



## QORTI TAL-APPELL

### IMĦALLFIN

**S.T.O. PRIM IMĦALLEF MARK CHETCUTI  
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO  
ONOR. IMĦALLEF ANTHONY ELLUL**

**Seduta ta' nhar l-Erbgħa, 25 ta' Jannar, 2023.**

**Numru 17**

**Appell numru 374/2022/1**

***FM Core Limited (C-49204) u Operations  
Holdings Limited, soċjetà estera (10552361)  
ilkoll u flimkien magħrufa bħala Gold Care  
Homes Malta (TID 140392)***

**v.**

**Ministeru ta' Għawdex; *CareMalta Limited*  
(C-28382); Direttur Ġenerali tal-Kuntratti  
f'isem id-Dipartiment tal-Kuntratti**

1. Dan huwa appell ta' *CareMalta Limited* [*CareMalta*] jew "l-appellanti" minn deċiżjoni tal-10 ta' Awissu 2022 tal-Bord ta' Revizjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Revizjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku ["L.S. 601.03"], li laqa' oġġezzjoni mressqa minn *Gold Care Homes Malta* [*Gold Care*] u ħassar deċiżjoni tal-Ministeru għal Għawdex ["il-ministeru"] u tad-Dipartiment tal-Kuntratti ["id-diparti-

ment”] illi titwarrab offerta ta' *Gold Care* għal kuntratt pubbliku u illi l-kuntratt jingħata lil *CareMalta*. Fid-deċiżjoni appellata l-Bord ta' Reviżjoni ordna wkoll illi ssir evalwazzjoni mill-ġdid tal-offerta ta' *Gold Care*.

2. Il-fatti relevanti seħnew hekk: saret sejha mill-ministeru bħala awtorità kontraenti għal offerti għal kuntratt “*for the finishing, furnishing, equipping, operating, managing, maintaining and transferring back Dar San Ġuzepp, Għajnsielem, Gozo as a facility for the long term care of the elderly including the provision of environmentally friendly cleaning products, IT equipment, furnishings and landscaping*”.
3. Fost il-kondizzjonijiet generali li jirregolaw is-sejha għal offerti hemm dik li tgħid hekk:

»2.4 In the case of a joint venture / consortium / group of economic operators, the joint venture / consortium / group of economic operators as a whole must satisfy the criteria established in the instructions to tenderers.

»2.5 An economic operator may, where appropriate and for a particular contract, with regard to criteria relating to economic and financial standing and to criteria relating to technical and professional ability, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria regarding educational and professional qualifications, or to relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.«

4. Imbagħad, fl-*instructions to tenderers*, jingħad hekk:

»7. Selection and award requirements

»... ..

»(B) Exclusion ... and selection criteria ... ..

»... ..

»(b) Economic and financial standing

»(1) Financial ratio

»Tenderers are to submit evidence (including related workings) from their audited financial statements for 2018 and 2019 that their:

- » i. Debt-to-Earnings Before Interest, Tax, Depreciation and Amortisation [EBITDA] ratio does not exceed 8 times;
- » ii. interest bearing liabilities on equity and interest bearing liabilities does not exceed 80%; and
- » iii. EBITDA to Debt repayments (including interest payments) is not below 1.0 times.

»(2) General yearly turnover

»The minimum aggregate turnover during the past 2 years (being 2018-2019) shall be not less than €1,500,000 for the quoted period.

»(3) Other economic or financial requirements

»Evidence that the tenderer has adequate financial resources together with the necessary credit facilities to finance the project throughout the duration of the contract. The tenderer must submit a statement by a recognised bank or any licensed credit institution certifying such credit facilities. Each tenderer's financial proposal must be accompanied by a support letter from the tenderer's bank that confirms the latter's favourable consideration to provide the debt financing portion of the total funding requirements contemplated in the respective proposal. In the case of a consortium / joint venture the afore-mentioned statement must cover all members / companies forming the consortium / joint venture.«

5. Saru offerti kemm minn *Gold Care* u kemm minn *CareMalta*. B'ittri tad-29 ta' April 2022 id-Direttur tal-Kuntratti għarraf illi sejra tintlaqa' l-offerta ta' *CareMalta* u sejra titwarrab dik ta' *Gold Care*. Ir-raġuni għala twarrbet l-offerta ta' *Gold Care* ġiet imfissra hekk fl-ittra tad-29 t'April 2022:

»The evaluation committee has concluded that *Gold Care Homes Malta* is ineligible under the eligibility criteria since it failed to satisfy clause Section 7 (B) b Economic and Financial Standing. This section stipulates that "economic operators need to submit evidence (including related workings) from their audited financial statements for 2018 and 2019 that their:

»i. Debt-to-Earnings Before Interest Tax, Depreciation and Amortization (EBITDA) ratio does not exceed 8 times – When the evaluation committee worked out this ratio, the total earnings of the two companies combined result in a loss both for 2018 and 2019; therefore this does not meet the criteria as the debt to earnings ratio is negative. The evaluation committee went a further step and calculated the ratio for the individual companies. *FM Core Ltd* satisfies the ratio for both years as both ratios are positive and do not exceed 8 times being 1.15 and 2.35 for 2018 and 2019 respectively; however for *Operations*

*Holdings Ltd* this ratio is not satisfied as for both years the company registered a loss.

»ii. Interest bearing liabilities on equity and interest bearing liabilities does not exceed 80% – When the evaluation committee worked out this ratio the resultant ratio is negative because the equity is negative and therefore it does not meet the criteria. The evaluation committee went a further step and calculated the ratio for the individual companies. *FM Core Ltd* satisfies this ratio for both years as both ratios are positive and do not exceed 80% being 57% and 68% for 2018 and 2019 respectively; however for *Operations Holdings Ltd* this ratio is not satisfied as for both years the company reported negative equity balance.

»iii. EBITDA to Debt repayments (including interest payments) is not below 1.0 times – The evaluation committee saw that the EBITDA is negative for the two companies combined and therefore it does not meet respective criteria. The evaluation committee went a further step and calculated the ratio for the individual companies, both companies do not satisfy the criteria as specified in this ratio. *FM Core Ltd* reported positive balance but is below the threshold as established in the criteria with 0.87 and 0.43 for 2018 and 2019 respectively. For *Operations Holdings Ltd* this ratio is not satisfied as for both years the company registered a loss.

»Therefore the evaluation committee concludes that, overall, the two operators *FM Core Limited* and *Operations Holdings Limited* do not satisfy all three conditions.«

6. *Gold Care* ressqet oġġezzjoni quddiem il-Bord ta' Reviżjoni b'ittra tad-9 ta' Mejju 2022 u talbet li titfassar id-deċiżjoni dwar l-għoti tal-kuntratt.

7. Il-bord iddeċieda hekk:

»The board ... .. concludes and decides:

»a) to uphold the appellant's first and second grievances;

»b) to cancel the notice of award letter dated 29<sup>th</sup> April 2022;

»c) to cancel the letter of rejection dated 29<sup>th</sup> April 2022 sent to *Gold Care Homes Malta*;

»d) to order the contracting authority to re-evaluate the bid of *Gold Care Homes Malta* received in the tender, whilst also taking into consideration this board's findings;

»e) after taking all due consideration of the circumstances and outcome of this letter of objection, directs that the deposit be refunded to the appellant.«

8. Ir-raġunijiet li wasslu lill-bord għal din id-deċiżjoni ġew imfissra hekk:

»... .. the appellant contends that:

- »a) First Ground of Appeal: Contracting authority erred in its interpretation and application of the EBITDA to debt repayments (including interest payments) selection criterion.

