

## QORTI TAL-APPELL

IMĦALLFIN

**S.T.O. PRIM IMĦALLEF SILVIO CAMILLERI  
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO  
ONOR. IMĦALLEF NOEL CUSCHIERI**

**Seduta ta' nhar il-Ġimgħa 30 ta' Ottubru 2015**

**Numru 18**

**Rikors Numru 281/2015**

**Fire-tech Limited (C17901) u Cross Zlin AS (60715886)  
flimkien magħrufa u msejħa bħala  
Firetech Cross TLS Joint Venture**

**v.**

### **Dipartiment tal-Kuntratti**

1. Dan huwa appell ta' *Firetech Cross TLS Joint Venture* [*Firetech*] minn deċiżjoni tat-28 ta' Lulju 2015 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi [*il-Bord ta' Reviżjoni*], imwaqqaf taħt ir-Regolamenti tal-2010 dwar il-Kuntratti Pubbliċi [L.S. 174.04], illi ċaħdet appell tal-istess *Firetech* minn deċiżjoni tad-Dipartiment tal-Kuntratti [*id-Dipartiment*] illi kuntratt għal "*supply, delivery, installation, commissioning and maintenance of an adaptive traffic light solution*" [*il-Kuntratt*] jingħata lil terzi.

2. Il-fatti rilevanti seħnew hekk: fl-14 ta' Ottubru 2014 saret sejħa mid-Dipartiment għal offerti għall-Kuntratt. Fost il-kondizzjonijiet tas-sejħa hemm dawk imsemmija *f'Important Note* meħmuża mad-dokumenti maħruġa mid-Dipartiment li *inter alia* tgħid hekk:

“EPPS<sup>1</sup> users holding a sole trader account are kindly reminded that their account can only be used to submit tenders under their sole trader's name and not on behalf of any other organisation.

“In case a tender needs to be submitted by a Joint Venture/Consortium, an account needs to be created through the ePPS for the Joint Venture/Consortium and only this account must be used to submit the tender.

“In the case where a person requires to submit a tender on behalf of an entity, which may be an organisation or Joint Venture/Consortium, the submission must be performed through the account of the entity. ... ..

“... ..

“The Department of Contracts reserves the right to disqualify Economic Operators who do not abide by the above instructions.”

3. Il-para. 7.1(B)(ii) (2) u (3) tal-kondizzjonijiet tas-sejħa mbagħad iġħidu illi biex jitqies kwalifikat li jagħmel offerta oblatur għandu:

“(2) State the value of works/deliveries of a similar nature [bħal dawk tal-Kuntratt] effected during 2009-2013: the minimum value of which must not be less than €600,000 in total for the quoted period. ... ..

“(3) State the number of works/deliveries of a similar nature as described above effected during 2009-2013, the minimum number of which must not be less than 3 for the quoted period. ... ..”

4. Saru offerti minn *Firetech* u minn terzi u, wara li nfetħu l-offerti fit-2 ta' Diċembru 2014, ġiet pubblikata lista tal-oblaturi u tal-prezzijiet offerti minnhom. L-ewwel żewġ ismijiet fuq il-lista (l-

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<sup>1</sup> e-PPS – *electronic Public Procurement System*.

orħos żewġ offeriti) huma *Alberta Fire & Security Equipment Limited* [*Alberta*], bil-prezz ta' seba' mija u sitta u tmenin elf, seba' mija u sebgħa u għoxrin euro u erbgħa u erbgħin ċenteżmu (€786,727.44) u *Firetech*, bil-prezz ta' miljun, mija u disat elef, ħames mija u erbgħa u għoxrin euro u tlieta u sittin ċenteżmu (€1,109,524.63).

5. Fit-22 ta' Mejju 2015 intbagħtet ittra lil *Firetech* mid-Dipartiment li tgħid hekk:

“... .. I regret to inform you that the Evaluation Committee decided that your offer was not the cheapest.

“For your information, this tender was awarded to *Alberta Fire & Security Equipment Ltd* for the amount of €786,721.45 inc. VAT.

“The sole award criterion for this tender was the cheapest priced tender satisfying the administrative and technical criteria.

“... ..”

6. B'ittra tal-1 ta' Ġunju 2015 *Firetech* talab lill-Bord ta' Reviżjoni:

“[i] to recommend that the complainants are re-instated within the procurement procedure;

“[ii] to recommend that the *Alberta Fire & Security Equipment Limited* do not fulfil the required minimum requirements as per *inter alia* provision 7 of the tender document,

“[iv<sup>2</sup>] to refund the deposit paid in its entirety.”

