

## **QORTI TAL-APPELL**

### **IMHALLFIN**

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

**Seduta ta' nhar il-Gimgha 29 ta' Jannar 2016**

**Numru 25**

**Rikors Numru 306/15**

**Brian Vella u Ronald Attard Ezercenti I-Kummerc  
Bl-isem "V & A Services"**

**v.**

**Kunsill Lokali Bormla u  
Saviour Mifsud**

### **Preliminari**

1. Dan huwa appell maghmul minn Brian Vella u Ronald Attard ezercitanti l-kummerc bl-isem V&A Servies [l-Appellanti] minn decizjoni ["id-decizjoni appellata"] moghtija fit-22 ta' Settembru 2015 mill-Bord ta' Revizjoni dwar Kuntratti Pubblici ["Bord"] imwaqqaf taht l-Avviz Legali 296/2010 [ir-Regolamenti], li permezz taghha l-imsemmi Bord cahad l-appell tal-appellanti minn decizjoni tal-awtorita` kontraenti il-Kunsill

Lokali ta' Bormla [“il-kunsill] li l-kuntratt ghal “*Gbir ta' Skart Domestiku Imhallat b'Mod Favur l-Ambjent*” jinghata lill-offerent rakkomandat Saviour Mifsud [l-appellat Mifsud].

## **Il-Fatti**

2. Fit-22 ta' Novembru 2013 kien gie pubblikat dokument ta' sejha ghall-offerti ghal gbir ta' skart domestiku. Ghal din is-sejha irrispondew 4 offerenti, fosthom l-appellanti u l-appellat Saviour Muscat.

3. Fl-aggudikazzjoni li saret fis-26 ta' Marzu 2015 l-appellat intaghzet bhala l-offerent rakkomandat u l-offerenti gew informati bid-decizjoni tal-kunsill b'ittra datata 27 ta' Marzu 2015 [l-Avviz]. F'dan l-Avviz gew indikati l-marki li nghataw lill-offerenti kollha, kemm ghall-parti teknika u kif ukoll ghal dik finanzjarja, bl-appellanti jiksbu l-inqas punteggi. Il-parti relevanti tal-ittra taqra hekk:-

“Il-Kunsili lokali ta' Bormla jgharraf li, fis-seduta tal-Kunsill li nzammet nhar il-Hamis 26 ta' Marzu 2015, aggudika t-tender KIBO 04/2013 lil Saviour Mifsud li kiseb l-ghola puntegg skont l-'award criteria' stabbilita.

	Technical - max 60pts	Financial max 40pts	Total - max 100pts
V & A Services	42.9	31.97	74.87
Saviour Mifsud	48	36.79	84.79
John Borg	41.7	40	81.7
WM Environment	46.5	37.78	84.28

“Il-Kunsill segwa l-procedura 'MEAT' fl-aggudikazzjoni ta' din l-offerta.”

4. L-appellanti jghidu li, ghalkemm il-Kunsill jghid li mal-imsemmi Avviz apparti mit-tabella fuq indikata nghatat aktar dettalji f'nota annessa maghha, ma kien hemm xejn anness mal-ittra li rcevev.

5. Mill-atti jirrizulta li ma' kopja tal-Avviz hemm annessa kopja ta' nota f'forma ta' prospett li fiha informazzjoni dettaljata u spjegattiva ta' kif l-awtorita` kontraenti waslet ghall-agguddikazzjoni taghha. Mid-decizjoni tal-Bord jidher li fil-konsiderazzjonijiet tieghu dan ha bhala stat ta' fatt li *“attached to the Letter of Rejection was the breakdown of marks as allotted by the Evaluation Committee”*.

6. Il-Qorti tosserva li mill-kopji tal-emails ezebiti fl-atti jirrizulta li fit-30 ta' Marzu 2015 il-Kunsill baghat l-imsemmi Avviz permezz ta' email lill-appellanti li minn naha taghhom dak in-nhar stess baghtu l-kopja lill-konsulent legali taghhom. B'email datata 2 ta' April 2015 [fil-11.36 am] l-appellanti talbu lill-Kunsill sabiex jibghatulhom “kopja kompleta tar-rapport” u dak in-nhar stess fl-16.12 pm il-Kunsill baghat lill-appellanti “l-informazzjoni rikjesta”. Fis-6 ta' April 2015 il-Kunsill fuq rikjesta ulterjuri tal-appellanti baghat “mill-gdid l-informazzjoni dwar punteggi moghtija lill-offerta” taghhom.

7. Fis-7 ta' April 2015 l-appellanti baghtu l-Avviz ta' Oggezzjoni taghhom li ghalih irrispondew l-Kunsill u l-appellat Muscat.