»The appellant is aggrieved by the fact that the contracting authority has decided that “*FM Core Ltd* reported positive balance but is below the threshold as established in the criteria with 0.87 and 0.43 for 2018 and 2019 respectively”, and therefore it has concluded that *FM Core Limited* has not satisfied this criterion. The tender provided that: “Tenderers are to submit evidence (including related workings) from their audited financial statements for 2018 and 2019 that their: [...] iii. EBITDA to Debt repayments (including interest payments) is not below 1.0 times” The appellant respectfully submits that the contracting authority has erred in its interpretation and application of this selection criterion by working out the ratio using the total debt rather than the debt repayment. This is evident from the workings carried out by the appellant after receiving the letter of rejection. As this board will surely appreciate, these are two different things. As the appellant shall prove in due course during these proceedings, *FM Core Limited* satisfied this criterion since its EBITDA to debt repayments (including interest payments) for 2018 and 2019 is not below 1.0 times.

- »b) Second Ground of Appeal: Reliance on Third Parties' Economic and Financial Standing

»i. The appellant is aggrieved by the fact that the contracting authority has rejected the appellant's bid since *Operations Holdings Limited*, the partner responsible for operations and management of the project, does not satisfy any of the above-mentioned selection criteria on financial ratio. The appellant respectfully submits that the contracting authority's decision on this point is in breach of law and the general principles of public procurement law.

»As shall be explained below, the appellant had every right at law, and according to the tender and the general rules governing tenders, to organise its consortium as it deemed fit to satisfy the selection criteria relating to economic and financial standing and for the appellant to rely on the capabilities of participants in the group or of other entities.

»The appellant expressly organised the *Gold Care Homes Malta* consortium by relying on *FM Core Limited's* capabilities for the satisfaction of the selection criteria on economic and financial standing and by relying on *Operations Holdings Limited's* capabilities for the satisfaction of the selection criteria on technical and professional ability.

»The contracting authority, however, and for some odd reason, has decided to take into account the financial ratios of *Operations Holdings Limited*, even though the appellant did not rely on its economic and financial standing, to lower those of *FM Core Limited* which satisfied (subject to the above-mentioned ground of objection) the selection criteria on financial ratios.

- »ii. The Court of Justice of the European Union has, in past judgments on this matter, held that:
- »a. the combination of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, including selection criteria on economic and financial standing, is permitted, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources of those entities necessary for the execution of the contract;
- »b. such an interpretation is consistent with the objective pursued by the Directives in this area of attaining the widest possible opening-up of public contracts to competition to the benefit not only of economic operators but also contracting authorities and further facilitates the involvement of SMEs.
- »These principles are codified in Directive 2014/24 (and Directive 2004/18 before it), and, therefore, transposed in the PPR.
- »Based on regulations 2, 235 and 58 of the Public Procurement Regulations and Rule 2.4 of the general rules governing tenders, it is evident that the appellant could have decided to rely on the economic and financial standing of *FM Core Limited*, one of the participants in the group, only, but so long as the appellant did “prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect”.
- »This commitment is patently evident by the very fact that *FM Core Limited* is part of the consortium, but, in any case, it is evident from the signed ESPD submitted by *FM Core Limited* and the joint venture agreement.
- »iii. The appellant made it very clear, in the respective ESPDs submitted for *FM Core Limited* and *Operations Holdings Limited*, that the financier will be *FM Core Limited*. In fact, the appellant only provided data on the financial ratio for *FM Core Limited* and it did not provide any data on the financial ratio for *Operations Holdings Limited*. However, the evaluation committee, unilaterally and in breach of the principle of self-limitation, requested, by way of rectification, the audited financial statement for *Operations Holdings Limited* and then did their own calculations on the financial ratio of the same. It must be said that the tender did not say that each member of the joint venture was to satisfy the selection criteria on financial ratio (economic and financial standing) and rather the law and the general rules governing tenders say that a group of economic operators may rely on the capabilities of participants in the group or of other entities. The appellant submits that this is the position taken by the contracting authority itself (correctly so, the appellant adds) in its response to question n<sup>o</sup> 12 in clarification note 7 referred to above in paragraph 4 when it permitted a “wholly

owned new subsidiary” to rely on the “technical and financial resources” of its “mother company” to satisfy the eligibility criteria of this tender. This corroborates the appellant’s submissions and is perfectly consistent with the law.

»iv. Further, and on a concluding note, the contracting authority’s conduct and decision on this point is in breach of the general principles of public procurement:

»a. Self-limitation & transparency. The interpretation that the contracting authority has adopted to the tender selection criteria is wrong and it is evident that it exceeds the prescribed procedure and the tender specifications and conditions.

»b. Promotion of genuine competition. The interpretation that the contracting authority has adopted is contrary to the above-quoted jurisprudence of the CJEU, and other cases and literature that might be cited in due course, since it restricts the actual competition on the tender and denies economic operators of the flexibility afforded by the law and the general rules governing tenders.

»c. Proportionality. The interpretation that the contracting authority has adopted, in any case, exceeds what is appropriate or necessary for the evaluation procedure to achieve the objective of the tender. Further, the evaluation committee did not, on this point, avail itself of rectification requests or clarification requests at its disposal and opted for the most onerous route of excluding the appellant’s bid.

»c) Third Ground of Appeal: recommended bidder does not satisfy the financial ratio: EBITDA to debt repayments methodology used by the contracting authority

»Without prejudice to the first ground of objection, the appellant submits that, if the methodology of calculation of the financial ratio applied to it were to be applied to recommended bidder, it appears the recommended bidder would not have satisfied these selection criteria, and this shall be proven in due course during these proceedings.

»This board also noted the contracting authority’s reasoned letter of reply filed on 19<sup>th</sup> May 2022 and its verbal submission during the virtual hearing held on 14<sup>th</sup> July 2022, in that:

»a) First ground of appeal – The first ground of appeal relates to the selection criterion regarding the financial ratio contained in Section 7(B)(b)(iii) of the tender documents “Tenderers are to submit evidence (including related workings) from their audited financial statements for 2018 and 2019 that their: ... iii. EBITDA to debt repayments (including interest payments) is not below 1.0 times. The evaluation committee reserves the right to request audited accounts for the past 2 years (being 2018-2019), if not appearing on the website of the *Malta Financial Services Authority* (MFSA).”

»In its evaluation of the appellant’s bid the contracting authority concluded that *FM Core Limited* had a EBITDA to debt repay-

ment ratio of 0.87 in 2018 and of 0.43 in 2019 (the overdraft balance of the company was considered as “debt repayment” being taken into account). The appellant’s accounts, as submitted by the appellant itself, were not comprehensive, so much so that the contracting authority had to check the audited accounts of *FM Core* filed with the *Malta Business Registry*. For financial year 2019, there is a discrepancy between the submitted accounts and the audited accounts filed in the *Malta Business Registry*. The contracting authority submits to the board that it is for the appellant to prove that the EBITDA to debt repayments ratios were incorrectly calculated in the case of *FM Core Limited*.

- »b) Second ground of appeal – The second ground of appeal is that the appellant’s bid could not have been rejected for the reason that *Operations Holdings Limited*, one of its consortium members, did not satisfy the selection criteria relating to the financial ratio. The appellant further explains that it is relying on *FM Core Limited’s* capabilities to meet the selection criteria on economic and financial standing and on *Operations Holdings Limited’s* capabilities to meet the selection criteria on technical and professional ability. Rather than relying on “third parties” the appellant is relying on its own member entities in terms of regulation 58 of the Public Procurement Regulations which allows the sharing of capabilities in consortia.

