a fol 4 ta' l-istess dokument, wiehed ghandu jasal ghall-konkluzjoni illi attwalment il-partijiet kienu ghadhom ma ntrabtux billi assoggettaw kollox ghal fatt li kienu ghadhom qed jistennew konferma minghand San Gobain illi huma setghu jesegwixxu s-sezzjonijiet skond kif mitluba fit-*tender*.

Illi ghalhekk meta s-socjeta` rikorrenti ffirmat id-dokument MMA1 u ntrabtet illi tikkoreggi "*all*

sample deviations and to fulfil all requests and changes and to perform all tender works to the satisfaction of the architects" dan logikament ghamlitu konsapevoli tal-fatt, ghaz-zewg partijiet u mhux ghal xi parti wahda biss, illi dak li kienet sejra titlob l-Awtorita` intimata kien, necessarjament, cirkoskritt minn dak li San Gobain (u l-ebda fornitur iehor, ghax hekk gie specifikat fl-istess kondizzjoni) kellu x'jiccertifika dwar is- "*sections to be assembled without profiles for the heights and spans as requested.*"

Din id-dikjarazzjoni hija datata 11 ta' Marzu 2005 u kwindi tissupera kwalsiasi dikjarazzjoni jew skambju ta' korrisondenza li seta' kien hemm qabel, bejn il-partijiet, bhal per esempju l-ittra ta' l-Awtorita` lis-socjeta` rikorrenti tas-16 ta' Dicembru 2004, fejn is-socjeta` rikorrenti ntalbet sabiex tissottometti *samples* godda. Gewx sottomessi jew le huwa ghal kollox irrilevanti ghax il-partijiet, wara, ghazlu li jirregolaw ir-relazzjonijiet ta' bejniethom ai termini ta' dak miftiehem fil-11 ta' Marzu 2005. Kwindi huwa interessanti hafna dak li jinghad in kwantu jirrigwarda "*they (San Gobain) certify the sections to be assembled without profiles for the heights and spans as requested.*"

Ma' l-ewwel darba li ssottomettew it-tender irceview minghand l-Awtorita` intimata risposta li kopja taghha tinsab esibita u giet markata bhala Dokument JS1.

Dan id-dokument, mahrug mill-Awtorita` intimata, jindika, la darba dan id-dokument huwa risposta ghall-ftugh tat-tender, illi l-Awtorita`, wara li fethet it-tender u presumibilmment qrat il-kontenut ta' l-istess, illi hija kienet gia ben konsapevoli illi s-socjeta` rikorrenti ma kienetx sejra tforni hgieg skond l-ispecificazzjonijiet tat-tender. Infatti l-Awtorita` intimata ma kienx ikun hemm ghal fejn titlob lis-socjeta` rikorrenti "*to provide manufacturer's technical literature, brochures,*

instructions etc for all proprietary materials and products that will be used in these works " kieku mhux ghax dak provdut fit-*tender* ma kienx gia a konjizzjoni ta' l-istess Awtorita`. Kieku s-socjeta` rikorrenti indikat, fit-*tender* taghha, hgieg adegwat ghall-1300 Pascals, l-Awtorita` ma kienx ikun hemm ghal fejn titlob xejn aktar ghax dak li kienet specifikat fit-*tender* kien sejjer ikun onorat mit-*tenderer*; la darba talbet dak li talbet isegwi li l-Awtorita` riedet tkun a konnoxxenza ta' x'hemm differenti minn dak li talbet fit-*tender* li kienet harget.

Inoltre rrizulta, anke ghall-perit konsulent ta' l-Awtorita` Bruenslow, kif ukoll ghall-konsulenti legali tal-partijiet, illi dan it-*tender* kien tat-tip *three packet system*, u cioe li kull *envelope* jinfetah jekk jigu soddisfatti l-kondizzjonijiet ta' *envelopes* precedenti.

Bil-fatt li l-Awtorita` accettat tiftah it-tielet *envelope* taz-zewg *tenderers* isegwi illi allura hija kienet kuntenta u soddisfatta minn dak li gie evalwat fl-ewwel zewg *envelopes* ta' l-unici zewg *tenderers* li kellha u cioe tas-socjeta` rikorrenti u ta' Calibre Systems Ltd. Irrizulta, mill-ftugh tat-tielet *envelope* li Calibre Systems Ltd kienet oghla mis-socjeta` rikorrenti b'aktar minn mitt elf lira maltija u ghalhekk l-Awtorita` intimata ghaddiet biex taghti *t-tender* lis-socjeta` rikorrenti.

Illi ghalhekk jidher li hemm ness bejn in-nuqqas ta' l-Awtorita` intimata u l-effett fuq is-socjeta` rikorrenti li b'risultat tieghu is-socjeta` rikorrenti baghtiet danni.

