

QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF JOSEPH AZZOPARDI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF NOEL CUSCHIERI

Seduta ta' nhar it-Tnejn 30 ta' Lulju 2018

Numru 3
Appell numru 236/2018

***Bonnici Bros Projects Limited (C-83649) u
Shapoorji Pallonji (Malta) Limited, (C-74260)***
it-tnejn formanti l-konsorzju
SP BB International JV

v.

**Onorevoli Ministru għas-Saħħa in
rappreżentanza tal-Ministeru għas-Saħħa; id-
Direttur tal-Kuntratti;
*Ergon-Technoline JV***

1. Dan huwa appell tal-konsorzju *SP BB International JV* ["*SP BB*"] minn deċiżjoni tat-8 ta' Ġunju 2018 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku ["L.S. 174.04"], li laqa' oġġezzjoni ta' *Ergon-Technoline JV* ["*Ergon*"] kontra deċiżjoni tal-Ministeru għas-Saħħa ["il-Ministeru"] illi kuntratt pubbliku jingħata lil *SP BB* wara li titwarrab l-offerta ta' *Ergon* għall-istess kuntratt u ordna, minflok, illi l-proċess tal-

għażla tal-offerta jsir mill-ġdid wara li jitqiesu l-offerti kollha, fosthom ukoll dik ta' *Ergon*.

2. Il-fatti rilevanti seħnew hekk: kienet saret sejha mill-Ministeru għal offerti għal kuntratt biex jinbena ċentru tas-saħħa reġjonali f'Casal Paola. Saru diversi offerti, fosthom dawk ta' *SP BB* u ta' *Ergon*. Lill-kumitat tal-għażla deherlu li l-offerta ta' *Ergon* kellha titwarrab u b'ittra tal-20 ta' Marzu 2018 il-Ministeru għarraf lil *Ergon* illi l-kuntratt kien sejjer jingħata lil *SP BB* u illi l-offerta tagħha kienet tqieset “*administratively not compliant*” għal dawn ir-raġunijiet:

»1. Tenderer failed to rectify the following shortcomings:

- »• part 4B.2.4 in *Technoline Ltd*'s ESPD was not completed;
- »• part 4B.1, 4B.2.4, 4C.1, 4C.9, 4D.1 of *EMDP Ltd*'s ESPD was not completed;
- »• parts 2A.17, 4B.1, 4B.2.4, 4C.1, 4C.9 of Luisa Fontanali's ESPD were not completed;
- »• parts 2A.17, 4B.1, 4B.2.4, 4C.1, 4C.9 of *Prisma Engineering*'s ESPD were not completed;
- »• parts 2A.17, 4B.1, 4B.2.4, 4C.1, 4C.9 of *Ongreening*'s ESPD were not filled in. Furthermore the proposed subcontractor answered “no” to Part 4D.1 without providing an explanation why as requested in the ESPD;
- »• part 4B.6.1 of *INSO Spa*'s ESPD was still not filled in.

»2. The adjudication board has serious doubts on the soundness of the economic and financial standing of the ultimate parent company of *Ergon* (*Condotte d'Acque S.p.A.*). Research over the internet showed that the company (*Condotte d'Acque S.p.A.*) filed a case to request the Italian court for protection due to financial difficulties. Legal advice sought by the board concluded that *Condotte d'Acque S.p.A.* would need authorisation to rescind any pending contracts and to enter into new agreements. This could impact *Ergon*, which is the leader of this joint venture undertaking 90% of the works. For this reason, the board feels that the company is not administratively compliant.

»Bidder presented as key expert a person who was excluded from participation (Ing. Christopher Sammut) in this tender as he was involved in the implementation and preparation of this tender/project
... ..«

3. *Ergon* ressaq oġġezzjoni quddiem il-Bord ta' Revizjoni b'ittra tad-29 ta' Marzu 2018. Il-Bord ta' Revizjoni b'deċiżjoni tat-8 ta' Ġunju 2018 ħassar id-deċiżjoni tal-Ministeru u ordna li l-proċess tal-għażla tal-offerti jsir mill-ġdid wara li titqies ukoll l-offerta ta' *Ergon*. Il-Bord ta' Revizjoni fisser hekk ir-raġunijiet li wassluh għal din id-deċiżjoni:

»This board,

»having noted this objection filed by *Ergon-Technoline JV* (hereinafter referred to as the Appellant¹) on 29 March 2018, refers to the contention made by [*Ergon*] with regards to the award of tender awarded by the Ministry of Health (hereinafter referred to as the Contracting Authority),

»... ..

»whereby [*Ergon*] contend that:

- »a) the Contracting Authority was incorrect in stating that certain documents pertaining to their offer had to be re-submitted, as in actual fact, what the ministry requested was a rectification of the already submitted documentation;
- »b) the information requested under clauses 4B.2.4 and 7(b)(b)(2) of the ESPD² is conflicting and, in any case, [*Ergon*] maintain that, from the information they submitted, the evaluation committee could arrive at the requested data from the same provided in part 4B.1 of the ESPD;
- »c) contrary to what the Contracting Authority stated in their report, they had submitted the relevant information regarding subcontractors and any part thereof which was not completed represented data which was not required from such subcontractors;
- »d) with regards to the allegations regarding the negative financial standing of *Condotte d'Acque SpA*, although *Condotte* forms part of the *Ferfina Group* of which *Ergon* is one of the subsidiaries, *Condotte* is not even a shareholder of *Ergon*;
- »e) with regards to Ing. Sammut's conflict of interests, the latter had no involvement in the project of Paola Regional Hub, except for the fact that he was nominated as a key expert by [*Ergon*].

»The board also noted the Contracting Authority's letter of reply dated 12 April 2018 and its verbal submissions during the public hearing held on 10 May 2018, in that:

¹ Biex ma tinħoloqx konfużjoni, billi għall-għanijiet ta' din is-sentenza l-appellanti huwa l-konsorzju *SP BB International JV*, kull fejn fid-deċiżjoni tal-Bord ta' Revizjoni tissemma "*the Appellant*" sejjer jitniżżel "[*Ergon*]" minflok.

² European Single Procurement Document.

- »a) the Ministry for Health contends that [*Ergon*]'s claim that they had submitted all the requested documentation is not factual, as they were requested to submit the missing information after the closing date of the tender;
- »b) the Contracting Authority insists that [*Ergon*] were obliged to fill in part 4B.2.4, whilst the same opted to ignore such requirements. At the same instance, the same Contracting Authority maintains that there existed no conflict between the requested minimum annual turnover and the cumulative turnover;
- »c) the Contracting Authority mentions the fact that [*Ergon*] opted to ignore certain sections of the ESPD regarding subcontractors although this information was mandatory;
- »d) the ministry, through a due diligence exercise, became aware that *Condotte SpA* is the main shareholder of *INSO*, the latter entity having an 80% shareholding in *HBT*, which, in turn, is the parent company of *Ergon*. At the same instance, *Ergon* is one of the members of the participating joint venture, *i.e. Ergon Technoline JV*. Since the Contracting Authority is knowledgeable of the fact that *Condotte SpA* requested court protection from creditors, the evaluation board deemed that such a situation can affect the financial standing of *Ergon*;
- »e) the authority also contend that Ing. Christopher Sammiit was employed with the Ministry of Health in 2016, the time when the tender was issued, so that a conflict of interest does exist by contracting Ing. Sammut as a key expert, in [*Ergon*]'s offer.

