



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

**ONOR. IMHALLEF  
RAYMOND C. PACE**

Seduta tad-29 ta' Novembru, 2012

Appell Civili Numru. 32/2011

**Design Solutions Limited**

**vs**

**Direttur tal-Kuntratti, Kunsill Malti ghax-Xjenza u t-  
Teknologija.**

**Il-Qorti,**

### **I. PRELIMINARI.**

Illi fit-22 ta' Awwissu 2011 il-Bord tal-Appell dwar Kuntratti Pubblici (il-Bord) ppronunzja s-segwenti decizjoni fl-ismijiet premissi: -

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

*Dr Philip Magri, on behalf of Design Solutions Ltd, the appellant company, first made the following submission regarding the deposit that was required for the appeal:*

*i. on lodging his appeal, his client was requested to deposit €10,800 which, according to the Contracts Department, represented 1% of the estimated value of the contract which in this case was not made public in the tender document;*

*and*

*ii. the amount of deposit should have been €7,670, i.e. 1% of €767,000, which was the value of the offer made by his client, as per Reg. 84 (1) which, among other things, stated that:*

*“The notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender submitted by the tenderer, provided that in no case shall the deposit be less than one thousand and two hundred euro (€1,200) or more than fifty-eight thousand euro (€58,000)”*

*Prof. Alex Torpiano, also on behalf of the appellant company, explained:-*

*a. that in this case the estimated value of the tender was not made public and when he queried this aspect he was informed by the Contracts Department that the estimated value of the tender was 'an internal source of information'; and*

*b. complained that once the estimated value of the tender was not made public in the first instance, then the bidder had no means to verify the amount that he was obliged to deposit according to regulations since, apparently, it was left entirely up to the contracting authority to fix the estimated contract value in a manner that was far from transparent.*

*Dr John Cremona, on behalf of the Malta Council for Science and Technology, the contracting authority, remarked that the Council was not involved with regard to*

*the amount that had to be deposited and hence he desisted from deliberating on this matter.*

*Dr Magri continued by making the following submissions about the matter of subcontracting:*

*i. by letter dated 30<sup>th</sup> June 2011 the Contracts Department informed his client that his offer was found to be technically not compliant since the total subcontracting exceeded the 35% threshold as per Volume 1 Section 2 'Tender Form' and Question/Answer No. 21 of Clarification No. 4 of the 22<sup>nd</sup> March 2011;*

*ii. in the evaluation grid at Clause 30.4 of Part 3 'Technical Compliance' (page 17 of the tender document) there were listed the technical compliance criteria on which the offer was to be evaluated as to whether it was technically compliant or not and the same evaluation grid ended with a Nota Bene stating that "If any of the answers to the questions in the evaluation grid above is found to be 'NO' by the Contracting Authority, then the bid is automatically considered to be 'Technically Not Compliant' and will not be evaluated further";*

*iii. on the 22<sup>nd</sup> March 2011, the Contracts Department issued Clarifications No. 4 and 5, with the latter having been referred to as Corrigendum 1, where Question 21 in Clarification No. 4 asked "Is any sub-contracting allowed?" Instead of a 'Yes' or 'No' answer, the contracting authority replied as follows "The maximum amount of subcontracting must not exceed 35% of the total contract value";*

*iv. the answer to Question No. 21 did not constitute a clarification but the addition on another criterion/principle to the original tender document. One could acknowledge that this clarification was to be considered as an integral part of the tender document but it could not be taken as an added criterion to those listed in the 'Technical Compliance Grid' on which the offer had to be adjudicated technically compliant or not;*

v. *the contracting authority failed to indicate that the level of sub-contracting outlined in Question 21 of Clarification 4 was being added to the Technical Criteria and that failure to comply with that criterion would lead to disqualification; and*

vi. *the maximum sub-contracting permissible was 35% of the total contract value which, although not made public, it turned out to be €1,080,000, and hence if his client had increased its offer to €1,000,000, instead of the very competitive price of €767,000, with the difference of about €300,000 being added on the portion that was to be carried out by the contractor, then his client would have still been the cheapest and would have satisfied the subcontracting requirement.*

*Prof. Torpiano intervened to remark that:*

a. *the tender document was indicative that sub-contracting was permissible and that emerged from the list of key experts, some of whom were not available on the local market. Nevertheless, Question 21 seemed to doubt this requirement since it asked whether sub-contracting was permissible or not;*

b. *if one were to concede that the Clarification No. 4 formed an integral part of the original tender document, the fact was that the sub-contracting element was not included in the technical compliance grid and neither was it mentioned that any infringement of the sub-contracting limit would lead to disqualification; and*

c. *it made no sense to refuse an offer which was 30% cheaper on the claim that the percentage sub-contracting limit had not been respected which quantum, he contended, was not verifiable in the absence of a given mechanism as to how to arrive at it.*