Ghal dawn il-motivi l-ewwel talba tas-socjeta` rikorrenti hija gusta u ghandha tintlaqa' u f' dan is-sens l-Awtorita` intimata qed tinstab li kienet responsabbli ghad-danni versu s-socjeta` rikorrenti.

Illi l-esponenti arbitru issa sejjer jghaddi sabiex jillikwida d-danni sofferti mis-socjeta` rikorrenti.

Id-danni reklamati mis-socjeta` rikorrenti huma dawk elenkati fid-dokument 8 ta' l-inkartament presentat mis-socjeta` rikorrenti.

L-ammont reklamati mis-socjeta` rikorrenti gie dibattut fis-seduta tal-25 ta' April 2006 u x-xhud Ivan Vassallo, f' isem is-socjeta` rikorrenti, ta spjegazzjoni konvincenti ghal kull partita li s-socjeta` minnu rappresentata qed tivvanta fl-imsemmi dokument, hlief ghall-ammont ta' Lm880 li huwa sejjah bhala "*contingencies*".

Kull *item* ta' dan id-dokument jidher gustifikat u gie konfermat bil-gurament. Huwa veru illi x-xhud ipprometta li sejjer jesibixxi xi dokumenti gustifikattivi in sostenn ghal xi hlasijiet, li fil-fatt ma gewx esibiti, izda in realta` x-xhud ikkonferma bil-gurament li s-socjeta` minnu rappresentata nefqet l-imsemmija somma u ghalhekk peress li jidher li l-figuri hemm innizzla huma gustifikati, hlief ghas-somma ta' Lm880, l-esponenti jhoss li huwa ghandu jaccettahom bhala tali u ghalhekk jillikwida s-somma ta' Lm25,834 bhala l-ammont li huwa attwalment dovut mill-Awtorita` intimata lis-socjeta` rikorrenti.

Ghaldaqstant l-arbitru sottofirmat wara li jichad l-kontestazzjoni ta' l-Awtorita` intimata bhala li hija infondata fil-fatt u fid-dritt, jilqa' t-talbiet tas-socjeta` rikorrenti, jiddikkjara lill-Awtorita` intimata bhala responsabbli fir-rigward tas-socjeta` rikorrenti ghad-danni lilha kawzati u jillikwida l-istess danni fis-somma ta' Lm25,834, bl-imghax dekorribbli millum u bl-ispejjes kollha kontra l-istess Awtorita` intimata."

L-Awtorita` intimata appellat minn din id-decizjoni ta' l-Arbitru bl-aggravju illi fil-konkluzjonijiet tieghu ma saret

ebda referenza specifika ghal certi dokumenti importanti esebiti, u b' mod partikolari dak referibilment ghad-dikjarazzjoni vinkolanti fuq is-socjeta` appellata illi t-*tender bid* taghha tkun konformi ghal dak mitlub fit-Tender Specifications. L-istess Awtorita` tghaddi, imbaghad, biex tissottometti illi l-Arbitru kien messu ppresta attenzjoni lil dik l-obbligazzjoni assunta mis-socjeta` appellata u l-konsegwenza legali li din l-obbligazzjoni, u dawk l-ohra accertati b' dikjarazzjonijiet ohra, kellhom inisslu. F' dan il-kuntest l-Awtorita` appellanti taghmel referenza espressa ghall-Artikolu 1125 tal-Kodici Civili;

Ghal dan l-appell is-socjeta` appellata ssollewat b' eccezzjoni t-tardivita` ta' l-appell. Hi tikkontendi illi la l-Awtorita` appellanti rceviet il-kopja tad-decizjoni fil-25 ta' Awissu, 2007, it-terminu ta' hmistax-il gurnata prevvist mill-ligi ghall-proponiment ta' l-appell gie ecedut b' gurnata. Ghas-sostenn ta' dan l-assunt taghha esebiet fotokopja ta' "Advice of Receipt" postali li kienet turi l-precitata data taht il-firma ta' l-ufficcjal postali. Din il-Qorti tistqarr li mhix konvinta ghal kollox minn din il-prova. Dan ghar-raguni li ma tressqet ebda prova konkreta la tal-*pink card* u lanqas ta' l-identifikazzjoni tal-persuna li allegatament irceviet f' isem l-Awtorita` l-busta bid-decizjoni. Lanqas almenu ma ntalab li jitharrek il-pustier ghal verifika u l-attendibilita` ta' dik ir-ricevuta postali sottoskritta minnu. Facli hafna ghal din il-Qorti li kieku kellha taccetta l-assunt tal-kumpanija appellata illi l-appell ghandu jitqies *fuori termine* ghax b' hekk kien jigi arrestat l-istharrig mill-Qorti tal-mertu ta' l-aggravju. Izda la din il-Qorti qatt ma ttrattat l-appelli devoluti b' dan il-mod legger u qatt ma fittxet skappattoji biex tevita d-doveri taghha mhix lanqas ser taghmlu f' dan il-kaz. Konsegwentement u ghar-ragunijiet suesposti qed tidisponi mill-eccezzjoni sottomessa billi tirrespingiha;