7. Ir-raġunijiet tal-oġġezzjoni kienu (i) illi *Alberta* ma kellhiex l-esperjenza ta' xogħlijiet kif irid il-para. 7.1(B)(ii) (2) u (3) tal-kondizzjonijiet tas-sejħa għal offeriti<sup>3</sup>, u għalhekk bilfors ikollha tingqeda b'sub-kuntratturi għal parti sostanzjali mix-xogħlijiet, bi

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<sup>2</sup> Recte, iii.

<sup>3</sup> Ara para. 0, *supra*.

ksur ta' kondizzjoni oħra tas-sejħa, u (ii) illi "*there are doubts on the technical capacity of the proposed system of the recommended tenderer to entertain the mandatory requirements*" relativi għall-ispeċifikazzjonijiet tekniċi tax-xogħlijiet tal-Kuntratt.

8. Waqt is-smiġħ tal-każ quddiem il-Bord ħareġ illi, għalkemm l-offerta magħżula kienet saret bl-identità elettronika ta' *Alberta*, id-dokumenti relativi għall-offerta juru illi l-oblatur ma kinitx *Alberta* iżda l-konsorzju (*joint venture*) *AlbSem JV* ["*AlbSem*"] magħmul minn *Alberta* bħala *lead partner* u *La Semaforica s.r.l.* L-ekwivoku dwar min tassew għamel l-offerta nħoloq għax il-konsorzju ma mexiex kif iridu l-istruzzjonijiet imnizzla fl-*Important Note*<sup>4</sup> u flok inħoloq kont elettroniku għall-konsorzju l-offerta ntbagħtet mill-kont elettroniku ta' *Alberta*. Billi d-dokumenti tal-offerta kienu juru li l-offerta saret mill-konsorzju, il-kumitat tal-għażla, meta qies l-offerti, qies l-offerta bħala magħmula mill-konsorzju u mhux minn *Alberta* weħedha. Dan ħareġ mix-xieħda li l-Perit Audrey Testaferrata de Noto, persident tal-kumitat, tat quddiem il-Bord ta' Reviżjoni, meta qalet illi "*the preferred bidder's documents included data on the joint venture and formed part of the tender. ... .. She also confirmed that the tender documents also contained an agreement through which*

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<sup>4</sup> Ara para. 2, *supra*.

*the joint venture was formed. ... [T]he evaluation process was done in respect to the Joint Venture and not to Alberta.”*

Billi, iżda, l-offerta kienet saret mill-kont elettroniku ta' *Alberta*, is-sistema elettroniku baqa' jagħraf lil *Alberta* bħala l-oblatur u kien għalhekk illi l-isem ta' *Alberta* flok dak ta' *AlbSem* baqa' jidher fuq id-dokumenti li nħarġu wara, fosthom il-lista ta' oblaturi u l-ittra tad-Dipartiment lil *Firetech* tat-22 ta' Mejju 2015.

9. Fit-28 ta' Lulju 2015 il-Bord ta' Revizjoni iddeċieda hekk dwar l-oġġezzjoni ta' *Firetech*:

“The Board,

“Having noted the Appellant’s objection, in terms of the ‘Reasoned Letter of Objection’ dated 1<sup>st</sup> June 2015 and also through the Appellant’s verbal submissions during the public hearing held on 2<sup>nd</sup> July 2015, had objected [*sic*] to the decision taken by the pertinent Authority, in that:

- “a) The Appellant Company contends that the Preferred Bidder submitted his offer as a “Joint Venture” with a third party. In this regard, the Appellant maintains that through the system of E-Tendering, a Joint Venture is assigned an identity number. The account number assigned to the Preferred Bidder does not refer to a “Joint Venture” but to a specific tenderer, in his own name *i.e. Alberta Fire & Security Ltd* and not in the name of the Joint Venture;
- “b) The Appellant maintains that the Joint Venture formed between the Preferred Bidder and the other company did not submit the tender offer in its own name so that the Contracting Authority would not be able to sign the contract within [*recte*, with] the Joint Venture since the successful bidder is not the same legal entity.

