



## **QORTI TA' L-APPELL**

**ONOR. IMHALLEF  
RAYMOND C. PACE**

Seduta ta' l-10 ta' Lulju, 2012

Appell Civili Numru. 5/2012

**United Equipment Company (UNEC) Ltd**

**vs**

1. **Id-Direttur tal-  
Kuntratti, u**
2. **Il-Korporazzjoni  
Enemalta ghal kull interess li jista' ikollha**

**Il-Qorti,**

### **I. PRELIMINARI.**

Illi fit-30 ta' Jannar 2012 il-Bord ta' Revizjoni dwar Kuntratti Pubblici (il-Bord) ippronunzja s-segwenti decizjoni fl-ismijiet premissi CT/4018/2011; GN/DPS/4002/PC3/2011 – Kaz Numru 365:-

*“After the Chairman’s brief introduction, the appellant company’s representative was invited to explain the motives of his company’s objection.*

*Prof. Ian Refalo, legal representative of United Equipment (UNEC) Ltd, the appellant company, remarked that it would appear that there was a mix-up in the presentation of the standards requested in the tender document and he invited Prof Alfred Vella, an expert in chemistry, to explain the technical aspects of the issues involved.*

*Prof. Alfred Vella, representing the appellant, under oath, gave the following evidence:-*

*i. by letter dated 30<sup>th</sup> September 2011 the Department of Contracts informed United Equipment UNEC Ltd that its bid did not satisfy the tender conditions in the following respects due to the fact that...*

*"Several parameters of the submitted Urea analysis exceed the limits requested in the tender specifications; specifically the following parameters: Iron, Calcium, Magnesium, Phosphates, Potassium, Heavy Metals, where the presence (in mg/kg) of these elements/compounds in the proposed urea exceeded the limits allowed by the tender specifications".*

*ii. clause 2 - Technical Requirements for Urea Granules - stated that:*

*‘The urea granules supplied shall comply with ISO 22241-1 for purity or (DIN 70070). The urea shall have the following specifications:*

*Table 1 — Urea Granules Specifications - Urea quality must comply -with the ISO 22241-1 standards’*

*iii. clause 1.0 of the same specifications stated, among other things, that:*

*‘To comply with the NOx emission regulations of the islands, the engines are fitted with a Selective Catalytic*

*Reducer (SRC) on the exhaust. The NOx reduction is obtained with the reaction of an ammonia rich reactant with the NOx emissions passing over a catalyst. In this case the ammonia rich reactant is a 40% solution of urea dissolved in demineralised water,'*

*iv. chemicals, invariably, contained a degree of contamination and a chemical with a high amount of contaminants would be suitable for certain uses whereas if it had a low level of contaminants it would be suitable for other uses, say, medical purposes.*

*v. whilst ISO standards referred to the 'solution' namely solidified urea dissolved in mineralized water, Table 1 referred to 'urea granules', i.e. the urea in its solid form;*

*vi. the urea granules that were being proposed by United Equipment UNEC Ltd when dissolved in water would comply with ISO 22241-1 as stipulated in the tender document;*

*vii. on the other hand, the urea granules specifications listed at Table 1 of the tender document referred to a more concentrated type of urea (more pure) than that required to produce the urea solution according to ISO 22241-1 referred in the same tender specifications;*

*viii. by way of explanation, this was like buying high quality table salt to spread it over snow/ice covered roads when salt of an inferior quality would have served the same purpose, in other words, it was a waste of money to procure high grade urea granules that could well be used in the pharmaceutical industry when a lower grade urea was suitable to produce the ISO standard requested for the catalyst reducer;*

*ix. if one were to stick strictly to the tender document, it also required that the presence of heavy metals had to be within certain levels but without specifying what these metals were when there were some 60 different types of heavy metals;*

*and*

*x. in the case of the appellant company's submission, it was true that the certain parameters of the tender with regard to iron, calcium, magnesium, phosphates, potassium, heavy metals were slightly exceeded but, still., the product would have met the ISO standard stipulated in the same tender document.*

*The Chairman Public Contracts Review Board remarked that if, at tendering stage, the bidder was aware that the specifications were deficient in certain respect then the company's representative/s could have raised such issues prior to the closing date of the tender so that those issues would be sorted out and communicated to prospective bidders by clarification notices.*

*Prof Refalo intervened to argue that, according to his client's technical personnel, the urea granules that were being proposed, when dissolved in water, would comply with ISO 22241-1 as stipulated in the tender document and, as a result, the tender submission was compliant.*

*Dr Antoine Cremona, legal representative of Enemalta Corporation, made the following remarks:-*

*a. the appellant company's tender submission was not compliant with the specifications laid down in Table 1 of clause 2.1 - Technical Requirements for Urea Granules - which matter of fact was admitted by Prof. Vella;*

*b. this supply was required for the catalyst reducer at the Delimara Power Station to treat the emissions;*

*c. the contractor for the overall project, BWSC, had engaged a sub-contractor, H+H Engineering & Service GmbH to provide the selective catalytic reducers and the specifications for the urea granules were furnished by the catalyst manufacturer and Enemalta Corporation was requested to hold on to those specifications otherwise the guarantee of the equipment could be jeopardized - in fact*

*Table 1 was pasted on the tender document from the technical specifications provided by the sub-contractor;*

*d. five contractors acquired the tender document but only United Equipment UNEC Ltd did effectively submit a bid;*

*e. BWSC had been carrying out tests on the use of urea and it transpired to Enemalta Corporation that, in these tests, BWSC was using urea with the same specifications as those offered by the appellant company and the results were satisfactory;*

*f. the situation had changed from tender issuing stage to tender evaluation stage such that the urea granules did not have to be as concentrated as indicated in the parameters of the tender;*

*g. on the procurement procedure side, Enemalta Corporation was faced with the situation or dilemma that the product offered by the appellant company was suitable for its requirements even if it was not according to specifications but if the appellant company's offer were to be accepted, that would amount to altering the tender specifications during the tendering process;*

*and*

*h. it could also be the case that the other four contractors who had acquired the tender document but refrained from tendering might have participated had the tender specifications not been those published but equivalent to those proposed by the appellant.*

*Prof. Vella explained that:-*

*a. ISO 22241-1 referred to a 32.5% solution of urea whereas the technical specifications at clause 1.0 'Introduction' (page 50) stated, among other things, that in "this case the ammonia rich reactant is a 40% solution of urea dissolved in demineralised water;*

*b. if his client's solution of 32.5% urea were to be changed to a solution of 40% urea then the level of heavy metal contaminants would still be compliant with tender requirements but the proposal would then become marginally out of specifications as indicated in the letter of rejection - for example, in the cases of iron, magnesium and phosphates the value would read 0.6 instead of 0.5 mg/kg;*

*c. he would categorically refuse the argument that equipment would not function properly if, say, the phosphates content in the solution was 0.6 instead of 0.5 but, on the other hand, he did appreciate the fact that for the adjudicating board 0.6 did exceed the limit of 0.5;*

*and*

*d. the problem arose with regard to clause 2.1 (page 50) because what was being requested in the first sentence, ISO 22241-1, did not match the specifications in the second sentence which went beyond that ISO standard since the ISO standard of 32.5% could vary from 31.8% and 33.2% but it could not reach 40%.*

*Dr. Cremona stated that Enemalta Corporation had since exchanged correspondence with BWSC questioning the requirement of high quality urea when urea of inferior quality served the same purpose.*

*Prof. Refalo concluded by: -*

*a. discarding the argument that if his client's bid were to be accepted it would amount to changing the goalposts during the tendering process because he insisted that his client's proposal was compliant with ISO 22241 -1 as stipulated in the tender document both in clause 2.1 and as repeated in Table 1 itself;*

*b. insisting that his client was positive that he had interpreted the specifications correctly and that he should not be penalized for having done that;*

*and*

*c. declaring that, in the case of the other tenderers who had acquired the tender document but did not submit an offer, they could have either interpreted the specifications in the same way as his client did or, if they detected a conflict between the ISO 22241-1 and Table 1 then they could have asked for a clarification*

*Dr Cremona concluded that:-*

*a. developments had taken place after the closing date of the tender which put Enemalta Corporation in a dilemma in the sense that the appellant company's proposal would meet its requirements but that same proposal was not according to published technical specifications;*