Fuq il-konsiderazzjoni tal-mertu ta' l-appell tinhass il-htiega li, qabel kull osservazzjoni ohra, il-Qorti tfakkar illi skond it-termini precizi ta' l-Artikolu 70A, kif ulterjorment supplimentat bis-subinciz (3) ta' l-istess artikolu, is-sindakar minn din il-Qorti jista` biss jigi solleccitat "fuq punt

ta' ligi li jitnissel minn decizjoni finali". Dan, *inter alia*, fis-sens illi din il-Qorti trid tkun sodisfatta illi d-decizjoni dwar il-punt ta' ligi "taffettwa sostanzjalment id-drittijiet ta' wahda jew aktar mill-partijiet" (inciz 3a) u fuq il-fatti accertati d-decizjoni ta' l-Arbitru dwar il-punt ta' ligi "hija *prima facie* miftuha ghal dubbju serju" (inciz 3c);

Mill-mod kif konceptit id-dritt ta' l-appell lil din il-Qorti fl-imsemmi Artikolu 70A, jidher li l-Att ta' l-1996 dwar l-Arbitragg (Kapitolu 387) segwa l-volonta` legislattiva gja dettata f' certi ligijiet specjali ohra. Ad ezempju, l-Artikolu 15 (2) ta' l-Att 1 ta' l-1992 dwar l-Ippjanar ta' l-Izvilupp. Mill-punto di vista pratiku-kazistiku dan l-ahhar provvediment gie mfisher illi "din il-Qorti tista' tirrevedi biss (sottlinejar tal-Qorti) kwistjonijiet dwar punt ta' dritt li jkun decizi mill-Bord. Dan ifisser li m' hemmx appell fuq kwistjonijiet ta' fatt, fuq kwistjoni ta' apprezzament ta' provi. M' hemmx dritt ta' appell lanqas fuq punti ta' ligi sakemm dawn ma jkunux espressament decizi fid-decizjoni appellata Biex l-appell ikun ammissibbli, il-kwistjoni trid tkun necessarjament dwar kwistjoni ta' dritt, li tkun qamet kontroversja dwarha, li tkun giet diskussa u elucidata fil-motivazzjoni u li tkun giet definita fid-decizjoni appellata". (Ara "**Emanuel Mifsud -vs- Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp**", Appell, 31 ta' Mejju, 1996; "**Zaren Camilleri -vs- L-Awtorita` ta' l-Ippjanar**", Appell, 28 ta' Frar, 1997 u "**Charles Farrugia -vs- L-Awtorita` ta' l-Ippjanar**", Appell, 20 ta' Marzu, 1998, fost ohrajn);

Dan kollu qed jigi rilevat in kwantu mill-investigazzjoni tad-decizjoni appellata, lil din il-Qorti ma jirrizultalhiex li l-Arbitru ssofferma fuq, u wisq anqas iddecieda, punt ta' ligi devolut lilu mill-partijiet jew estratt mill-kunsiderazzjonijiet fattwali tal-kontroversja. Invece, hu evidentement car illi l-Arbitru llimita ruhu ghall-istharrig tal-provi, sija testimonjali jew dokumentali, u fuq ir-rikostruzzjoni valutattiva tieghu ta' dawn l-istess provi irraguna li dak asserit mis-socjeta` appellata fil-premessi tat-talba taghha ghad-danni kien fondat. Essenzjalment, l-Arbitru mmotiva dik id-decizjoni

tieghu fir-riflessjoni illi l-Awtorita` appellanti esigiet kondizzjoni fit-*tender* taghha li fattwalment ma setghetx tigi onorata ghax din ma kienetx possibbli, gjaladarba l-ebda fornitur rinomat ma seta' jipprovdi hgieg li kien jirrezisti 1300 Pascals. Ghall-Arbitru din ma kienetx semplici "*difficultas praestand*" izda impossibilita` rikonducibbli ghax-xorta ta' materjal li kien programmat li jintuza, u tali impossibilita` kienet komunikata anke lill-Awtorita` appellanti;

