



QORTI TA' L-APPELL

**ONOR. IMHALLEF
RAYMOND C. PACE**

Seduta tat-18 ta' Ottubru, 2012

Appell Civili Numru. 16/2011

**Mario Borg (350078(M) ezercitanti l-Kummerc bl-isem
“Borg Skip Hire Service”**

vs

Kunsill Lokali Gzira

Il-Qorti,

I. PRELIMINARI.

Illi fis-26 ta' Mejju 2012 il-Bord ta' Revizjoni dwar Kuntratti Pubblici (il-Bord) ippronunzja s-segwenti decizjoni fl-ismijiet **“Borg Skip Hire Service vs Gzira Local Council u Emmanuel Mifsud”** (Kaz Numru 290 – *GLC/2010 Tender for the Collection of Mixed Household Waste – Gzira Local Council*) hawn premessi:-

"After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Dr Jan Karl Farrugia legal representative of Borg Skip Hire Service, the appellant company, explained that his client was aggrieved by the way the points were awarded by the evaluation board with regard to various criteria. He stated that the points were to be allocated as to 60% for technical compliance as per established criteria and 40% for price. At this point Dr Farrugia raised the following issues.

With regard to 'Human Resources To Be Dedicated to the Contract (15 points) Dr Farrugia contended that, at the time that the tender was being adjudicated, Mr Emmanuel Mifsud, the recommended tenderer, did not employ seven employees but he had two employees and that his client also had two employees registered with him (documents submitted during the hearing showed that, whilst Mr Mifsud had 2 full-timers, 2 part-timers and 3 on reduced hours, Mr Borg had 2 full-time employees). Dr Farrugia added that, besides waste collection, the recommended tenderer also carried out other activities, e.g. milk distribution. Dr Farrugia felt that the evaluation board was incorrect to award a maximum of 15 points to Mr Mifsud and 5 points to his client when, in real terms, they both had two employees registered with them.

On his part, Dr Massimo Vella, legal representative of the Gzira Local Council, maintained that the recommended tenderer had produced evidence from the Employment and Training Corporation which demonstrated that he employed seven employees as at 2nd August 2010 and their designation was that of collector, garbage collector, collector, driver, truck driver, helper and another driver and, as a result, they were all related to waste collection.

Dr Vella explained that waste collection usually involved the deployment of two trucks and, as a consequence, it was evident that with only two drivers the appellant company could not carry out effective waste collection

operations. Dr Vella said that, on the other hand, Mr Mifsud had three drivers, three collectors and a helper.

Mr Joe Camilleri, deputy mayor and evaluator, explained that in his locality waste collection was carried out by two refuse collection trucks operating simultaneously.

Mr Mario Borg, representing the appellant company, stated that he had two drivers employed with him and declared that in the event that he would be awarded this contract he would employ more personnel on waste collection duties. At this point Dr Farrugia intervened to point out that by letter dated 24th August 2010 his client had informed the Gzira Local Council as follows, namely

"If I will be awarded the tender, other waste collectors, whom I can rely on their efficiency, will definitely be employed"

Dr Vella referred to Article 21 sub-article (b) of the tender document which stated that:

"In those cases where the tenderers intend to sub-contract the works, they are to produce an authentic certificate from ETC indicating the relevant details of the nominated sub-contractor/s and its employees. Any tenderer who fails to provide the requested certificate/s with his offer will not be eligible for the award of the contract."

The Chairman Public Contracts Review Board remarked that the evaluation board had to assess a tender submission on the documentation submitted.

Referring to 'Ownership of Waste Collection Vehicles To Be Dedicated to the Contract' (10 points), Dr Farrugia claimed that, whilst Mr Mifsud had two refuse collection vehicles registered in his name, his client had three such vehicles registered in his name besides two other sub-contracted vehicles. Nevertheless, proceeded Dr Farrugia, the evaluation board awarded a maximum of 10 points to Mr Mifsud and 0 points to his client.

Dr Vella remarked that Mr Borg had indicated three vehicles when in fact one of them was still in the process of being acquired from abroad and had not been registered in his name at the time.