## **Id-Decizioni Appellata**

8. Il-Bord wasal ghad-decizjoni tieghu wara li ghamel is-segventi osservazzjonijiet.

“Having noted Appellant’s Objection, in terms of the “Reasoned Letter of Objection” dated 7<sup>th</sup> April 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on the 27<sup>th</sup> August 2015, had objected to the decision taken by the Contracting Authority, in that

- “a) The Appellant contends that the Contracting Authority failed to give the specific reasons for the rejection of his offer;
- “b) The Appellant maintains that the Adjudication process was not carried out in accordance with the instructions issued by the Department of Contracts;
- “c) The Appellant claims that the method of allocation of marks assigned to his bid with regards to the age of vehicles was not correct as the allocated system places too emphasis on the latter to be utilised in the tendered service;
- “d) The Appellant contends that the “Experience Criterion” should not have been adopted since Circular 19/2013 issued by the Department of Contracts specifically exempted this requirement for tenders below the below the €500,000 through the application of the “Experience Clause”, the Appellant’s bid was unfairly penalised;
- “e) The Appellant claims that the Evaluation Board did not follow the MEAT Evaluation Process;
- “f) The Appellant also contends that there existed a conflict of interest to the effect that the Tender should have been cancelled.

“Having considered the Contracting Authority’s verbal submissions during the Public Hearing held on the 27<sup>th</sup> August 2015 and also the Letter of Reply dated 9<sup>th</sup> April 2015, in that:

- “a) The Contracting Authority maintains that sufficient reasons were given in its’ “Letter of Rejection” to enable the Appellant to submit an objection to the decision taken by the Authority;

- “b) The Appellant raised the question of the Award Criteria after submitting his offer so that he was fully aware of the conditions prior to submission of his bid;
- “c) With regards to the procedure of allocating marks, the Contracting Authority maintains that it has followed the correct and transparent procedure to ensure a level playing field to all bidders;
- “d) The Contracting Authority contends that all the circulars mentioned by the Appellant in his objection were all issued after the publication of the Tender.

“Reached the following conclusions:

- “1. With regards to the Appellant’s First Grievance, this Board, after having heard credible submissions by the Contracting Authority and after having examined the “Letter of Rejection” sent to the Appellant, opines that the information sent to the Appellant with the “Letter of Rejection”, did in fact contain ample information with regards to “Reasons” for the rejection of the Appellant’s bid.

“This Board also notes that attached to the “Letter of Rejection” was the breakdown of marks as allotted by the Evaluation Committee. This Board justifiably opines that, the Contracting Authority gave enough reasons for them to reject the Appellant’s bid to enable the latter to object.

“At the same time this Board credibly points out that, in fact, the Appellant’s objection was based on the same details and reasons as submitted by the Contracting Authority. In this regard, this Board does not uphold the Appellant’s First Grievance.

- “2. With regards to the Appellant’s second grievance, this Board does not find any solid evidence that the Evaluation Committee did not follow the procedures as laid out by the Department of Contracts. This Board, on the other hand credibly notes that the Evaluation Committee acted in a transparent and fair manner. This same Board was not given proof or circumstances as to note otherwise. In this regard, this Board does not uphold the Appellant’s second contention.

- “3. With regards to the Appellant’s Third Grievance, this Board after reviewing the “Allocation of Marks” schedule, as processed by the Evaluation Committee and from credible submissions made by the same, opines that the mode of allocation of the marks has been an established useful tool in assessing the compliance of a Tender. The final marks are not given by one single person but

by more so that, although the method may seem “Subjective”, it does reflect the general average overview of the allotment of fair mark.

The Appellant’s main contention in this regard, is the allocation of the marks given to his bid with regards to his vehicles. This Board credibly notes that the Preferred Bidder’s vehicles were more recent so that some advantage should be given on older ones being offered by the Appellant.

In this regard, this Board opines that the Allocation of Marks made by the Evaluation Committee represented a fair and transparent view of the Evaluation. To this effect, this Board does not uphold the Appellant’s Third Contention.

- “4. With regards to the Appellant’s Fourth Grievance, this Board would justifiably point out that all the circulars mentioned by the Appellant in his objection were issued after the publication of the Tender Document.

In fact, Circular 19/2013 states clearly that “The Exemption of the Experience Criteria” shall not apply for Tenders below the €500,000 for all tenders published after 1<sup>st</sup> January 2014. The Publication of the Tender Document was in fact 22 November 2013. In this regard, this Board does not uphold the Appant’s Fourth Contention.

- “5. With regards to the Appellant’s Fifth Contention, this Board, after having examined all the facts relating to this objection, credibly notes that the Evaluation Committee did in fact exercise the principle of the “Most Economic Advantageous Tender”.