*b. one had to appreciate that, on the basis of the information that Enemalta Corporation had at the time the tender was issued it had to adhere to the requirements of the catalyst manufacturer in order not to invalidate the guarantee;*

*and*

*c. it was at a later stage that the catalyst manufacturer confirmed to Enemalta Corporation that if the urea were to be of the same type as that tested by B WSC, which was similar to that proposed by the appellant company, then the guarantee would still remain valid.*

*At this point the hearing was brought to a close.*

*This Board,*

- having noted that the appellant company, in terms of the reasoned letter of objection dated 17<sup>th</sup> October 2011 and through the verbal submissions made during the hearing held on the 11<sup>th</sup> January 2012, had objected against the decision of the Contracts Department to*

*disqualify its offer as technically non-compliant and to recommend tender cancellation;*

- *having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by letter dated 30<sup>th</sup> September 2011 the Department of Contracts informed United Equipment UNEC Ltd that its bid did not satisfy the tender conditions due to the fact that several parameters of the submitted Urea analysis exceed the limits requested in the tender specifications; specifically the following parameters: Iron, Calcium, Magnesium, Phosphates, Potassium, Heavy Metals, where the presence (in mg/kg) of these elements/compounds in the proposed urea exceeded the limits allowed by the tender specifications, (b) chemicals, invariably, contained a degree of contamination and a chemical with a high amount of contaminants would be suitable for certain uses whereas if it had a low level of contaminants it would be suitable for other uses, say, medical purposes, (c) whilst ISO standards referred to the 'solution', namely solidified urea dissolved in mineralized water, Table 1 referred to 'urea granules', i.e. the urea in its solid form, (d) whilst the urea granules that were being proposed by United Equipment UNEC Ltd when dissolved in water would comply with ISO 22241-1 as stipulated in the tender document, on the other hand, the urea granules specifications listed at Table 1 of the tender document referred to a more concentrated type of urea (more pure) than that required to produce the urea solution according to ISO 22241 -1 referred in the same tender specifications, (e) if one were to stick strictly to the tender document, it also required that the presence of heavy metals had to be within certain levels but without specifying what these metals were when there were some 60 different types of heavy metals, (f) in the case of the appellant company's submission, it was true that the certain parameters of the tender with regard to iron, calcium, magnesium, phosphates, potassium, heavy metals were slightly exceeded but, still, the product would have met the ISO standard stipulated in the same tender document, (g) whilst ISO 22241-1 referred to a 32.5% solution of urea whereas the technical specifications at*



*clause 1.0 'Introduction' (page 50) stated, among other things, that in "this case the ammonia rich reactant is a 40% solution of urea dissolved in demineralised -water ", if the appellant company's solution of 32.5% urea were to be changed to a solution of 40% urea then the level of heavy metal contaminants would still be compliant with tender requirements but the proposal would then become marginally out of specifications as indicated in the letter of rejection - for example, in the cases of iron, magnesium and phosphates the value would read 0.6 instead of 0.5 mg/kg, (h) whilst Prof Vella would categorically refuse the argument that equipment would not function properly if, say, the phosphates content in the solution was 0.6 instead of 0.5 but, on the other hand, he did appreciate the fact that for the adjudicating board 0.6 did exceed the limit of 0.5, on the other hand, he did appreciate the fact that for the adjudicating board 0.6 did exceed the limit of 0.5, (i) the problem arose with regard to clause 2.1 (page 50) because what was being requested in the first sentence, ISO 22241-1, did not match the specifications in the second sentence which went beyond that ISO standard since the ISO standard of 32.5% could vary from 31.8% and 33.2% but it could not reach 40% and (j) according to Prof Refalo, (i) one should discard the argument that if his client's bid were, to be accepted it would amount to changing the goalposts during the tendering process because he insisted that his client's proposal was compliant with ISO 22241-1 as stipulated in the tender document both in clause 2.1 and as repeated in Table 1 itself, (2) his client had interpreted the specifications correctly and that the company should not be penalized for having done that and (3) in the case of the other tenderers who had acquired the tender document but did not submit an offer, they could have either interpreted the specifications in the same way as his client did or, if they detected a conflict between the ISO 22241-1 and Table 1 then they could have asked for a clarification;*

- having considered the contracting authority's representative's submissions, namely that (a) the appellant company's tender submission was not compliant*

*with the specifications laid down in Table 1 of clause 2.1 - Technical Requirements for Urea Granules - which matter of fact was admitted by Prof. Vella, (b) this supply was required for the catalyst reducer at the Delimara Power Station to treat the emissions, (c) the contractor for the overall project, B WSC, had engaged a sub-contractor, H+H Engineering & Service GmbH to provide the selective catalytic reducers and the specifications for the urea granules were furnished by the catalyst manufacturer and Enemalta Corporation was requested to hold on to those specifications otherwise the guarantee of the equipment could be jeopardized - in fact Table 1 was pasted on the tender document from the technical specifications provided by the subcontractor, (d) five contractors acquired the tender document but only United Equipment UNEC Ltd did effectively submit a bid, (e) BWSC had been carrying out tests on the use of urea and it transpired to Enemalta Corporation that, in these tests, BWSC was using urea with the same specifications as those offered by the appellant company and the results were satisfactory, (f) the situation had changed from tender issuing stage to tender evaluation stage such that the urea granules did not have to be as concentrated as indicated in the parameters of the tender, (g) on the procurement procedure side, Enemalta Corporation was faced with the situation or dilemma that the product offered by the appellant company was suitable for its requirements even if it was not according to specifications but if the appellant company's offer were to be accepted, that would amount to altering the tender specifications during the tendering process, (h) it could also be the case that the other four contractors who had acquired the tender document but refrained from tendering might have participated had the tender specifications not been those published but equivalent to those proposed by the appellant, (i) Enemalta Corporation had since exchanged correspondence with BWSC questioning the requirement of high quality urea when urea of inferior quality served the same purpose, (j) developments had taken place after the closing date of the tender which put Enemalta Corporation in a dilemma in the sense that the appellant company's proposal would meet its requirements but that*

*same proposal was not according to published technical specifications, (k) one had to appreciate that, on the basis of the information that Enemalta Corporation had at the time the tender was issued it had to adhere to the requirements of the catalyst manufacturer in order not to invalidate the guarantee and (1) it was at a later stage that the catalyst manufacturer confirmed to Enemalta Corporation that if the urea were to be of the same type as that tested by BWSC, which was similar to that proposed by the appellant company, then the guarantee would still remain valid;*

*reached the following conclusions:*

*1. The Public Contracts Review Board opines that the situation had changed from tender issuing stage to tender evaluation stage such that the urea granules did not have to be as concentrated as indicated in the parameters of the tender. Furthermore, it also transpired that BWSC had been carrying out tests on the use of urea and it is a known fact that the same company was using urea with the same specifications as those offered by the appellant company and the results were satisfactory apart from being considerably cheaper.*

*2. The Public Contracts Review Board is also fully cognisant of the fact that five contractors had originally acquired the tender document but only United Equipment UNEC Ltd did, effectively, submit a bid.*

*3. The Public Contracts Review Board argues that, on the procurement procedure side, Enemalta Corporation was faced with the situation or dilemma that the product offered by the appellant company was suitable for its requirements even if it was not according to specifications. However, this Board feels that if the appellant company's offer were to be accepted, that would amount to altering the tender specifications during the tendering process, possibly being totally oblivious of the fact that any of the other four - or others for all that matters, who could have reneged on the opportunity to acquire the tender document let alone, effectively, bidding*

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*- could have participated had the specifications been lowered.*

*In view of the above this Board recommends that this tender be reissued bearing new standards which are equally acceptable but which result to be likewise effective as well as being cheaper. Undoubtedly, this would place all potential bidders on a level playing field and, possibly, allow more participants to submit their cheaper offers.*

*Considering the prevailing circumstances which transpired during the hearing, the Public Contracts Review Board recommends that the deposit paid by the appellant company should be reimbursed."*

Rat ir-rikors tal-appell ta' United Equipment Company (UNEC) Ltd. (C 10827) datat 15 ta' Frar 2012 fejn talbet lill-Qorti sabiex tvarja d-decizjoni tat-30 ta' Jannar 2012 moghtija mill-Bord ta' Revizjoni fil-kaz numru 365 u dan fis-sens illi tikkonfermaha in kwantu dina rrakomandat ir-rifuzjoni tad-depozitu tal-appell mhallas mis-socjeta` esponenti, thassarha u tannullaha in kwantu din cahdet it-talba tas-socjeta` esponenti, u tghaddi minflok billi taqta' u tiddeciedi illi l-kuntratt bin-numru CT/4018/2011; GN/DPS/4002/PC3/2011 bl-isem **Period Contract for the Supply and Delivery of Granular Urea to Delimara Power Station** jinghata lis-socjeta` esponenti. Bl-ispejjez kontra l-appellati.