“Having Considered the Contracting Authority’s verbal submissions during the hearing held on 2<sup>nd</sup> July 2015, in that:

- “a) The Contracting Authority maintains that from the documentation submitted by the Preferred Bidder it was clearly inferred that the latter’s offer was based on a Joint Venture, if it was accepted;
- “b) The Contracting Authority also contends that from the documentation submitted by the Preferred Bidder, it was

clearly indicated that the Preferred Bidder would be executing the Tenderer's word on a "Joint Venture" basis;

- "c) Although the "Joint Venture" was not legally constituted, the indication from the documentation submitted by the Preferred Bidder clearly indicated that such a constitution was legally formed.

"Reached the following conclusions:

- "1. This Board, after hearing all submissions, opines that the fact that the preferred bidder did not abide by the bureaucratic system of filing the correct name of legal entity of the e-Tender does not infringe the principle of "substance over form". This Board also credibly note that the Preferred Bidder did give a clear indication that he will perform the tendered works via a "Joint Venture". At the same time, this Board notes that the documentation submitted by the Preferred Bidder, wherein he mentions the "Joint Venture" with full identification and also the agreement clearly illustrates that the Preferred Bidder entered into a joint agreement with *La Semaforica srl*, Via Ponticello 17, Padova, Italy".

"The identification of this third party company was well documented and its financial standing was also well adjudicated. Although it is a fact that the e-Tendering Process dictates that, if an e-Tenderer submits his offer on the basis of a Joint Venture, the Contracting Authority must allocate an identification number in the name of the Joint Venture and the fact is that was not done, does not in any way camouflage the identity of the bidder.

"The documentation submitted with the Tender Document should prevail. In this case, although the Tender Document was submitted in the name of *Alberta Fire & Security Company*, the latter had clearly informed the Contracting Authority through credible documentation that, should the tender be awarded to the Appellant, the bidder would carry out the tendered work as a Joint Venture whose agreement has been agreed, signed and submitted to the Contracting Authority.

"In this regard, this Board justifiably opines that "substance should prevail over form" and is credibly convinced that the information submitted by the preferred Bidder explicitly indicated that the Tendered Works would be executed through a Joint Venture. This issue was vividly shown through the "Joint Venture" agreement dated 20 November 2014 duly signed by both parties. It must also be pointed out that the Preferred Bidder also submitted data on the Joint Venture consortium, as stipulated in the Tender Document. In this regard, this Board justifiably opines that although the Tender submitted was in the name of *Alberta Fire & Security Ltd*, the latter had informed the Contracting Authority of such a Joint Venture. In this regard, this Board does not uphold the Appellant's first grievance.

- “2. With regards to the Appellant’s second grievance, this Board after having heard credible submissions by the Contracting Authority and after having reviewed the documentation submitted by the Preferred Bidder, is justifiably convinced that the latter did give a clear indication that he had already entered into a “Joint Agreement” with *La Semaforica srl* and that he had also indicated such a partnership in the “Data on Joint Venture/Consortium (where applicable) Form” which formed part of the Tender Document, so that the Evaluation Committee, quite correctly, considered the existence of the partnership between *Alberta Fire & Security Ltd* and *La Semaforica srl*. In this regard, this Board justifiably opines that although the submitted tender was in the name of *Alberta Fire & Security Ltd*, enough documentation was submitted by the latter to indicate a Joint Venture should the award of the Tender be in his favour. This Board justifiably notes that the “Joint Venture” has already been identified to the Contracting Authority and should not present a problem if the award contract is signed by both parties to the Joint Venture. In this regard, this Board does not uphold the Appellant’s second grievance.
- “3. This Board would respectfully address the issue of “Principle of Proportionality” with specific reference to this Appeal, in that the fact that the Preferred Bidder submitted the offer in his name *i.e. Alberta Fire & Security Ltd*, yet at the same time the same bidder did declare and prove through documentation that he had entered into an agreement with a third party company to form a “Joint Venture”, does not in any logical way alter the conditions of the Tender Document. In this regard, this Board justifiably opines that the discrepancy in the name of the Tenderer should not be an issue. The Recommended Bidder did provide all the relevant information at first hand, with regards to the “Joint Venture”.

“At the same time, this Board credibly notes that the fact whether the Recommended Bidder was a Joint Venture or not did not impose any disadvantage to the other bidders. The identify of the composition of the bidder was clear from the vely start. This Board also notes that the Preferred Bidder was approximately €300,000 cheaper and fully compliant. In this regard, this Board upholds the Evaluation Committee’s decision to apply the “Principle of Proportionality”. This Board also credibly notes that the e-Tendering System necessitates that a “Joint Venture” is given an identity number and not the Tender Document itself.