The “MEAT” issue is debatable, in that, the scope of adopting this policy, is to ensure the most economical and advantageous Tender. This Board, justifiably opines, that although the formula for the “MEAT” Evaluation was not adopted, the Evaluation Committee, in its recommendations, did in fact choose the most favourable bid to its benefit. In this regard, this Board does not uphold the Appellant’s Fifth Grievance.

- “6. On a general note, this Board justifiably points out that the Appellant raised grievances in front of this same Board, which could have been avoided by filing a “Pre-Contractual Concern”. At the same time, this same Board takes note of the allegations made by the Preferred Bidder that sensitive information relating to contesting bidders, was passed on to the Appellant. In this regard, this Board opines that the Contracting Authority should investigate such a contention and take the necessary legal action required.

“7. With regards to the Appellant’s claim that the Recommended Bidder’s previous Legal Advisor was also the Contracting Authority’s Legal Advisor, this Board opines that although the Hon. Court of Appeal decided that there existed a conflict of interest, the latter did decided that this issue did not in any way, effect the decision taken by the Evaluation Committee, so that there was no proven grounds why the Tender should be cancelled. In this regard, this Board does not uphold the Appellant’s contention.

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

### **L-Appell**

9. Dan hu bazat fuq zewg aggravji: [1] in-nuqqas ta’ informazzjoni dettaljata skont il-ligi fl-ittra tar-rifjut mibghuta lill-appellanti u, [2] in-nuqqas ta’ kjarezza jekk is-sistema “MEAT” [*Most Economical Advantageous Tender*] kenitx adoperata fil-process ta’ evalwazzjoni.

10. L-appellanti qed jitolbu li, ghar-ragunijiet esposti fir-rikors tal-appell taghhom prezentat fid-9 ta’ Ottubru 2015, din il-Qorti thassar id-decizjoni appellata u, minflok, tghaddi biex tiddeciedi l-vertenza konsistentement mat-talba taghhom kif imfissra fl-Avviz ta’ Oggezzjoni prezentat minnhom; bl-ispejjez kontra l-appellati jew min minnhom.

11. Il-Kunsill u l-appellat Mifsud ipprezentaw risposta fit-23 ta’ Ottubru 2015 u fl-24 ta’ Novembru 2014 rispettivament u talbu li, ghar-ragunijiet

indikati fir-risposta taghhom, l-appell jigi michud, bl-ispejjez kontra l-appellanti.

L-ewwel aggravju

12. Dan hu bazat fuq il-pretensjoni tal-appellanti li l-Avviz datata 27 ta' Marzu 2015 mibghut lilhom mill-Kunsill bhala l-awtorita` kontraenti kienet monka stante li ma kinitx tikkontjeni "l-ebda raguni jew spjegazzjoni, dettaljata jew le", ghall-fatt li l-appellanti gew eskluzi u ghaliex l-offerta taghhom kienet giet rifjutata u dan minkejja li fid-decizjoni appellata intqal li l-Avviz kien jikkontjeni "*ample information with regards to the reasons for the rejection*" ghall-offerta maghmula mill-appellanti, kif ukoll li mal-Avviz kien hemm anness "*breakdown of marks as allotted by the Evaluation Committee.*" li, skont il-Bord kienu ragunijiet bizzejjed sabiex l-offerta tal-appellanti tigi rifjutata.

13. L-appellanti jilmentaw li mhuwiex minnu li fl-imsemmi Avviz kienet inghatat "*ample information*" skont il-ligi ghar-rifjut u wkoll, mhuwiex minnu li kien hemm anness maghha il-"*breakdown of marks*". In fatti jsostnu li l-ittra kienet tikkontjenti "*the bare facts and only after requests was detailed information given.*" Jghidu li konsegwentement, il-Bord fl-ezami u fid-decizjoni tieghu tal-kaz, ha bhala l-assunt li mal-imsemmi



Avviz kien hemm l-informazzjoni dettaljata skont il-ligi, mentri fil-fatt dan ma kienx minnu.