Rat li dan l-appell kien appuntat ghas-smigh ghas-seduta tal-10 ta' Mejju 2012.

Rat ir-risposta tad-Direttur tal-Kuntratti datata 28 ta' Frar 2012 a fol 14 tal-process fejn sostna ghall-motivi kollha esposti, din il-Qorti qed tigi miltuba tichad ir-rikors imressaq mis-socjeta` United Equipment Company (UNEC) Limited, bl-ispejjez kontra taghha.

Rat ir-rikors tas-socjeta` appellanti United Equipment Company (UNEC) Ltd (C 10827) datat 15 ta' Marzu 2012 a fol 67 tal-process fejn talbet lill-Qorti joghgobha tirrikjama s-smigh tal-appell odjern ghal data iktar vicina; u

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I-Qorti, wara li rat ir-risposta datata 2 ta' April 2012, laqghet it-talba u rrikjamat l-appell ghas-smigh ghad-19 ta' April 2012.

Rat ir-risposta tal-appell tal-Korporazzjoni Enemalta datata 26 ta' Marzu 2012 a fol 72 tal-process fejn sostniet ghar-ragunji hemm indikati li d-decizjoni mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici hija gusta u timmerita konferma u ghalhekk l-appell interpost ghandu jigi michud bl-ispejjez kollha ta' din l-istanza kontra s-socjeta` appellanti.

Rat il-verbal tas-seduta mizmuma fl-19 ta' April 2012 fejn meta ssejjah l-appell deheru Dr. Chris Falzon Scerri ghad-Direttur tal-kuntratti, Dr. Antoine Cremona ghal Enemalta u Dr. John Gauci ghas-socjeta` appellanti. Id-difensuri nfurmaw lill-Qorti illi gew notifikati bl-atti kollha relattivi, inkluz bid-digriet tar-rikjam tal-kawza ghallum. Dr. John Gauci esebixxa sentenza li giet immarkata bhala Dok "JG". Deher ukoll Dr. Franco Agius ghad-Direttur tal-Kuntratti. Id-difensuri trattaw il-kaz. L-appell gie differit ghas-sentenza in difett ta' ostakolu ghall-24 ta' Mejju 2012 u wara ghat-28 ta' Gunju 2012.

Rat li b'digriet datat 5 ta' Gunju 2012 dan l-appell gie rikjamat ghad-decizjoni ghas-26 ta' Gunju 2012 u d-difensuri tal-partijiet taw ruhhom notifikati ghall-partijiet kollha nvoluti f'din il-kawza b'tali digriet tar-rikjam tal-kawza.

Rat li l-kawza gie differita ghas-sentenza ghall-10 ta' Lulju 2012.

Rat in-nota tas-socjeta` appellanti United Equipment Company (UNEC) Limited (C 10827) datata 20 ta' April 2012 a fol 95 tal-process li permezz taghha gew esebiti kopji tas-sentenzi li saret referenza ghalihom waqt it-trattazzjoni tal-appell.

Rat l-atti kollha tal-istess kawza inkluz id-decizjoni mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (il-Bord) fl-ismijiet premessi datata 30 ta' Jannar 2012.

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Rat id-dokumenti esebiti.

Rat l-atti kollha l-oħra tal-kawza.

## **II. KONSIDERAZZJONIJIET.**

Illi l-appell odjern huwa fis-sens li (a) l-Bord ta' Revizzjoni dwar Kuntratti Pubblici (il-Bord) ma' setghax jirrakomanda li t-*tender* jinhareg mill-gdid bi *standards* godda meta gie ampjament ippruvat li l-offerta tas-socjeta' appellanti kienet konformi mal-*istandards* ikkwotati u senjatament l-ISO -22241 – 1 u dan għaliex jirrizulta li l-offerta tas-socjeta' appellanti kienu konformi mal-ispecificazzjonijiet teknici ndikati fl-istess Sejha Għall Offerti (SO) li kienu jehtiegu li l-materjal fornit magħrufa bħala urea jkun konformi mal-istess *Standard ISO – 22241 – 1*, u dan iktar u iktar meta l-Korporazzjoni Enemalta kkonfermat li l-kimika offruta mis-socjeta' appellanti kienet attwalment tajba sabiex jigi operat l-apparat magħruf bħala *catalyser*, ma għandiex allura tinhareg Sejha għall-Offerti (SO) għida u dan għaliex l-istess sejha kienet konformi ma' dak rikjest skond **ir-Regolamenti Dwar Kuntratti Pubblici (Avviz Legali 296 tal-2010)** u l-istess sejha għall-offerta kienet tirrikjedi li l-kimika rikjesta kellha tkun konformi mal-istandard magħruf bħala ISO – 22241 -1. Jidher li l-Korporazzjoni Enemalta interpretat tali *standards* fi stat pur tagħhom mentri l-appellanti interpretaw l-istess *standards* fl-istat dilwit tagħhom hekk kif rikjest fl-istess Sejha għall-Offerti (SO) u tali interpretazzjoni tal-appellanti għall dak rikjest fl-istess Sejha Għal Offerti (SO) rrizulta li kien korrett minn dak li rrizulta quddiem il-Bord ta' Revizzjoni dwar Kuntratti Pubblici għaliex (i) jikkonforma mal-istandard ikkwotat fis-SO; (ii) huwa l-prodott li għandha bzonn il-Korporazzjoni; (iii) il-manifattur tal-*catalyser* fejn ser jintuza l-prodott ikkonferma li l-prodott offert mis-socjeta' appellanti huwa idoneu għall tali uzu; (iv) l-istess prodott qed attwalment jintuza bi specificazzjonijiet identici bħal dak offerti mis-socjeta' appellanti; dwar specificazzjonijiet teknici skond **Regolament 46 (2) (a) tar-Regolamenti Dwar Kuntratti**

**Pubblici – Avviz Legali 296 tal-2010)** huwa rikjest inter alia li dawn ikunu konformi ma *“standards internazzjonali”* u r-riferenza ghall-istandard ISO hija attwalment riferenza ghal tali standard internazzjonali u la darba gie ppruvat li l-offerta tas-socjeta' appellanti hija konformi ghall-istess mela allura l-istess offerta ma setghatx tigi rifjutata; dan iktar u iktar meta **Regolament 46 (3)** jipprovdi li meta l-Awtorita' kontraenti taghzel li taghmel riferenza ghall-ispecificazzjonijiet fis-**subregolament (2) (a)** *“ma tistax tichad offerta ghar-ragunijiet li l-prodotti u s-servizzi li dwarhom issir l-offerta ma jkun konformi mal-ispecificazzjonijiet li ghalihom tkun ghamlet riferenza, la darba l-offerent jaghti prova fl-offerta tieghu ghas-sodisfazzjon tal-awtorita' kontraenti, b'kull mezz xieraq li jkun, li s-soluzzjoni li jkun qieghed jipproponi jkun jissodisfaw b'mod ekwivalenti il-htiegijiet imfissra bl-ispecificazzjonijiet teknici. Mezz xieraq jista' jkun li jsir dossier tekniku tal-produttur jew rapport ta' test minn korp rikonoxxut”* u dan skond is-socjeta' appellanti gie hekk sodisfatt kif skond hija l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici sostna fid-decizjoni tieghu; (b) saru konsiderazzjoni rrelevanti fid-decizjoni ghaliex gie deciz li l-kuntratt ma jinghatax lis-socjeta' esponenti ghaliex kien hemm erba' kuntratturi ohra li gabru s-SO izda ma tefghux l-offerta taghhom u dan ma kellhux issir ghaliex ma kien hemm xejn x'izomm jew jimpedixxi lill istess kuntratturi li jissottomettu l-offerti taghhom; jekk b'xi mod xi hadd minnhom hassu prekluz ghal xi raguni jew ohra li mhux cara setghu jirrikoru ghar-rimedji li l-Ligi stess taghti bhal dawn ghall kjarifiki opportuni jew ghall xi rimedju pre-kontrattwali lill-Bord stess skont ir-**Regolament 85 (1) (a) tar-Regolamenti dwar Kuntratti Pubblici.**