»The appellant is incorrect in asserting that its bid was disqualified based on the financial capability of *FM Core Ltd* only. To the contrary the appellant’s bid was rejected since the two consortium members taken together did not satisfy the selection criteria relating to economic and financial standing. *FM Core Ltd* does not have the financial capability to finance the capital and the losses sustained by *Operations Holdings Limited*. In fact, the contracting authority evaluated the economic and financial standing criteria in relation to both *FM Core Limited* and *Operations Holdings Limited*, together, to verify whether the appellant could rely on the two members’ capabilities.

- »c) Third ground of appeal – First, it is for the appellant to prove its allegation that a different method of calculation of the financial ratio was applied to the recommended bidder. In any case and without prejudice to the above, the respondent contracting authority rejects the appellant’s allegation.

»This board also noted the preferred bidder’s reasoned letter of reply filed on 19<sup>th</sup> May 2022 and its verbal submission during the virtual hearing held on 14<sup>th</sup> July 2022, in that.

- »a) No changes to the original bid – Without prejudice to all other legal arguments included hereunder, the only recognised method through which an entity may rely on the capacities of third parties is through the proper submission of the appropriate ESPD document. As a matter of fact, Directive 2014/24/EU imposes that: “It should be set out explicitly that the ESPD should also provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of the information regarding such entities can be carried out together with and on the same conditions as the verification in



respect of the main economic operator". This is followed up through Section C of the ESPD, wherein an economic operator that so wishes to rely on the capacities of third parties shall confirm and reply in the affirmative to the following question: "Does the economic operator rely on the capacities of other entities in order to meet the selection criteria set out under Part IV and the criteria and rules (if any) set out under Part V below?"

»In this particular context, the claim being made by the appellant is that *Operations Holdings Limited* was relying on the capacities of *FM Core Limited* to satisfy Part IV of the criteria. Thus and thereby, the only method through which *Operations Holdings Limited* could have so availed of the exemption envisaged in article 235 of the Public Procurement Regulations (an exemption which *CM* contests in the situation *de quo*), was through the submission of the ESPD document by *Operations Holdings Limited* asserting that it was relying on the capacities of *FM Core Limited*. *Ex admissis* ... the appellant consortium claims that any such declaration (if at all) has been organised through the ESPD of *FM Core Limited* and not through the ESPD of *Operations Holdings Limited*.

»Thus and thereby, if at all, the reliance declaration has been erroneously made and cannot at such stage be amended or changed, as any such modification and change amount to a change in the original bid, which is an approach which is not permissible under the Public Procurement Regulations.

- »b) Failure to satisfy the financial measures creates a serious existential threat to the consortium – article 235 of the PPR has been included following a number of ECJ judgments and the inclusion of same within the European Union *acquis communautaire* with a specific objective of widening competition. Whilst widening of competition is indeed permissible, reliance on the capacities of third parties is not permitted in all circumstances, and this as indicated by article 235 of the PPR itself. The article of the law allows it only "where appropriate" and it does so to limit any abuse which might be directed at circumventing rules and/or mandatory requirements.

»In this particular context the following financial workings:

- »• Debt-to-Earnings before Interest Tax, Depreciation and Amortisation ratio does not exceed 8 times;
- »• Interest bearing liabilities on equity and interest bearing liabilities does not exceed 80%;
- »• EBITDA to debt repayments is not below 1.0 times.

»are all measures of financial performance of the companies / entities involved, which are crucial to determine the going concern of the same entities and thereby confirm that for the foreseeable future the entities will remain in operation. Any failure of such measures shall a *contrario sensu* constitute a serious existential threat to the same entity, and as a consequence the consortium with which it is associated. It is for this reason that it is crucial that the financial measure is triggered and applied identically to all economic operators forming part of a consortium

– in this particular context both *FM Core Limited* and *Operations Holdings Limited* – as any fallacy or failure by one entity will automatically and profoundly impact the consortium organised as *GCHM*.

»This interpretation is consistent with the provisions of the general rules governing tenders, which claims that: “In the case of a joint venture / consortium / group of economic operators, the joint venture / consortium / group of economic operators as a whole must satisfy the criteria established in the instructions to tenderers”, as well as; “All partners in the joint venture / consortium / group of economic operators are bound to remain in the joint venture / consortium / group of economic operators until the conclusion of the contracting procedure. The consortium / joint venture / group of economic operators winning this contract must include the same partners for the whole performance period of the contract other than as may be permitted or required by law”.

Thus and thereby, whilst it is clear through the general rules governing tenders that it is the joint venture as a whole that ought to satisfy the requirement and not an individual member, the financial measure must scrutinise both companies to ascertain that no member of the consortium perishes due to financial troubles throughout the pendency of the contract.

- »c) *Ubi lexi voluit dixit* – In an analogous situation, specifically in the requirement of “other economic or financial requirements”, the tender document itself created a special provision for joint venture / consortium and didn’t require evidence for each and every member of the joint venture / consortium. The tender document held that: “Evidence that the tenderer has adequate financial resources together with the necessary credit facilities to finance the project throughout the duration of the contract. The tenderer must submit a statement by a recognised bank or any licensed credit institution certifying such credit facilities. Each tenderer’s financial proposal must be accompanied by a support letter from the tenderer’s bank that confirms the latter’s favourable consideration to provide the debt financing portion of the total funding requirements contemplated in the respective proposal. In the case of a consortium / joint venture the aforementioned statement must cover all members / companies forming the consortium / joint venture”.

«Would the tender document require a different approach in terms of the financial ratio it would have so declared – *ubi lexi voluit dixit*. The fact that the tender document is silent on this matter makes it mandatory on the evaluation committee to review the economic operators individually and separately *vis-à-vis* the financial ratio; the above is consistent with article 19 of Directive 2014/24/EU, whereby it is held that: “Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in article 58 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic

operators are to meet those requirements. Any conditions for the performance of a contract by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate”.

»In the situation *de quo*, the contracting authority / DOC clarified the manner in which economic operators in the form of joint ventures / consortium are to satisfy the other economic or financial requirements, but did not deem it necessary to clarify *vis-à-vis* other criteria. At this point, would the evaluation committee have decided otherwise, it would itself be infringing the doctrine of self-limitation, which is an important public procurement principle which has been referred to by this board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document; this will ensure predictability and transparency.

- »d) *CM* fully satisfies requirements – Finally, in a tame attempt, the appellant claims that the recommended bidder *qua CM* does not satisfy the financial ratio criteria. Whilst forcefully rebutting this claim as totally unfounded, the appellant consortium failed to explain how *CM* does not satisfy the criteria, and thus by virtue of this provision *CM* is reserving its rights to present further submissions (oral and written) during the public hearing in relation to this unfounded grievance put forward by the appellant consortium.

»This board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witness duly summoned, will consider appellant's grievances as follows:

- »a) With regards to the first and third grievance, it was ascertained, in the beginning of the hearing, that the contracting authority erred in its interpretation by working out the ratio using the total debt rather than the debt repayment. Therefore, the first grievance is being upheld whilst the third grievance is being declared not applicable any further.
- »b) Second grievance - Reliance on third parties' economic and financial standing

»Initially this board will list down what it deems to be of most relevance to this specific grievance.

- »i. General Rules Governing Tenders V4.4 – sections 2.4 & 2.5 which state:

»“2.4 In the case of a joint venture / consortium / group of economic operators, the joint venture / consortium / group of economic operators as a whole must satisfy the criteria established in the instructions to tenderers.