14. Jissottomettu li dan imur kontra dak li tghid il-klawsola 15 [c] tat-dokument ta' sejha li tobbliga lill-awtorita` kontraenti li tinforma permezz ta' *standard letter* fid-dettal ir-ragunijiet l-ghaliex l-offerta taghhom kienet giet rifjutata. Ukoll, l-imsemmija ittra tmur kontra dak li kien gie deciz mill-Bord f'kazijiet ohra<sup>1</sup> li *“Local Councils are legally bound to state specifically reasons for refusal of a tender when sending a notice of refusal of award to unsuccessful tenderers.”*

15. L-appellanti jkompli jfissru l-konsegwenzi ta' dan in-nuqqas hekk:

“... wiehed ma jistax jargumenta li l-appellanti xorta wahda sabu hin u materjal biex jelaboraw fuq l-ilmenti taghhom u li ssottomettew Avviz ta' Oggezzjoni dettaljat u li, ghalhekk, ma garrbu l-ebda pregudizzju ghall-iskarsita' offruta mill-kontenut ta' l-ittra tas-27 ta' Marzu, 2015. Jekk wiehed jabbraccja tali premessa, wiehed ikun qed jikkondona l-ghemil superficiali u traskurat ta' min hu fid-dmir legali li jaghti spjeqazzjoni dettaljata. Fi kliem iehor, id-diligenza u z-zelu tal-appellanti li jressqu Avviz ta' Oggezzjoni ma jistax jitraxxindi l-obbligi imposti fuq l-awtorita` kontraenti li taghti taghrif kif support. Interpretazzjoni altriment ikun ifisser li l-ligi u dak li gieli irrakkomanda l-Bord, jigu verifikati u emaskulati, ossia rezi fix-xejn.”

16. Il-Kunsill irrisponda ghal dawn l-aggravji bil-mod segwenti. Jghid li bl-Avviz datat 27 ta' Marzu 2015 il-Kunsill informa lill-offerenti kollha, inkluz l-appellant, li t-tender kien gie agjudikat favur l-appellat Mifsud u

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<sup>1</sup> Isemmu l-kaz nru.688 KLOB 04 2013

li l-istess appellat kien kiseb l-oghla puntegg skont l-“award criteria” stabbiliti. Il-Kunsill inkluda wkoll tabella li permezz taghha gew murija l-punti allokat li diversi offerenti u dan kemm rigward l-aspett tekniku kif ukoll l-aspett finanzjarju tal-offerta. Ghalhekk mhux minnu li l-Avviz kien priv minn motivazzjoni.

17. Il-Kunsill ikompli jghid li, barra minn hekk, in segwitu għall-ispedizzjoni tal-Avviz huwa ipprova lill-offerenti, inkluz l-appellanti, prospett li juri l-allokkazzjoni tal-marki magħmula fir-rigward tal-offerta tagħhom u dan riferibbilment għal kull kriterju rikjest fid-dokument tat-tender. Dan sar fi zmien utili għall-appellanti, tant li dawn uzaw dak l-istess tagħrif biex ressu l-oggezzjoni tagħhom quddiem il-Bord.

18. Rigward is-sottomissjoni tal-appellanti li t-tagħrif mogħti sussegwentement għall-Avviz ma jiswa xejn, il-Kunsill jghid li l-interpretazzjoni “tant rigida u formali” li qed jagħtu l-appellanti fir-rigward ma hija sorretta minn ebda dispozizzjoni tal-ligi. It-tagħrif mogħti sussegwentement għall-Avviz kien tagħrif addizzjonali li jispjega t-tqassim tal-punti tal-offerti tal-appellanti u kien ingħata fi zmien li fih l-appellanti setghu jagħmlu uzu minnu kif fil-fatt għamlu. L-appellanti jishqu li ma hemm assolutament xejn irregolari fil-fatt li tali tagħrif ingħata wara l-Avviz u fuq talba tal-appellanti. Fil-fatt ir-regolament 44 [3] tar-Regolamenti espressament jagħti terminu lil kull awtorita`

kontraenti biex taghti tali taghrif lill-partijiet interessati wara li ssirilha talba ghal daqshekk. Fil-kaz odjern it-taghrif mitlub mill-appellanti inghata fiz-zmien ferm iqsar minn dak kontemplat mil-ligi ta' 15 il-jum.

19. L-appellat Saviour Mifsud jaghmel sottomissjonijiet simili ghal dawk tal-Kunsill. Dwar l-ewwel aggravju huwa jissenjala li, filwaqt li l-appellanti jilmentaw minn nuqqas ta' informazzjoni fl-ittra ta' rifjut mibghuta mill-Kunsill, "izda mbaghad l-appelli pjuttost dettaljati taghhom kemm quddiem il-Bord kif ukoll quddiem din il-Qorti huma bbazati proprju fuq l-informazzjoni moghtija lilhom mill-Kunsill.."

#### *Konsiderazzjonijiet tal-Qorti*

20. Il-Qorti tosserva li l-materja sollevata mill-appellanti hija regolata bl-Artikolu 15 tal-kondizzjonijiet specjali tad-dokument ghas-sejha u precizament bil-paragrafu [c] tal-istess artikolu, li testwalment jaqra hekk:

"(c) The unsuccessful tenderers shall be informed in detail on the grounds by which their tenders were not accepted by means of a standard letter, which includes an indication of the relative weakness of their bid by way of a comparative table of the scores for the winning tender and the ones for the unsuccessful tender."