Illi ghall dan l-appell id-Direttur tal-Kuntratti sostna li (a) la darba din il-procedura hija msejjsa fuq ir-**regolament 85 (5) tar-Regolamenti dwar il-Kuntratti Pubblici**, mela allura din hija biss riferenza u mhux appell veru u proprju u dan anke ghaliex ir-**regolament 85 (9) tal-2010 dwar Kuntratti Pubblici (Avviz Legali 296-2010)** jipprovdi li d-decizjonijiet tal-Bord jkunu *“finali u konklussivi dwar l-ghoti tal-kuntratti”*, tant li r-**regolament 85 (8) (b)** jispecifica li d-decizjonijiet tal-Bord jikkostitwixxu titolu ezekuttiv tant li l-

istess jista' jigi infurzat skond dak li jipprovdi l-**artikolu 273 tal-Kap. 12**; (b) l-offerta tas-socjeta' appellanti ma kienitx konformi ma' dak rikjest fis-SO dwar l-ispecificazzjonijiet teknici skond kif indikat fl-ittra datata 30 ta' Settembru 2011 (Dok. "6") u dan kif ammess mill-Professor Vella fejn huwa jghid li l-prodott offert mill-appellanti ma kienx konformi mal-ispecificazzjonijiet indikati fit-tabella f'pagna 50 u dan ghaliex l-appellat hawn isostni li l-granuli ta' urea kellhom ikunu konformi mhux biss mal-ISO 0 22241 – 1 izda wkoll mal-parametri indikati fit-tabella numru 1, u dan ghaliex is-sejha ghall-offerti kienet dwar granuli ta' urea fi stat solidu u mhux likwidu taghhom u f'dan il-kuntest huwa mmaterjali li l-prodott offert kien jaqdi l-esigenzi tal-awtorita' kontraenti ghaliex l-evalwazzjoni trid issir biss fid-dawl ta' dawk il-kriterji li jkunu mnizzla u ppublikati fis-sejha ghall-offerti; kieku giet accettata l-offerta dan kien ifisser bdil fil-kriterji teknici u ghalhekk ikun ksur tal-principju ta' non diskriminazzjoni sancit fir-**regolament 4 tar-Regolamenti dwar il-Kuntratti Pubblici; r-regolament 46 (3) tar-Regolament** ma setghax jigi applikat ghaliex hawn il-prodott offert ma kienx ekwivalenti ghall-ispecificazzjonijiet teknici; (c) fil-verita' dak li ddecideda l-Bord kien li jekk tigi accettata l-offerta tas-socjeta' appellanti jkun ifisser li jkun ser tibdil tat-*"tender specifications during the tendering process"*, u dan setgha kien ta' pregudizzju kemm ghall dawk l-entitajiet li gabru l-offerta u kemm ghall dak li potenzjalment setghu gabru l-offerta la darba inbiddu l-ispecificazzjoni teknici u jinghad li l-Bord kien korrett ghaliex ghandhu jkun hemm *equal treatment of tenderers* skond kif deciz fil-kaz il-**Kummissjoni vs Danimarka (Stoerbaelt) (Case C – 243-89)** u kif provdut fid-**Direttiva 2004/18/EC** fejn skond l-**artikolu 2** jinghad li *"Contracting authorities shall treat economic operators equally and non discriminatorily and shall act in a transparent way"*. B'din id-decizjoni allura l-Bord ma kienx qed jaghmel konsiderazzjonijiet irrelevanti izda kien qed jimxi mal-principji ta' ugwaljanza u tal-kompetizzjoni gusta kif indikata fl-imsemmija Direttiva u skond ir-**regolamenti 4, 28, u 46 (1) tar-Regolamenti dwar Kuntratti Pubblici.**



Illi fl-ahharnett il-Korporazzjoni Enemalta jsostni li (a) ma hijiex il-legittimu kontradittur ghaliex skond **I-Avviz Legali 296/2010** l-Awtorita' kontraenti hija d-Direttur tal-Kuntratti u mhux il-Korporazzjoni Enemalta; (b) l-offerta tas-socjeta' appellanti ma kienitx konformi mal-ispecificazzjonijiet teknici fis-SO u l-fatt li waqt l-process ta' aggradikazzjoni tat-tender irrizulta li l-manifatturi tal-impjant fejn kien ser jintuza l-prodott oggett tat-tender kienu qed juzaw huma stess kimika li ma kienitx konformi mal-ispecificazzjonijiet tas-SO li kienu provduti proprju mis-socjeta' manufattrici H + H Engineering & Service GmbH, izda b'daqshekk ma jfissirx li l-offerta tas-socjeta' appellanti ghaliex tajba ghall iskop li kien intiz ghaliha, b'daqshekk kienet konformi mat-tender, ghaliex ma kienitx. La darba dan huwa l-kaz mela allura hadd ma jista jghid li la darba il-prodott mehtieg kien ta' livell inferjuri minn dak rikjest fl-istess tenders mela allura entitajiet ohra, huma minn huma, ma gewx pregudikati, u dan ghaliex huma setghu applikaw la darba l-livell rikjest fis-sejha tal-offerti tbaxxa u ghalhekk ma setghax issir ebda tibdil fl-ispecificazzjoni teknici mehtiega fl-istess SO u dan ghaliex altrimenti jinkisru l-principji bazici ta' trasperanza u trattament ugwali tal-offerti skont id-disposizzjonijiet tal-**A.L. 296/10** u d-**Direttiva 2004/18/EC u 2004/17/EC**).

Illi dwar l-ewwel punt imqajjem mid-Direttur tal-Kuntratti, din il-Qorti thoss li minn dak li hemm fir-risposta tal-istess intimat jirrizulta se mai li ir-riferiment li sar ghall ghar-**regolament 85 (9) tar- Regolamenti dwar Kuntratti Pubblici** imsemmi jirreferi biss ghall decizjonijiet maggoritarji li jittiehdu mill-Bord li jkunu finali u konkluzivi dwar "*l-ghoti ta' kuntratt*", u allura l-argument fil-kaz odjern, anke kieku maghmul fis-sens kif pretiz mill-appellat, ma jreggiex ghaliex id-decizjoni tal-Bord f'dan il-kaz ma kienitx li taghti kuntratt, izda biss fejn trattat l-aggravju tas-socjeta' appellanti quddiem l-istess Bord li d-decizjoni tad-Dipartiment tal-Kuntratti tat-30 ta' Settembru 2011 li skalifikaha ghaliex hija ma kienitx "*technically non compliant*" u il-Bord cahad dan l-appell taghha bbazat fuq l-aggravju li l-prodott offert kien konformi ma' dak rikjest fis-SO, u li allura la darba huwa hekk hija kellha tinghata l-istess kuntratt, u b'decizjoni tieghu l-Bord cahad tali

aggravju ghaliex sostna li (a) is-sitwazzjoni fl-istadju imsemmi inbidlet ghaliex skond huwa urea granules ma kellhomx ikunu koncentradi kif rikjest fl-istess tender; (b) li kien hemm hames kuntrattaturi li irtiraw *it-tender documents* izda kienet biss is-socjeta' appellanti li ssottomettiet offerta; (c) li l-Enemalta sostniet li l-prodott offert kien tajjeb ghall ghan taghha anke jekk mhux konformi mal-ispecificazzjonijiet tas-S0, izda skond il-Bord jekk tali offerta tigi accettata dan kien jammonta ghal tibdil *fit-tender specifications during the tendering process*, u dan meta l-erba' kuntratturi li kienu gabru d-dokumenti, jew anke kull kuntrattur iehor, kien japplika fid-dawl ta' specificazzjonijiet iktar baxxi u allura l-Bord irrakomanda li *"this tender be reissued bearing new standards which are equally acceptable but which result to be likewise effective as well as being cheaper. Undoubtly this would place all potential bidders on a level playing field, and possibly allow more participants to submit their cheaper offers"*.