»“2.5 An economic operator may, where appropriate and for a particular contract, with regard to criteria relating to economic and financial standing and to criteria relating to technical and professional ability, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria regarding educational

and professional qualifications, ... Where an economic operator wants to rely on the capacities of other entities, it must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.”

»Therefore, this board opines that, although initially it is clear and evident that joint ventures need to satisfy criteria “as a whole”, it is also very much accepted and legally permissible to rely on the capacities of certain members making up the joint venture, always within certain requisites that must be reached and honoured.

- »ii. Tender Dossier Section 1 – Instructions to Tenderers – paragraph 7(B)(b)(1) whereby it is clearly stated that “the evaluation committee reserves the right to request audited accounts for the past 2 years (being 2018-2019), if not appearing on the website of the *Malta Financial Services Authority (MFSA)*”. It is therefore evident that when these audited accounts were requested by the evaluation committee to the appellant, this would not, in the view of this board, constitute a request for rectification. This, on the basis of the fact that such audited accounts were not initially required to be presented (in the first place).
- »iii. ESPD of members constituting *Gold Care Homes Malta* – section 2C.1 – “Does the economic operator rely on the capacities of other entities in order to meet the selection criteria set out under Part IV and the criteria and rules (if any) set out under Part V below?” – the answer to such question reference is marked as “Yes”.
- »iv. ESPD of members constituting *Gold Care Homes Malta* – section 4B.4 (page 25) – was left blank. However, this board opines that a simple rectification request would have, for fairness’s sake, solved such an issue. This board does not agree with argumentation brought forward by the preferred bidder that such a ‘rectification’ would have amounted to a change in the original bid. Note to clause 7 (2A) clearly states “Tenderers will be requested to either clarify / rectify any incorrect and / or incomplete documentation and / or submit any missing documents within five (5) working days from notification”. Note 2B continues on the same similar lines.
- »v. Reference is made to document presented by the preferred bidder entitled “*Assessing and monitoring the economic and financial standing of bidders and suppliers*” submitted in relation to the issues of ‘reliance’ and ‘guarantees’. Paragraph 2.7.1, in the board’s opinion, speaks about the safeguards a contracting authority needs to adopt when a major shareholder / stakeholder of a JV is relying on other members of such JV. Therefore, it is as clear as day that reliance on financial aspects can be adopted, always keeping in mind any requisites that would need to be satisfied in terms of law. One such safeguard, it continues, is to adopt a ‘joint and several guarantee’. In fact, it states “a written commitment to provide such guarantees would normally be

sufficient at selection stage". This has been duly done – adhered to – by appellant.

»This board will now continue with its interpretations:

»b) Substance over form argument as brought forward by appellant – this board refers to the fact mentioned above, more specifically the ESPD Section 2C.1 where the question on reliance was marked as 'yes'. Reference is also made to the fact that for the financial ratios (tests on the economic and financial standing), the appellant used only the data / figures of one member of the JV, *FM Core Ltd*. Even though ESPD Section 4B.4 was left blank, it is this board's opinion that it was clear from the start that for economic and financial standing requisites reliance was going to be placed on the financial 'robustness' of *FM Core Ltd*. Such suppositions are certainly not enough, but that is why there are 'safeguards' / 'tools' within the tender dossier and within the public procurement process to 'save' a tender offer whenever possible. This, through the rectification request, which should have been made available to the appellant when the evaluation committee saw that such a section was left blank by the appellant. That, in the board's opinion, would have been a proportionate manner of how the evaluation committee should have acted. It would also certainly fit within the principle of self-limitation that evaluation committees are required to observe. It is after all what the Public Procurement Regulations are all about – to promote genuine competition. Such 'promotion' obviously has always to be within the very high regard to the rules and principles legislating it.

»When considering all the above, this board upholds this second grievance of the appellant.«

9. *CareMalta* appellat b'rikors tad-29 ta' Awissu 2022. Il-ministeru u d-dipartiment wiegħbu fit-22 ta' Settembru 2022 u qablu mal-appell. *Gold Care* wiegħbet fl-14 ta' Ottubru 2022 biex tgħid illi l-appell għandu jiġi miċħud.

10. L-ewwel u t-tielet aggravji tal-appell huma marbuta ma' xulxin u għalhekk il-qorti sejra tqishom flimkien. L-aggravji jgħidu hekk:

»Aggravju #1 Evalwazzjoni ta' *joint venture / consortium* tassattivament issir b'mod kongunt

» Kif jintqal f'artikolu 2.4 tal-*general rules governing tenders*:

»"In the case of a joint venture / consortium / group of economic operators, the joint venture / consortium / group of economic operators as a whole must satisfy the criteria established in the instructions to tenderers".

»Tal-istess fehma kienet l-awtorità kontraenti, fejn fir-risposta tagħha qalet li,

»“The appellant is incorrect in asserting that its bid was disqualified based on the financial capability of *FM Core Limited* only. To the contrary the appellant’s bid was rejected since the two consortium members taken together did not satisfy the selection criteria relating to economic and financial standing.”

»... ..

»Is-sejha kienet ċara ħafna u qalet li *tenderers* għandhom jissodisfaw ir-rekwiżit u mhux xi wieħed mill-partecipanti ta’ *joint venture* / konsorzju. Dana huwa konsistenti ma’ dak li jgħidu GRGT, li *joint venture* / konsorzju għandhom jitqiesu bħala entità waħda sabiex jissodisfaw il-kriterji (ara artikolu 2.4 tal-GRGT).

»Fl-ebda ħin l-awtorità kontraenti fis-sejha ma qalet:

- »• għal dan il-kriterju, oblaturi li qed jorganizzaw lilhom infushom bħala konsorzju għandhom jilħqu l-kriterju b’mod differenti minn oblaturi li huma waħedhom; u / jew
- »• f’każ ta’ konsorzju huwa biżżejjed li wieħed biss mill-komponenti tal-konsorzju għandhom jissodisfaw dan il-kriterju mandatarju; anzi kienet ċara billi użat il-kliern ‘*tenderers*’; u / jew
- »• artikolu 2.4 ta’ GRGT ma’ japplikax f’din is-sitwazzjoni partikolari; u jew
- »• artikolu 2.5 ta’ GRGT huwa suprem u, f’każ ta’ kunflitt, għandu japplika artikolu 2.5 u mhux artikolu 2.4.

»La ma’ għamlet xejn minn dak sopraċitat, tassattivament u mingħajr ekwivoku artikolu 2.4 tal-*general rules governing tenders* għandu japplika għal kulhadd, u konsegwentament, “... *the joint venture / consortium / group of economic operators as a whole must satisfy the criteria established in the instructions to tenderers*”.

»Huwa b’dan il-mod biss li l-prinċipju ta’ trattament ugwali bejn oblaturi jista’ jiġi osservat.

»... ..

»Fil-każ in diżamina, il-*financial ratios* tal-konsorzju / *joint venture* kellhom jigu ikkalkulati flimkien (kif dettat minn artikolu 2.4 ta’ GRGT) bil-konsegwenza li, għal dan il-kriterju, *Gold Care* falliet *stante* li kellha *financial ratios* li huma anqas minn dak li huwa mandatorjament mitlub mis-sejha.

»Dan ifisser li, bla ebda ombra ta’ dubju, l-awtorità kontraenti kienet korretta meta eskludiet lill-oblatur (*Gold Care*, f’dan il-każ) u dana għax naqas milli jissodisfa l-kriterju finanzjarju.