Following an analysis of the vehicle certificates submitted by tenderers this picture emerged during the hearing, viz:

Mr Mifsud had registered in his name a Scammel Reg. No. NAT 270 (1975) and a DAF Reg No GBL 265 (2002); sub-contracted a Seddon Atkinson AAJ 306 and a Dennis Reg. No. SRF 223 registered in the name of Mr Steve Farrugia and a DAF Reg. No. ZNZ 959 registered in the name of Mr Saviour Galea. (Note: GBL 265 listed twice by the board in its evaluation sheets).

Mr Mario Borg had registered in his name: an Atkinson Reg. No. CAD 574 (1978) and a Dennis Elite Reg No AAQ 615 (1986); sub-contracted and registered in the name of Mr Mark Bonnici a DAF Reg. No. GAH975 and an Atkinson Reg No MAR172 [Mercedes Reg. No IBP 181 (2002) was registered in the name of Mr Mario Borg on 27/10/10]

Mr Joe Camilleri explained that whereas two trucks are required to provide this service, yet, the tenderer had to indicate what other vehicles such tenderer could rely on to back up his operations when any one of his vehicles was garaged for repairs. He added that, normally, the contractor would have an agreement with another operator to stand in for him in case one of his entity's vehicles was temporarily out of service.

The Chairman Public Contracts Review Board questioned how was it that both tenderers had two refuse collection tracks registered in their name and, at the same time, Mr Mifsud was awarded maximum 10 points and Mr Borg was awarded no points at all, as if Mr Borg had made no submission with regard to the ownership of refuse collection vehicles.

Mr Anthony Abela, a councilor and evaluator and Mr Camilleri explained that the evaluation process was carried out as a team - it was a collective exercise - and it was not the case that each evaluator carried out one's own assessment independently and then the points were added up. At this point Mr Camilleri could not furnish a plausible explanation to justify the allocation of points in this manner.

When the item 'Date of Manufacture (Max. 10 points) was discussed Dr Farrugia submitted that, in this regard, even when discarding the 2002 vehicle which had not been registered hi the name of his client by the closing date of the tender, one would end up with two vehicles registered in his client's name with the relative dates of manufacture being 1978 and 1986. Dr Farrugia complained that this aspect was completely overlooked by the evaluation board as his client was allocated 0 points.*

The Chairman Public Contracts Review Board questioned why the recommended tenderer was awarded maximum (10) points for the two vehicles registered hi his name with the relative dates of manufacture being 1975 and 2002 whereas the appellant was awarded 0 points for his two trucks. The other board members intervened to add that, considering that the tender document did not stipulate that a bidder either got full points or none at all, then it was logical to allocate points in such a way as to reflect 0 points for no submission at all, maximum points for an impeccable submission and points between 0 and 10 for submissions which satisfied tender specifications in varying measures.

Mr Camilleri consulted the workings on the evaluation sheets and (i) he noted that, at one stage, 8 points were awarded to the appellant company and then this figure was overwritten with 0 points and (ii) he acknowledged that the recommended tenderer was allocated 10 points but could offer no explanation why the appellant company was given 0 points when the said company had two vehicles registered in its name.

Mr Camilleri remarked that, in terms of paperwork, the evaluation process consisted of the evaluation sheets and the minutes of the meeting held on the 26th October 2010 for the purpose of discussing and deciding on the tender in question, but that there was no single comprehensive evaluation report.

The Chairman Public Contracts Review Board stated that the adjudicating process had to be reported upon more thoroughly (and not through a simple reference in the minutes to subject matter in one of the respective local Council's public meetings) and the decisions taken and the points awarded had to be clearly explained for the sake of fairness and transparency within the holistic perspective of public funds' management.

When Dr Farrugia referred to 'References' (20,points), he remarked that the recommended tenderer only submitted a reference from Architect Aquilina in connection with domestic waste collection for the Gzira Local Council whereas his client had submitted references from HSBC, Mosta Technopark, the Environment Landscapes Consortium, Malta Dairy Products and from Mr John Micallef, a government consultant. Dr Farrugia pointed out that, once again, the evaluation board awarded maximum of 20 points to Mr Mifsud and 15 points to his client.