Illi dan ifisser li mhux minnu dak li qed jinghad mill-appellat li d-decizjoni tal-Bord fuq dan il-punt hija finali u konklussiva u dan ghaliex fl-ewwel lok ma kienx hemm decizjoni tal-Bord li tat kuntratt; izda barra minn dan din il-Qorti ma thossx li dak li inghad mill-istess appellat f'kull cirkostanza jista' jigi ritenut bhala legalment korrett u dan ghaliex jirrizulta mir-**regolament 85 (8) tar-Regolamenti dwar Kuntratti Pubblici** li d-decizjoni tal-Bord hija finali kemm il-darba ma jkunx sar appell skond id-disposizzjonijiet tal-istess Regolament lill din il-Qorti.

Illi l-fatt li skond ir-**regolament 85 (5)** meta ssir referenza lill din il-Qorti kemm minn min ikollu interess u kemm minn min ihossu aggravat bid-decizjoni tal-Bord, m'ghandhux izomm lid-Direttur tal-Kuntratti jew lill Kap ta' awtorita' kontraenti milli jimplementa d-decizjoni finali tal-Bord ta' Revizzjoni, dan ma jfissirx li din il-Qorti ma tistax u ma ghandiex il-poter li tannulla d-decizjoni tal-Bord, ghaliex tali interpretazzjoni tirrendi l-intervent u d-decizjoni eventwali ta' din il-Qorti wahda biss ta' portata akkademika u ghall kollox ineffikaci; izda dan ma huwiex legalment korrett tant li jidher anke mill-istess regolament li adirittura jaghti dritt din id-darba limitat proprju lid-

Direttur tal-Kuntratti u l-awtorita' kontraenti li jirreferu huma stess il-kwistjoni lill din il-Qorti fuq xi kumpens moghti skond dak provdut fir-**regolament 85 (2) (c)** u fuq kollox fil-kaz tar-**regolament 85 (3)** fil-kaz fejn il-Bord huwa tenut mill-Ligi li jiddikjara espressament kuntratt null u bla effett meta (i) kuntratt ikun gie moghti qabel ma gie ppublikat kif indikat fl-istess regolament; (ii) meta minkejja dan l-awtorita' kontraenti xorta wahda taghmel kuntratt u dan bil-konsegwenzi hemm indikati. Ma hemmx dubju li f'dan il-kaz anke limitat fejn jista' jsir appell mill-appellat li ssoleva din l-eccezzjoni, li d-decizjoni tal-Qorti tasal sabiex tannula d-decizjoni tal-Bord meta din tmur kontra dawn il-provedimenti, u din il-Qorti thoss li dan huwa iktar u iktar f'dan il-kaz, meta si tratta ta' referenza lill din il-Qorti minn parti li ghandha interess, liema parti ma ghandha ebda restrizzjoni li taghmel tali referenza lill din il-Qorti fuq kull punt li jhossu aggravat minnhom mid-decizjoni tal-Bord, u ghalkemm dan ir-riferiment lill din il-Qorti ma jzommx lill-istess Direttur tal-Kuntratti jew l-Kap ta' l-Awtorita' kontraenti milli jimplimenta d-decizjoni finali tal-Bord tar-Revizzjoni, din se mai qed tirreferi biss ghal meta jinghata kuntratt mehuda fil-kuntest ta' dak provdut kemm fir-**regolament 85 (5) u 85 (9)** u anke hawn id-decizjoni jkollha konsegwenzi legali anke dwar l-effett ta' l-ghoti tal-istess kuntratt; meta d-decizjoni tal-Bord, bhal f'dan il-kaz ma kienitx waslet sabiex taghti kuntratt, mela id-decizjoni ta' din il-Qorti skond l-istess regolament naturalment teffetwa kemm id-decizjoni tal-Bord, jekk din tigi revokata, u kull haga ohra li setghet saret konsegwenza tal-istess decizjoni tal-Bord, kemm il-darba naturalment din ma tkunx konformi mad-decizjoni ta' din il-Qorti, u dan ghaliex decizjoni ta' din il-Qorti ma hijiex semplici rakkomandazzjoni izda decizjoni li taghmel dikjarazzjonijiet u ordnijiet vinkolanti lill-partijiet involuti fl-istess kontestazzjonijiet u li l-istess decizjonijiet ta' din il-Qorti, ghandhom ikunu esegwieti u rezi effettivi, u li allura ghandhom il-poter li jannulaw kull decizjoni tal-Bord, u allura f'dan il-kaz anke kull att li setgha sar in virtu' ta' decizjoni tal-Bord li tista' tigi u jekk tigi ddikjarata nulla jew b'xi mod revokata jew anke varjata. Kull interpretazzjoni ohra trendi r-riferenza bil-Ligi ghall din il-Qorti bhala procedura ineffikaci u inutili u li tmur kontra l-kuncett stess

ta' Qorti, li hija l-organu *par excellence* gudizzjarju li jiddeciedi finalment kull pendenza lilha riferita minn u skond il-Ligi bejn il-partijiet, u li d-decizjoni taghha ghandha jkollha effett bhala ordnijiet ta' istituzzjoni u Qorti kostitwieta u protetta bil-Kostituzzjoni ta' Malta, u li d-decizjonijiet taghha ghandhom jigu esegwieti u resi esegwibbli – din hija Qorti ta' decizjonijiet vinkolanti u mhux ta' dikjarazzjonijiet jew rakkomdazzjonijiet u ma hemm xejn fil-Ligi li jghid mod iehor u allura din il-Qorti ma ghandha l-ebda dubju li din l-eccezzjoni da parte tad-Direttur tal-Kuntratti ma ghandha l-ebda fundament legali u dan anke in vista ta' dak ritenut mill-Onorabbli Qorti tal-Appell fid-decizjoni **“Avv. Peter Fenech nomine vs Dipartiment tal-Kuntratti”** (A.C. – 27 ta' Gunju 2008) u ghalhekk din l-eccezzjoni qed tigi michuda.

Illi dwar l-ewwel aggravju jrid jigi ezaminat fid-dawl tal-konstatazzjoni ta' dawk li kienu l-ispecifikazzjonijiet teknici tas-S0 attwali u dan kien ghall provizzjoni u konsenja ta' Urea intiza sabiex tintuza ghall l-iskop indikat fil-*Project Description* u cjoe':-

*“To comply with the No2 emission regulation of the Islands, the engines are fitted with a Selective Catalytic Reducer (SCR) on the exhaust, The No2 reduction is obtained with the reaction of an amominia rich reactant with the NO2 emissions passing over a catlyst. In this case the amominia rich reactant is a 40% solution of urea dissolved in demineralised water”.*

Illi skond it-*Technical Requirements for Urea Granules* jirrizulta minn paragrafu 2 ta' Volume 3 – *Technical Specifications* “*The Urea granules supplied shall comply with ISO – 22241 – for purity or (DIN 70070). The urea shall have the following specifications – Table 1 – Urea Granules Specification u jerga jinghad – Urea must comply with the ISO 22241 – 1 standards*” u din hija segwieta minn lista ta' paramteri – metudu ta' analizi, mezz ta' mizura u valur propru u inghad li “*The product data specification indicated in Table 1 - Urea Granules Specification above is required by the catlyst manufacturer to satisfy emission abatement level*

*guarantees, must be satisfied to be of an acceptable quality”.*

Illi mill-provi prodotti jirrizulta li l-*urea granules* offeriti mis-socjeta' appellanti fl-offerta taghha kienu konformi mal-*ISO – 22241 specifications* meta dawn kien fl-istat dilwit tieghu u dan ma huwiex kontestat mill-appellati; izda li huwa kontestat huwa li s-sejha ghall-offerti irrikjediet li dan l-*istandard ISO – 22241* u wkoll il-partikolarijiet tat-tabella 1 hemm indikata, li fil-verita' kienu qed jindikaw f'hiex jikkonsisti kimikament dan l-*ISO – 22241 standard*, kienet tirrikjedi li dawn l-elementi teknici kellhom jigu sodisfatti mill-prodott offert ta' granuli ta' urea fl-istat solidu taghhom.