*Dr Cremona, on his part, submitted the following comments:*

*i. at part 'A' of Volume 1 Section 2 'Tender Form' the tenderer had to indicate the 'Value of sub-contracting as percentage of the total cost' and note 3 stated that:*

*"The maximum amount of sub-contracting must not exceed [... %] of the total contract value. The main contractor must have the ability to carry out at least [... %] of the contract works by his own means."*

*ii. sub-contracting was allowed in the original tender document but it did not specify up to what percentage of the contract value was subcontracting permissible;*

*iii. the shortcoming, as reflected in (ii) above, was clarified in the answer to Question No. 21 in Clarification No. 4 which established the sub-contracting limit at 35% of the contract value and which instruction was made available to all the bidders;*

*iv. the technical evaluation grid also posed the following question, namely, "Is offer as per Terms of Reference? Since the clarifications issued formed part of the tender document, then, when the appellant company indicated that in its 'Tender Form' that the value of sub-contracting was 48% of the contract value then the company was in breach of the amount of sub-contracting permissible, namely 35% of the contract value and, in the circumstances, the evaluating board had no option but to disqualify the appellant's offer; and*

*v. once the tender document had already provided for sub-contracting, what was omitted was the extent subcontracting was permissible. Yet, it was immaterial if one introduced the sub-contracting limit through a clarification or a correction.*

*The Chairman, Public Contracts Review Board, remarked that there had to be ways and means how to verify what portion of the contract would be sub-contracted otherwise there would be no point in inserting the sub-contracting limits. He added that, besides the bonafide attitude that one expected on the part of the tenderer, one could also arrive at the sub-contracting element of the contract from*

*the agreements entered into between the contractor and his sub-contractors together with the invoices issued/presented.*

*Mr Charles Attard Bezzina, chairman of the evaluation board, remarked that the tender document requested such information as to the portion of responsibilities, the service intended to be sub-contracted and the value of the subcontracting.*

*Dr Norval Desira, on behalf of the recommended tenderer, offered the following remarks:-*

- a. the extent to which such sub-contracting was allowed;*
- b. in his reply the Director of Contracts used the exact terminology found in note 3 of part A of the Tender Form;*
- c. in the case of a joint venture, whatever was not covered in the joint venture agreement was, effectively, going to be carried out by the subcontractor/s which, as a result, was verifiable, not to mention the bonafide concept on the part of the tenderer that one could not ignore unless matters indicated otherwise.*

*Architect Robert Sant, on behalf of the recommended tenderer, pointed out that the difference between a partner/key expert in a joint venture and a sub-contractor was that the partner/key expert could not be substituted whereas the sub-contractor could be replaced during the contract period. He added that the reason behind the requirement that sub-contracting could only be resorted to up to a certain limit was that a number of key experts had to remain on the project throughout the duration of the contract period.*

*Prof. Torpiano remarked that the tender form allowed a bidder to participate either as a joint venture or as a contractor with subcontractors, the latter being the case of the appellant company. He reiterated that the clarification emerging from Question No. 21 did not indicate that the*

*extent of sub-contracting was forming an integral part of the technical compliance criteria or the terms of reference which, if breached, would lead to disqualification.*

*The Chairman, Public Contracts Review Board, remarked that it was not within the realms of the said Board to question the quantum of the sub-contracting permissible in this contract but what it had to ascertain was that that requirement was applicable to all tenderers for the sake of level playing field.*

*Dr Desira concluded that (i) if a tenderer did not fill in Volume 1 Section 2 'Tender Form' properly, then that tenderer could have never satisfied the eligibility criteria, (ii) if a tenderer did not satisfy the eligibility criteria, then one's offer could not be considered in subsequent stages, including the technical compliance, (iii) if the answer to Question 21 of Clarification No. 4 was not clear enough to the appellant company, then the said company had all the opportunity to ask for a clarification on the issue, (iv) with regard to 'Technical Capacity', 'Evaluation Criteria/Technical Specifications', 'Tender Form' and 'Financial Offer', note 3 at page 27 of the Tender Form stated that "No rectification shall be allowed. Only clarifications on the submitted information may be requested" and (v) the responsibility of the Public Contracts Review Board was to ensure that the tendering process was transparent and fair and that the bidders were compliant with requirements but it was not the Public Contracts Review Board's remit to deliberate on the price of the cheapest compliant tender.*

*Prof. Torpiano concluded the appellant company's offer was compliant according to the technical compliance grid that featured in the tender document and, as a consequence, the rejection of the offer was not justified.*