“In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by Appellant should not be reimbursed.”

10. *Firetech* ressaq appell mid-deċiżjoni tal-Bord ta' Reviżjoni b'rikors tas-6 ta' Awissu 2015 quddiem din il-qorti. Id-Dipartiment tal-Kuntratti u l-Awtorità għat-Trasport f'Malta (li fl-interess tagħha kienet saret is-sejha għal offerti) wiegħbu fl-14 t'Awissu 2015 u *AlbSem* wiegħeb fil-5 ta' Ottubru 2014.
11. Qabel ma tqis il-meritu tal-appell il-qorti sejra tibda billi tqis eċċezzjoni preliminari mressqa minn *AlbSem* dwar il-validità tal-appell għar-raġuni illi r-rikors li bih sar l-appell isejjaħ lilu nnifsu "rikors" flok "rikors tal-appell".
12. Din l-eċċezzjoni mhux biss tidher minnha nfisha bħala waħda għalkollox frivola u vessatorja iżda hija wkoll espressament kontradetta mill-kliem tal-liġi, li fir-reg. 85(5)(a) tal-L.S. 174.04 igħid illi appell minn deċiżjoni tal-Bord ta' Reviżjoni jsir "permezz ta' rikors ipprezentat fir-registru" ta' din il-qorti, kif fil-fatt sar fil-każ tallum. Il-fatt illi fil-para. (b) tal-istess regolament jissemma "rikors tal-appell" ma jibdix il-fatt li l-appell isir "permezz ta' rikors".
13. Il-qorti għalhekk tiċċad l-eċċezzjoni li tirrazenta l-fieragh.
14. Ngħaddu issa għall-meritu tal-appell.
15. L-ewwel aggravju ta' *Firetech* huwa illi l-ħtieġa illi l-offerta ssir mill-kont elettroniku ta' min jitfa' l-offerta, u mhux mill-kont



eletroniku ta' ħaddieħor, hija "rekwiżit mandatorju" li n-nuqqas ta' tħaris tiegħu kellu jwassal biex l-offerta titwarrab. Dan l-aggravju tfisser hekk:

"Illi *in primis* għandu jiġi indikat li hawn si *tratta* ta' *electronic tender*, li fi kliem sempliċi din hija sistema elettronika ta' kif għandhom jiġu intavolati l-offerti – bażikament minflok b'mod manwali wieħed imur fid-dipartiment konċernat, l-offerent jintavola s-sejħa tiegħu permezz ta' sistema tal-informatika ("*information system*");

"Illi l-istess sejħa tal-offerti hija ċara ħafna dwar kif dawn *e-tenders* għandhom jiġu sottomessi, u fil-fatt bħala parti mis-sejħa hemm taqsima li tispjega b'mod ċar ħafna dwar kif dawn għandhom isiru u min jista' jagħmel *upload* tal-offerta (*upload* ta' offerta ssir permezz ta' *account* speċifiku tal-offerent);

"Illi s-sejħa titlob u tesigi li f'każ ta' offerta li tkun qed tiġi intavolata minn *Joint Venture* u/jew *Consortium* għandu jinfetaħ *account* speċifiku u offerti li jkunu ġew intavolati minn tali account BISS jistgħu jiġu konsidrati... ..

"Illi ... ..dan ir-rekwiżit kien ċar li *si tratta* ta' element mandatorju ... ..

"Illi minkejja li dawn il-punti tqajjmu u tressqu quddiem il-Bord, liema punti ġew saħansitra rikkonoxxuti mill-Bord, instabet skuża sabiex tali element mandatarju jiġi kalpestat, ... ..

