



## QORTI TAL-APPELL

### IMĦALLFIN

**S.T.O. PRIM IMĦALLEF MARK CHETCUTI  
ONOR. IMĦALLEF JOSEPH R. MICALLEF  
ONOR. IMĦALLEF TONIO MALLIA**

**Seduta ta' nhar l-Erbgħa, 1 ta' Diċembru, 2021.**

**Numru 20**

**Rikors numru 209/21/1**

**iManage Limited (C 47760)**

**v.**

- 1. Direttur tal-Kuntratti;**
- 2. Infrastructure Malta;**
- 3. Meinhardt (Malta) Private Limited (C 82602)**

### **Il-Qorti:**

1. Dan hu appell imressaq fid-9 ta' Lulju, 2021, mis-socjeta` appellanti iManage Ltd. kontra deciżjoni tat-30 ta' Ġunju, 2021, li ta l-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi (minn hawn 'il quddiem imsejjaħ "il-Bord") fil-każ riferenza IM029/2020 (każ numru 1589).

2. F'dan il-każ l-appellata Infrastructure Malta ħarget tender "*for professional services in connection with the supervision and works*

*certification for works tender IM010/2020 – construction of an underpass at the roundabout junction node Wa23 between Triq San Tumas, Triq il-Kunsill tal-Ewropa and Vjal l-Avjazzjoni in Luqa*". Saru diversi offerti għal dan il-kuntratt, fosthom mis-soċjeta` appellanti iManage Ltd., li pero`, ġiet dikjarata "*non-compliant*" mill-kumitat evalwattiv. Din is-soċjeta` appellanti ressqet appell għal quddiem il-Bord. Quddiem dan il-Bord ir-"*recommended bidder*", is-soċjeta` appellata Meinhardt (Malta) Private Ltd., ressqet eċċezzjoni preliminari fejn qalet li l-appell kien inammissibbli perss illi, skont hi, is-soċjeta` appellanti messha talbet "*a pre-contractual remedy*" taht ir-Regolament 262 tar-Regolamenti dwar kuntratti pubbliċi. Il-Bord, b'sentenza tat-30 ta' Ġunju, 2021, aċċetta din l-eċċezzjoni u ma laqax l-appell li kienet ressqet quddiemu s-soċjeta` appellanti.

3. Id-deċiżjoni tal-Bord hija s-segwenti:

"The Board refers to the minutes of the Board sitting of the 22<sup>nd</sup> June 2021.

Having noted the objection filed by iManage Ltd. (hereinafter referred to as the Appellant) on 19<sup>th</sup> April 2021, refers to the claims made by the same Appellant with regards to the tender of reference IM029/2020 listed as case No. 1589 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr. Norval Desira

Appearing for the Contracting Authority  
Scerri Herrera Dr. Alexander

Appearing for the Preferred Bidder:  
Mifsud Bonnici & Dr. Calvin Calleja Dr. Clement

Whereby, the Preferred Bidder's preliminary plea is based on the following:

1. The Appeal is Inadmissible – the Appellant failed to file an application for a pre-contractual remedy in terms of Regulation 262 of the PPR. The Appellant is challenging a tender specification of the Tender which was drafted clearly and unambiguously.
2. The Appellant's letter of objection is *ex admisis* based on one central issue; namely, the alleged restrictive interpretation by the Contracting Authority of the phrase 'specialised in Structural Engineering'.
3. Appellant failed to request clarifications in terms of Regulation 38 of the PPR.

This Board, after hearing submissions made by the Preferred Bidder's and Appellant's legal representatives, opines that the issue that merits immediate attention is whether an objection should have been filed in accordance with Regulation 270 or whether a call for remedies should have been initiated by virtue of Regulation 262 of the Public Procurement Regulations (PPR)

This Board notes that the tender document is clearly stating that the Key Expert 2 is to be 'specialised in structural engineering'. This is a definite term and is not subject to interpretation. Hence, any grievance should have been dealt with by Regulation 262 of the PPR.

**In conclusion this Board;**

Having evaluated all the above and based on the above considerations and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

4. Is-socjeta` appellanti issa qed tappella minn din id-deciżjoni għal quddiem din il-Qorti. L-aggravju prinċipali tagħha huwa marbut mal-fatt illi l-*"key expert 2"* li hi ressqet fl-offerta tagħha kien jikkwalifika fl-inġinerija strutturali kif kien mitlub fid-dokumenti tas-sejħa u ma kellux jiġi skwalifikat u l-offerta tagħha kienet ammissibbli. Il-Bord, qed jiġi

sottomess, għamel hażin li ddikjara l-appell tagħha inammissibbli peress li mhux minnu li hija kellha rimedju alternattiv.

5. Wara li semgħet dak li kellhom xi jgħidu d-difensuri tal-partijiet, u wara li rat l-atti kollha tal-kawża u d-dokumenti esebiti, sejra tgħaddi għas-sentenza tagħha.