»Fuq dan il-punt preċiż, senjatament fuq *reliance on capacities of third parties*, u b’mod partikolari f’każ ta’ konsorzju, dina l-qorti diġà kellha l-opportunità li titkellem u tressaq il-ħsibijiet tagħha, fid-deċiżjoni fl-isemijiet Owen Borg kontra Kunsill Lokali ta’ San Gwann<sup>1</sup>, fejn intqal li,

»“Id-dokumenti għas-sejha esiġew kopertura tal-assikurazzjoni għall-impjegati tal-offerenti. F’dan il-każ, il-polza ta’ assikurazzjoni li ġiet preżentata ma kinitx tkopri lil *Galea Cleaning Solutions JV*, li

<sup>1</sup> App. 6 ta’ Ottubru 2020; rik. 265/20

hija konsorzju ta' diversi persuni, iżda lil wieħed mill-membri ta' tali konsorzju.

»“Din is-soċjetà argumentat illi kienet dik il-persuna li kienet se timpjega l-ħaddiema u ma kienx meħtieġ li kulħadd jiġi kopert b'polza ta' assikurazzjoni. Id-dokumenti tas-sejha, però, riedu li l-ħaddiema kollha tal-offerent kellhom ikunu koperti b'assikurazzjoni u mhux uħud minnhom.

»“Hu veru li, skont ir-regoli ta' *public procurement*, offerent, fit-tweġġ tal-kuntratt, ikun jista' jinqeda minn persuni esteri li jkollhom kapaċitajiet partikolari, iżda fl-istadju tal-offerta dak li hu mitlub kellu jiġi offrut mill-offerent u mhux minn parti waħda, Jekk offerta saret minn diversi persuni b'*joint venture*, kienet din li kellha toffri polza tal-assikurazzjoni għall-ħaddiema kollha tagħha.”

»Għalhekk huwa ċar ħafna li, għaladarba kien hemm l-obbligu li l-oblaturi li organizzaw ruħhom f'konsorzju kellhom jissodisfaw ir-rekwiżit “*as a whole*”, u għaladarba ma tqajmet l-ebda sitwazzjoni li indirizzat dan il-punt qabel intefgħu l-offerti (per eżempju permezz tal-proċeduri *ai termini* ta' artikolu 262 tal-L.S. 601.03), l-awtorità kontraenti kienet għusta meta illimitat ruħha għal dak li huwa miktub, senjatament li għandu jsir evalwazzjoni “*as a whole*” u mhux kif qed tippretendi *Gold Care* li tistrieħ fuq il-kapaċitajiet ta' terzi, meta f'dan il-każ ma' kienx permissibli *ab initio*.

»Aggravju #3 Apprezzament żbaljat tal-fatti

»Huwa ċar li l-bord naqas li jifhem x'kien il-kriterju u wisq anqas x'tip ta' kawtela kienet qed tipprowa tintroduċi l-awtorità kontratenti.

»Permezz ta' “*Section 1 instructions to tenderers, 7. selection and award requirements, [b] economic and financial standing*”, ġew indikati tliet kriteri mandatorji u distinti minn xulxin, senjatament:

»L-ewwel *financial ratio*;

»It-tieni *general yearly turnover*;

»It-tielet *other economic or financial requirements*.

»Kull kriterju indikat huwa intiż sabiex jagħti assikurazzjonijiet varji lill-awtorità kontraenti u dana sabiex jiġi konfermat li l-oblatur li ser jintgħażel għandu l-abilità finanzjaraja sabiex l-eventwali kuntratt, u l-obbligi li jsorġu minnu, ikunu jistgħu jiġu onorati fl-intier tagħhom.

Huwa minn ewl id-dinja li kull kriterju ta' *economic and financial standing* għandu funzjoni differenti:

»*bil-financial ratios* intiżi sabiex jaraw li l-entità tista' tibqa' fis-seħħ mingħajr riskji ta' falliment;

»il-*general yearly turnover* sabiex tassigura li l-entità għandha l-esperjenza tiġġestixxi proġetti ta' ċertu portata; u

»l-*other economic or financial requirements* sabiex jassiguraw li l-entità għandha aċċess għal finanzjament tul id-durata tal-kuntratt.

»Hawn issir referenza għall-awtriċi Professor Sue Arrowsmith fil-ktieb tagħha, *The Law of Public and Utilities Procurement: Regulation in the*

*EU and UK, Volume 1<sup>2</sup>*, liema awtiriċi ġiet varji drabi iċċitata minn dina l-qorti, fejn fost affarijiet oħra qalet li,

»“Economic and financial standing is not defined, but its meaning is important since only exclusions based on this are authorised under the provisions of the Directives / Regulations on economic and financial standing. It is submitted that a measure relates to economic or financial standing when it seeks to ensure that the firm has adequate financial resources to remain in business during the contract period, to complete the contract, and to meet any legal liability to the authority arising from performance (for example, for breach of contract or negligence).”

»Fil-każ in kwistjoni, l-eskluzjoni da parti tal-awtorità kontraenti fil-konfront ta' *Gold Care* saret minħabba li ma kinitx tissodisfa l-kriterju tal-*financial ratios*.

»... .. sar żball meta fl-interpretazzjoni tiegħu qal li “*it is this board's opinion that it was clear from the start that for economical and financial standing requisites reliance was going to be placed on the financial 'robustness' of FM Core Limited*”.

»Din il-konklużjoni l-bord wasal għaliha għaliex straħ *inter alia* fuq l-istqarrija ta' *Gold Care* li qalet li,

»“The appellant made it very clear, in the respective ESPDs submitted for *FM Core Limited* and *Operations Holdings Limited*, that the financier will be *FM Core Limited*.”

»... ..

»Il-*financial robustness* ta' *FM Core Limited*, kbira kemm hi kbira, falliet mit-test oġġettiv impost mill-bord, kif gej:

»L-ewwel Għalkemm ħadd mhu qiegħed jiddubita mill-abilità finanzjarja ta' *FM Core Limited*, meta din daħlet biex tagħmel tajjeb għall-*financial ratios* ta' *Operations Holdings Limited* ma kinitx b'saħħitha biżżejjed biex tagħmel tajjeb għallkon-sorzju, u per konsegwenza falliet mit-test (ara l-kumment tal-awtorità kontraenti “*taken as a whole*”);

»It-tieni *Financial ratios* huma intiżi sabiex wiħhed jevalwa l-assi kontra djun (*assets versus liabilities*) tal-entità, bil-konsegwenza li, jekk għandek *negative financial ratio*, teżisti possibiltà serja u imminenti li l-entità tfalli u ma tkunx tista' tonora l-obbligi tagħha;

»It-tielet L-aċċess għall-mezzi finanzjarji u l-*financial robustness* huma ikkawtelati permezz tal-kriterju “*other economic or financial requirements*” u għalhekk l-ebda finanzjament ta' *FM Core Limited* ma huwa neċessarju għall-fini tal-proġett, għaliex dan ġie ipprovdut permezz ta' “*evidence that the tenderer has adequate financial resources together with the necessary credit facilities to finance the project throughout the duration of the contract*”.

»Huwa għalhekk ċar ħafna li l-bord ħallat il-*financial robustness* u per konsegwenza l-aċċess għall-mezzi finanzjarji għall-fini tal-proġett, regolat permezz ta' [3] *Other economic or financial requirements*, ma'

<sup>2</sup> »Sweet and Maxwell, third edition, 2014, paġna 1190«



I-abilità o meno li l-entità tibqa' tezisti: in *poche parole* fawwad u għamel apprezzament żbaljat tal-kriterju *Section 1 instructions to tenderers, 7. selection and award requirements [b] economic and financial standing [1] financial ratio*, għaliex dak mhux intiż biex isir kalkolu tas-saħħa finanzjarja, iżda sabiex jagħtu "... *indication of a company's standing over a the long term view and the prospect of the bidder being there for the duration*".