Ankorke din il-Qorti mhix strettament tenuta li tindaga fuq dan l-aspett, l-Artikolu 1125 Kodici Civili, ghal liema tirreferi l-Awtorita` appellanti jrid jinqara unitament ma' dak ta' l-Artikolu 1133 ta' l-istess Kodici bir-referenza li dan jaghmel ghan-nuqqas ta' ezekuzzjoni dovuta ghal "xi haga barranija" li taghha d-debitur ta' l-obbligazzjoni ma jkunx fi htija. "*La causa estranea di cui si fa menzione nell' articolo 839 della Ordinanza No VII del 1868 (fil-prezent Artikolu 1133, Kodici Civili) ha luogo nel caso che l' inadempimento assoluto o relativo provenga non dal debitore ma di una causa da lui non dipendente e per cui egli non dovrebbe rispondere*" ("**Antonio Micallef et nomine -vs- Negte Giuseppe Gasan nomine**", Appell Kummercjali, 6 ta' Gunju, 1930). Fil-kaz prezenti, ghallanqas fuq l-affermazzjoni ta' l-Arbitru fis-sentenza appellata, is-socjeta` appellata pprovat, ghas-sodisfazzjon tieghu, illi kienet tizisti impossibilita`, oggettiva u assoluta, li kienet timpedilha l-fazi ezekuttiva ta' l-obbligazzjoni minn kif mill-Awtorita` appellanti pretiz. Impossibilita` din mhux dovuta ghal xi kolpa tas-socjeta` appellata fit-twettiq tal-prestazzjonijiet taghha imma ghal xi haga barranija li taghha hi ma kienetx responsabbli nonostante l-isforz diligenti taghha;

Anke indipendentement minn din l-analisi, dejjem biex wiehed jirrikollega ruhu mal-punt aktar 'il fuq imqanqal, dak li in sostanza qed jintalab minn din il-Qorti bl-appell interpost hi stedina biex il-Qorti taghmel accertament *ex novo* tal-provi, primarjament certi dokumenti esebiti. A propozitu, gja gie rilevat illi lil din il-Qorti mhix konsentita

ri-ezami tal-fatti tal-kaz u lanqas sindakar dwar l-apprezzament tal-provi jew, ukoll, ta' xi valutazzjoni zbaljata maghmula mill-Arbitru. Fl-istess termini stretti ta' l-Att *de quo*, l-istharrig mill-Qorti ta' revizjoni hu wiehed limitat ghal "punt ta' ligi li jitnissel minn decizjoni finali" u mhux ukoll ghac-censura tal-konvinciment ta' l-Arbitru fuq l-elementi probatorji;

Propriu f' sentenza ta' l-1999 tal-**Qorti ta' Kassazzjoni Taljana** (Numru 5633, riportata fil-**"Commentario breve al Codice di Procedura Civile"**, Carpi, Colesanti e Tarruffo, Edizione Cedam, 2004, pagina 2481) jinghad b' risposta ghal certi osservazzjonijiet maghmula mill-Awtorita` appellanti illi:-

L' ammissibilita` della denuncia di nullita` del lodo arbitrale per inosservanza di regole di diritto ("error in iudicando") in quanto ancorata agli elementi accertati dagli arbitri, postula l' allegazione esplicita dell' erroneita del canone di diritto applicato rispetto a detti elementi, e non è quindi, proponibile in collegamento con la mera deduzione di lacune d' indagine e di motivazione, che potrebbe evidenziare l' inosservanza di legge solo all' esito del riscontro dell' omesso e inadeguato esame di circostanze di carattere decisivo";

Kull kumment agguntiv iehor hu forsi superfluwu. B' danakollu, din il-Qorti ma tistax ma ssemmix ukoll illi skond l-Artikolu 70(B) (1) ta' l-Att min jikkontesta d-decizjoni ghandu mhux biss l-oneru li jidentifika l-punt ta' ligi li hu jassumi li gie vjolat mill-Arbitru izda wkoll li jipprovdi t-tifsira korretta tieghu. Fi kliem iehor, ir-rikjam generiku li taghmel l-Awtorita` appellanti ghad-disposizzjoni tal-ligi mhux bizzzejjed biex jittiehed kunsiderazzjoni debita ta' l-aggravju jekk dan, imbaghad, ma jikkontjenix dik ukoll ta' l-interpretazzjoni korretta tal-punt ta' ligi. Fattur dan li fl-appell prezenti ma jidherx li gie sew ikkultivat.

Kopja Informali ta' Sentenza

Ghal dawn il-motivi din il-Qorti, filwaqt li ghar-ragunijiet suesposti tirrespingi l-eccezzjoni tat-tardivita` ta' l-appell imqanqla mis-socjeta` appellata, qed tichad l-appell fil-mertu u tikkonferma d-decizjoni arbitrali, bl-ispejjez ta' din il-procedura jitbataw mill-Awtorita` appellanti.

< Sentenza Finali >

-----TMIEM-----