Dr Vella explained that the relevant technical criteria required "reference/s of successfully completed contracts of similar nature" but the references presented by the appellant company were from private firms for the hire of skips whereas the tender under reference involved domestic waste collection which service was provided only by local councils. Dr Vella further explained that since the recommended tender had been providing this service to the Gzira Local Council, the latter could not issue a reference for its own use. Nevertheless, proceeded Dr Vella, at the same time, the Gzira Local Council could not overlook the fact that the recommended tenderer had previous experience in domestic waste collection. Dr Vella stated that the difference in the allocation of points stemmed from the fact that one had previous experience

in domestic waste collection whereas the other bidder presented experience in the hire of skips which was a different kind of service. Dr Vella considered that, in this instance, the evaluation board allocated the points in a reasonable and objective manner. Dr Vella also pointed out that a standard requirement in every public tender was the submission and demonstration of previous experience in similar works.

Mr Mario Borg remarked that he had previously provided domestic waste collection services as a member of the 'Koperattiva Indafa Pubblika' (the reference by Mr John Micallef, a government consultant who used to handle matters connected with said cooperative refers) -but not in his own name.

The Chairman Public Contracts Review Board noted that one had to demonstrate experience relevant to the service requested in the tender, i.e. domestic waste collection and not skip hire services. He opined that, in this instance, the evaluation board might have been rather generous with the appellant company. The other board members of the Public Contracts Review Board remarked that, if anything, the appellant company should have provided proof of previous experience from the local council/s that he had provided related services to and not from a consultant.

Dr Vella observed that the reference made by Mr Micallef in favor of the appellant did not mention any particular successfully completed contracts, as requested in the tender document, but it referred, in a rather limited manner, to the character and reliability of the appellant in his own capacity.

With regard to 'Prices' (40% of the points), Mr Camilleri remarked that in so far as the 'daily fuel costs' are concerned, the following picture emerged with regard to the 1st year of the contract period:

| | <u>Mr Borg</u> | <u>Mr Mifsud</u> |
|-------------------|-----------------------|-------------------------|
| Ghallis site | €49.56 | €31.20 |
| Sant Antrnin site | €69.38 | €39.75 |

Mr Camilleri added that the prices quoted by Mr Borg were based on the assumption that his company would employ 2 employees whereas Mr Mifsud had 7 employees on his books and, therefore, it was possible for the latter to deploy 6 of them to operate 2 refuse collection trucks. Mr Camilleri argued, or rather assumed, that the number of employees also had a bearing on the 1st year daily rate for door-to-door waste collection, e.g. €329 by Mr Borg and €385 by Mr Mifsud. Mr Camilleri argued that, since the appellant company based its rates on the employment of two employees, the same appellant company would not be able to claim additional payment if, eventually, he would assign more employees on this contract.

The Chairman Public Contracts Review Board noted that it was not possible for the appellant company to operate two trucks concurrently with only two employees. On the other hand, he also observed that the appellants had indicated that, on contract award, the company would be engaging more employees. However, the appellant company, then again, failed to indicate how many it would be engaging on this contract and so the evaluation board was not able to consider that aspect in its workings. The Chairman Public Contracts Review Board remarked that the way Borg Skip Hire Services made its submission in this regard did not provide peace of mind to the contracting authority that the service as proposed was going to run smoothly.

Dr Farrugia declared that his client was bound by the rates that the company had quoted irrespective of the number of employees that it would eventually engage on the contract and to any other such considerations.

The Chairman Public Contracts Review Board noted that the contracting authority could impose penalties if the service fell short of the requested standard, however, that was a question of monitoring and enforcement by the said authority.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 3rd December 2010 and also through their verbal submissions presented during the hearing held on 18th May 2011, had objected to the decision taken by the pertinent authorities;*
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to (a) the fact that the appellant company was aggrieved by the way the points were awarded by the evaluation board with regard to various criteria, (b) 60% of the points were allocated for technical compliance as per established criteria and 40% for price, (c) specific issues related to:*

'Human Resources to Be Dedicated to the Contract'

Claim made by the appellant company: the evaluation board was incorrect to award a maximum of 15 points to Mr Mifsud and 5 points to Borg Skip Hire Services when, in real terms, they both had two employees registered with them,