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

*This Board,*

- *having noted that the appellant's company, in terms of the reasoned letter of objection of the 11<sup>th</sup> July 2011, and through the verbal submissions made during the hearing held on the 1<sup>st</sup> August 2011, had objected to the decision taken by the pertinent authorities, to disqualify its offer on being adjudicated technically non compliant;*
- *having noted the appellant firm's representatives claims and observations regarding the matter of the required deposit which they made as asked, but contested. They observed that: (a) on lodging the appeal, the appellant company was requested to deposit €10,800 which, according to the Contracts Department, represented 1% of the estimated value of the contract which, in this case, was not made public in the tender document; and (b) the amount of deposit should have been €7,670, i.e. 1% of €767,000, which was the value of the offer made by the appellant company as per Reg. 84 (1) which, among other things, stated that "The notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender submitted by the tenderer, provided that in no case shall the deposit be less than one thousand and two hundred euro (€1,200) or more than fifty-eight thousand euro (€58,000)"; (c) that, in this case, the estimated value of the tender was not made public and when the appellant company's representative queried this aspect he was informed by the Contracts Department that the estimated value of the tender was 'an internal source of information'; and (d) complained that once the estimated value of the tender was not made public in the first instance, then the bidder had no means to verify the amount that the company was obliged to deposit according to regulations since, apparently, it was left entirely up to the contracting authority to fix the estimated contract value in a manner that was far from transparent;*
- *having seen the Contracting Authority's representative's reply on the matter of the deposit wherein he stated that the contracting authority, the Malta Council for Science and Technology, was not involved with regard*



*to the amount that had to be deposited and hence he desisted from deliberating on this matter;*

- *having further noted the appellant firm's representative's submissions that (a) by letter dated 30<sup>th</sup> June 2011 the Contracts Department informed the said appellant company that its offer was found to be technically not compliant since the total subcontracting exceeded the 35% threshold as per Volume 1 Section 2 'Tender Form' and Question/Answer No. 21 of Clarification No. 4 of the 22<sup>nd</sup> March 2011, (b) in the evaluation grid at Clause 30.4 of Part 3 'Technical Compliance' (page 17 of the tender document) there were listed the technical compliance criteria on which the offer was to be evaluated as to whether it was technically compliant or not and the same evaluation grid ended with a Nota Bene stating that "If any of the answers to the questions in the evaluation grid above is found to be 'NO' by the Contracting Authority, then the bid is automatically considered to be 'Technically Not Compliant' and will not be evaluated further", (c) on the 22<sup>nd</sup> March 2011, the Contracts Department issued Clarifications No. 4 and 5, with the latter having been referred to as Corrigendum J, where Question 21 in Clarification No. 4 asked 'Is any sub-contracting allowed?' Instead of a 'Yes' or 'No' answer, the contracting authority replied as follows, namely "The maximum amount of subcontracting must not exceed 35% of the total contract value", (d) the answer to Question No. 21 did not constitute a clarification but the addition of another criterion/principle to the original tender document. One could acknowledge that this clarification was to be considered as an integral part of the tender document but it could not be taken as an added criterion to those listed in the Technical Compliance Grid on which the offer had to be adjudicated technically compliant or not, (e) the contracting authority failed to indicate that the level of subcontracting outlined in Question 21 of Clarification 4 was being added to the Technical Criteria and that failure to comply with that criterion would lead to disqualification and (f) the maximum sub-contracting permissible was 35% of the*

*total contract value which, although not made public, it turned out to be*

- *€1,080,000, and hence if the appellant company had increased its offer to €1,000,000, instead of the very competitive price of €767,000, with the difference of about €300,000 being added on the portion that was to be carried out by the contractor then the said appellant would have still been the cheapest and would have satisfied the subcontracting requirement;*

- *having taken into consideration Professor Torpiano's remarks, namely that: (a) albeit the tender document was indicative that sub-contracting was permissible and that emerged from the list of key experts, some of whom were not available on the local market, yet, Question 21 seemed to doubt this requirement since it asked whether sub-contracting was permissible or not; (b) if one were to concede that the Clarification No. 4 formed an integral part of the original tender document, the fact was that the sub-contracting element was not included in the technical compliance grid and neither was it mentioned that any infringement of the sub-contracting limit would lead to disqualification; and (c) that it made no sense to refuse an offer which was 30% cheaper on the claim that the percentage sub-contracting limit had not been respected which quantum, he contended, was not verifiable in the absence of a given mechanism as to how to arrive at it;*

- *having considered the contracting authority's representative's submissions, namely that (a) at part 'A' of Volume 1 Section 2 'Tender Form' the tenderer had to indicate the 'Value of sub-contracting as percentage of the total cost' and note 3 stated that "The maximum amount of sub-contracting must not exceed [... %] of the total contract value. The main contractor must have the ability to carry out at least [.... %] of the contract works by his own means", (b) as a result, subcontracting was allowed in the original tender document but it did not specify up to what percentage of the contract value was subcontracting permissible, (c) this shortcoming was clarified as per answer to Question No. 21 in Clarification No. 4 which established the sub-contracting limit at 35% of the*