"Illi ... .. li tgħid li rekwiżit mandatorju huwa "*bureaucratic system of filing the correct name of legal entity*" huwa żball sagrosant – il-prinċipji ta' trasparenza fis-sejħiet pubbliċi jesigi li kull rekwiżit mandatorju għandu jiġi osservat, u fin-nuqqas ta' ottempranza ma' dawn ir-rekwiżiti, l-offerent għandu jiġi skwalifikat, u mhux bħal f'dan il-każ qed jiġi ġustifikat;

"Ta' din l-istess fehma kienet din l-onor. Qorti tal-Appell fil-każ *Cherubino Limited* kontra Dipartiment tal-Kuntratti (400/2014/1), fejn kien intqal li rekwiżiti qegħdin hemm sabiex jiġu osservati u mhux jiġu utilizzati metodi sabiex tali rekwiżiti jigu kalpestati – u dana hekk għandu jkun, għaliex fin-nuqqas jibdew jitwiieldu elementi ta' suġġettività, liema elementi ma għandhomx isibu posthom fis-sejħiet pubbliċi;

"Illi l-bord huwa ukoll żbaljat meta jgħid li:

"“This Board also credibly notes that the e-Tendering System necessitates that a “Joint Venture” is given an identity number and not the Tender Document itself”

“Dan għaliex hija s-sejha li qed titlob li l-*Joint Venture* tressaq l-offerta tagħha b'*account* ġdid miftuħ f'isem il-*Joint Venture*, u mhux l-*e-tendering system*, kif intqal mill-bord ... ..

“... .. l-offerent kien żbaljat meta uża *account* ieħor sabiex għamel *upload* tal-offerta tiegħu (u mhux *account* tal-*joint venture*), il-*contracting authority* kienet żbaljata meta aċċettat l-offerta u dana bi ksur ta' kundizzjoni imposta minnha stess fis-sejha, u l-Bord ta' Reviżjoni tal-kuntratti kien żbaljat meta ta l-barka tiegħu sabiex dan il-ksur jiġi sanat;

“Illi għaldaqstant u per konsegwenza, l-unika triq li l-awtorità kontraenti kellha tiegħu kienet dik li teskludi lil *Alberta Fire & Security Limited* u dana *stante* l-fatt li naqsu li jottempraw ruħhom ma' rekwizit mandatorju indikat fis-sejha.”

16. Il-kwistjonijiet essenzjalment huma tnejn: l-ewwel kwistjoni hija min hu l-oblatur, *Alberta* jew *AlbSem*? Jekk l-oblatur huwa *Alberta* ma huwiex kontestat li din ma għandhiex l-esperjenza ta' xogħlijiet li trid is-sejha għal offerti u għalhekk l-offerta tagħha ma setgħetx tintlaqa'. Jekk min-naħa l-oħra l-oblatur huwa *AlbSem*, hemm l-esperjenza meħtieġa minhabba l-partecipazzjoni ta' *La Semaforica s.r.l.* fil-konsorzju. Dan iwassal għat-tieni kwistjoni: jekk l-oblatur huwa *AlbSem*, l-offerta ta' dan tiswa jekk saret mill-kont elettroniku ta' *Alberta* flok minn kont elettroniku mañluq apposta għall-konsorzju?
17. It-tweġiba għall-ewwel mistoqsija tiddependi fuq jekk l-identità tal-oblatur toħroġx mill-identità elettronika ta' min jagħmel l-offerta jew mis-sustanza tal-offerta nfisha. Fil-fehma tal-qorti, ladarba d-dokumenti relativi għall-offerta kienu juru ċar u bla ekwivoku illi l-offerta kienet qiegħda ssir minn konsorzju, ma għandu jkun hemm ebda dubju raġonevoli illi l-oblatur kien *AlbSem* u mhux *Alberta*. L-użu ta' kont elettroniku flok ieħor ma jibdix l-identità ta' min jagħmel l-offerta

meta joħroġ ċar mid-dokumenti nfushom tal-offerta min tassew qiegħed jagħmel l-offerta.

18. Stabilit għalhekk illi l-oblatur kien *AlbSem* tqum il-mistoqsija jekk l-iżball fl-użu tal-kont elettroniku huwiex żball fatali li għandu jwassal biex l-offerta titwarrab.

19. Għalkemm huwa minnu illi, biex titħares it-trasparenza u ma jkunx hemm diskriminazzjoni, ir-regoli għandhom jitħarsu b'mod uniformi u prevedibbli, u s-soġġettività u d-diskrezzjonalità jitnaqqsu kemm jista' jkun, madankollu l-prinċipju ta' proporzjonalità jrid illi mhux kull nuqqas ikollu l-istess konsegwenza, iżda din għandha tiddependi mill-gravità tan-nuqqas u mill-konsegwenzi tiegħu, partikolarment jekk jagħtix vantaġġ lil min jonqos jew joħloqx preġudizzju lil oblaturi oħra<sup>5</sup>. Ma huwiex biżżejjed illi, kif igħid id-Dipartiment fit-tweġiba tiegħu, huwa zamm id-dritt li jagħzel jiskwalifikax lil min ma jħarisx ir-regoli f'kollox (*"The Department of Contracts reserves the right to disqualify Economic Operators who do not abide by the above instructions"*) iżda trid tqis ukoll in-natura u l-konsegwenzi tan-nuqqas.