»Il-bord *inoltre* qal li sakemm ikun hemm "*written commitment*" li tagħmel tajjeb (li skont il-bord kien hemm, minkejja li l-ebda prova dwar dan ma' tressqet fis-seduta f'dan is-sens), huwa biżżejjed sabiex ikun hemm is-*safeguards* neċessarji; dan ikompli jikkonferma kemm il-bord għamel apprezzament żbaljat, għaliex se *mai*, jekk hemm *safeguard* x'tingħata minn *FM Core Limited*, ma hix dik ta' *financier* tal-proġett, iżda *safeguard* marbuta man-nuqqasijiet ta' *Operations Holdings Limited* in kwantu għall-*financial ratios*. F'dan is-sens *FM Core Limited* trid tagħti dikjarazzjoni li ser tkun qed tagħmel tajjeb għad-djun li għandha *Operations Holdings Limited*, liema dejn ġie akkumulat indipendentement mill-proġett gewwa Għawdex (u mhux tagħti assigurazzjoni dwar aċċess għall-finanzi għall-proġett, liema assigurazzjoni qed tingħata permezz tal-kriterju l-iehor "*other economic or financial requirements*"), u b'liema dikjarazzjoni l-awtorità kontraenti jkollha possibilment rasha mistrieħa li l-konsorzju kif inhu kompost ser jibqa' intatt tul id-durata tal-kuntratt kollu ... ..

»Dwar dan il-punt, il-Qorti Ewropea kienet cara ukoll. Fid-decizjoni fl-ismijiet *Partner Apelski Dariusz v. Zarząd Oczyszczania Miasta* [C-324/14]<sup>3</sup> jintqal b'mod car li:

»"... it must be stated, first, that, although it is free to establish links with the entities on whose resources it relies, and to choose the legal nature of those links, the tenderer is nonetheless required to produce evidence that it actually has available to it the resources of those entities or undertakings, which it does not itself own, and which are necessary for the performance of the contract (see to that effect, judgment in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 29 and the case-law cited).

»Thus, in accordance with articles 47(2) and 48(3) of Directive 2004/18, a tenderer may not rely on the resources of other entities in order to satisfy in a purely formal manner the conditions required by the contracting authority ..."

»Huwa għalhekk ċar li mhux kull dikjarazzjoni ta' *reliance* hija valida, iżda trid tkun waħda li tagħti l-komfort neċessarju għall-fini tal-mankanza. Dikjarazzjoni intavolata sempliċiment għall-formalità ("*purely formal manner*"), purament kemm traqqa' l-pannu bil-qargħa f'hamra, mhiex biżżejjed. Id-dikjarazzjoni trid tkun waħda tali li, b'mod sostantiv, tkun ċara li qed tagħmel tajjeb għan-nuqqasijiet li għandu l-oblatur.

»F'dan il-każ, *Gold Care* (it-tenderer) mhux kapaċi jilhaq il-kriterju tal-*financial ratios*. Minkejja li mhux permissibli, l-istess ipprovat tgħid li qed tistrieħ fuq il-kapaċitajiet ta' wieħed mill-membri tal-konsorzju, iżda, minkejja dan, naqset li tagħti l-assigurazzjonijiet li jirrikjedu l-liġi u kif ikkomfermat mill-Qorti Ewropea fil-każ *Partner Apelski Dariusz*.

<sup>3</sup> »[37-38] 7 April 2016«

»Dwar il-punt tal-formalità *versus* is-sustanza, jekk wiehed kellu jgabbel id-dokumenti finanzjarji ta' *FM Core Limited* ma' dawk ta' *Operations Holdings Limited* wiehed jinduna li huwa impossibli li *FM Core Limited* b'xi mod tista' terfa' u / jew tagħmel tajjeb għal *Operations Holdings Limited*, għaliex dawn huma entitajiet differenti u ta' portata kompletament differenti, bil-konsegwenza li mhux possibli li jsir dak li qed tgħid *Gold Care*. Huwa għalhekk ċar id-dikjarazzjoni (jekk saret) ta' *reliance* kienet waħda purament għall-konvenjenza u mhux għax verament tista' tiġi b'xi mod sodisfatta.«

#### 11. *Gold Care* wiegħbet hekk:

»... .. I-aggravji jekk tagħsarhom huma essenzjalment wiehed: is-soċjetà appellanti mhux qed taqbel li *operator* ekonomiku wiehed jista' jistrieħ fuq il-kapaċità finanzjarja jew teknika ta' ieħor.

»Dwar l-ewwel aggravju

»It-teži tas-soċjetà appellanti hija li *s-selection criteria* stipulati fit-*tender* odjern kellhom jiġu sodisfatti minn kull membru formanti parti minn konsorzju individwalment u tassattivament. Issaħħaħ it-teži tagħha billi tinterpreta l-użu tat-terminu "*tenderers*" bħala riferenza għal kull oblatur individwalment inkluż dawk li ssieħbu f'konsorzju flimkien.

»Il-konsorzju appellat jissottometti li din hija interpretazzjoni skorretta u li ma ssibx ġustifikazzjoni la fid-Direttiva 2014/24/UE<sup>4</sup> (id-"Direttiva") u lanqas fil-liġi nostrana li tittrasponiha. Skont regolament 56 tar-Regolamenti dwar l-Akkwist Pubbliku (ir-"Regolamenti"), "offerent jista' jkun jew persuna fiżika jew persuna ġuridika jew entità pubblika jew grupp ta' tali persuni u, jew entitajiet"<sup>5</sup>.

»Għalhekk riferenzi għal "*tenderers*" fit-*tender* odjern huma riferenzi għall-offerenti kollha li iddeċiedew jipparteċipaw fis-sejħa, irrispettivament jekk ipparteċipawx waħedhom jew ma' oblaturi oħrajn permezz ta' konsorzju.

»Naslu issa għall-pern tal-kwistjoni mertu ta' dan l-appell. Klawżola 2.4 tal-*general rules governing tenders* tistipula li: "*in the case of a joint venture / consortium / group of economic operators, the joint venture / consortium / group of economic operators as a whole must satisfy the criteria established in the instructions to tenderers*".

»... ..

»Il-konsorzju appellat kellu kull dritt, u dan dejjem skont it-*tender* u l-*general rules governing tenders*, li jorganizza l-konsorzju tiegħu b'tali mod li dan jissodisfa *s-selection criteria* marbuta mal-*economic and financial standing* tiegħu. Il-konsorzju appellat kellu wkoll kull dritt li jistrieħ fuq il-filiet ta' xi wiehed jew ieħor mill-membri tiegħu.

»Dawn id-drittijiet joħorġu b'mod ċar mid-Direttiva u mir-Regolamenti.

<sup>4</sup> »Direttiva 2014/24/UE tas-26 ta' Frar 2014 dwar l-akkwist pubbliku u li tħassar id-Direttiva 2004/18/KE«

<sup>5</sup> »Legislazzjoni Sussidjarja 601.03«

»Regolament 235 tar-Regolamenti jagħti din is-setgħa ta' dipendenza fuq il-kapaċitajiet ta' entitajiet oħra lill-operaturi ekonomiċi inkluż għas-*selection criteria* relatati mal-qagħda ekonomika u finanzjarja:

»“fir-rigward tal-kriterji relatati mal-qagħda ekonomika u finanzjarja kif stabbilit skont ir-regolamenti 218 sa 221, u l-kriterji relatati mal-abbiltà teknika jew professjonali kif stabbilit skont ir-regolamenti 222 u 223, operatur ekonomiku jista', fejn dan ikun adegwat u għal kuntratt partikolari, jiddependi fuq il-kapaċitajiet ta' entitajiet oħra, irrilevanti min-natura legali tar-rabtiet li għandu magħhom. [...] Meta operatur ekonomiku jkun irid jiddependi fuq il-kapaċitajiet ta' entitajiet oħra, dan għandu jagħti prova lill-awtorità kontraenti li huwa ser ikollu r-riżorsi meħtieġa għad-dispożizzjoni tiegħu, pereżempju, billi jippreżenta impenn minn dawk l-entitajiet għal dan il-għan.”