21. Ir-raguni wara din il-klawsola hija cara u hi fis-sens li l-offerenti li ma gewx rakkomandati jkunu jafu liema fatturi gew ikkonsidrati daghja

mill-awtorita` kontraenti fil-konfront ta' min rebah it-tender u dan bil-ghan li l-istess offerenti jkollhom informazzjoni bizzejjed dwar l-aggudikazzjoni li tkun saret sabiex, jekk ihossu hekk opportun, jintavolaw appell quddiem il-Bord skont il-ligi.

22. Fil-kaz odjern jirrizulta li fl-Avviz kien jikkontjeni tabella indikanti l-punti allokatu lill-offerenti kollha, kemm dwar l-aspett tekniku kif ukoll dwar l-aspett finanzjarju. B'dan l-ezercizju komparattiv l-offerenti nghataw l-informazzjoni dwar il-punti finali li kisbu, izda ma jistax jinghad li dan wahdu jikkostitwixxi informazzjoni dettaljata dwar ir-ragunijiet li ghalihom l-offerenti li ma kellhomx success ma gewx rakkomandati. L-istess pero` ma jistax jinghad ghan-nota li, fl-atti odjerni, tinsab annessa mal-kopja tal-imsemmi Avviz. F'din in-nota li hi f'forma ta' prospett hemm ezami komparattiv bejn l-offerta tal-appellanti u dik tal-appellat Mifsud. Hemm elenkata informazzjoni dettaljata u klassifikata dwar id-diversi fatturi li gew ezaminati mill-Kunsill u l-punteggi li nghataw ghal kull wiehed minn dawn il-fatturi, fosthom id-dati tal-manifatturar tal-vetturi u l-mudell ta' dawn il-vetturi, kif ukoll l-esperjenza bazata fuq "successfully completed contracts of similar nature and execution". Fl-istess prospett hemm ukoll informazzjoni dettaljata dwar l-aspett finanzjarju tal-offerta.

23. Fil-fehma tal-Bord, kondiviza wkoll minn din il-Qorti, l-informazzjoni li nghatat lill-appellanti permezz tal-imsemmija nota kienet tissodisfa l-vot tal-paragrafu [c] tal-artikolu fuq citat.

24. Jirrizulta pero` li l-pern tal-ilment tal-appellanti jikkonsisti fl-allegazzjoni tieghu li hu ma kienx ircieva l-imsemmi prospett mal-Avviz li kien intbaghat lilhom u kien biss fuq talba taghhom lill-Kunsill li dan eventwalment inbaghat dak il-prospett. Isostnu allura li dan in-nuqqas kellu jirrendi nulla d-decizjoni tal-Bord fir-rigward bhala "msejjsa fuq premessa arginata fuq pedament erroneju u ghaldaqstant ghandha tigi mhassra".

25. Din il-Qorti tosserva li dak li qed jitolbu l-appellanti fir-rigward seta' jregi fin-nuqqas tal-ghotja lilhom tal-prospett fuq indikat fiz-zmien preskritt mil-ligi ghal appell quddiem din il-Qorti, izda fil-kaz in dizamina dan ma rrizultax. Anke kieku kellha titqies bhala veritiera l-allegazzjoni tal-appellanti, il-fatt provat hu li l-prospett gie fil-fatt mibghut lill-appellanti li minn naha taghhom prezentaw Avviz ta' Oggezzjoni dettaljat fejn saret referenza ghall-informazzjoni kontenuta fil-prospett, senjatament il-punti allokatu in bazi ghall-esperjenza u dawk moghtija rigwardanti l-vetturi ezaminati mill-Kunsill. Ghalhekk zgur li ma jistax jitqies li l-appellanti sofrew xi pregudizzju fir-rigward u fic-cirkostanzi din il-Qorti ma tistax

tara kif jista' validament jinghad li kien hemm ksur tal-klawzola 15 [c] fuq citata.

26. Apparti minnhekk ma giex muri, u ma giet citata ebda ligi jew klawzola fid-dokument ta' sejha kif l-allegat fatt li l-prospett kien intbaghat ftit jiem wara l-Avviz jirrendi nulla din il-parti tal-process.

27. Ghaldaqstnat dan l-aggravju huwa mhux biss infondat izda wkoll fieragh.

*It-tieni aggravju*

28. Huwa jispjega hekk dan l-aggravju:

“16. Illi fid-decizjoni tieghu l-Bord, *inter alia*, l-ewwel innota illi, *"the Evaluation Committee did in Fact exercise the principle of the "Most Economic Advantageous Tender"* u ftit imbaghad sostna li, *"This Board. justifiably opines, that although the Formula For the "MEAT" Evaluation was not adopted ... "*.