»... ..

»This board, after having examined the relevant documentation and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, would, prior to the consideration of the issues raised by *Ergon Technoline JV*, refer to the bid bond issued by the declared preferred bidder, namely *SP BB International JV*; such information was included in the documentation submitted to this board by the Ministry for Health.

»In this regard, this board cannot but notice that the bid bond issued, allegedly referring to *SP BB International JV*, is not in accordance with the decisions taken by this board and confirmed by the Court of Appeal. One should refer to the decisions decided by this board in Case 1043 on 9 May 2017 and Case 1066 decided on 21 July 2017, wherein it was adjudicated that the bid bond should be issued by the bidder. In this particular case, the Bidder was *SP BB International JV* whilst the guarantee was issued by *Bonnici Brothers Limited*, one of the members of this *joint venture*³, without stating that this bond is issued on behalf of the latter.

»As has been emphasized on various occasions, the tender guarantee (bid bond) is intended as a pledge that the bidder will not

³ Fil-fatt *Bonnici Bros Limited* (C-3905) ma hijjex membru tal-*joint venture*; il-membru hija *Bonnici Bros Projects Limited* (C-83649).

retract his offer up to the expiry date of the guarantee, and, if successful, that he will enter into a contract with the Contracting Authority. The recommended bidder in this case is *SPBB International JV* and nowhere is this *joint venture* mentioned in the bid bond issued by *Bonnici Brothers Limited*. In this regard, this board noted that the evaluation committee failed to take this issue into consideration in the evaluation process, and such deficiency in the evaluation process will be reflected in the final adjudication of this appeal.

»1. With regards to *Ergon-Technoline's* first contention, in that the latter are insisting that they had originally submitted the requested information, this board would respectfully refer to Perit Mark Spiteri's testimony, where he stated that:

»“We submitted three particular parts for one simple reason. In the technical envelope, to use your jargon, the information to be submitted was too large, so we had to split it in three parts. I have just confirmed that in these two (the witness here was referring to two out of three parts) of the three, the power of attorney and the ESPD's were submitted and I am very happy to show this to the board right now.”

»On the other hand, the Ministry for Health is maintaining that [*Ergon*] submitted the missing information (although not complete) only after a request for the submission of ESPD's of *Technoline*, *EMDP Limited*, Ms Luisa Fontanalier, *Prisma Engineering* and *Ongreening*, all of which were omitted from [*Ergon*]'s original submissions.

»In this regard, this board would like to respectfully point out that it has been presented with numerous similar cases with regards to the submission of the requested information by [*Ergon*]; however, unless this same board is presented with proof or other evidence that the requested information was in fact sent and received by the Contracting Authority, the same cannot assume that *Ergon-Technoline JV's* claims in this regard are correct and proper; however, quite appropriately, the Ministry for Health requested a rectification for the missing documentation and, at this stage of consideration, this board established that after such rectification all documentation so requested was now made available to the Contracting Authority for the evaluation process.

»2. With regards to *Ergon-Technoline JV's* second contention, this board would refer to clause 7 (B)(B)2) of the instructions to tenderers which states that:

»“The minimum cumulative turnover during the past five years (being 2011-2015) shall be not less than € 20,000,000. This information is to be submitted by filling part 4B.1 of the European Single Procurement Document (ESPD)”.

»The above mentioned clause clearly and vividly dictates that the bidder must indicate the total turnover for the years 2011-2015 and which must not be less than € 20,000,000 and such information must be submitted by filling part 4B.2.4 of the ESPD, so that, in this case, the bidder was not given a choice and there was no room for omitting such information from the ESPD.

»At the same instance, part 48.2.4 of the ESPD dictates the submission of the “average yearly turnover”, which really means that for each of the years 2011 to 2015, the economic operator has to declare the turnover achieved during each of the years 2011 to 2015 so that the final result of such turnover is compared and agreed with the cumulative turnover so declared in Part 4B.1. Bidders who comply with such clauses and exceed the minimum requirement of € 20,000,000 will qualify to participate in the tender.

»In this regard, this board finds no justifiable cause to deem such requirements as stated in clauses 7(B)(B)(2) and part 4b.2.4 to be conflicting. This board opines that the minimum cumulative turnover is the dictated benchmark to qualify whilst the purpose of indicating the yearly turnover is mainly to assess the financial stability of the economic operator and whether the cumulative turnover includes any exceptional turnover in any of the particular years under review. If, on the other hand, *Ergon-Technoline JV* deemed clauses 7(B)(B)(2) and 4b.2.4 to be conflicting, the latter had all the available remedies to clarify the situation prior to the submission of their offer.

»In actual fact, after having examined [*Ergon*]’s offer in this regard this board notes that the information so requested in the tender dossier was present but not under the appropriate section of the ESPD, namely the cumulative turnover which could have easily been assessed from the information submitted by [*Ergon*] under Part 4B.1

... ..

»It is evidently clear that both the annual turnover of each of the years 2011 to 2015 and the cumulative turnover could be determined easily from the above submitted information. This board, is taking into consideration the magnitude of this particular tender and, in doing so, the board is also applying the principle of proportionality whereby it is this board’s opinion that, although [*Ergon*] failed to abide by the inclusion of certain information under the appropriate section in the ESPD, the requested information was, in actual fact, available to the evaluation board but under a separate section of the same ESPD. One has to appreciate that the information so submitted by *Ergon-Technoline JV* is still appropriate and sufficient for attaining the objective pursued and such an acceptance of this fact does not go beyond the requirements to achieve what the Ministry for Health requested. In this regard, this board upholds the [*Ergon*]’s second contention.

»3. With regards to *Ergon-Technoline JV*’s Third Contention, whereby they claim that they had submitted the requested information regarding the sub-contractors, this board was made aware, through the authority’s letter of reply dated 12 April 2018, that they confirmed that the omission to complete Part 4B.6.1. by *INSO SpA* was in fact rectified, so that this board opines that there exists no issue in this regard.

»4. With regards to [*Ergon*]’s fourth grievance, this board would refer to the actual relationship between *Condotte SpA* and the bidder *Ergon-Technoline JV*. One must acknowledge that the issue relates to the dubious financial standing of *Condotte* and not the bidder. The bidder is *Ergon-Technoline JV* and its composition of members consists of *Ergon* and *Technoline Limited*, so that the financial standing of these two entities should have been evaluated and

established. *Ergon* is owned by *HBT*, the latter, in turn being 80% owned by *INSO SpA* which is owned by *Condotte*. The issue with regards to the financial standing relates to *Condotte*, which had applied for a standstill period to the Court of Rome for the implementation and submission of a new business, industrial and financial plan, obviously obtaining protection from creditors' claims during the period of protection. Such protection expired on 18 May 2018 which will be postponed by further 60 days under suitable circumstances.

»At this stage of consideration, this board would respectfully point out that such an application to the Italian courts does not represent an application for a declaration of bankruptcy but rather an application for protection of the courts from creditors during the period through which *Condotte* will prepare the restructuring exercise. From documentation available, this board notes that *Condotte* is still restructuring but under the administration of court appointed experts.