Illi fil-verita' din il-Qorti thoss li l-kontestazzjoni odjerna ma hijiex fuq hekk biss izda jekk fil-verita' t-tender jew is-Sejha ghall-Offerti kienx jipprovdi li l-istandard tal-granuli ta' urea li kellhu jigi provdut u supplit mill-offerenti kellhux ikun konformi biss mal-istandard ISO – 22241 jew ma' l-istandard ISO – 22241 u wkoll it-tabella 1 hemm indikata, kif jidher car li qed effettivament jippretendu l-appellati, u dan ghaliex ma hemm l-ebda dubju li l-istess urea supplita hija konformi mal-ISO standard izda setgha jezisti d-dubju jekk din hijiex konformi mal-proprietajiet kontenuti fit-tabella 1 meta dawn ikunu ghadhom fl-istat solidu taghhom, u dan ghaliex fl-istat likwidu jew dilwit taghhom il-prodott offert mis-socjeta' appellanti huwa teknikament konformi mal-istess.

Illi din tikkoncerna interpretazzjoni tat-*Tender Documents*, li l-Bord ta' Revizjoni dwar Kuntratti Pubblici (il-Bord) kellhu jaghmel fid-dawl tal-appell li sar quddiemu mis-socjeta' appellanata konsegwenti ghad-decizjoni tad-Direttur tal-Kuntratti datata 30 ta' Jannar 2012 sabiex jiskwalifika lill-appellanti mill-process ta' aggodikazzjoni ghaliex gie ritenut *“technically non-compliant”*. Izda fil-verita' d-decizjoni tal-Bord naqset li tidhol f'dan il-punt ghaliex fil-verita' kull ma ghamlet kien biss li qalet is-segwenti:-

1. *The Public Contracts Review Board opines that the situation had changed from tender issuing stage to tender evaluation stage such that the urea granules did not have to be as concentrated as indicated in the parameters of the tender. Furthermore, it also transpired that BWSC had been carrying out tests on the use of urea and it is a known fact that the same company was using urea with the same specifications as those offered by the appellant company and the results were satisfactory apart from being considerably cheaper.*

2. *The Public Contracts Review Board is also fully cognisant of the fact that five contractors had originally acquired the tender document but only United Equipment UNEC Ltd did, effectively, submit a bid.*

3. *The Public Contracts Review Board argues that, on the procurement procedure side, Enemalta Corporation was faced with the situation or dilemma that the product offered by the appellant company was suitable for its requirements even if it was not according to specifications. However, this Board feels that if the appellant company's offer were to be accepted, that would amount to altering the tender specifications during the tendering process, possibly being totally oblivious of the fact that any of the other four - or others for all that matters, who could have reneged on the opportunity to acquire the tender document let alone, effectively, bidding - could have participated had the specifications been lowered.*

*In view of the above this Board recommends that this tender be reissued bearing new standards which are equally acceptable but which result to be likewise effective as well as being cheaper. Undoubtedly, this would place all potential bidders on a level playing field and, possibly, allow more participants to submit their cheaper offers.*

*Considering the prevailing circumstances which transpired during the hearing, the Public Contracts Review Board recommends that the deposit paid by the appellant company should be reimbursed."*

Illi minn dan jidher car li kull ma ghamel il-Bord kien biss li qal li jekk tigi accettata l-offerta tas-socjeta' appellanti dan ikun ifisser li tkun qed taccetta tibdil fil-specificazzjonijiet teknici tat-tender meta huwa stess ma spjegax ghalix dan huwa hekk; huwa veru li l-Bord sostna li fil-frattemp *"the situation had changed from tender issuing stage to tender evaluation stage such that the urea granules did not have to be as concentrated as indicated in the parameters of the tender"* izda dan ma kienx il-punt li kellhu jigi deciz, u cjoe' x'kien attwalment il-kontenut tat-tender u x'kienu allura effettivamente l-ispecificazzjonijiet teknici rikjesti, izda jidher li l-Bord interpreta biss u fuq kollox kif il-Korporazzjoni Enemalta fehmet u interpretat l-istess specificazzjonijiet tat-tenders u dan dejjem bbazat fuq dak li hija fehmet li s-socjeta' li mmanufurat il-catalyst kienet qed skond hija qed tirrikjedi f'dak iz-zmien tal-hrug tat-tender, u ghall dak li l-istess Korporazzjoni Enemalta eventwalment skopriet li l-istess socjeta' fornitrici kellha bzonn, li kien allura differenti minn dak li l-Enemalta Corporation fehmet originarjament. Izda dan kollu huwa ovvju li ma ghandhu x'jaqsam xejn ma' dak li attwalment kien jipprovdi l-istess tender, u l-interpretazzjoni oggettiva ta' l-istess. Jinghad li l-interpretazzjoni tat-Tender ma kienitx komputu tal-Korporazzjoni ta' Enemalta, izda komputu tal-Bord li jinterpreta u dan b'mod oggettiv ikkunsidrat minghajr dubju fid-dawl ta' l-iskop ghall hrug tal-istess tender, u forsi kien hawn li l-intenzjoni ta' l-Enemalta setghet tkun relevanti izda qatt vitali, tenut kont tal-fatt li dak li huwa relevanti huwa fuq kollox u bla dubju l-kontenut tal-istess tender u l-interpretazzjoni tieghu.

Illi issa hija l-opinjoni ta' din il-Qorti li minn qari tal-istess Sejha tal-Offerta jidher car li l-iskop li ghalih gie rikjest l-istess prodott kien *"To comply with the No2 emission regulation of the Islands, the engines are fitted with a Selective Catalytic Reducer (SCR) on the exhaust, The No2 reduction is obtained with the reaction of an amominia rich reactant with the NO2 emissions passing over a catlyst. In this case the amominia rich reactant is a 40% solution of urea dissolved in demineralised water"*.

Illi dan allura jfisser li l-prodott kien dejjem intenzjonat li jigi uzat fl-istat dilwit tieghu u qatt fl-istat solidu tieghu, ghalkemm huwa inecceppibli li l-prodott kellhu jigi provdut fl-istat solidu tieghu u fil-verita' dan ma' setghax ikun mod iehor. Illi huwa allura f'dan il-kuntest li l-ispecificazzjonijiet teknici kellhom jinqraw u jigu nterpretati. Issa mill-ispecificazzjonijiet teknici jidher car li dak li kien rikjest kien li l-istess prodott kellhu fuq kollox ikun konformi mal-istandard ISO – 22241 u jirrizulta wkoll li t-tabella 1 tindika l-proprjetajiet kimici li kellhu jkollux l-istess prodott sabiex b'hekk jikkonferma ruhhu mal-istandard ISO – 22241; mela allura il-prodott kellhu jkun fuq kollox konformi mal-istandard ISO – 22241 u sabiex ikun hekk kellhu jkun konformi ma' dak indikat f'Tabella 1, u mhux li l-prodott kellhu jkun konformi kemm mal-istandard ISO – 22241 u wkoll mat-tabella 1, ghaliex fil-fatt tabella 1 tikkonsisti f'dak necessarju jew mehtieg sabiex l-istess prodott jilhaq l-istandard ISO. Mela allura f'dan il-kuntest dak li fehmet il-Korporazzjoni Enemalta li jfissru tali specificazzjonijiet huma totalment irrelevanti u fi kwalunkwe kaz zbaljat, u dan ghaliex dak li s-Sejha ghall Offerti provdjet u esegiet kien li l-prodott ikun konformi mal-istandard ISO u sabiex ikun hekk kellhu jkollu l-proprjetajiet indikati f'Tabella 1, proprju sabiex ikun milhuq l-istess standard.