“17. Skont l-ittra ta' l-awtorita kontraenti tas-27 ta' Marzu, 2015, hemm espressament dikjarat li, *"Il-Kunsill segwa l-procedura 'MEAT' fl-aggudikazzjoni ta' din l-offerta."* Il-konkluzjoni tal-Bord kienet illi tali formula ma gietx adoperata. Madanakollu, skont l-istess Bord, *"the Evaluation Committee, in its recommendations, did in fact choose the most favourable bid to its benefit"*

“18. Ghall-appellanti, din il-parti tad-decizjoni hi afflitta minn konfuzjoni.”

29. L-appellanti jkomplu jissottomettu hekk:

“20. Il-mistoqsijiet li jigu naturali huma dawn: [a] jekk il-procedura fl-ghazla tal-offerta kellu jsegwi certa procedura appozita u specifika (i.e., il-procedura ta' *MEAT*), ghaliex cionostanti li din ma gietx segwita, l-Bord xorta wahda iddecieda li jissorvola tali omissjoni u jikkonkludi li l-aggudikazzjoni xorta hi wahda kienet ideoneja? [b] Ghaliex il-Bord iddecieda li l-awtorita kienet korretta fl-aggudikazzjoni ahharija meta l-awtorita kontraenti stess kienet sostniet li haddnet procedura (ta' *MEAT*) li fir-realta - ghax hekk qal il-Bord - ma rrizultatx li thaddmet? [e] kif seta' qatt il-Bord jikkonstata li l-procedura ta' *MEAT* ma thaddmitx kif rikjest u xorta wahda jkun sodisfatt li l-procedura t' aggudikazzjoni kienet "the most favourable?"

30. L-appellanti jaghmlu referenza wkoll ghall-principju ta' trasparenza rifless fir-regolament 4[1] tal-Avviz Legali 296/2010<sup>2</sup> u ghall-kuncetti tac-certezza legali, tal-aspettattiva legittima u tal-uzu ta' diskrezzjoni. Huwa jispjega hekk din il-parti tal-aggravju:

“22. Fuq din il-bazi, ghandu jidher manifest li dan l-aspett tal-konfezja ma kellux jigi sorvolat jew trattat b'mod daqstant lievi rnill-Bord. Il-fatt li procedura li kellha tigi segwita ma gietx effettivament imhaddma u adoperata minn min kien tenut ihaddimha, kellu jinduci lill-Bord jilqa' l-ilmient ta' l-appellanti u mhux, hekk kif ghamel, jissorvola tali kwezit billi jghid illi fl-ahhar tal-gurnata l-ghemil tal-awtorita kontraenti xorta rrizulta bhala idoneju.

“23. Certu proceduri gew addottati fl-ambitu ta' sejha ta' l-offerti sabiex ikun hemm binarji pre-stabbiliti u fissi - rikonoxxjuti minn kull participant - li fuqhom tittiehed l-eventwali decizjoni fi-ghoti tat-tender. Jekk persuna jew entita' tithalla tutilizza xi sembjanza ta' procedura li mhux prevista u/jew premeditata fis-sistema ta' l-aggudikazzjoni u/jew l-ghoti ta' tenders, mela allura nigu f'sitwazzjoni li wiehed jista' jakkorda *tender* fuq kwalsiasi bazi, tkun xi tkun, imbasta apparentement oggettiva. L-appellanti jikkontendu li dlan ma jista' qatt isehh u dan biex kull offerent ikun mohhu mistrieh li l-offerta tieghu ser tigi eventwalment mistharrga u evalwata minn entita' bl-adoperu effettiv ta' procedura

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<sup>2</sup> Dan jaqra hekk: “Contracting authorities shall ensure that there is no discrimination between economic operators, and that all economic operators are treated equally and transparently in all calls for tenders whatever their estimated value.”

specifika u mhux bi thaddim ta' xi forma ta' volonta' ohra li taf jew ma tafx tkun idoneja jew ekwibrata.

“24. In vista ta' dak appena maghdud, l-appellanti jirrimarkaw li l-ebda prassi ma tista' tissupplanta sistemi li gew impoggija fis-sehh biex jigu evalwati offerti. Dan hu proprju minhabba l-precetti ta' "legal certainty" u ta' "legitimate expectation". L-aspett formali tad-duttrina ta' "legal certainty" jirreferi ghar-rekwizit fejn hemm l-eleminazzjoni ta' incertezzi legali f'dawk il-kazijiet fejn jittiehdu decizjonijiet li l-ghan taghhom hu li jorbtu u jobbligaw il-persuna u jiddefenixxu d-drittijiet u l-obbligi taghha. Minn dan kollu, allura, jemana principju iehor, dak tal-prevedibbilta'. Inoltre, id-duttrina ta' "legitimate expectation" timplika illi meta persuna titwassal biex temmen illi fir-rigward taghha ser tigi applikata xi tip ta' decizjoni li konsegwentement ser ikollha certu effett fuqha, dik il-persuna koncernata ghandha d-dritt tippretendi illi din l-applikazzjoni ser tigi imwettqa in buona fede u entro dawk il-parametri li piu' o meno huma pre-stabbiliti.