»Although there exists a very distant connection between *Condotte* and *Ergon*, this board does not find any justifiable cause to envisage that *Condotte's* present restructuring programme will affect the financial standing of *Ergon-Technoline JV*, the bidder. At the same instance, this board does not foresee deterrents for the joint venture in carrying out its obligations as duly requested in the tender document. For clarity's sake, this board is not implying in any way that the evaluation committee should not carry out the necessary due diligence tests on the financial standing of the bidders, but must also consider the fact that, under such circumstances, the principle of proportionality should prevail in the evaluation process. In this regard, this board opines that the procedure which *Condotte* is undergoing for restructuring should not throw a shadow or bad light on the financial standing of the tenderer, namely *Ergon-Technoline JV*.

»5. With regards to [*Ergon*]'s fifth contention, this board would first consider what constitutes a conflict of interest. A conflict of interest involves a conflict between the public duty and private interests of an official, whose participation in a project could improperly influence the performance of his duties or the outcome of a public activity.

»In this particular case, Ing. Christopher Sammut was nominated as a "key expert" for the execution of [*Ergon*]'s offer. During the submissions and testimony of Ing. Sammut, it was credibly established that he was employed with the Contracting Authority of this tender up to May 2017.

»At the same instance, from the testimony of Ing. Sammut, this board was made aware that, although the latter was still in employment with *FMS* when this specific tender was issued, he was not involved at all in this particular project being tendered for. This board, after having considered Ing. Sammut's testimony and various submissions regarding such an issue, opines that, although, at the time of publication of this tender, Ing. Sammut was employed by *FMS*, such a fact does not necessarily render that he was involved in the planning and drafting of the technical specifications of this project. However, at the same time, this board was made aware that Ing. Sammut was still in employment with the *Foundation of Medical Services* as a consultant, having the responsibility of co-ordinating the Paola Hub. Although the phrase

“conflict of interest” is a very vague subject, this board opines that Ing. Sammut’s appointment as a key expert to [Ergon]’s offer will incur a conflict of interest, as in fact the latter had access to sensitive information with regards to this project. In this regard, this board doesn’t uphold *Ergon-Tecnoline JV*’s fifth contention.

»6. On a general note, this board is not comfortably convinced that the evaluation process was carried out in a transparent and diligent manner and, as duly noted in the opening paragraphs of this adjudication report, this board opines that the evaluation committee should have adopted the principle of equal treatment throughout the assessment procedure of each offer. One must consider the magnitude of this project and the voluminous documentation which each bidder had to provide and the respective financial outlay thereto. At the same instance, this board also takes into consideration the fact that all the financial aspects of each bid are known to all.

»In this regard, this board opines that it will not be beneficial for the Contracting Authority to cancel the tender, and every effort should be made to save the tender as, in actual fact, the tendering procedure was correct and appropriate. However, in the opinion of this board, the doubtful issue lies in the evaluation process which was carried out.

»In view of the above, this board:

- »a) has serious doubts as to how the evaluation procedure was executed;
- »b) does not uphold the Ministry of Health’s decision in the award of the tender;
- »c) refers back *Ergon-Technoline*’s offer, together with all the other competing bids for re-evaluation by an evaluation board composed of different members, taking into consideration this board’s adjudication report;
- »d) recommends that the deposit paid by [Ergon] should be fully refunded.«

4. *SP BB* ressaq appell minn din id-deċiżjoni b’rikors tat-28 ta’ Ġunju 2018 li għalih id-Direttur tal-Kuntratti wieġeb fl-10 ta’ Lulju 2018 u *Ergon* wieġeb fit-13 ta’ Lulju 2018.

5. Qabel ma tqis l-appell ta’ *SP BB*, il-qorti sejra tqis eċċezzjoni ta’ nullità tal-appell imressqa minn *Ergon* billi, jekk tintlaqa’ l-eċċezzjoni, il-każ jieqaf hawn. L-eċċezzjoni tgħid hekk:

»... .. minkejja dak li hemm miktub fl-okkju tal-appell, ir-rikors tal-appell gie intavolat minn “I-konsorzju *SP BB International JV*” u mhux ukoll mill-membri tal-istess konsorzju.

»Iżda kif ġie ammess mill-appellanti stess il-konsorzju *SP BB International JV* ma għandha l-ebda personalità ġuridika

»La darba jirriżulta li sallum l-appellanti ("l-konsorzju *SP BB International JV*") għadha ma teżistix ma setgħetx tagħmel l-appell... ..
...«

6. Jekk il-konsorzju ma għandux personalità ġuridika l-isem *SP BB International JV* huwa biss ditta, jew *trade name*: l-isem li bih persuna tinnegozja. Fil-każ tallum *SP BB International JV* huwa d-ditta li biha *Bonnici Bros. Projects Limited* u *Shapoorji Pallonji (Malta)* jmexxu n-negozju li għandhom flimkien. Il-persuni li jmexxu n-negozju, u li jiksbu u jintrabtu b'obbligazzjonijiet, huma dawk iż-żewġ soċjetajiet u mhux id-ditta li hija biss isem li tidentifikahom it-tnejn flimkien.
7. Għalhekk, meta fir-rikors tal-appell jingħad illi r-rikors qiegħed isir minn *SP BB International JV*, li qiegħed jingħad hu illi qiegħed isir miż-żewġ soċjetajiet flimkien, u mhux li qiegħed isir minn entità li ma għandhiex personalità, għax l-isem huwa biss dak li bih tiġi identifikata l-persuna, u fil-każ tallum l-isem qiegħed jidentifika ;iż-żewġ membri tal-konsorzju. Li fil-fatt il-partijiet f'dawn il-proċeduri huma *Bonnici Bros. Projects Limited* u *Shapoorji Pallonji (Malta)* jidher ċar mill-*occhio* tar-rikors, li juri wkoll ċar li *SP BB International JV* huwa d-ditta li biha huma magħrufa ż-żewġ soċjetajiet għall-għanijiet ta' dan in-negozju.
8. Ir-rikors tal-appell għalhekk sar sew, u ma hemmx in-nullità li qiegħed jara *Ergon*. F'kull każ, ukoll li kieku l-isem tal-appellant kien muri ħażin, dan kien ikun nuqqas li jista' jissewwa taħt l-art. 175(2) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili u mhux nuqqas li jwassal għal nullità taħt l-art. 789 tal-istess Kodiċi.

9. L-eċċezzjoni ta' nullità hija għalhekk miċħuda.
10. Il-qorti sejra tgħaddi issa għall-appell ta' *SP BB*, li fl-ewwel aggravju jgħid illi l-Bord ta' Revizjoni ma kienx messu qanqal il-kwistjoni tal-validità tal-garanzija bankarja meta din il-kwistjoni ma kienet tqajmet minn ebda waħda mill-partijiet interessati:

»Illi kif jidher *ictu oculi* mid-deċiżjoni appellata, il-kwestjoni marbuta mal-*bid bond* provvduta mill-konsorzju esponenti ma kinitx waħda illi tqajmet minn xi ħadd mill-partijiet. Għall-kuntrarju, kien il-bord illi *arte proprio* dehrlu li għandu jqajjem allegati nuqqasijiet jew preokkupazzjonijiet marbuta mal-garanzija mressqa mill-konsorzju appellant.

»Illi huwa umilment sottomess illi proċeduralment il-bord ma kellu ebda jedd u/jew diskrezzjoni illi jagħmel dan.