*contract value and which instruction was made available to all the bidders, (d) the technical evaluation grid also posed the following question, "Is offer as per Terms of Reference?" Since the clarifications issued formed part of the tender document, then, when the appellant company indicated that in its 'Tender Form' that the value of sub-contracting was 48% of the contract value then it was in breach of the amount of sub-contracting permissible, namely 35% of the contract value, and, in the circumstances, the evaluating board had no option but to disqualify the appellant company's offer; and (e) once the tender document had already provided for subcontracting, what was omitted was the extent subcontracting was permissible to and that, as a result, it was immaterial if one introduced the sub-contracting limit through a clarification or a correction;*

- *having taken note of the recommended tenderer's representative's remarks that (a) in various parts of the tender document and in every clarification issued, it was repeatedly stated that clarifications/corrigenda formed an integral part of the tender document and that they were to supersede anything that was previously provided to the contrary, (b) clause 22.3 of the 'Instructions to Tenderer' (page 14) provided that "the tender must contain no changes or alterations, other than those made in accordance with instructions issued by the Central Government Authority (issued as clarification notes) or necessitated by errors on the part of the tenderer. In the latter case, corrections must be initialled by the person signing the tender.", (c) the answer to Question 21 of Clarification No. 4 could have been a 'Yes' or a 'No', but it was sensible of the Director of Contracts to acknowledge that the tender document already permitted subcontracting and that what was omitted was the extent to which such subcontracting was allowed and that in his reply the Director of Contracts used the exact terminology found in note 3 of part 'A' of the Tender Form and (d) in the case of a joint venture, whatever was not covered in the joint venture agreement was, effectively, going to be carried out by the subcontractor/s which was, therefore, verifiable, not to mention the bona fide concept on the part*

*of the tenderer that one could not ignore unless matters indicated otherwise;*

- *having also considered the recommended tenderer's representative's submission that (a) if a tenderer did not fill in Volume 1 Section 2 'Tender Form' properly then that tenderer could have never satisfied the eligibility criteria, (b) if a tenderer did not satisfy the eligibility criteria then one's offer could not be considered in subsequent stages, including the technical compliance, (c) if the answer to Question 21 of Clarification No. 4 was not clear enough to the appellant company then one had all the opportunity to ask for a clarification on the issue, (d) with regard to Technical Capacity, Evaluation Criteria/Technical Specifications, Tender Form and Financial Offer, note 3 at page 27 of the Tender Form stated that "No rectification shall be allowed. Only clarifications on the submitted information may be requested" and (e) the responsibility of the Public Contracts Review Board was to ensure that the tendering process was transparent and fair and that the bidders were compliant with requirements but it was not the Public Contracts Review Board's remit to deliberate on the price of the cheapest compliant tender;*
- *having finally taken into consideration, the appellant company's last claim that its offer was compliant according to the technical compliance grid that featured in the tender document, and therefore the rejection of the offer was not justified,*

*reached the following conclusions:*

*1. The Public Contracts Review Board opines that the shortcoming in the original document wherein the extent of the subcontracting was erroneously not stated was, nevertheless, rectified through Clarification No. 4 (which referred to Question No. 21) wherein the subcontracting limit was established at a maximum of 35%. This Board has no doubt that this clarification superseded any previous same subject matter. Furthermore, the phrase "must not exceed" is more than amply clear that this requisite is compulsory and not subject to any other*

*interpretation. Also, it is a fact that any clarification and any amendment to original document, apart from forming an integral part of the tender document, is also binding on all participating tenderers. This Board places emphasis on the fact that one has to understand that a non-observance of a compulsory clause disqualifies a participating tenderer.*

*2. This Board argues that the reference made by the appellant company as regards the fact that, according to the same company, the quantum (the subcontracting limit not exceeding 35%) was not verifiable in the absence of a given mechanism as to how to arrive at it, is untenable. The Public Contracts Review Board retains that any disagreement with any particular clause could have easily been challenged upon the publication of the pertinent Clarification and not at this juncture, namely, at the appeal stage.*

*3. This Board feels that, in reducing the value, the appellant company took a calculated commercial risk. Undoubtedly, this Board argues, the said appellant could have easily stuck to a better quoted figure without prejudicing the subcontracting value (limit) as requested by the contracting authority.*