"Ownership of Waste Collection Vehicles to Be Dedicated to the Contract"

Claim made by the appellant company: albeit Mr Mifsud had two refuse collection vehicles registered in his name and the appellant had three such vehicles registered in its name besides two other sub-contracted vehicles, yet the evaluation board awarded a maximum of 10 points to Mr Mifsud and 0 points to Borg Skip Hire Services,

'Date of Manufacture'

Claim made by the appellant company: even if one were to discard the 2002 vehicle which had not been registered in the name of the appellant company by the closing date of the tender, one would end up with two vehicles registered in the same appellant company's name with the relative dates of manufacture being 1978 and 1986 -

nevertheless, the evaluation board completely overlooked this fact and allocated 0 points to Borg Skip Hire Services,

'References'

Claim made by the appellant company: *the recommended tenderer only submitted a reference from Architect Aquilina in connection with domestic waste collection for the Gzira Local Council whereas Borg Skip Hire Services had submitted references from HSBC, Mosta Technopark, the Environment Landscapes Consortium, Malta Dairy Products and from Mr John Micallef, a government consultant. Also, according to Mr Borg, he had previously provided domestic waste collection services as a member of the 'Koperattiva Indafa Pubblika' (the reference by Mr John Micallef, a government consultant who used to handle matters connected with said cooperative refers) - but not in his own name,*

'Prices'

Claim made by the appellant company: *the appellant company declared that it was bound by the rates that the company had quoted irrespective of the number of employees that it would eventually engage on the contract and to any other such considerations.*

- having considered the contracting authority's representative's reference to (a) specific issues related to:*

'Human Resources to Be Dedicated to the Contract'

Counter argument raised by the contracting authority: *maintained that the recommended tenderer had produced evidence from the Employment and Training Corporation which demonstrated that he employed seven employees as at 2nd August 2010 and their designation was that of collector, garbage collector, collector, driver, truck driver, helper and another driver and, as a result, they were all related to waste collection,*

'Ownership of Waste Collection Vehicles to Be Dedicated to the Contract'

Counter argument raised by the contracting authority: the evaluation board (a) noticed that Mr Borg had indicated three vehicles when in fact one of them was still in the process of being acquired from abroad and had not been registered in his name at the time and (b) explained that, whereas two trucks are required to provide this service, yet, the tenderer had to indicate what other vehicles such tenderer could rely on to back up his operations when any one of his vehicles was garaged for repairs,

'Date of Manufacture'

Counter argument raised by the contracting authority: during the hearing the evaluation board's representative consulted the workings on the evaluation sheets and (i) he noted that, at one stage, 8 points were awarded to the appellant company and then this figure was overwritten with 0 points and (ii) he acknowledged that the recommended tenderer was allocated 10 points but could offer no explanation why the appellant company was given 0 points when the said company had two vehicles registered in its name,

'References'

Counter argument raised by the contracting authority: explained that (a) the relevant technical criteria required "reference/s of successfully completed contracts of similar nature" but the references presented by the appellant company were from private firms for the hire of skips whereas the tender under reference involved domestic waste collection which service was provided only by local councils and (b) since the recommended tender had been providing this service to the Gzira Local Council, the latter could not issue a reference for its own use,

'Prices'

Counter argument raised by the contracting authority: the evaluation board stated that the prices quoted by Mr Borg were based on the assumption that his company would employ 2 employees whereas Mr Mifsud had 7 employees on his books and, therefore, it was possible for the latter to deploy 6 of them to operate 2 refuse collection trucks.

reached the following conclusions, namely:

1. The Public Contracts Review Board submits that the evaluation board had to assess a tender submission on the documentation submitted.

2. The Public Contracts Review Board fails to understand how it was at all possible that both tenderers had two refuse collection trucks registered in their name and, at the same time, Mr Mifsud was awarded a maximum of 10 points and Mr Borg was awarded no points at all and this as if Mr Borg had made no submission with regard to the ownership of refuse collection vehicles.