20. Fil-każ tallum in-nuqqas ma ta ebda vantaġġ lil *AlbSem* u ma ħoloq ebda preġudizzju għall-oblatu l-oħra. Ma bidel xejn mill-kondizzjonijiet tekniċi jew finanzjarji tal-Kuntratt kif imfissra fis-sejħa u ma bidel xejn mill-kontenut tal-offerta li bill-bidunett saret f'isem il-konsorzju. Ma kien hemm ebda ħabi li seta' wassal għal ingann. Lanqas tista' tgħid illi l-użu ta' kont elettroniku flok ieħor għamel aktar iebes ix-

<sup>5</sup> Ara *Ballut Blocks Services Ltd v. Ministru għar-Riżorsi u l-Affarijiet Rurali et* (app. 440/2012), Qorti tal-Appell, 31 ta' Mejju 2013.

xogħol tal-kumitat tal-għażla, kif forsi kien ikun il-każ li kieku l-offerta saret manwalment flok elettronikament, li jista' jagħmel aktar komplikat il-proċess ta' tqabbil bejn offerta u oħra. F'dawn iċ-ċirkostanzi, ma tkunx miżura proporzjonata dik li twarrab offerta minħabba nuqqas li ma kellu ebda effett Prattiku, aktar u aktar meta tqis illi l-iskop tal-eserċizzju huwa li jinkiseb l-aħjar u l-orħos servizz f'kondizzjoni ta' ugwaljanza bejn oblatur u ieħor. Il-qorti għalhekk taqbel mad-Dipartiment meta dan igħid illi "ma kinux jeżistu l-estremi għalbiex tiġi mwarrba l-offerta ta' *AlbSem JV*" u illi "kienet tkun deċiżjoni ... .. sproporzjonata li kieku din l-offerta kellha tiġi mwarrba".

21. Dan huwa kompatibbli mas-sentenza tal-Qorti tal-Prim'Istanza tal-Komunità Ewropeja fil-każ ta' *Tideland Signal Limited v. Kummissjoni tal-Komunitajiet Ewropej*<sup>6</sup> dwar jekk kinitx proporzjonata deċiżjoni li titwarrab offerta minħabba żball ġenwin u manifest fl-indikazzjoni taż-żmien li għalih offerta kellha tibqa' torbot meta dak l-iżball seta' faċilment jissewwa mingħajr vantaġġi jew preġudizzji għal ħadd:

"... .. as regards the principle of proportionality, the Court finds that in the present case the Evaluation Committee, faced with the applicant's ambiguous tender, had a choice between two courses of action, either of which would have produced ... legal certainty ... .., namely to reject the tender outright or to seek clarification from the applicant. Given the likelihood ... .. that the tender was indeed intended to remain valid for 90 days from 11 June 2002 until 9 September 2002 as required by section 8.1 of the Instructions to Tenderers and the fact that the applicant would have been obliged to provide within 24 hours any clarification sought so that the tender procedure as a whole would have suffered only minimal disruption and delay, the Court holds that the Evaluation Committee's decision to reject the tender without seeking clarification of its intended period of

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<sup>6</sup> T-211/02, 27 ta' Settembru 2002.

validity was clearly disproportionate and thus vitiated by a manifest error of assessment.”