*4. The Public Contracts Review Board feels that the legal provision in question, namely - "The notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender submitted by the tenderer, provided that in no case shall the deposit be less than one thousand and two hundred euro (€1,200) or more than fifty-eight thousand euro (€58,000)."-has to be construed as implying 1% of the estimated value of the tender as published by the Department of Contracts or pertinent contracting authority as otherwise the amount paid by each potential appellant would be different even though one would be filing an objection on the same tender. As a result, this Board opines that the payment of a deposit of €10,800 to enable appellant to lodge the appeal was justified.*

5. *As a consequence of (1) to (4) above the Public Contracts Review Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed."*

Rat ir-rikors tal-appell ta' Design Solutions (C16245) datat 9 ta' Settembru 2011 fejn talbet lill-Qorti sabiex *in vista* tal-aggravji minnha mressqa tilqa' l-appell taghha u dan billi tirrevoka u thassar is-sentenza appellata u dan billi taghmel dawk id-dikjarazzjonijiet u/jew taghti dawk il-provvedimenti u/jew ordnijiet ossia rimedji kollha mehtiega u necessarji skont il-kaz inkluz billi tannulla l-ghoti tal-kuntratt lill-offerent maghzul billi tordna li l-kuntratt ghandu jinghata lis-socjeta' esponenti jew billi tannulla l-process kollu tas-sejha ghall-offerti ossija t-'tender' rigwardanti '*Services Tender for Architectural Works, including Design & Supervision, for the National Interactive Science Centre, Malta*' u tordna li dan jerga' jsir mill-gdid jew ukoll billi tillikwida favur is-socjeta' esponenti dak l-ammont li din l-Onorabbli Qorti jidhrilha xierqa in rappresentanza tad-danni sofferti mill-istess socjeta' esponenti bhala kawza diretta tal-agir tal-intimati, *oltre* milli tordna wkoll ir-rifuzjoni 'in toto' jew 'in parte' tad-depozitu maghmul *a tenur* tar-**regolament 84 (1) tar-Regolamenti dwar il-Kuntratti Pubblici**, bl-ispejjez ta' dan l-appell kontra l-istess intimati.

Rat ir-risposta tal-appell tal-Kuntratti datata 30 ta' Settembru 2011 a fol 12 tal-process fejn sostna li ghar-ragunijiet hemm indikati d-decizjoni tal-Bord tal-Appell dwar Kuntratti Pubblici hija gusta u timmerita konferma u ghalhekk l-appell interpost ghandu jigi michud bl-ispejjez kontra Design Solutions Limited.

Rat li dan l-appell kien appuntat ghas-smigh ghas-seduta tat-23 ta' Frar 2012.

Rat ir-risposta tal-Appell tal-Kunsill Malti ghax-Xjenza u t-Teknologija datata 21 ta' Frar 2012 a fol 70 tal-process fejn sostna li ghar-ragunijiet hemm indikati d-decizjoni tal-Bord tal-Appell dwar Kuntratti Pubblici hija gusta u timmerita konferma u ghalhekk l-appell interpost ghandu

Kopja Informali ta' Sentenza

jigi michud bl-ispejjez taz-zewg istanzi kontra l-istess socjeta` appellanti.

Rat il-verbal tas-seduta mizmuma fit-23 ta' Frar 2012 fejn meta ssejjah l-appell deher Dr. L-Avukat Christian Falzon Scerri ghad-Direttur tal-Kuntratti rapprezentat minn Dr. Franco Agius. Deher l-Avukat John Cremona ghall-Kunsill Malti tax-Xjenza u Teknologija rapprezentat minn Joe Borg. Deher ukoll Alex Torpiano in rapprezentanza tas-socjeta` appellanti Design Solutions Limited assistit mill-Avukat Philip Magri. Il-Qorti nnotat li l-process quddiem il-Bord ta' Rivizjoni Dwar il-Kuntratti Pubblici mhux anness ma' dawn il-proceduri u ordnat li dan jsir minnufih. L-Avukati trattaw il-kaz. L-appell gie differit ghas-sentenza in difett ta' ostakolu ghad-29 ta' Novembru 2012.

Rat l-atti kollha tal-istess kawza inkluz id-decizjoni tal-Bord tal-Appell dwar Kuntratti Pubblici fl-ismijiet premissi datata 22 ta' Awwissu 2011.

Rat id-dokumenti esebiti.