3. The Public Contracts Review Board also fails to comprehend why the recommended tenderer was awarded maximum (10) points for the two vehicles registered in his name with the relative dates of manufacture being 1975 and 2002 whereas the appellant was awarded 0 points for his two trucks. Also, this Board cannot but notice the lack of professionalism manifested when no member of the evaluation board could explain why, with regard to 'Date of Manufacture', at one stage, 8 points were awarded to the appellant company and then this figure was overwritten with 0 points.

4. The Public Contracts Review Board places major emphasis on the fact that an adjudication process had to be reported upon more thoroughly, formally and not through a simple reference in the minutes to subject matter in one of the respective local Council's public meetings. Furthermore, the decisions taken and the points awarded had to be clearly explained for the sake of fairness and transparency within the holistic perspective of public funds' management.

5. The Public Contracts Review Board agrees with the evaluation board, namely that a tenderer was expected to demonstrate experience relevant to the service requested in the tender, namely domestic waste collection and not skip hire services and that the reference made by Mr Micallef in favor of the appellant did not mention any

particular successfully completed contracts, as requested in the tender document, but it referred, in a rather limited manner, to the character and reliability of the appellant in his own capacity. Also, this Board notes that, unlike in other instances in this tender, the evaluation board seemed to be considerably generous in the marks allocated to the tenderer. This Board remarks that, if anything, the appellant company should have provided proof of previous experience from the local council/s that he had provided related services to and not from a consultant acting in his personal capacity.

6. The Public Contracts Review Board, while taking full cognisance of the fact that it was not possible for the appellant company to operate two trucks concurrently with only two employees, yet, one cannot but also observe that the appellants had indicated that, on contract award, the company would be engaging more employees. Nevertheless, this Board also recognizes the fact that the appellant company, then again, failed to indicate how many it would be engaging on this contract and, as a consequence, the evaluation board was not able to consider that aspect in its workings.

In view of the above, the Public Contracts Review Board concludes that:

a. the appellant company had fallen short from submitting what was actually requested in areas which one could consider to carry a considerable amount of import.

b. during the hearing it has been amply manifested that the contracting authority's 'modus operandi' in the evaluation process left very much to be desired, was unprofessionally run, inconsistent and generally oblivious of the criteria which had to be followed in order to enable an equitable and transparent evaluation and adjudication process.

As a consequence, this Board feels that, in this particular instance, the tendering process be cancelled in view of

various procedural irregularities noted which rendered this tendering process vitiated.

Furthermore, this Board also recommends that the deposit paid by the appellant company be reimbursed and that the tender be cancelled and re-issued and that new members will be assigned to the evaluation board."

Rat ir-rikors tal-appell ta' Mario Borg ezercenti l-Kummerc bl-isem "Borg Skip Hire Service" datat 3 ta' Gunju 2011 fejn talab lil Qorti sabiex tvarja d-decizjoni tas-26 ta' Mejju 2011 billi fil-waqt li tikkonferma illi l-*modus operandi* tal-awtorita`kontrajenti waqt il-process ta' evalwazzjoni kien fih nuqqasijiet lampanti, tmexxa b'nuqqas ta' professjonalita', kien inkonsistenti u b'mod generali kien nieqes minn dawk il-kriterji li kellhom jigu tassattivament segwiti sabiex issir evalwazzjoni u ghotja ekwa u trasparenti, tilqa' senjatament it-tielet talba dedotta fl-ilment tal-appellant u tiddikjara illi *a tenur* tal-kriterji tal-evalwazzjoni u ghar-ragunijiet esposti, illi l-appellant jinghata l-kuntratt *de quo*, bl-ispejjez taz-zewgt istanzi kontra l-Kunsill Appellat u bir-rifuzjoni tad-depositu mhallas.

Rat li dan l-appell kien appuntat ghas-smigh ghas-seduta tas-6 ta' Dicembru 2011.

Rat ir-risposta tal-appell tal-Kunsill Lokali Gzira datata 30 ta' Gunju 2011 a fol. 17 tal-process fejn sostna ghall-motivi kollha esposti, li din il-Qorti qed tigi miltuba tichad l-appell bl-ispejjez kontra l-appellanti.