»Il-proċedura ta' appelli qiegħda mnizzla b'mod dettaljat fir-Regolamenti dwar l-Akkwist Pubbliku, senjatament fl-artiklu 276 tar-Regolamenti, li jagħlaq billi jgħid:

»“wara li jgħarbel l-evidenza kollha u wara li jikkunsidra s-sottomissjonijiet kollha mressqa mill-partijiet, il-Bord ta' Revizjoni għandu jiddeċiedi dwar jekk għandux jilqa' jew jiċċad l-appell jew anke li jħassar is-sejha jekk hekk ikun jidhirlu li jkun l-aħjar fiċ-ċirkostanzi tal-każ”.

»Imkien ma jingħad illi l-bord għandu d-diskrezzjoni illi jwettaq huwa stess l-evalwazzjoni mill-ġdid u li jifli dokumentazzjoni illi mhijex marbuta u/jew relevanti għall-oġġezzjonijiet imressqa mill-partijiet.

»Illi huwa ċar illi mkien fis-sottomissjonijiet tad-diversi partijiet ma tqajjem xi gravam jew xi preokkupazzjoni marbuta mal-garanzija mressqa mill-konsorzju esponenti. Għalhekk dan il-punt ma setax jitqajjem mill-bord.

»... ..

»Illi mingħajr preġudizzju għal dan, u b'rabta mal-istess aggravju, huwa sottomess illi minbarra l-fatt illi d-deċiżjoni appellata hija minn dan il-lat proċeduralment erronja, hija wkoll żbaljata mil-lat ta' prinċipji ta' ġustizzja naturali, partikolarment b'rabta mad-dritt tal-partijiet għal smiġħ xieraq. Dan għaliex il-partijiet interessati – *in primis* il-konsorzju esponenti – safa sorpriż fid-deċiżjoni b'punt illi mhux biss ma kienx tqajjem mill-partijiet, iżda, aghar minn hekk, li ma kienx ingħata l-opportunità li jagħmel sottomissjonijiet dwaru. Huwa għalhekk sottomess illi anke li kieku, *dato ma non concesso*, il-bord kellu d-diskrezzjoni li jikkunsidra l-għamla tal-*bid-bond* ċertament ma setax jaħsad lill-partijiet billi jqajjem dan il-punt biss fid-deċiżjoni appellata. «

11. Il-proċess ta' għażla ta' offerti għal kuntratt pubbliku, ladarba jolqot flus pubbliċi, huwa ħaġa ta' interess pubbliku u huwa wkoll fost id-

dmirijiet tal-Bord ta' Revizjoni li jara li jiġħares dak l-interess. Jekk lill-bord deherlu li kien hemm irregolarità fl-offerta rebbieħa kellu mhux biss is-setgħa iżda wkoll id-dmir li jqanqal il-kwistjoni; kien jonqos mid-dmir tiegħu li kieku ma għamilx hekk

12. Dwar it-tieni parti tal-aggravju – li l-Bord ta' Revizjoni ċaħħad lill-partijiet mill-jedd għal smiġħ xieraq – il-qorti tosserva illi l-bord effettivament ma ta ebda deċiżjoni finali dwar il-validità tal-garanzija bankarja u ma skwalifikax l-offerta ta' *SP BB* minħabba fl-irregolarità: li għamel il-bord hu li ħassar il-proċess ta' għażla b'dan li jerggħu jitqiesu l-offerti kollha. Għalhekk ma ċaħħadx lil *SP BB* mill-fakoltà li jagħmel sottomissjonijiet fuq il-validità tal-garanzija.

13. L-ewwel aggravju hu għalhekk miċħud.

14. It-tieni aggravju fil-fatt jolqot il-meritu tal-validità tal-garanzija u jgħid hekk:

»... .. il-*bid bond* hija waħda valida u għalhekk il-preokkupazzjonijiet tal-bord m'għandhomx mis-sewwa.

»L-artiklu 8 tas-sejħa għall-offerti kien jistabilixxi kif ġej:

»“The tender guarantee is set at €60,000 and must be an original and valid guarantee presented in the format available to peruse from www.etenders.gov.mt. In the case where a tenderer is submitting an offer for one or more of the lots, only one tender guarantee is required to be submitted but it must be made for the total amount of the lots being tendered for. The guarantee must be issued by a local Maltese Bank or a Financial Institution licensed by a recognised Financial Regulator in the country where the company is located and who assumes responsibility for claims and payments to the amount as stated above. It must remain valid up to and including the 21st February 2018. The tender guarantee must be drawn up in the name of Director General Contracts.”

»... ..

»Mhuwiex kontestat illi, fil-każ tal-konsorzju appellanti, il-garanzija tal-offerta ġiet provvduta minn *Bonnici Bros Limited* (C-3905), li hija l-*holding company* u *sole shareholder* tal-kumpanija *Bonnici Bros*

Projects Limited (C-83649), membru tal-konsorzju offerenti. Hija l-umli fehma tal-esponenti illi l-fatt li l-*bid bond* ma nħariġx f'isem il-konsorzju bl-ebda mod ma jxejjen il-validità tal-istess *bid bond*.

»Jingħad l-ewwelnett illi ladarba l-bord għażel illi jifli l-*bid bond* provvduta (xi ħaġa li l-appellanti jsostnu illi l-bord ma setax jagħmel), kellu mbagħad almenu jmur *oltre* eżami *prima facie* tad-dokument u kellu jqis jekk il-*bid bond* kinitx tillhaq l-għan tagħha, ċjoè dak li tkun “*a pledge that the tenderer will not retract his offer*”. B'rabta ma' dan, il-konsorzju appellanti jinnota illi f'każ li ġara dak li jsemmi l-artiklu 8 (ċjoè, illi l-konsorzju jirtira l-offerta tiegħu) il-garanzija kienet tkun onorata mill-Bank dan għaliex:

- »• mid-diċitura tal-garanzija ma jista' jkun hemm ebda dubbju illi l-garanzija nħarġet b'rabta ma' din is-sejħa għall-offerti partikolari u mal-unika offerta illi fiha *Bonnici Bros Limited* kienet involuta (*tramite s-sussidjarja tagħha Bonnici Bros Projects Limited*);
- »• il-konsorzju esponenti jżid jgħid illi fil-każ tal-offerta tiegħu, *Bonnici Bros Limited* ipprovdiet ukoll rabta bil-miktub illi l-konsorzju *qua* offerent seta' jistrieħ fuq il-ħiliet finanzjarji tagħha *ai termini* tar-regolament 235 tal-Regolamenti dwar l-Akkwist Pubbliku. Il-*bid bond* hija garanzija ta' natura finanzjarja u għalhekk dan il-*commitment* iserraħ moħħ l-awtorità kontraenti illi l-*bid bond* kienet tali illi setgħet tinvokah f'każ ta' *default* min-naħa tal-konsorzju offerent.