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

## **II. KONSIDERAZZJONIJIET.**

L-aggravju tas-socjeta' appellanti huwa fis-sens li d-Dipartiment tal-Kuntratti ma setax arbitrarjament jippubblika dokumenti ta' kjarifika jew *corrigendum* kif ghamel fit-22 ta' Marzu 2011 u l-istess jitqiesu li huma parti mit-*tender* li jkun gja hareg ghaliex dan iwassal ghan-nuqqas ta' trasparenza u certezza li trid il-Ligi; dak li sar bil-mistoqsija numru 21 fil-Kjarifika numru 4 ma kienx li kjarifika xi punt izda li zied kriterju gdid wara l-pubblikazzjoni tat-*tender*. Fil-fatt il-mistoqsija li saret "*Is any subcontracting allowed?*" ma gietx segwita b'risposta ta' iva je le, izda bit-twegiba li l-ammont totali ta' *subcontracting* ma kellux ikun izjed minn 35% tal-valur tat-*tender*. Din ghalhekk ma kenitx kwistjoni ta' kjarifika ta' punt li ma kienx car fit-*tender* izda zieda ta' kriterju iehor u dan il-ligi ma tittollerahx. Dan kien jammonta ghall-tibdil fit-*tender* wara li inhareg li ma hux permess mill-ligi. Dan

Kopja Informali ta' Sentenza

huwa iktar serju mhux biss ghaliex zied kriterju gdid izda ghaliex l-offerent li ma jkunx issodisfa tali kriterju gie rez *“technically non-compliant”* u b'hekk jigi skwalifikat.

Dan iktar u iktar meta fit-*Technical Non Compliance Grid* f'pagna 17 sa 19 tat-*Tender Document* l-istess kwezit ma kienx indikat bhala wahda mill-kondizzjonijiet li kieku mhux osservata kienet trendi l-offerta relativa *non compliant* tant li l-istess Grid tipprovdi li *“N.B. If any of the answers to the questions in the evaluation grid is found to be “No” by the Contracting Authority, then the bid is automatically considered to be “Technically Not Compliant” and will not be evaluated further”*.

Mela allura l-ebda kjarifika ma kellha tigi kkunsidrata bhala wahda mill-kweziti teknici necessarji sabiex tigi kkunsidrata bhala kwezit li ghandu jigi rispettati sabiex jigi kkunsidrat jekk offerta hijiex *technically compliant*, u dan iktar u iktar f'dan il-kaz meta (i) l-*evaluation grid* qatt ma ghamlet riferenza ghall-istess *subcontracting* u l-limitu tieghu; (ii) tali element ma jistax jigi kkunsidrat bhala element tekniku; (iii) li tali rekwizit ta' percentagg ta' *subcontracting* ma setax jittiehed bhala kriterju hekk importanti meta il-valur tal-kuntratt ma kienx rez pubbliku u allura ma setax jinhadem f'dak l-istadju. Dan kollu pregudika l-offerta maghmula mis-socjeta' appellanti u dan juri nuqqas ta' certezza u trasparenza li bih mexa l-process kollu tat-*tendering* b'zieda allura ta' kriterji godda li biddlu u emendaw il-kriterji li kienu applikabbli fil-mument tal-hrug tat-*tender*; (ii) it-tieni aggravju huwa li ladarba ma kienx maghruf l-valur tal-*tender* fil-mument meta sar l-appell huwa ikkonforma ruhu ma' dak li jipprovdi r-**regolament 84 (1)** li jesigi li mal-appell ikun hemm depositu ta' 1% tal-valur stmat tal-offerta kif maghmula mill-offerent u allura mis-socjeta' appellanti u fil-fatt hekk ghamel l-appellant ghaliex id-deposita l-ammont ta' 1% tal-valur tal-offerta minnu sottomessa u mhux tal-valur tal-kuntratt li sa dak iz-zmien lanqas kien maghruf.

Illi ghal 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 eżekuttiv tant li l-istess jista' jigi infurzat skont dak li jipprovdi l-**artikolu 273 tal-Kap. 12.**

Illi dan il-punt gie trattat fid-decizjoni fl-ismijiet **“United Equipment Company Limited vs d-Direttur tal-Kuntratti et”** (A.I.C. (RCP) – 10 ta' Lulju 2012 fejn inghad 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 legalament 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 skont id-disposizzjonijiet tal-istess Regolament lil din il-Qorti”*.

Illi l-fatt li skont **ir-regolament 85 (5)** meta ssir referenza lil din il-Qorti kemm minn min ikollu interess u kemm minn min ihossu aggravat bid-decizjoni tal-Bord, m'ghandux 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 ghal kollox ineffikaci; izda dan ma huwiex legalment korrett tant li jidher anke mill-istess regolament li addirittura jaghti dritt din id-darba limitat proprju lid-Direttur tal-Kuntratti u l-awtorita' kontraenti li jirreferu huma stess il-kwistjoni lil din il-Qorti fuq xi kumpens moghti skont 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