»Dan ġie ripetut *verbatim* fit-*tender* odjern *tramite* klawżola 2.5 tal-*general rules governing tenders* li tgħid hekk:

»“An economic operator may, where appropriate and for a particular contract, with regard to criteria relating to economic and financial standing and to criteria relating to technical and professional ability, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. [...]”

»Fit-*tender* odjern, l-awtorità kontraenti kienet f'arġet *clarification note* 7 fl-24 ta' Lulju 2020 fejn ikkonfermat illi oblatur jista' jistrieħ fuq il-kapaċitajiet finanzjarji u / jew tekniċi ta' oblatur / operatur ekonomiku ieħor:

»“Question No. [12]: Further clarification – Bidder as a new company

»“We thank you for your reply in terms of clarification note 1. In furtherance to this, could you please confirm that, if a wholly-owned new subsidiary of a current mother company, who has years of experience in the elderly care sector, has a letter of undertaking with the mother company to make use of its technical and financial resources, then such a new wholly-owned subsidiary can make use of the mother company's financial and technical capacities to satisfy the eligibility criteria of this tender? We thank you in advance for your support and assistance.

»“Answer No. [12]: Above statement is confirmed.”

»Permezz tal-kjarifika tagħha, l-awtorità kontraenti ikkorrobat dak li diġà kien ikkomunikat lill-oblaturi fit-*tender* odjern u ma f'halliet l-ebda dubju lill-oblaturi li huma setgħu jissieħbu flimkien f'konsorzju u, aktar importanti minn hekk, li oblatur, b'hal “*new wholly-owned subsidiary*” bla ebda saħħa finanzjarja u bla esperjenza teknika, setà jistrieħ fuq il-kapaċitajiet finanzjarji ta' operatur ekonomu ieħor. Dan setà jsir *tramite* konsorzju jew *tramite subcontracting*.

»Tajjeb illi wieħed jgħid li s-soċjetà appellanti għażlet li tinjora din il-kjarifika fir-rikors tal-appell tagħha.

»B'hekk l-unika interpretazzjoni li setgħet tingħata lill-frażi “*as a whole*” fi klawżola 2.4 tal-*general rules governing tenders* hija li l-konsorzju kellu dritt jistrieħ fuq il-kapaċità finanzjarja ta' xi wieħed jew aktar mill-membri tiegħu.

»Sabiex jiġi eliminat kull dubju, il-konsorzju kellu wkoll dritt li jistrieġ fuq il-kapaċità ta' entitajiet terzi *tramite subcontracting*, u mhux biss tal-membri tiegħu. Dan jgħidu t-tender in kwistjoni stess fi klawżola 2.4 tal-*general rules governing tenders* li tispiċċa hekk:

»“Under the same conditions, a group of economic operators as referred to in regulation 32 of the Public Procurement Regulations may rely on the capabilities of participants in the group or of other entities.”

»Il-konsorzju appellat mexxa preċiżament in linea mar-regoli stabbiliti mil-liġi u l-awtorità kontraenti. Wara kollox, dan huwa dak li jitolbu l-prinċipji ġenerali ta' dritt komunitarju ta' *legal certainty* u *legitimate expectations* imħaddna konsegwentement mid-Direttiva.

»Għalhekk id-deċiżjoni tal-awtorità kontraenti li tiddetermina s-sitwazzjoni ekonomika u finanzjarja tal-konsorzju appellat billi tiegħu in kun-siderazzjoni l-*financial ratios* sija ta' *FM Core Limited* sija ta' *Operations Holdings Ltd* kienet skorretta u illegali.

»Skont il-*European Code of Best Practice Facilitating Access by SMEs to Public Procurement Contracts*, il-*European Commission* għamlitha ċara li:

»“1.2. Taking advantage of the possibility for economic operators to group together and rely on their combined economic and financial standing and technical ability

»“Public Procurement Directives allow an economic operator to rely on economic and financial capacities and on technical abilities of other companies, regardless of the legal nature of the links which it has with them, in order to prove that it complies with the level of capacities or abilities required by the contracting authority. The economic operator must, nonetheless, prove that it will have at its disposal the resources necessary for the execution of the contract.

»“In the case of groups of economic operators, it is now clearly stated in the Public Procurement Directives that the group may rely on the capacities of all the participants in the group. In addition, the group may also rely on capacities of other entities not belonging to the group.

»“[...]

»“All these provisions and practices obviously make it easier to constitute groups of independent SMEs to be tenderers or candidates in big public procurement contracts, especially in the case of complex contracts involving a variety of skills.

»“[...]

»“In the case of large contracts, where SMEs are not in a position to be a prime contractor or to bid jointly with other SMEs, subcontracting may still provide them with good opportunities [...]

»“[...]

»“4.2. Taking advantage of the possibility for economic operators and groups of economic operators to prove their combined economic and financial standing and technical ability

»“As already indicated above (point 1.2), the Public Procurement Directives offer the possibility for economic operators to rely on

the economic and financial standing and technical capacity of other undertakings. This possibility can obviously help SMEs to cope with high qualification levels and financial requirements.

»Tant hu hekk, li d-Direttiva 2004/18/KE<sup>6</sup> *qua* l-proġenitur tad-Direttiva 2014/24/UE, kien jispjefika f'artikolu 47(2) u (3) li:

»“Operatur ekonomiku jista', fejn xieraq u għal xi kuntratt partikolari, joqgħod fuq il-filiet ta' entitajiet oħrajn, bla rigward għannatura legali tar-rabtiet li hi għandha magħhom. Huwa għandu f'dak il-każ jipprova lill-awtorità kontrattwanti li se jkollu għaddisposizzjoni tiegħu ir-riżorsi neċessarji, per eżempju, billi jipproduċi garanzija minn dawk l-entitajiet għal dak l-effett.

»“Taħt l-istess kondizzjonijiet, grupp ta' operaturi ekonomiċi kif sar riferiment għalih fl-artikolu 4 jista' joqgħod fuq il-filiet ta' partecipanti fil-grupp jew ta' entitajiet oħrajn.”

»Illum il-ġurnata, din il-klawżola tinsab fl-artikolu 63(1) tad-Direttiva:

»“Under the same conditions, a group of economic operators as referred to in article 19(2) may rely on the capacities of participants in the group or of other entities.

»Tenut kont tas-suespost, kif tista' qatt is-soċjetà appellanti tishaq li r-rekwiżiti finanzjarji tat-*tender* kellhom jiġu sodisfatti minn kull membru tal-konsorzju individwalment, jew mill-membri tal-konsorzju abbinati? Kif tista' qatt l-awtorità kontraenti targumenta li l-kwistjoni ta' *joint venture* hija distinta mill-kwistjoni ta' *reliance*?

»Is-sitwazzjoni kienet tkun ferm differenti kienu t-*tender* qal, bla tlaqliq, li kull membru tal-*joint venture* jew konsorzju kellu individwalment jissodisfa *selection criteria* speċifiċi u ta' ġustifikazzjoni għal tali restrizzjoni. Dan mhux minnu fit-*tender* odjern, kif ser jiġi sottomess aktar 'l isfel.