»Illi f'dan ir-rigward, issir referenza għad-deċiżjonijiet li jagħmel referenza għalihom il-*PCRB* biex jiġġustifika l-osservazzjoni tiegħu dwar il-*bid bond*, senjatament il-każijiet 1043 u 1066. Il-konsorzju esponenti jinnota qabel xejn u għal kull bwon fini illi dawn huma deċiżjonijiet li ma ġewx appellati. Iżid jgħid illi wieħed irid iħares lejn iċ-ċirkustanzi kollha tal-każ. Hekk, ngħidu aħna, fil-każ 1066, il-*bid-bond* tqieset mhux aċċettabbli mhux tant għaliex tressqet minn membru wieħed biss tal-konsorzju, imma pjuttost għaliex “*the format presented by Ozo Marine Joint Venture does not give any relevance to the awarded tender and the successful applicant*”. Dan ma jistax jingħad f'dan il-każ fejn il-garanzija tagħmel referenza ċara u korretta għas-sejħa għall-offerti partikolari u għalhekk ċertament m'hemmx ombra ta' dubbju illi kienet intiża għal din is-sejħa u għall-offerta mressqa mill-konsorzju illi fih *Bonnici* kienu parti.«

15. Il-qorti tapprezza l-għanaqal li wera d-Direttur tal-Kuntratti fit-tweġiba

tiegħu meta qal illi:

»... .. ma jħossx li fil-mument huwa jista' jesprimi ruħu dwar is-siwi tal-*bid-bond* mogħtija mill-konsorzju appellanti. [I]-Bord ta' Revizjoni dwar il-Kuntratti Pubbliċi ordna li din l-offerta għandha terġa' tiġi meqjusa mill-ġdid u għalhekk id-direttur ma jixtieqx jippreġudika din l-evalwazzjoni ġdida b'kummenti magħmula f'din it-tweġiba.«

16. Bħad-Direttur tal-Kuntratti, il-qorti f'dan l-istadju tgħid biss illi ċertament il-preokkupazzjonijiet tal-Bord ta' Revizjoni kienu ġustifikati. L-

obligazzjoni tal-bank li jhallas taħt il-garanzija tqum biss jekk “*Bonnici Bros Ltd... .. (hereinafter referred to as the tenderer) withdraws his tender before the expiry of the period of the guarantee*”. L-offerta ma saritx minn *Bonnici Bros Limited*, li lanqas ma hija membru tal-konsorzju, u għalhekk din ma tistax tirtira offerta li qatt ma għamlet. Li kieku *SP BB* irtira l-offerta li għamel kien ikollu għall-inqas argument plawsibbli l-bank li jirrifjuta li jhallas għax ma tkunx seħħet il-kondizzjoni għall-ħlas tal-garanzija⁴. Għamel sew għalhekk il-Bord ta’ Revizjoni li wera preokkupazzjoni dwar il-garanzija.

17. It-tieni aggravju wkoll huwa għalhekk miċħud.

18. Fit-tielet aggravju *SP BB* jikkritika l-konklużjoni tal-Bord ta’ Revizjoni illi t-tagħrif nieqes dwar “*cumulative turnover*” kien fil-fatt ingħata f’parti oħra tal-offerta ta’ *Ergon*. Kompla jfisser l-aggravju hekk:

»... .. il-bord kien żbaljat f’dan ir-rigward. Għandu jingħad qabel xejn illi *Ergon Technoline JV* kienet naqset illi, mal-offerta originali tagħha, tissottmetti l-ESPDs ta’ *Technoline, EMDP Limited, Ms Luisa Fontanalier, Prisma Engineering and Ongreening*. L-Awtorità kontraenti kienet intitolata illi, f’dan il-każ, titlob lill-offerent sabiex jippreżenta d-dokumenti nieqsa u hekk għamlet. Madanakollu, id-dokumenti ġew sottomessi mill-ġdid b’informazzjoni nieqsa – senjatament part 4B.2.4. Fi kliem ieħor, in-nuqqas min-naħa tal-oblatur kien doppju – l-ewwel ma fornix l-ESPDs rikjesti, imbagħad meta ssottomettihom ma rriżultatx minnhom l-informazzjoni rikjesta (f’dan il-każ, it-*total turnover*).

»Illi filwaqt illi wieħed jifhem illi, f’isem il-proporzjonalità, jingħata ċans illi offerent jipprovi (fejn espliċitament permess) informazzjoni jew dokumenti nieqsa, huwa umilment sottomess illi dan m’għandux jintuża biex offerent jintalab ripetutament jagħti informazzjoni sakemm jillhaq ir-rekwiżiti tas-sejha għall-offerti. Dan ikun tgħawwiġ tal-prinċipju ta’ proporzjonalità u jagħti vantaġġ indebitu lil offerent fuq oħrajn.«

⁴ Ara e.g. *Quattro Labs Limited et v. Malta College of Arts, Science and Technology et*, App. 13 ta’ April 2018.

19. Lid-Direttur tal-Kuntratti deherlu li ma kellux jikkummenta fuq din il-kwistjoni (kif ukoll dwar ir-raba' u l-ħames aggravji) biex ma jippre-
gudikax l-evalwazzjoni li għad irid jagħmel il-kumitat tal-għażla:

»... .. billi l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici ordna li ssir evalwazzjoni ġdida tal-offerti minn membri ġodda u d-direttur esponent jaqbel li għandu jsir hekk, f'għieħ it-trasparenza, allura huwa jfoss li huwa għaqli li ma jikkummentax aktar fuq dawn l-aggravji. Dan biex il-kumitat tal-għażla l-ġdid ikun jista' jaħdem mingħajr influwenzi.

»Għalbekk dawn it-tliet aggravji għandhom jtqiesu għalissa bħala intempestivi sakemm l-offerta ta' *Ergon-Technoline JV* terġa' tigi meqjusa mill-ġdid.«

20. Kuntrarjament għall-kwistjoni tal-validità tal-garanzija, iżda, hawnhekk il-Bord ta' Revizjoni wasal għal deċiżjoni definittiva⁵ li, jekk ma tin-qalibx minn din il-qorti, tkun torbot il-kumitat tal-għażla l-ġdid. Il-qorti għalhekk hija tal-fehma illi għandha tqis il-meritu ta' dan l-aggravju.

21. Il-qorti hija tal-fehma iżda illi dan ma kienx każ fejn oblatur "intalab ripetutamente jagħti informazzjoni sakemm jilħaq ir-rekwiziti tas-sejħa għall-offerti"; li ġara hu li kien hemm dokumenti nieqsa, l-oblatur intalab jipprovdidi dawk id-dokumenti, id-dokumenti ipprezentahom iżda lill-kumitat tal-għażla deherlu li kien fihom tagħrif nieqes waqt illi lill-Bord ta' Revizjoni deherlu li t-tagħrif ingħata għalkemm mhux preċiżament fil-forma mitluba. Ladarba iżda t-tagħrif effettivament ingħata, u b'mod li ma ta ebda vantaġġ kompetitiv lill-oblatur, tkun sanzjoni sproporzjonata li titwarrab offerta għax it-tagħrif ingħata f'paġna 5 flok f'paġna 4, aktar u aktar meta tqis illi l-għan aħħari fl-għażla ta' offeriti għal kuntratti pubbliċi huwa li tingħażel l-aħjar offerta bla ma jingħata

⁵ "In this regard this board upholds [Ergon]'s second contention [dik dwar il-cumulative turnover]."

vantaġġ kompetittiv lil ebda oblator, u għalhekk ma għandhomx jitwarrbu offerti validi għal raġunijiet insuffiċjenti.

22. Dan it-tielet aggravju wkoll għalhekk huwa miċħud.

23. Ir-raba' aggravju jolqot id-deċiżjoni tal-Bord ta' Revizjoni illi d-diffikultajiet finanzjarji ta' *Condotte d'Acque Spa* ["*Condotte*"] ma għandux jitfa' dell ikrah fuq l-offerta ta' *Egron. SP BB* kompla fisser l-aggravju hekk:

»Mhux kontestat illi oblator f'sejha għall-offerti huwa obligat illi juri illi l-qagħda finanzjarja tiegħu hija tali illi tagħmlu idoneju biex jissoddisfa r-rekwiżiti tas-sejha għall-offerti. Huwa proprju għalhekk illi r-Regolamenti jikkellmu fost l-oħrajn dwar meżzi ta' prova tal-qagħda finanzjarja tal-offerenti.