Illi izda dak li huwa relevanti huwa li lis-Sejha ghall-Offerti stess jidher car l-prodott supplet kellhu jkun konformi mal-ISO – 22241 u dan l-istandard huwa spjegat fit-Tabella 1 hemm indikata u dan johrog car meta l-istess *Table 1 – Urea Granules Specifications* hija intitolata hija stess "*Urea must comply with the ISO 22241 – 1 standards*", li ma jistax ma jfissirx li tali tabela tikkonsisti f'dak li l-prodott offert kellhu jkollu dejjem bl-iskop li attwalment il-komponenti tieghu jkunu tal-istess standard u mhux xi haga izjed minn hekk. Dan huwa car minn qari tal-istess sejha tal-offerta fl-intier taghha u ma hemmx dubju li la darba dan huwa car mid-dokument fih innifsu ma hemm bzonn ta' ebda interpretazzjoni minn fonti ohra, inqas u inqas minn dak li hasbet (jirrizulta inkorrettement) l-Korporazzjoni Enemalta li kien mehtieg ghall operazzjoni



tal-istess apparat fil-kuntest tal-iskop dikjarat fis-Sejha tal-Offerti ghaliex kien hemm bzonn l-istess prodott.

Illi dwar jekk l-paramteri rikjesti mill-istess *Standard ISO – 22241* gewx milhuqa mill-prodott tas-socjeta' appellanti ma hemmx dubju mill-provi u opinjonijiet teknici sottomessi quddiem il-Bord li teknikament il-prodott dilwit lahaq l-istess livell jew standard hemm indikat, u d-dubju qam jekk dak rikjest teknikament kienx qed jirreferi wkoll ghall prodott fl-istat solidu tieghu u dan dejjem jidher li gie mifhum hekk mill-Korporazzjoni appellata ghaliex il-prodott kellhu jigi hekk suplit u konsenjat fl-istat solidu tieghu.

Illi izda dan ma jfissirx li s-Sejha ghall Offerta kienet qed tghid li l-prodott solidu kellhu jkun konformi mal-*istandard ISO – 22241* u mat-tabella 1, indikativa tal-proprjetajiet sabiex l-istess standard jigi milhuq, u dan ghaliex jidher car li l-prodott sabiex jintuza kellhu jkun dilwit skond kif indikat fil-*Project Description* tal-istess *tender* fil-*General Part – Volume 1 Section 1 – Instructions to Tenderers* f'para. 1.2. fuq citata (paragrafu ta' qabel ta' l-ahhar – fol. 26) u wkoll f'*Volume 3 – Technical Specifications* fejn f'paragrah 2.2.9 *Preparation of the Solution* fejn jinghad li "*The Urea Granules will be dissolved in demineralised water to obtain the required 40% urea solution....*". Mela skond dan kollu hija l-opinjoni ta' din il-Qorti li tabella 1 u l-istandard ISO – 22241 jirreferu ghall urea fl-istat dilwit taghha u ghalhekk u konsegwenza ta' dan ifisser li l-prodott offert mis-socjeta' appellanti kien *technically compliant* mal-ispecificazzjonijiet teknici ndikati fl-istess tender u allura din ma kienitx kwistjoni ta' "*changing the goal posts during the tendering process*" izda li l-proposta u l-prodott tas-socjeta' appellanti kien konformi mal-ISO 2241-1 "as stipulated in the tender documebnt both in clause 2.1 and as repeated in Table 1 itself" kif sostna l-Professor Ian Refalo ghall-appellanti quddiem l-istess Bord.

Illi dan ifisser ukoll li l-interpretazzjoni moghtija tal-ispecificazzjonijiet teknici mis-socjeta' appellanti anke tramite l-konsulent tekniku taghha hija konformi ma' dak

indikant fl-istess tender iktar u iktar meta ma hemm l-ebda dubju li l-ISO standards li saret riferenza ghalhom fl-istess Sejha ghall Offerti tirreferi ghall *“solution” namely solidified urea dissolved in demineralised water* u *“the urea granules that were being proposed by United Equipment UNEC Ltd when dissolved in water would comply with ISO – 22241 -1 as stipulated in the tender document”* u ghalhekk il-posizzjoni legali hija kif effettivament deskritta mill-Professur Ian Refalo fis-sens li *“according to his client’s technical personnel, the urea granules that were being proposed, when dissolved in water, would comply with ISO 22241-1 as stipulated in the tender document and, as a result, the tender submission was compliant”*.

Illi ma hemmx dubju li t-Tender Document seta' gie kostruit hafna ahjar minn kif effettivament gie redatt izda dan ma jfissirx li l-istess ma huwiex intelligibbli u lanqas li ma setghax jigi interpretat x'kien ifisser u x'kien is-sinifikat tal-istess tenut kont tal-iskop ghaliex inhareg. Jirrizulta wkoll ghalhekk li dak li kellhu jsir kien li jigi interpretat l-istess *Tender Document*, haga li ma saritx mill-Bord, u dan ibbazata fuq dak li kien hemm miktub u mehtieg, u mhux fuq dak li l-Korporazzjoni Enemalta fehmet li kien mehtieg, fehma li jirrizulta fuq kollox li ma kinietx korretta iktar u iktar tenut kont ta' dak li rrizulta mit-testijiet li ghamlu l-manifatturi tal-istess catalyst, ghaliex ghalkemm ibbazata fuq dak li fornitha d-ditta manufattrici tal-catalyst, fil-verita' tali ditta ma kienetx qed tesigi dak lil-Korporazzjoni Enemalta baqghet tinsisti dwarhu, li allura lanqas kien konformi ma' dak rikjest mill-prodotturi tal-istess catalyst. Izda dan ma jfissirx li t-Tender documents kienu qed jesigu dak li l-Korporazzjoni Enemalta jidher li ppretendiet ghaliex fehmet id-direzzjonijiet lilha moghtija mill-fornituri msemmija b'dak il-mod, u dan ghaliex jidher car li l-fornituri stess tal-istess apparat kienu huma stess qed juzaw prodotti tal-istess kwalita' u standard bhal dak offert mis-socjeta' appellanti u li kienu konformi mal-istandard ISO – 22241 -1 li kien l-unika standard li s-Sejha ghall-Offerti ghamlet riferenza ghalha. Dan jidher li kien accettabbli ghall kullhadd.

Illi mela allura dan ifisser li b'tali interpretazzjoni li qed taghmel il-Qorti tas-Sejha ghall-Offerti in kwistjoni, interpretazzjoni li l-Bord naqas ghall kollox li jaghmel, sabiex tigi accettata l-offerta tas-socjeta' appellanti, ma hemmx il-htiega li jkun hemm tibdil f'xi kondizzjoni tat-tender u fil-fatt jinghad li l-offerta tas-socjeta' appellanti hija konformi mal-ispecificazzjonijiet teknici tat-tender b'dan li l-istess tender hija *technically compliant* u meta saret riferenza ghall-istandard ISO – 22241 -1 saret riferenza ghall-istandards internazzjonali skond kif indikat fir-**Regolament 46 (2) dwar il-Kuntratti Pubblici (A.L. 296 tal-2010)** u l-prodott offert mis-socjeta' appellanti kien konformi mal-ispecificazzjonijiet kollha teknici ndikati fl-istess Sejha tal-Offerti.

Illi la darba dan huwa hekk mela allura l-offerta tas-socjeta' appellanti ma setghatx tigi rifjutata u dan iktar u iktar meta l-istess *Volume 3 tat-Technical Specifications* jipprovdi testwalment li *"Where in the tender document a standard is quoted, it is to be understood that the Contracting Authority will accept equivalent standards"*. F'dan il-kaz din il-Qorti thoss li gie ppruvat li l-prodott offert kien teknikament konformi mal-ispecificazzjonijiet teknici ndikati fl-istess offerta u fl-ghar ipotesi (u din biss ghal-grazzja tal-argument) ekwivalenti ghall-istess u hawn ukoll l-istess kuntratt innifsu jipprovdi ghall tali eventualita' b'dan li f'dan il-kuntest is-socjeta' appellanti lanqas ghandha bzonn toqghod fuq dak li hemm provdut fir-**regolament 46 (2) (a) u (3) tal-Avviz Legali 296 tal-2010** u dan ghaliex hemm l-istess Sejha ghall-Offerti li tipprovdi proprju l-istess kuncett bl-applikazzjoni espressa tieghu.