22. L-ewwel aggravju huwa għalhekk miċħud.
23. It-tieni aggravju huwa dwar id-deċiżjoni tal-Bord ta' Revizjoni illi d-depożitu biex saret l-oġġezzjoni quddiem l-istess bord ma jintraddx lil *Firetech*. *AlbSem* – għalkemm ma jidhirx li għandu xi interess dwar xi jsir mid-depożitu – igħid illi dan l-aggravju għandu jigi miċħud waqt illi d-Dipartiment, għalkemm korrettement jiddefendi din id-deċiżjoni tal-Bord ta' Revizjoni, madankollu lealment jagħraf il-meritu ta' dan l-aggravju u għalhekk ma jikkontestahx.
24. Meta *Firetech* ressaq l-oġġezzjoni tiegħu d-dokumenti disponibbli għalih – il-lista' ta' oblaturi u l-ittra tad-Dipartiment tat-22 ta' Mejju 2015 – kienu juru illi l-offerta magħżula kienet dik mitfugħa minn *Alberta*. Ma kienx magħruf illi l-offerta saret minn konsorzju u għalhekk f'dak il-waqt kienet raġonevoli l-oġġezzjoni ta' *Firetech* li l-Kuntratt jingħata lil *Alberta* u għal din ir-raġuni kien ikun xieraq li, f'dawk iċ-ċirkostanzi, id-depożitu jintradd.
25. Dan l-aggravju għalhekk sejjer jintlaqa'.
26. Ft-tielet aggravju *Firetech* igħid illi l-Bord ta' Revizjoni qies biss il-kwistjoni tal-identità ta' min ressaq l-offerta magħżula u ma

qiesx ukoll l-oġġezzjoni dwar il-kapaċità teknika tal-offerta.

Fisser l-aggravju hekk:

“Illi b’mod stramb għall-aħħar, il-bord ipproċeda sabiex jagħti deċiżjoni dwar dak parzjalment imressaq, mingħajr l-opportunità li jitressqu l-oġġezzjonijiet ulterjuri;

“Ta’ min jgħid u jindika li kien ġie stabilit tul il-proċeduri li *in primis* kien ser jiġi diskuss u deċiż il-punt preliminari dwar l-obbligu li jinfetaħ *account* ġdid f’isem il-*Joint Venture*, u sussegwentment jiġu mistħarrġa l-punti l-oħra kif talvolta indikati fl-appell bil-miktub ta’ *Firetech JV*;

“Fil-fatt, il-bord fid-deċiżjoni tiegħu wkoll jagħmel referenza għall-oġġezzjoni preliminari għax fil-fatt *inter alia* qed jiġi indikat li,

““Mr Stephen Muscat on behalf of the Contracting Authority explained that this first preliminary grievance on which the objection was based was a result of form”

“Wiegħed kien jistenna li l-bord, wara li jiddeċiedi fuq il-punt preliminari, jerga’ jsejjaħ lill-partijiet konċernati sabiex jiġi trattat it-tieni punt ta’ oġġezzjoni u ċjoè dwar “*technical specifications*”, liema punt huwa parti integrali mill-oġġezzjoni ta’ *Firetech JV*, li iżda ġie skartat kompletament;

“Illi dan ifisser li l-bord f’dan il-kuntest naqas li

“(a) jittratta l-punti kollha imressqa minn *Firetech JV*, bi ksur tal-Avviż Legali 174.04;

“(b) jaderixxi mal-proċedura iffissata mill-bord stess.”

27. Huwa relevanti illi f’dan l-istadju tiġi riprodotta l-oġġezzjoni dwar

l-ispeċifikazzjonijiet tekniċi kif imressqa fl-ittra li biha *Firetech*

ressaq l-oġġezzjonijiet tiegħu quddiem il-Bord ta’ Revizjoni:

“Technical specifications

“Irrespective of all stated within this notice of objection, there are doubts on the technical capacity of the proposed system of the recommended tenderer to entertain the mandatory requirements;

“Provision 4.09 of the tender document claims that,

““Traffic controllers shall conform with the current versions of MSA EN 50556 (Road Traffic Signal System) with parameters indicated in Table MSA EN 12675 (Traffic Signal Controllers) ...”

“These classifications are of a high standard, and there are founded doubts that the supplier can indeed entertain these and the other stringent requirements listed within the tender document;

“This matter will be further analysed during the sitting before the Public Contracts Review Board.”

28. Il-Bord ta' Revizjoni ma jidhirx li jzomm verbali tas-seduti quddiemu izda fid-deċiżjoni tal-bord tiġi riprodotta (għalkemm *f'oratio obliqua*) ix-xiehda li tingħata quddiemu. Qari tad-deċiżjoni juri illi ma tressqet ebda xiehda dwar l-ispeċifikazzjoni teknika sabiex din tiġi “*further analysed during the sitting*” u għalhekk il-bord ma kellu xejn quddiemu fuq xiex jiddeċiedi hliet l-allegazzjoni vaga ta' *Firetech* illi “*there are founded doubts*” li baqgħet izda ma ġietx sostanzjata. F'dawn iċ-ċirkostanzi l-Bord ta' Revizjoni ma setax jilqa' l-oġġezzjoni ta' *Firetech*.