»Illi f'dan il-każ, il-kumitat t'evalwazzjoni għamel *due diligence* dettaljat fuq l-offerenti, li minnhom irriżulta illi, fil-każ ta' *Ergon Technoline JV, Condotte*, li hija waħda mill-*holding companies* b'sehem fil-konsorzju, tqiegħdet fi proċeduri ta' "protezzjoni" quddiem il-qrati ta' Ruma. Dan, skont il-kumitat t'evalwazzjoni kien jikkomprometti l-qagħda tal-konsorzju offerenti.

»Kif ġà ntqal, l-ishma ta' *Ergon*, waħda mill-membri tal-konsorzju, jappartjenu lis-soċjetà *HBT*, li min-naħa tagħha, 80% tal-ishma tagħha huma ta' proprjetà tas-soċjetà *INSO*, li l-azzjonista maġġoritarja tagħha hija *Condotte*. Għandu jingħad illi waqt is-smiġh tressaq jixhed Dott. Robert Curcuruto, avukat ta' *INSO*, li ma ċaħadx illi *Condotte* kienet involuta f'dawn il-proċeduri *in vista* ta' sensiela ta' kredituri li hija għandha. Ikkonferma wkoll illi l-"*presidente*" jew *managing director* ta' *Condotte* saħansitra kien tqiegħed taħt arrest b'rabta mal-involviment tiegħu fl-operat ta' *Condotte*.

»Inkredibbilment, minkejja dawn il-fatti li ġustament qajmu pre-okkupazzjoni f'moħħ il-kumitat t'evalwazzjoni, il-bord deħrlu li dawn ma kinux kwestjonijiet li kellhom jinkwetaw lill-awtorità kontraenti, u f'dan ir-rigward laqa' l-gravam ta' *Ergon*. Din il-parti tad-deċiżjoni però xejn ma hija ġustifikata. Kollu għalxejn illi mad-daqqa t'għajn il-konsorzju jidher finanzjarjament stabbli, jekk imbagħad jirriżulta illi wieħed mill-komponenti tiegħu huwa kompromess bi problemi finanzjarji, addirittura b'xeħta kriminali. Hawn ma jridx wieħed jinsa illi m'aħniex qed nitkellmu minn proġett ta' xi ftit eluf li jitlesta f'xahar jew tnejn, iżda proġett maġġur ta' importanza nazzjonali. Tista' awtorità kontraenti tirriskja illi tiffirma kuntratt ma' min diġà, mar-radd tas-salib, għandu problemi serji finanzjarji?«

24. *Ergon* wieġeb hekk:

»... .. ir-raġunijiet għal liema persuna tista' tiġi eskluża minn gara pubblika huma mniżżla fil-liġi, u *cioè* r-regolamenti 191 sa 198 tar-Regolamenti dwar l-Akkwist Pubbliku (l-Avviz Legali 352 tal-2016 kif sussegwentement emendat) b'liema giet trasposta d-Direttiva 2014/24/EU. Awtorità kontraenti ma tistax teskludi oblatur b'offerta valida hlief għal dawk ir-raġunijiet imposti mil-liġi jew fis-sejha tal-offerti.

»F'dan ir-rigward fejn jikkoncerna kwistjonijiet ta' falliment, huwa r-reg. 194 li japplika, liema reg. 194 japplika biss fir-rigward ta' operatur ekonomiku li jkun qed jippartecipa f'sejha għall-offerti. Ir-reg. 194 ma japplikax għal *shareholder* ta' dak l-operatur, jew addiritura għal *shareholder* ta' *shareholder* ta' dak l-operatur.

»Issa fil-każ odjern irriżulta ampjament li s-soċjetà *Condotte* ma hijiex l-operatur ekonomiku li qed tagħmel l-offerta; l-ebda wieħed mis-soċjetajiet offerenti fil-konsorzju esponenti ma qiegħda tiddependi fuq *Condotte* sabiex tilhaq ir-rekwiżiti imposti mis-sejha. Is-soċjetà *Condotte* hija għal kolloz terz għall-offerta tal-esponenti. Il-*link* li hemm bejn *Condotte* u s-soċjetà *Ergon* hija li *Condotte* hija s-*shareholder* tas-*shareholders* tas-soċjetà *Ergon Projects Limited*.

»Huwa ben magħruf li hemm personalità ġuridika distinta bejn soċjetà u x-*shareholders* tagħha. F'dan ir-rigward wara li qamet din il-kwistjoni l-esponenti ressqet anke parir minn avukati Taljani sabiex jikkonfermaw dan.

»*Condotte* ma tifformax parti tal-konsorzju esponenti u hija għal kollox estranea għall-appalt odjern. Għalhekk il-kumitat t'evalwazzjoni ma setgħetx teskludi l-offerta tal-esponenti fuq dan il-bażi, *multo magis*, mingħajr anqas ma titlob xi kjarifika mingħand l-esponenti sabiex tiċċara kwalsiasi dubju li seta' kellha.«

25. Tassew illi l-L.S. 174.04, fir-regg. 192 *et seqq.*, ma tqisx bħala waħda mir-raġunijiet għall-“esklużjoni ta' operatur ekonomiku” il-fatt illi wieħed mill-azzjonisti ta' dak l-operatur ekonomiku jkun f'sitwazzjoni ekonomika bħal dik li tinsab fiha *Condotte*. Madankollu jistgħu jinholqu ċirkostanzi fejn jinhatfu ġudizzjarjament l-assi ta' soċjetà li tkun f'dik is-sitwazzjoni, u għalhekk ukoll fil-każ tallum – fejn jidher ukoll li kien hemm għall-inqas suspett ta' attività illecita li wasslet biex uffiċjal għoli ta' *Condotte* jitqiegħed taħt arrest – ma kinitx għalkollox bla bażi l-pre-okkupazzjoni tal-kumitat ta' għażla dwar il-possibilità li s-sitwazzjoni ta' *Condotte* tista' tolqot frażin lil *Ergon Projects Limited* li hija membru tal-konsorzju *Ergon-Technoline JV* [“*Ergon*”].

26. Barra minn hekk, is-sitwazzjoni tidher li għadha fluwida, billi ma tressqitx prova li *Condotte* waslet għal ftehim ta' *concordato* mal-kredituri tagħha.
27. Fil-fehma tal-qorti jkun xieraq illi l-kwistjoni titqies mill-ġdid mill-kumitat ta' għażla wara li jikseb tagħrif aktar aġġornat, u għalhekk il-kumitat ma għandux jitqies marbut bil-konklużjoni tal-Bord ta' Revizjoni fuq din il-kwistjoni. F'dan is-sens il-qorti qiegħda tilqa' l-aggravju ta' *SP BB*.
28. Il-ħames aggravju jolqot id-deċiżjoni dwar konflitt ta' interess, u ġie mfišser hekk:

»Waħda mir-raġunijiet li wasslu għat-twarrib tal-offerta ta' *Ergon Technoline JV* kienet illi wieħed mill-*key experts* impressqa minnha, l-Inġinier Christopher Sammut, kien, sa ffit xhur qabel, impjegat mal-*FMS* u kellu saħanistra sehem fil-proġett tal-*Paola Hub*. Il-kumitat ta' evalwazzjoni ġustament sab illi dan kien joħloq kunflitt t'interess u *Ergon Technoline JV* appellaw fost l-oħrajn minn dan il-punt.