Rat il-verbal tas-seduta tas-6 ta' Dicembru 2011 fejn il-kawza giet differita ghall-31 ta' Mejju 2012 ghas-sentenza in difett ta' ostakolu.

Rat il-verbal tas-seduta tal-31 ta' Mejju 2012, fejn jirrizulta d-decizjoni ma setghetx tinghata ghaliex il-*file* relattiv dwar l-inkartament tad-decizjoni tal-Bord tal-Appelli dwar il-Kuntratti Pubblici kien baqa' ma giex esebit jew allegat ma' l-atti, minkejja li l-Qorti ordnat komunika lill-Awtoritajiet indikati fil-verbal tas-seduta tas-6 ta' Dicembru 2011,

komuniki li baqghu ma sarux; fil-fatt l-inkartament relattiv gie esebit fl-istess seduta biss wara li l-appellanti harrek lil Saviour Debono bhala Segretarju tal-Bord sabiex jesebixxi kopja tal-*file* relattiv li saret fl-istess seduta u dan biss konsistenti fis-Sejha ghal Offerti (SO) u d-decizjoni, u l-appell gie differit ghas-sentenza in difett ta' ostakolo ghat-18 ta' Ottubru 2012.

Rat in-nota tal-appellant Mario Borg fil-kwalita' tieghu premessa datata 13 ta' Gunju 2012 fejn esbixxa kopja tal-ilment li gie ntavolat quddiem il-Bord ta' Revizjoni dwar Kuntratti Pubblici u decizjoni flimkien ma' dokumenti hemm annessi.

Rat l-atti kollha tal-istess kawza nkluz id-decizjoni mill-Bord ta' Revizjoni dwar Kuntratti Pubblici (il-Bord) fl-ismijiet premessi datata 26 ta' Mejju 2011.

Rat id-dokumenti esebiti.

Rat l-atti kollha l-ohra tal-kawza.

II. KONSIDERAZZJONIJIET.

Illi l-appell odjern huwa fis-sens li l-appellant gie ippregudikat mill-agir inkompetenti tal-awtorita`kontraenti u dan il-pregudizzju gie kanonizzat fid-decizjoni mehuda mill-Bord peress li l-offerta tal-appellant illum saret pubblika u s-sejha gdida naturalment ser tipprekludieh milli genwinament ikun kompetittiv bhalma kien fl-offerta tieghu wara s-sejha originali u f'dan il-kuntest jghid li jekk tigi ezaminata l-offerta tieghu minn semplici aritmatika jirrizulta li b'apprezzament ekwu u mparzjali tad-dokumentazzjoni huwa kellu jinghata t-*tender* ghaliex huwa kellu jaqbez il-puntegg moghti lill-offerent l-iehor li kien preferut mill-awtorita`kontraenti, u dan ukoll rigward il-prezz (li huwa marbut ma' dak minnu offert); fuq kollox jghid li l-Bord skarta r-riferenzi li saru dwaru.

Illi mid-*decide* tal-istess Bord fis-sentenza tieghu datata 26 ta' Mejju 2011 jirrizulta li nghad li:-

"1. The Public Contracts Review Board submits that the evaluation board had to assess a tender submission on the documentation submitted.

2. The Public Contracts Review Board fails to understand how it was at all possible that both tenderers had two refuse collection trucks registered in their name and, at the same time, Mr. Mifsud was awarded a maximum of 10 points and Mr. Borg was awarded no points at all and this is as if Mr. Borg had made no submission with regard to the ownership of refuse collection vehicles.

3. The Public Contracts Review Board also fails to comprehend why the recommended tenderer was awarded maximum (10) points for the two vehicles registered in his name with the relative dates of manufacture being 1975 and 2002 whereas the appellant was awarded 0 points for his two trucks. Also, this Board cannot but notice the lack of professionalism manifested when no member of the evaluation board could explain why, with regard to 'Date of Manufacture, at one stage 8 points were awarded to the appellant company and then this figure was overwritten with 0 points.

4. The Public Contracts Review Board places major emphasis on the fact that an adjudication process had to be reported upon more thoroughly, formally and not through a simple reference in the minutes to the subject matter in one of the respective local Council's public meetings. Furthermore, the decisions taken and the points awarded had to be clearly explained for the sake of fairness and transparency within the holistic perspective of public funds' management.