“25. Ghalkemm hu rikoxsut li l-awtorita kontraenti ghandha certa latitudini ta' diskrezzjoni, l-istess diskrezzjonalita ghandha r-restrizzjonijiet u parametri taghha. In ..... *"nel fare uso della discrezione accordata e mestiere che risulti essere giusta/ e fatta con discernimento e giudiziosamente secondo l-esigenza del caso e lo spirito della legge. Di fatti la discrezione secondo i dottori non e che 'discernere per legem quid sit justum:"*<sup>3</sup>. Ma' dan jizdied jinghad illi, ..... *A discretion does not empower a man to do what he likes merely because he is minded to do so - he must in the exercise of his discretion do not what he likes but what he ought. In other words/ he must; by the use of his reason/ ascertain and follow the Course which reason directs. He must act reasonably*<sup>4</sup>”

31. Dwar dan l-aggravju, il-Kunsill, filwaqt li jaghmel referenza ghal kazistika lokali, jsostni li hu mexa perfettament abbazi tal-kriterji ndikati fis-sejha ghall-offerti, liema sejha kienet telenka l-kriterji rilevanti u l-*quantum* tal-punti li setghu jigu allokati ghal kull kriterju. Jishaq li:

<sup>3</sup>(Negte. **Francesco Saverio Caruana v. Onor. Negte. Emmanuel Scicluna nomine**, Appell Kummercjali, 16 ta' Frar, 1876 riportata f'Kollez. Vol.VII-522).

<sup>4</sup>(cfr. H.W.R. Wade & C.F. Forsyth, "Administrative Law", Butterworths, 10<sup>th</sup>. edition, p.295). Ara wkoll **Alfred Vella v. Ministru tal-Gustizzja u tal-Intern** (Tribunal Amministrattiv, 28 ta' Settembru, 2015).



“Ma jirrizultax li l-Kunsill mexa b’riga differenti mad-diversi offerenti u l-allokkazzjoni tal-punti fl-ahhar mill-ahhar wasslet lill-istess Kunsill biex jasal għall-offerta li kienet l-aktar wahda favorevoli għalih, ossia l-offerta l-aktar ekonomikament vantaggjuza.”

32. Ikompli jispjega:

“Fid-decizjoni appellata il-Bord qies illi l-kumitat ta’ evalwazzjoni kien ezercita l-principju tal-MEAT..... u kompli josserva – aktarx lakonikament – illi, għalkemm ma gietx addottata l-formola tal-evalwazzjoni MEAT, l-apprezzament tal-kriterji ..... xorta wahda wassal biex intgħazel l-offerta l-aktar vantaggjuza.”

33. Dwar l-addozzjoni o meno tal-formula uzata waqt il-process ta’ evaluation l-appellanti jagħmlu referenza għac-cirkolari [nru. 19/2013] mahruġa mid-Dipartiment tal-Kuntratti. Il-Kunsill jissenjala li din ic-cirkolari, li hija applikabbli għat-tenders kollha pubblikati wara l-1 ta’ Jannar 2014, harget wara l-pubblikazzjoni tad-dokument tas-sejha fil-kaz odjern fit-22 ta’ Novembru 2013 u għalhekk dik ic-cirkolari ma kenitx tapplika għal dan il-kaz. L-istess jingħad għal *Procurement Policy Note no. 8* li telenka l-kriterji li għandhom jigu adottati fl-uzu tal-MEAT. Din kienet giet mahruġa fit-18 ta’ Awwissu 2014 u għalhekk wara l-pubblikazzjoni tad-dokument fuq imsemmi.

34. Il-Kunsill jissottometti li fid-dawl tal-premess huwa evidenti li fil-kaz odjern, l-aggudikazzjoni skont il-kriterju *MEAT* kellha ssir unikament skont is-subincizi numru 4 u 5 tal-regolament numru 28 u l-appellanti “la allegaw u wisq inqas ippruvaw”, li l-Kunsill b’xi mod mar kontra dak dispost f’dawn ir-regolamenti appena citati.