»Min-naħa tiegħu l-bord ikkonferma l-posizzjoni tal-kumitat ta' evalwazzjoni u kkonkluda li tassew kien jeżisti dan il-kunflitt t'interess. Fid-dawl ta' dan, b'mod skjett, warrab l-aggravju ta' *Ergon Technoline JV*.

»Fid-dawl ta' dan, il-konsorzju esponenti ma jistax jifhem kif, ladarba dan il-kunflitt t'interess ġie rikonoxxut mill-bord, l-istess bord seta' jordna li l-offerta tal-konsorzju *Ergon* tiġi ri-integrata fl-evalwazzjoni. Il-konsorzju jirrileva illi f'dan ir-rigward is-sentenza hija manifestament żbaljata għaliex kontradittorja għal kollox. Huwa obbligu ta' kull oblatur illi jassigura illi kwalunkwe offerta tiegħu tkun ħielsa mhux biss minn kull kunflitt t'interess, iżda addirittura minn kwalunkwe riskju ta' tali kunflitt. F'dan il-każ, ir-riskju mhux biss jeżisti, iżda ġie konfermat u rikonoxxut mill-istess bord. Huwa għalhekk sottomess illi l-bord kellu għalhekk ikompli biex jeskludi l-offerta ta' *Ergon Technoline JV* u mhux "isalvaha"!«

29. *Ergon* wieġeb hekk:

»L-appellanti huma għal kollox skorretti u qegħdin jipprovaw jiżgwidaw dina l-onorabbli qorti meta jallegaw li l-bord kkonkluda li "tassew kien jeżisti dan il-kunflitt t'interess".

»Mhux biss il-bord ma ddeċieda xejn dwar dan il-punt fid-dispositiv tad-deċiżjoni tiegħu iżda fil-konsiderazzjonijiet tiegħu ma tkellimx fuq kunflitt t'interess attwali u preżenti iżda fuq kunflitt t'interess futur. ...
... ..

»..... [I]l-bord ma sabx kunflitt attwali u ma sabx li l-esponenti fha vantaġġ. Evidentement dan kien billi l-bord kien sodisfatt mix-xieħda tal-Ing. Sammut li huwa fl-ebda mod ma kien involut fl-offerta tal-esponenti, u kien ser ikun biss involut f'każ li l-esponenti jingħataw l-appalt.

»Dan kollhu premess l-esponenti filwaqt li jirreferi għal sottomissjonijiet ġà magħmula fl-oġġezzjoni tiegħu quddiem il-bord jirriveva li l-awtorità kontraenti kienet għal kollox skorretta meta skartat l-offerta tal-esponenti mingħajr ma talbet xi forma ta' kjarifika mingħand l-esponenti.

»Fl-ordinament tagħna, il-baži legali sabiex tiġi skartata offerta milquta minn kunflitt t'interess hija r-reg. 194 tal-SL 197.04:

»“194. Kuntratt ukoll m'għandux jingħata lil operatur ekonomiku li, waqt il-proċedura ta' akkwist għal dak il-kuntratt:

“(b) ikollu konflitt ta' interess, kif imfisser fit-tifsira fir-regolament 2, li ma jistax jiġi rimedjat effettivament b'mezzi inqas intrużivi;”

»Minn dan għandu jirriżulta ampjament li l-eskluzjoni tal-oblatur ma hijiex awtomatika iżda għandha ssir biss fejn ma hemmx rimedju ieħor. Dan kien jimponi obbligu fuq l-awtorità kontraenti sabiex tinvestiga jekk jeżistix rimedju ieħor.

»Dan ma huwa xejn għajr applikazzjoni tal-ġurisprudenza in materia tal-Qorti tal-Ġustizzja tal-Unjoni Ewropeja fejn ġie konfermat kemm-il darba li mhux kull konflitt t'interess għandu jwassal għall-iskartar ta' offerta iżda biss fejn oblant ikun ha vantaġġ ingust. Ser jiġi citat mis-sentenza Intrasoft International v. Commission (T-403/12) deċiża fit-13 t'Ottubru 2015:

»“76. The awarding authorities are under no absolute obligation to exclude systematically tenderers in a situation of a conflict of interests, such exclusion not being justified in cases in which it is possible to show that that situation had no impact on their conduct in the context of the tender procedure and that it entails no actual risk of practices liable to distort competition between tenderers. On the other hand, the exclusion of a tenderer where there is a conflict of interests is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency (judgment in Nexans France v. Entreprise commune Fusion for Energy, T:2013:141, paragraphs 116 and 117).”

»Il-ġurisprudenza tal-qrati tagħna hija wkoll konkordi ma' dan. Fis-sentenza MTR Contracting Limited v. id-Direttur tal-Kuntratti et (64/2013) deċiża fit-28 ta' Ġunju 2013 il-qorti ddikjarat:

»“Isegwi mill-premess, illi darba li lill-kumitat ta' evalwazzjoni rriżultat ha konflitt ta' interess li fil-fehma tagħha kellu jiġi indirizzat, kellu jagħti opportunità lis-soċjetà appellanti tirranġa s-sitwazzjoni, u għal dan il-fini timponi terminu raġjonevoli li fih is-soċjetà kellha tipproċedi biex telimina dak il-konflitt. Ma kellux immedjatament

jiskwalifika lis-soċjetà rikkorenti, iżda kellu jimponi żmien biex is-soċjetà appellanti tikkonforma ruħha mal-esiġenzi tal-liġi, u hu biss f'każ li jgħaddi dak iż-żmien inutilment li in segwitu jiskwalifika lill-istess soċjetà.”

»Isegwi li l-bord kien korrett meta irrimetta l-kwistjoni lura lill-kumitat ta' evalwazzjoni sabiex din taġixxi kif trid il-liġi.«

30. Jekk minħabba konflitt ta' interess oblatur għandux jiġi skwalifikat jew jingħatax żmien biex ineħħi dak il-konflitt jiddependi fuq jekk il-konflitt ikunx għa laħaq ta vantaġġ kompetittiv lil dak l-oblatur.
31. Fil-każ tallum il-konflitt jikkonsisti fil-fatt illi l-Inginier Sammut, mañtur bñala *key expert* ma' *Ergon*, kien impjegat u, wara, konsulent mal-*Foundation for Medical Services* meta tfasslet is-sejħa għal offerti. Il-konflitt huwa għalhekk evidenti u ma kienx għaqli għal *Ergon* li tañtar bñala espert tagħha persuna li kienet impjegata ma' entità marbuta mal-awtorità kontraenti.
32. Madankollu, mix-xieħda tal-Inginier Sammut quddiem il-Bord ta' Re-viżjoni ñareġ illi, għallinqas sa dakinhar li xehed, ma kien gñadu wettaq ebda rwol fil-proġett ta' *Ergon*, u gñalhekk, jekk dan hu minnu – gñax il-qorti taraha ftit iebsa li temmen illi persuna mañtura bñala *key expert* ma tintalabx parir fuq it-tñejjija ta' offerta li, jekk tintlaqa', sejra jkollha rwol ewlieni fit-twettiq tagħha –, jidher li sa issa *Ergon* gñadu ma ña ebda vantaġġ kompetittiv mit-tagħrif li l-Inginier Sammut seta' kiseb fuq il-proġett meta kien gñadu konsulent mal-*Foundation for Medical Services* fiż-żmien meta kienet qiegħda titñejja s-sejħa għal offerti.