Ikkonsidrat;

6. Illi jirriżulta illi f'dan il-każ li l-offerta tas-soċjeta` appellanti għet dikjarata "*non-compliant*" peress illi, skont il-kumitat evalwattiv, ma ndikatx persuna li hija speċjalizzata fl-inginerija strutturali kif indikat fis-sejha. Is-soċjeta` appellanti ma qablitx ma' din id-deċiżjoni u ressqet appell għal quddiem il-Bord. Dan il-Bord qies l-appell inammissibbli għax qal li dak li riedet is-sejha kien ċar u mhux ambigwu, u jekk kellha xi problema bil-klawsola relattiva, kien messha ressqet talba għal rimedju pre-kuntrattwali a bażi tar-regolament 262 tar-regolamenti pubbliċi.

7. Din il-Qorti tgħid mill-ewwel li hi ma taqbilx mad-deċiżjoni tal-Bord. Is-soċjeta` appellanti ma kinitx qed tgħid li l-klawsola relattiva hija ambigwa, iżda li l-espert tagħha propost kellu l-kwalifiki kollha meħtieġa, u għalhekk kien jikkwalifika għall-irwol skont il-pattijiet u l-kundizzjonijiet kollha tas-sejha. Dan l-argument ma setax jitressaq bħala talba għal rimedju pre-kuntrattwali u dan peress illi tali argument jolqot il-mertu veru u proprju tad-deċiżjoni li ha l-kumitat evalwattiv.

8. Is-soċjeta` appellanti ressqet diversi punti għaliex f'hażet li l-espert tagħha kien jikkwalifika. Quddiem il-Bord ressqet is-segwentni punti biex tiġġustifika l-pożizzjoni tagħha. Hija qalet li:

*“Appellant Company believes that Key Expert 2, as proposed, **does indeed qualify** as a person holding a “Degree Qualification in Civil Engineering specialised in Structural Engineering – MQF Level 7 or equivalent”, given, amongst others, that:*

- a) Key Expert 2 holds as Degree Qualification in Civil Engineering, as confirmed by the University of Malta;*
- b) Key Expert 2 holds a degree MQF Level 7 or equivalent, as confirmed by the University of Malta;*
- c) Key Expert 2 followed a course at the University of Malta which, effectively, was of a longer duration than that currently offered by the same University which now enables students to specialise in structural engineering as stated above;*
- d) **Key Expert 2 did specialise, during his architecture course at the University of Malta** and in so far as such specialisation was indeed possible at the time, by, effectively, submitting specific structural engineering projects in partial fulfilment of the requirements for obtaining his degree;*
- e) Key Expert 2 has vast experience in high value infrastructure and other projects in Malta, as is evident from his curriculum vitae which was submitted to the Evaluation Committee, including experience in structural engineering”.*

9. Hu ċar li s-soċjeta` appellanti ma kinitx qed tikkontesta l-allegata ambigwita` fil-klawsola relattiva. Jidher li l-kumitat evalwattiv kien ingħata kopja ta' parir li kienet ingħatat l-Infrastructure Malta fis-sens riferit, iżda dan mhux rilevanti. Il-kwistjoni hi li l-materja li ressqet is-soċjeta` appellanti kienet waħda ta' provi li setgħet tiġi trattata u deċiża mill-Bord. Jekk, *dato ma non concesso*, kien hemm xi punt, fl-oġġezzjoni tas-soċjeta` appellanti, li l-Bord seta' jqis bħala li kellu jiġi ndirizzat permezz

ta' talba għal rimedju pre-kuntrattwali, fl-ilment tagħha kien hemm diversi punti oħra li jolqtu direttament il-kwalifiki li kellu l-espert propost. Jekk dan l-espert kellux jew le l-kwalifiki li riedet is-sejha hija materja ta' fatt li l-Bord kellu jistharreġ u jiddeċiedi, u mhux jabdika r-responsabilitajiet tiegħu. Il-klawsola hi dik li hi, u l-Bord kellu jiddeċiedi jekk l-espert propost jikkwalifikax. Il-mertu ma kienx relatat mal-ħtieġa jew validita` tal-klawsola, iżda jekk l-espert kienx jikkwalifika bħala inġinier ċivili speċjalizzat fl-inġinerija strutturali. Dan mertu li kellu jiġi diskuss mill-Bord.

Għaldaqstant, għar-raġunijiet premissi, tiddisponi mill-appell tas-socjeta` iManage Ltd. billi tilqa` l-istess, tħassar u tirrevoka d-deċiżjoni li ha l-Bord ta' Reviżjoni dwar Kuntratti Pubblici tat-30 ta' Ġunju, 2021, u tiċhad l-eċċezzjoni preliminari li ressqet is-socjeta` appellata Meinhardt (Malta) Private Ltd., u tibgħat l-atti għal quddiem l-imsemmi Bord biex dan ikompli jisma' u jiddeċiedi l-każ fil-mertu.

L-ispejjeż ta' dan l-appell għandhom jifhallsu mit-tliet intimati *in solidum*.

Mark Chetcuti  
Prim Imħallef

Joseph R. Micallef  
Imħallef

Tonio Mallia  
Imħallef

Deputat Reġistratur  
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