Illi dwar il-punt li l-kuntratt ma kellhux jinghata ghaliex kien hemm ebda' kuntratturi li gabbru l-s-sejha ghall offerti izda li ma tefghux offerta jinghad li fil-kaz in ezami din ma treggiex ghaliex kif qed jigi deciz il-punt in ezami ma kienx jimporta tibdil fil-kondizzjonijiet jew specificazzjonijiet teknici tal-offerta izda sempliciment interpretazzjoni korretta ta' l-istess; madanakollu anke jekk ghall grazzja tal-argument dan kellhu jigi kkunsidrat taht dan l-aspett ma hemmx dubju li kull persuna, inkluza potenzjalment u ipotetikament dawk li ma gabrux l-istess offerti, setghu

talbu kjarifiki necessarji skond l-istess sejha ghall-offerti u wkoll skond dak li jipprovdi r-**regolament 85 (1) (a) u/jew 2 (b) tal- tal-Avviz Legali 296 tal-2010**. Dan apparti li dak deciz f'din id-decizjoni illum mertu ta' dan l-appell tmur kontra dak deciz mill-istess Bord dwar allegati kuntratturi li setghu tefghu l-offerti wara sejha ghall offerti izda li ma ghamlu xejn minn dan fil-kaz "**Electrofix Energy Limited vs Ministeru Ghall Ghawdex**" – **Kaz Numru 366** deciz fit-30 ta' Jannar 2012, ghalkemm mhux bilfors din il-Qorti taqbel mal-konsiderazzjonijiet hemm indikati, tant li din il-Qorti thoss li f'dak il-kaz bhal fil-kaz odjern, ma gie pruvat u lanqas biss gie accennat li kien hemm xi hadd li ghandhu l-interess necessarju sabiex jaghmel din l-azzjoni jew jaghmel xi forma ta' oggezzjoni, la darba hadd ma ha l-passi necessarji sabiex jipproteggi l-istess interess tieghu bl-ebda mod la mad-Direttur tal-Kuntratti, la mal-Bord u wisq inqas bi proceduri gudizzjarji huma x'inhuma.

Illi fuq kollox jidher li s-socjeta' appellanti kienet fil-posizzjoni meta ssottomettiet l-istess offerta taghha bhal ta' kullhadd u il-fatt li kienet hija biss li tefghet l-istess offerta ma jfissirx li kien hemm xi hadd li gie b'xi mod gie pregudikat ghaliex hija tefghet offerta li skond hija kienet konformi tal-ispecificazzjonijiet teknici provduti fl-istess Sejha, u tali Sejha ghall-Offerti kienet wahda pubblika u kull minn kien interressat, kien minn kien, setgha ghamel l-istess, u ma kien hemm xejn diskriminatorju fis-Sejha ghall-Offerti, u ma jirrizultax li tul il-process tas-Sejha tal-Offerti, u wara l-eghluq tas-Sejha tal-istess offerti u wkoll waqt il-perjodu ta' aggodikazzjoni kien hemm xi tibdil fis-Sejha tal-Offerti jew fil-kondizzjonijiet taghha, b'dan ghalhekk li ma kien hemm xejn li jmur kemm fl-istess tender u kemm fl-eventwali aggodikazzjoni tat-tender, meta konformi mal-istess Sejha tal-Offerti, bhal ma' kienet teknikament l-offerta tas-socjeta' appellanti, kontra l-principji tal-ugwaljanza u tal-kompetizzjoni, u ma hemm xejn, in vista ta' dak hawn deciz li huwa remotament kontra l-principji tal-ugwaljanza u tal-kompetizzjoni kif indikati fid-**Direttiva 2004/18/EC** u dawn kif trasportati fir-**regolamenti 4, 28, u 46 (1) tar-Regolamenti dwar Kuntratti Pubblici**. L-istess jinghad dwar l-applikazzjoni

ghall fattispecie tal-kaz tas-sentenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea fil-kaz “**Kummissjoni vs Dannimarka (Storebaelt) Case C – 243 – 89**) u dan ghaliex f’dak il-kaz jidher li kien jittratta dwar tibdil f’kondizzjonijiet ta’ Tender billi halli li jsiru *reservations* minn offerenti li kienu pregudizzjali ghall-offerenti ohra, meta dan certament ma huwiex il-kaz odjern. Hawn gie stabilit li s-socjeta’ appellanti ghamlet offerta li kienet teknikament konformi mal-istess spesifikazzjoni teknika tas-Sejha tal-Offerti, u li s-socjeta’ appellanti kienet l-unika offerent.

Illi fl-ahharnett dwar li l-Enemalta Corporation ma hijiex il-legittimu kontradittur jidher car l-kuntratt skond l-istess sejha ghall-offerti kellhu jkun maghmul mal-Enemalta Corporation (ara *Volume 2 – Section 1 – Draft Contract Form*) li hija indikata bhala l-*Contracting Authority* u kienet ukoll partecipi fid-decizjoni tal-Bord illum taht appell u wkoll ippartecipat fl-istess u ghalhekk l-eccezzjoni taghha li hija ma hijiex l-legittimu kontradittur lanqas qatt ma tista’ treggi – ma hemmx dubju li ghandha tkun parti f’dan l-appell kemm ghar-ragunijiet hawn indikati u ghall-integrita’ tal-gudizzju.

Illi b’hekk l-appell qed jigi milqugh.

### **III. KONKLUZJONI.**

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta’ u tiddeciedi**, billi filwaqt li tichad ir-risposta tal-appell tad-Direttur tal-Kuntratti datata 28 ta’ Frar 2012 u r-risposta tal-appell tal-Korporazzjoni Enemalta datata 26 ta’ Marzu 2012 ghaliex huma infondati fil-fatt u fid-dritt ghar-ragunijiet hawn premissi, nkluzza li qed tigi michuda l-eccezzjoni tal-istess Korporazzjoni Enemalta li hija ma hijiex il-legittimu kontradittur, **tilqa’ l-appell interpost mis-socjeta’ United Equipment Company (UNEC) Ltd fir-rikors tal-appell taghha datat 15 ta’ Frar 2012 biss in kwantu huwa konsistenti ma’ dak hawn deciz, b’dan li din il-Qorti kif miltuba mis-socjeta appellanti qed tvarja id-decizjoni tal-Bord tar-Revizjoni tal-Kuntratti Pubblici Kaz Numru 365 in konnessjoni ma’ CT/4018/2011; GN/DPS/4002/PC3/2011 fl-ismijiet**

premessi datata 30 ta' Jannar 2012 wara ittra ta' oggezzjoni prezentata mis-socjeta' United Equipment (UNEC) Ltd datata 8 ta' Ottubru 2011 kontra d-decizjoni tad-Dipartiment tal-Kuntratti datata 30 ta' Settembru 2011, b'dan li fil-waqt li tikkonfermaha fejn ordnat li kull depositu mhallas mis-socjeta' appellanti quddiem l-istess Bord sabiex sar l-appell quddiem l-istess jigi moghti lura lis-socjeta' appellanti, thassaraha u tannulla in kwantu cahdet it-talba tas-socjeta' appellanti quddiem l-istess Bord datata 8 ta' Ottubru 2011 b'dan allura li tilqa' l-istess talba tas-socjeta' appellanti datata 8 ta' Ottubru 2011 u minflok tannulla d-decizjoni tad-Dipartiment tal-Kuntratti datata 30 ta' Settembru 2011, u b'hekk tirrintegra l-istess socjeta' appellanti United Equipment (UNEC) Company Ltd fil-process ta' aggudikazzjoni tal-istess sejha tal-offerti CT/4018/2011; GN/DPS/4002/PC3/2011 – Period Contract for the Supply and Delivery of Granular Urea to Delimara Power Station u tordna lid-Direttur tal-Kuntratti sabiex jikkonforma ruhu ma' din id-decizjoni stante li l-istess offerta tas-socjeta' appellanti kienet teknikament konformi mal-ispecificazzjonijiet tas-Sejha tal-Offerti u b'hekk tordna li l-aggudikazzjoni tal-istess Tender issir mill-istess Direttur tal-Kuntratti fid-dawl ta' dak hawn deciz u tal-Ligi.

**Bl-ispejjez kollha kontra l-appellati solidalment bejniethom.**

**Moqrija.**

**Onor. Mhallel Raymond C. Pace LL. D.  
10 ta' Lulju 2012**

Kopja Informali ta' Sentenza

**Romina Galea**  
**Deputat Registratur**  
**10 ta' Lulju 2012**

**< Sentenza Finali >**

-----TMIEM-----