33. Fiċ-ċirkostanzi għalhekk ma jidhirx li, minn dak li ħareġ sa issa, hemm l-estremi biex l-offerta ta' *Ergon* titwarrab minħabba konflitt ta' interess, b'dan iżda illi l-kumitat ta' għażla għandu jikseb tagħrif aktar dettaljat dwar ir-rwol tal-Inġinier Sammut, kemm mal-*Foundation for Medical Services* u kemm ma' *Ergon*, meta jasal biex iqis l-offerta ta' *Ergon*.

34. L-añhar aggravju ta' *SP BB* jgħid hekk:

»Illi l-añhar aggravju tal-konsorzju esponenti jirreferi għal dik il-parti tad-deċiżjoni fejn il-bord iddikjara illi kellu *serious doubts as to how the evaluation procedure was executed*. Jidher illi proprju din il-kunsiderazzjoni illi wasslet sabiex il-bord jordna li l-evalwazzjoni ssir mill-ġdid, b'bord rikompost, u bl-offerti tal-appellanti kollha riammessi fil-ġirja.

»Illi l-esponenti bl-ebda mod ma taqbel ma' din il-konklużjoni tal-bord. Jibda biex jingħad illi għalkemm l-appellanti diversi naturalment ma kinux qed jabqlu mal-konklużjonijiet tal-bord, ħadd minnhom ma wasal biex għamel l-allegazzjoni serja illi l-proċess t'evalwazzjoni sar b'xi mod "dubbuż" jew "mhux diliġenti". Wieħed għalhekk isibha diffiċli jifhem kif il-bord wasal għal din il-konklużjoni *sua sponte*. Dan minbarra l-fatt illi, fuq il-maġġoranza tal-aggravji, il-bord saħansitra ta raġun lill-kumitat t'evalwazzjoni jew saħanistra faħħru li għamel *due diligence* bir-reqqa

»Illi fiċ-ċirkustanzi, l-esponenti ssostni illi d-deċiżjoni tal-bord safejn imsejsa fuq il-kunsiderazzjoni illi l-kumitat t'evalwazzjoni għamel evalwazzjoni "dubbuża" hija għal kollox bla sisien legali u fattwali. Għalhekk ma hemm ebda ġustifikazzjoni għall-ordni tal-bord li l-evalwazzjoni ssir mill-ġdid b'kumitat t'evalwazzjoni ġdid, u wisq anqas illi f'tali evalwazzjoni jiġu riammessi oblaturi li – bħal *Ergon Technolive JV* – irriżulta li kellhom nuqqasijiet fl-offerta tagħhom (kif irrikonoxxa, ironikament, l-istess bord).«

35. Il-qorti taqbel perfettament mal-osservazzjoni tad-Direttur tal-Kuntratti meta fit-twegiba tiegħu għal dan l-aggravju qal illi:

»Jidher li dak li wassal lill-Bord ta' Revizjoni biex jikkancelła r-riżultat tal-evalwazzjoni kien imsejjes fuq il-fatt li l-kumitat tal-għażla ma għamilx għarbiel korrett tal-offerti kif hekk kellu jagħmel skont id-dokument tas-sejha. M'hemmx dubju li l-Bord ta' Revizjoni bħala organu ġudizzjarju għandu responsabbiltà kbira fuqu li jiżgura lin-nies hemm barra li l-kuntratti pubbliċi qegħdin jiġu mogħtija kif jixraq u li għalhekk flushom qegħdin jintefqu kif imiss. Għalhekk ladarba l-bord esprima t-ffassib tiegħu dwar ir-regolarità tal-evalwazzjoni, sal-punt li

ordna li din għandha ssir mill-ġdid, huwa xieraq u prudenti f'għieh is-serjetà u t-trasparenza li din terġa' ssir mill-ġdid.

»Wara kollox wieħed ma jridx iwarrab minn quddiem għajnejh ukoll li fil-qasam tal-kuntratti pubbliċi tilgħab parti importanti mhux biss it-trasparenza u n-nuqqas ta' trattament differenti imma wkoll il-perċezzjoni tal-pubbliku. Peress li l-aġġudikazzjoni ta' kuntratti pubbliċi jolqot il-mod ta' kif joħorġu flus il-poplu allura huwa importanti li l-poplu jkollu fiduċja li dan il-proċess qed jitmexxa kif suppost. Dan jgħodd aktar b'qawwa f'dan il-każ minħabba li l-proġett jiswa 'l fuq minn ħamsa u għoxrin miljun euro.

»La nxejtet iż-żerriegħa tad-dubju, huwa siewi li dan id-dubju jiġi meqrud għalkollox b'evalwazzjoni ġdida. Hadd mill-partecipanti ma hu ħa jiġi ippreġudikat b'daqshekk, inkluż il-konsorzju appellanti, għaliex l-offerenti kollha ħa jerġgħu jiġu meqjusa mill-ġdid minn kumitat tal-għażla ġdid.«

36. Għalkemm forsi din il-parti tad-deċiżjoni tal-Bord ta' Revizjoni setgħet kienet motivata aħjar, u mhux biss billi l-Bord ta' Revizjoni jgħid illi, "b'mod ġenerali", ma huwiex "*comfortably convinced*" bil-korrettezza tal-proċess tal-għażla, din il-qorti wkoll hija mħassba bil-fatt illi l-kumitat tal-għażla ma ntebaħx bl-irregolarità tal-garanzija bankarja ta' *SP BB* u dan joħloq dubju jekk kienx hemm fatturi oħra li wkoll ma ntebaħx bihom. Aktar u aktar, għalkemm mhux biss, meta l-għażla tolqot kuntratt b'valur daqs dak tal-kuntratt tallum, huwa xieraq li kull dubju jitneħħa.
37. Dan l-aggravju wkoll huwa għalhekk miċħud.
38. Il-qorti għalhekk tilqa' l-appell fis-sens biss li tgħid illi l-kumitat ta' għażla ma huwiex marbut bil-konklużjonijiet tal-Bord ta' Revizjoni dwar l-effett li s-sitwazzjoni finanzjarja ta' *Condotta d'Acque Spa* jista' jkollha fuq *Ergon*, kif jingħad fil-para. 27 ta' din is-sentenza, u tiċħad l-appell fil-bqija; tikkonferma d-deċiżjoni tal-Bord ta' Revizjoni illi l-proċess tal-għażla tal-offerti jsir mill-ġdid b'dan illi flimkien mal-offerti

validi titqies ukoll l-offerta ta' *Ergon* fid-dawl tal-konsiderazzjonijiet magħmula f'din is-sentenza (partikolarment fil-para. 27 u 33), u b'dan ukoll, issa li l-offerti huma magħrufa, illi ebda oblatur ma għandu jithalla jieħu vantaġġ minn dan il-fatt.

39. Fiċ-ċirkostanzi, billi jidher li kien hemm nuqqasijiet minn kulhadd, huwa xieraq illi l-ispejjeż jinqasmu ndaq bejn il-partijiet: il-Ministeru u d-Direttur tal-Kuntratti jħallsu sehem minn tlieta ($\frac{1}{3}$) flimkien, *Ergon* iħallas sehem minn tlieta ($\frac{1}{3}$) u *SP BB* jħallas is-sehem l-ieħor minn tlieta ($\frac{1}{3}$).

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