5. The Public Contracts Review Board agrees with the evaluation board, namely that a tenderer was expected to demonstrate experience relevant to the service requested in the tender, namely domestic waste and not skip hire services and that the reference made by Mr. Micallef in favour of the appellant did not mention any particular successful completed contracts, as requested in the

tender document, but it referred, in a rather limited manner, to the character and reliability of the appellant in his own capacity. Also, this Board notes that, unlike in other instances in this tender, the evaluation board seemed to be considerably generous in the marks allocated to the tenderer. This Board remarks that, if anything, the appellant company should have provided proof of previous experience from the local council/s that he had provided related services to and not from a consultant acting in his personal capacity.

6. The Public Contracts Review Board, while taking full cognisance of the fact that it was not possible for the appellant company to operate two trucks concurrently with only two employees yet, one cannot but also observe that the appellants had indicated that, on contract award, the company would be engaging more employees. Nevertheless, this Board also recognises that the fact that the appellant company, then again, failed to indicate how many it would be engaging on this contract and as a consequence, the evaluation board was not able to consider that aspect in its workings.

In view of the above, the Public Contracts Review Board concludes that:

a. the appellant company had fallen short from submitting what was actually requested on the areas which one could consider to carry a considerable amount of import.

b. during the hearing it has been amply manifested that the contracting authority's 'modus operandi' in the evaluation process left very much to be desired, was unprofessionally run, inconsistent and generally oblivious of the criteria which had to be followed in order to enable an equitable and transparent evaluation and adjudication process.

As a consequence, this Board feels, that in the particular instance, the tendering process be cancelled in view of

various procedural irregularities noted which rendered this tendering process vitiated.

Furthermore, this Board also recommends that the deposit paid to the appellant company be reimbursed and that the tender be cancelled and re-issued and that new members will be assigned to the evaluation board”.

Illi minn dan jidher li d-decizjoni tal-Bord kienet ghal kollox kritika tal-mod ta' kif l-Evaluation Board u l-Kunsill appellat ghamel evalwazzjoni tal-offerti quddiemu, u mill-atti processwali din il-Qorti ma tistax ma taqbilx mad-decizjoni appellata in kwantu l-istess ma hija xejn inqas minn kundanna esplicita ta' kif tmexxa il-process ta' evalwazzjoni tal-istess offerti sottomessi, wahda minnhom tal-appellant, li juru li l-appellant kien *in gran parti* penalizzat bla ebda raguni valida. Din il-Qorti qed tissoferma fuq dan il-punt ghaliex hawn qed nittrattaw fuq affarijiet serji, li huma ben regolati bil-ligi, u ma hemmx dubju li f'dan il-livell tali komportament riskontrat mill-Bord ma huwiex accettabbli minn hadd speċjalment minn Bord ta' evalwazzjoni u/jew l-Awtorita` kontraenti.

Illi naturalment l-appellant jaqbel ma' dan kollu, u l-appell tieghu huwa ristrett fejn gie ritenut mill-Bord li *“a. the appellant company had fallen short from submitting what was actually requested on the areas which one could consider to carry a considerable amount of import”* u dan ghaliex huwa jsostni li kien fil-fatt prova li kellu r-rekwiziti kollha skont is-Sejha ghall-Offerti.

Illi pero' dan ma huwiex minnu u dan *in vista* ta' dak ritenut f'paragrafi 5 u 6 fuq citati tal-istess decizjoni u xejn minn dak sottomess f'dan l-appell ma wera jew almenu indika li l-Bord kien zbaljat fuq dan il-punt, ghaliex jidher li r-riferenzi li attwalment l-istess appellant ipprezenta mat-tender ma kienux jirreferu ghas-servizzi li huwa kellu joffri fl-istess tender u hija f'dan is-sens li artiklu 2.3 taht in-nomenklatura *“Administrative Criteria”* ghandha tinqara, u certament li mid-dokumenti kollha esebiti dan ma giex provdut mill-appellanti. L-istess jinghad dwar l-impjegati li l-istess appellanti ndika li kellu fil-mument li saret l-offerta

u dan certament ma kienx jikkombaccja ma dak rikjest fl-artikolu 21 fil-kuntest tal-*“Employment of Personnel to render the service”* tal-istess sejha ghall-offerti b'dan ghalhekk li jidher u jirrizulta li l-konkluzjoni tal-Bord f'dan il-kuntest kienet sostanzjalment u fil-meritu legalment u fattwalment korretta u ghalhekk dan l-appell ma jistax jinghad li huwa fondat u allura ma hemmx bazi li jigi milqugh.