ppubblikat kif indikat fl-istess regolament; (ii) meta minkeja 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 ssollewa din l-eccezzjoni, li d-decizjoni tal-Qorti tasal sabiex tannulla 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 lil din il-Qorti minn parti li ghandha interess, liema parti ma ghandha ebda restrizzjoni li taghmel tali referenza lil din il-Qorti fuq kull punt li jhossu aggravat minnhom mid-decizjoni tal-Bord, u ghalkemm dan ir-riferiment lil din il-Qorti ma jzommx lill-istess Direttur tal-Kuntratti jew l-Kap tal-Awtorita' kontraenti milli jimplementa d-decizjoni finali tal-Bord tar-Revizzjoni, din se mai qed tirreferi biss ghal meta jinghata kuntratt mehud 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 kinitx waslet sabiex taghti kuntratt, mela id-decizjoni ta' din il-Qorti skont l-istess regolament naturalment teffettwa 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 hijjex 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 esegwiti u rezi effettivi, u li allura ghandhom il-poter li jannullaw 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 ghal din il-Qorti bhala procedura ineffikaci u inutili u li tmur kontra l-kuncett stess ta' Qorti, li hija l-organu per excellence gudizzjarju li jiddeciedi finalment kull pendenza lilha riferita minn u skont il-Ligi bejn il-partijiet, u li d-decizjoni taghha ghandha jkollha effett bhala ordnijiet ta' istituzzjoni u qorti kostitwita u protetta bil-Kostituzzjoni ta' Malta, u li d-decizjonijiet taghha ghandhom jigu esegwiti 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”. B'hekk din il-pregudizzjali qed tigi michuda.*

Kwantu ghall-mertu ta' dan l-appell din il-Qorti, wara li rat l-appell impost mis-socjeta' appellanti u r-risposta tal-appellati b'mod esawrjenti u bir-reqqa, anke tenut kont tal-mod professjonali li tali sottomissjonijiet gew maghmula mill-partijiet kollha f'dan l-appell, hija tal-fehma li l-aggravju mressaq mill-appellanti huwa gustifikat ghalix fil-waqt li huwa veru li jistghu isiru dawk li jissejhu bhala *Explanations/Clarifications Notes Concerning Tendering Documents*, il-fatt jibqa' li skont dak indikat f'paragrafu 11 tal-offerta, dal li jista' jsir huma klarifikazzjonijiet tal-kondizzjonijiet tat-tender kif mahrug b'dan allura li ma jitbiddlux ir-rekwiziti tal-offerti rikjesti bil- u wara l-hrug tal-istess dokument.

F'dan il-kaz partikolari dak li gara ma kienx li saret kjarifika ta' dak li kien rikjest fis-sejha tal-offerti, izda gara li dan zied kwezit gdid fl-istess *Tender Document*. Fil-fatt meta inhareg t-*Tender Document* ma kien hawn ebda indikazzjoni li kien hemm limitu ta' kemm kellu jkun il-persentagg ta' xoghol li seta' jnghata taht *subcontracting*; wara l-mistoqsija li saret skont il-kronologija tal-fatt magistralment esposti f'paragrafi 11 sa 24 tar-risposta tal-appell tad-Direttur tal-Kuntratti (fol. 14 sa 16) jirrizulta li ghall mistoqsija jekk kienx hemm ammont massimu ghal xoghol li seta' jigi sub appaltat, bl-Ingiliz “*Is there a maximum amount of subcontracting allowed?*”. Ir-risposta ghall-istess ma kenitx u fil-verita` ma setghetx tkun iva jew le, ghalix dan l-element kien totalment mankanti fit-*Tender Document* innifsu tant li fejn kien hemm dan l-element kien hemm biss hekk:-

*"The maximum amount of sub-contracting must not exceed [... %] of the total contract value. The main contractor must have the ability to carry out at least [... %] of the contract works by his own means."*

Dan ifisser, u dan huwa ammess minn almenu xi whud mill-appellati, inkluz id-Direttur tal-Kuntratti, li fil-hrug tat-*Tender* kien hemm zball ghaliex kien hemm ommissjoni ta' dawk li kienu r-rekwiziti dwar l-istess. Dan ifisser li bil-hrug tat-*tender document* ma kienx effettivament hemm indikazzjoni dwar limitu ta' *subcontracting*, tant li l-mistoqsija ma kienx jekk fil-fatt kienx hemm limitu ghall-ammont ta' *subcontracting* u dan ghaliex fil-kuntratt ma' kien indikat l-ebda limitu.

Dan iwassal sabiex fl-opinjoni tal-Qorti jindika li dak in-nuqqas u bil-klawsola kif proposta tindika li effettivament ma kienx hemm limitu ta' ammont fid-dokument tas-Sejha tal-Offerti ghal dak li kellu jkun *subcontracting* permissibbli, b'dan ghalhekk li meta saret dik li ssejhet bhala kjarifika, ma kienet kjarifika xejn ghaliex ma spjegatx rekwizit li kien gja ezistenti, izda fil-fatt holqot hija kwezit gdid f'dawk li huma l-elementi essenzjali tal-istess kuntratt u dan billi imponiet limitu ghall-ammont li seta' jigi sub-appaltat meta qabel ma kienx hemm. Allura dan ma huwiex element ta' kjarifika izda holqien ta' kwezit u element gdid li ma kienx parti mid-Dokument originarjament mahrug u dan imur *oltre* minn dak li jista' jew setgha jsir skont l-artikolu 11 fuq citat ghaliex biddel il-kondizzjonijiet u l-elementi tal-Offerta Originali mahruga.