29. *Firetech* izda iġid illi l-ħsieb kien illi għall-bidu l-Bord ta' Revizjoni jisma' biss dwar il-kwistjoni “preliminari” tal-identità tal-oblatur u, jekk u wara li tiġi superata dik il-kwistjoni, iġhaddi biex jisma' dwar l-aspett tekniku; kien għalhekk, iġid *Firetech*, illi f'dak l-istadju ma tressqitx xiehda dwar dik il-materja. Il-Bord ta' Revizjoni izda baqa' għaddej u iddeċieda kemm fuq il-kwistjoni “preliminari” u kemm fuq dik teknika billi qal illi l-offerta magħżula kienet “*fully compliant*” bla ma kien sema' xejn dwar l-oġġezzjoni relativa ta' *Firetech*.

30. Id-Dipartiment u *AlbSem* ma jaqblux li kien hemm ftehim, jew għall-inqas intendiment, illi tingħata aktar minn deċiżjoni waħda u illi x-xiehda dwar l-ispeċifikazzjonijiet tekniċi tinstema' wara li tkun ingħatat deċiżjoni dwar l-identità tal-oblatur. Id-Dipartiment josserva illi:

“Mill-atti registrati quddiem il-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi ma jirriżultax li kien hemm xi verbal jew xi digriet interlokutorju li kien jindika li l-Bord l-ewwel kien ña jiddeċiedi xi punt preliminari biex imbagħad jerga' jlaqqa' l-partijiet biex jittrattaw il-mertu u fl-añhar igħaddi għas-sentenza finali. ... .. Għalhekk ladarba mill-atti tal-kawża ma jirriżultax li l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi kien iddifferixxa l-kawża biex jiġi maqtugħ biss xi punt preliminari u lanqas ma jirriżulta xi qbil bejn il-partijiet biex il-kwistjoni tinfirex fuq aktar minn sentenza waħda, allura kollox jindika li l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi kien awtorizzat sabiex igħaddi għas-sentenza finali fuq kollox. Għalhekk l-allegazzjoni tal-konsorzju appellanti li l-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi ntrabat biss li jagħti sentenza parzjali ma tregix ... ..”

31. Fi proċeduri bñal dawk tallum, relattivi għall-aġġudikazzjoni ta' appalti pubbliċi fejn hemm termini stretti ta' żmien marbuta mad-disponibilità tal-fondi, kienet tkun għalkollox ñaġa straordinarja illi l-proċess quddiem il-Bord ta' Reviżjoni jitwal billi jinqasam kif qiegħed igħid *Firetech*. F'ċirkostanzi bñal dawn kienet tkun meħtieġa prova konvinċenti u konkluziva illi tassew kien hemm xi ftehim bñal dak indikat minn *Firetech*. Il-fatt illi mhux biss ma hemmx prova konvinċenti u konkluziva iżda ma hemm prova ta' xejn huwa fatali għall-argument ta' *Firetech*. Li ġara hu illi *Firetech* naqset milli tressaq xiehda dwar l-oġġezzjoni tagħha u dik l-oġġezzjoni setgħet biss għalhekk tiġi miċħuda.



32. Dan l-añħar aggravju ta' *Firetech* huwa għalhekk miċħud.
33. Għal dawn ir-raġunijiet il-qorti tiddisponi mill-appell billi tirriforma d-deċiżjoni tal-Bord ta' Reviżjoni. Tħassarha fejn il-Bord ta' Reviżjoni iddeċieda illi d-depożitu biex saret l-oġġezzjoni ma jintraddx lil *Firetech* u tordna, minflok, illi d-depożitu jintradd kollu. Tikkonferma d-deċiżjoni fil-bqija. L-ispejjeż ta' dan l-appell, sabiex jirriflettu l-fatt illi dan l-episodju nħoloq minħabba żball ta' *AlbSem* u wkoll illi l-aggravji ewlenin ta' *Firetech* ġew miċħuda, jinqasmu hekk: żewġ ishma minn tlieta ( $\frac{2}{3}$ ) jħallashom *Firetech* u s-sehem l-ieħor minn tlieta ( $\frac{1}{3}$ ) jħallsu *AlbSem*.

Silvio Camilleri  
President

Giannino Caruana Demajo  
Imħallef

Noel Cuschieri  
Imħallef

Deputat Registratur  
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