Illi izda din il-Qorti thoss li l-appell kif impostat huwa null u bla effett u dan peress li d-decizjoni tal-Bord kellha wkoll bhala parti lil Emmanuel Mifsud u dan ma gie bl-ebda mod indikat u wisq inqas inkluz f'dan l-appell bhala parti u dan in-nuqqas irendi l-istess rikors tal-appell stess bhala null u bla effett u dan anke abbazi ta' dak ritenut fis-sentenza **“Norman Rossignaud et vs Awtorita`tal-Ippjanar”** (App. 66/99 – A.C. – 9 ta' Frar 2001 fejn inghad li:-

“Issa, huwa principju ormai assodat ta' lment fil-ligi u fil-gurisprudenza taghna, illi m'hemmx bzonn illi jsiru xi referenzi kopjuzi fir-rigward, illi l-appell irid isir fil-konfront tal-partijiet kollha li ghandhom interess. Certament ma setghax f'dan il-kaz jithalla barra Dottor Ramon Rossignaud li kif jinghad huwa l-parti l-iktar interessata u li fil-konfront tieghu d-decizjoni appellata taghmel stat minghajr ma jigi pregudikat il-kuncett kollu tal-integrita' tal-gudizzju li jirregola l-process gudizzjarju.

F'dawn ic-cirkostanzi, ghalhekk, din il-Qorti m'ghandhiex alternattiva hlief li tilqa' l-ewwel eccezzjoni preliminari tal-Awtorita`ta' l-Ippjanar rigwardanti l-allegata nullita' tal-appell odjern u konsegwentement ghar-ragunijiet fuq esposti, tiddikjara l-istess appell bhala irritu u null u konsegwentement ma tiehux aktar konjizzjoni tieghu”.

Illi ma hemmx dubju li f'dan il-kaz Emanuel Mifsud kien parti fl-appell quddiem il-Bord u jirrizulta li l-appell odjern ma sarx fil-konfront tieghu u dan in-nuqqas ma jistax jigi sanat f'dan l-istadju lanqas permezz tal-**artikolu 175 (2) tal-Kap. 12** ghaliex din ma tipprovdiex ghal zieda fil-partijiet li sar l-appell fil-konfront taghhom. B'hekk l-appell odjern huwa wkoll null u bla effett.

III. KONKLUZJONI.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi**, billi filwaqt li tilqa' r-risposta tal-appell tal-appellat il-Kunsill Lokali Gzira datata 30 ta' Gunju 2011 biss in kwantu l-istess hija konformi ma' dak hawn premess, **tichad l-appell interpost mill-appellanti Mario Borg ezercitanti l-kummerc bl-isem "Borg Skip Hire Service" fir-rikors tal-appell datat 3 ta' Gunju 2011 u dan billi tilqa' l-ewwel eccezzjoni preliminari tal-Kunsill appellat rigwardanti l-allegata nullita' tal-appell odjern u konsegwentement tiddikjara l-istess appell bhala irritu u null ghall-finijiet u effetti kollha tal-Ligi u b'hekk tikkonferma d-decizjoni tal-Bord ta' Revizjoni dwar Kuntratti Pubblici fl-ismijiet premessi "Borg Skip Hire Service vs Gzira Local Council u Emmanuel Mifsud" (Kaz. Numru 290) datata 26 ta' Mejju 2011.**

Bl-ispejjez kontra l-appellanti Mario Borg fil-kwalita' tieghu premessa bhala ezercenti l-kummerc bl-isem "Borg Skip Hire Service".

Moqrija.

< Sentenza Finali >

-----TMIEM-----