35. Dwar dan it-tieni aggravju l-appellat Muscat jghid li “fl-appell quddiem il-Bord, l-aggravju originali mressaq mill-appellanti ma kienx fis-sens li ma ntuzatx il-procedura tal-MEAT, anzi l-aggravju taghhom kien fis-sens li ... kellha tintuza procedura oħra minflok dik tal-MEAT li effettivamente giet uzata”.

*Konsiderazzjonijiet tal-Qorti*

36. Fl-ewwel lok ghandu jigi senjalat li c-cirkulari mahruġa fir-rigward, senjatament dik numru 19/2013 u dik numru 11/2014, jirrizulta li dawn inhargu wara l-pubblikazzjoni tad-dokument ta' sejha u fit-termini espressi taghhom japplikaw biss għal dawk it-tenders pubblikati wara 1 ta' Jannar 2014 fil-kaz tal-ewwel cirkulari u t-tenders pubblikata wara 1 ta' Lulju 2014 għat-tieni cirkulari. Għalhekk il-kontenut ta' dawn ic-cirkulari huwa inapplikabbli għal kaz odjern. L-istess jingħad dwar il-*Procurement Policy Note 08*, intiza sabiex tigi addottata l-formula hemm indikata dwar l-uzu tal-*MEAT* bħala 'award criteria'. Dan hareġ fit-18 ta' Awwissu 2004 u għalhekk wara li kien hareġ id-dokument ta' sejha in kwistjoni u wara li l-'award criteria' kienu diga` ippubblikati.

37. Għaldaqstant huwa korrett il-Kunsill fis-sottomissjoni tiegħu li, ladarba dawn ic-cirkulari u l-*Procurement Policy* huma inapplikabbli għat-tender in kwistjoni, għandhom allura japplikaw id-dispożizzjonijiet tar-regolamenti numri 4 u 5 tal-regola 28 tar-Regolamenti, li jiddelineaw

il-kriterji li ghandhom jigu ikkonsidrati meta l-‘award’ ikun sar lill-offerta li tkun *“most economically advantageous”*. Allura huwa f’dan is-sens li ghandu jigi ikkonsidrat dak li ntqal mill-Kunsill fl-Avviz u cioe` li hu kien addotta l-procedura *MEAT* fl-agjudikazzjoni.

38. L-istess jinghad ghall-osservazzjoni tal-Bord li, ghalkemm il-Kunsill ma addottax il-formula tal-procedura *MEAT* [probabbilment skont ic-cirkulari u n-Nota 08 fuq indikati] xorta wahda r-rizultat tal-evalwazzjoni li ghamel il-Kunsill kien li dan *“did in fact exercise the principle of the ‘Most Economic Advantageous Tender’”* u wkoll li l-Kunsill *“did in fact choose the most favourable bid to its benefit”*. Dan huwa konformi mal-konsiderazzjoni valida li r-rizultat tal-*MEAT* ma kienx jiddependi biss fuq l-adozzjoni tal-formola mfassla fin-Nota 08.

39. Inoltre, kif osservat mill-Bord, l-allokazzjoni tal-punteggi da parti tal-Kunsill irrendiet il-process ta’ evalwazzjoni u l-eventwali agjudikazzjoni *“fair and transparent”* u dan ghax kif osservat mill-istess Bord *“...the mode of allocation of the marks has been an established useful tool in assessing the compliance of a Tender. The final marks are not given by one single person but by more so that, although the method may seem ‘Subjective’ it does reflect the general average overview of the allotment of a fair mark”*.

40. Finalment, jinghad li s-sottomissjonijiet tal-appellanti fil-kaz odjern – li gew vjolati l-principji tac-certezza legali u tal-aspettattiva legittima -

huma insostenibbli fattwalment u legalment. Huma insostenibbli legalment ghax il-kriterji applikabbli ghal kaz de quo huma indikati fil-paragrafi [4] u [5] tar-regolament 28 fuq indikat u huma insostenibbli fattwalment ghax ma giex provat jew indikat fejn il-Kunsill bhala awtorita` kontraenti naqas fir-rigward.

41. Ghaldaqstant anke dan l-aggravju huwa infondat.

42. Fid-dawl ta' dak li jinghad fil-paragrafu 7 tal-konsiderazzjonijiet tal-Bord, il-Qorti ma tistax ma ttennix il-preokkupazzjoni taghha espressa fis-sentenza taghha tal-11 ta' Novembru 2014 fl-ismijiet **WM Environmental Limited v. Kunsill Lokali Bormla et.**

### **Decide**

Ghar-ragunijiet premissi tichad l-appell, bl-ispejjez kollha a kariku tal-appellanti.

Silvio Camilleri  
Prim Imhalled

Giannino Caruana Demajo  
Imhalled

Noel Cuschieri  
Imhalled

Deputat Registratur  
df