Fl-opinjoni ta' din il-Qorti dan huwa iktar serju meta dan gie ikkonsidrat mit-Tribunal bhala parti mit-*Technical Compliance Grid*, meta fil-fatt ma kienx u setax ikun ghaliex fid-dokument originali mahrug ma kien hemm ebda kwalifika dwar l-ammont li setgha jinghata f'*subcontracting*.

Izda mhux hekk biss izda jidher li l-appellati jew almenu xi whud minnhom qed fl-opinjoni ta' din il-Qorti jikkonfondu flimkien l-element tat-*Technical Compliance Grid* li n-non osservanza taghhom twassal ghall-eleminazzjoni

tagghom mill-process tat-*tendering*, ghal dak li huma *technical capacity* li certament fil-bran citat fil-paragrafu 30.2 Part 2 (ii) tas-Sejha tal-Offerti qed taghmel riferenza ghal dak li hija s-*Selection Criteria* u mhux ghall-*admissability* jew *compliance criteria*, u ghalhekk din il-Qorti thoss li f'dan l-aggravju l-appell huwa ben fondat u qed jigi milqugh.

Illi dwar it-tieni aggravju dan ukoll ghandu jigi milqugh ghaliex jirrizulta li l-appell propost mill-appellanti fil-11 ta' Lulju 2011 quddiem il-Bord kien akkumpanjat b'depozitu kif rikjest mid-Direttur tal-Kuntratti stess fl-ittra tieghu tat-30 ta' Gunju 2011 (Dok. "DK 6" – fol. 65) fl-ammont ta' €10,800. Dan minkejja li l-istess ittra rreferiet ghal *one per cent of the estimated value submitted of tender* li kien ta' €1,000,000. Izda l-**artikolu 84 (1) tar-Regolamenti tal-2010 dwar il-Kuntratti Pubblici (Avviz Legali 296 tal-2010)** jirreferi ghall-*"depositu ekwivalenti ghal wiehed fil-mija tal-valur stmat tal-offerta maghmula mill-offerent"* li f'dan il-kaz kienet ta' €767,000 u allura d-depożitu kellu jkun ta' €7,670. Mela anke dan l-aggravju huwa fondat.

*In vista* ta' dak hawn deciz dan iwassal sabiex mhux biss d-decizjoni tal-Bord tigi revokata izda wkoll billi din il-Qorti qed tannulla l-process kollu tas-sejha tal-offerti ossija t-*'tender'* rigwardanti *'Services Tender for Architectural Works, including Design & Supervision, for the National Interactive Science Centre, Malta'* u tordna li dan jerga' jsir mill-gdid u tordna wkoll ir-rifuzjoni *in toto* tad-depożitu maghmul *a tenur* tar-**regolament 84 (1) tar-Regolamenti dwar il-Kuntratti Pubblici**.

### **III. KONKLUZJONI.**

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi**, billi filwaqt li tichad ir-risposta tal-appellat id-Direttur tal-Kuntratti datata 30 ta' Settembru 2011, u dik tal-Kunsill Malti tax-Xjenza u t-Teknologija datata 21 ta' Frar 2012, **tilqa' l-appell interpost mill-appellanti s-socjeta' Design Solutions Limited datata 9 ta' Settembru 2011 b'dan li qed thassar u tirrevoka d-**

**decizjoni tal-Public Contracts Review Board fl-ismijiet premissi "Case No. 316 CT/3098/2010 – Adv. CT/028/2011 - 'Services Tender for Architectural Works, including Design & Supervision, for the National Interactive Science Centre, Malta' b'dan li din il-Qorti qed tannulla l-process kollu tas-sejha tal-offerti ossija t-'tender' rigwardanti 'Services Tender for Architectural Works, including Design & Supervision, for the National Interactive Science Centre, Malta' u wkoll dak kollu li sar b'konsegwenza tal-istess inkluz l-ittra ta' rakkomandazzjoni datata 30 ta' Gunju 2011 u tordna li tali Sejha ghall-Offerti terga' issir mill-gdid u tordna wkoll ir-rifuzjoni 'in toto' tad-depozitu magħmul *a tenur* tar-regolament 84 (1) tar-Regolamenti dwar il-Kuntratti Pubblici.**

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

**Moqrija.**

**< Sentenza Finali >**

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