»Apparti mill-istorja legali u l-liġi preżenti dwar din il-kwistjoni, il-pożizzjoni tal-konsorzju appellat isib konfort addizzjonali fil-ġurisprudenza tal-Qorti tal-Ġustizzja tal-Unjoni Ewropea (“QĠUE”). Il-QĠUE ippronunzjat ruħha diversi drabi fuq il-fatt li operatur ekonomiku jista' jistrieħ fuq il-kapaċità finanzjarja ta' entitajiet oħra. Fil-każ *Swm Costruzioni*<sup>7</sup>, il-qorti sabet illi l-liġi dwar l-akkwist pubbliku tippermetti l-akkumulazzjoni tal-kapaċitajiet ta' diversi operaturi ekonomiċi (mhux biss wieħed) sabiex jiġu sodisfatti r-rekwiżiti minimi ta' kapaċità stabbiliti mill-awtorità kontraenti, bil-kundizzjoni li l-awtorità tingħata kundizzjoni li din tingħata prova li l-kandidat jew l-offerent li jirrikorri għall-kapaċitajiet ta' entità jew diversi entitajiet oħra ser ikollu għaddispożizzjoni tiegħu r-riżorsi ta' dawn tal-aħħar li huma neċessarji għall-eżekuzzjoni tal-kuntratt.

»Din l-interpretazzjoni hija konsistenti mal-għan prinċipali tad-Direttiva u *cioè* li l-kompetizzjoni tinfetaħ kemm jista' jkun possibbli fil-kuntest ta' kuntratti pubbliċi u li dan jibbenefika mhux biss lill-operaturi

<sup>6</sup> Id-Direttiva 2004/18/KE tal-Parlament Ewropew u tal-Kunsill tal-31 ta' Marzu 2004 fuq kordinazzjoni ta' proċeduri għall-għoti ta' kuntratti għal xogħlijiet pubbliċi, kuntratti għal provvisti pubbliċi u kuntratti għal servizzi pubbliċi.

<sup>7</sup> »Case C-94/12 *Swm Costruzioni 2 SpA et v. Provincia di Fermo* [2013] ECR 646, para. 33-34«

ekonomiċi fis-suq imma ukoll lill-awtoritajiet kontraenti nfushom<sup>8</sup>. *Inoltre*, tali interpretazzjoni tiffaċilita l-aċċess tal-impriži żgħar u ta' daqs medju għall-kuntratti pubbliċi.

»Jidher li l-PCRБ fehem bis-sħiħ l-importanza ta' kompetizzjoni ġenwina u miftuħa u li l-istess għan għandu jiġi mwettaq fil-kuntest tar-regoli dwar l-akkwist pubbliku:

»“It is after all what the Public Procurement Regulations are all about – to promote genuine competition. Such “promotion” obviously has always to be within the very high regard to the rules and principles legislating it.”

»L-importanza tal-partecipazzjoni tal-impriži żgħar u ta' daqs medju għet rikonoxxuta ukoll mill-Avukat Ġenerali Jääskinen fl-opinjoni tiegħu mogħtija nhar it-28 ta' Frar 2013 fil-każ surreferit C-94/12<sup>9</sup>, b'mod partikolari f'paragrafu 37:

“Excluding tenderers relying on the capacities of more than one auxiliary entity per qualitative selection criteria category favours larger undertakings at the expense of *ad hoc* consortia of SMEs. It is likely to privilege dominant local or regional players in relation to public works which fit their capacities but are too demanding for smaller operators acting alone and too small to interest bigger nationally or internationally operating companies. This cannot be regarded as non-discriminatory.”

»Huwa minnu li l-awtorità kontraenti kellha dritt li tesiġi li ċertu *selection criteria* essenzjali jiġu sodisfatti jew imwettqa minn partecipant partikolari fi fhdan il-konsorzju.

»F'dan ir-rigward, l-awtorità kontraenti għandha diskrezzjoni *ai termini* tar-regolament 58 tar-Regolamenti li:

»“Where necessary, the authorities responsible for the tendering process may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in regulation 217 provided that this is justified by objective reasons and is proportionate.”

»Dan irid isir b'mod ċar u mhux ambigwu fit-*tender*, senjatament billi jingħad, kif xi kultant isir, bil-miktub li f'każ ta' konsorzju kull membru jrid tassattivament jissodisfa *selection criterion* partikolari u dan jista'

<sup>8</sup> »Case C-305/08 *CoNISMa v. Regione Marche* [2009] ECR 807 para. 37«

<sup>9</sup> »Case C-94/12 *Swm Costruzioni 2 SpA et vs Provincia di Fermo* [2013] ECR 130, Opinion of Advocate General Jääskinen:

»“Another objective of the public procurement rules is to open up the public procurement market for all economic operators, regardless of their size. The inclusion of small and medium-sized enterprises (SMEs) is especially to be encouraged as SMEs are considered to form the backbone of European Union economy. The chances of SMEs to participate in tendering procedures and to be awarded public works contracts are hindered, among other factors, by the size of the contracts. Because of this, the possibility for bidders to participate in groups relying on the capacities of auxiliary undertakings is particularly important in facilitating the access to markets of SMEs.”«

jsir biss jekk l-awtorità kontraenti tiġġustifika l-istess b'raġunijiet oġġettivi u turi li huwa proporzjonat.

»Apparti li regolament 58(2) tar-Regolamenti jagħmilha ċara li awtorità kontraenti għandha din is-setgħa, dan ġie ribadit riċentement fit-28 ta' April 2022 f'Caruter<sup>10</sup>:

»“36. L-artikolu 63 ta' din id-direttiva jipprevedi, fil-paragrafu 1 tiegħu, li operatur ekonomiku jista', għal kuntratt partikolari, jirrikorri għall-kapaċitajiet ta' entitajiet oħra, fir-rigward tal-kriterji relatati mal-kapaċità ekonomika u finanzjarja kif ukoll mal-kriterji relatati mal-kapaċitajiet tekniċi u professjonali, u li, taħt l-istess kundizzjonijiet, grupp ta' operatori ekonomiċi jista' jirrikorri għall-kapaċitajiet ta' parteċipanti tal-grupp jew ta' entitajiet oħra. Barra minn hekk, huwa jippreċiża, fil-paragrafu 2 tiegħu, li għal ċerti tipi ta' kuntratt, fosthom il-kuntratti għal servizzi, 'l-awtoritajiet kontraenti jistgħu jesigū li ċerti kompiti kritiċi jitwettqu direttament mill-offerent stess jew, fejn l-offerta tkun sottomessa minn grupp ta' operatori ekonomiċi [...], minn parteċipant f'dak il-grupp”.

»Hawnhekk il-QĠUE kienet rinfaccjata b'regola taljana li tobbliga lill-lead partner ta' konsorzju li rebaħ il-kuntratt iwettaq il-parti l-kbira minnu. Mingħajr tlaqliq, il-QĠUE osservat li tali regola tmur lil hinn minn dak li jippermetti d-Direttiva, u li tirrestringi indebitament is-sens u l-portata tad-diskrezzjoni f'idejn l-awtorità kontraenti li tiddetermina kif konsorzju għandu jissodisfa ċertu rekwiżiti marbuta mas-sitwazzjoni ekonomika u finanzjarja jew il-ħila teknika tiegħu.

»Bl-istess mod, is-soċjetà appellanta qiegħda tfittex li tikkastiga lill-konsorzju appellat billi teskludih mill-proċess ta' kompetizzjoni fl-ewwel stadju tal-evalwazzjoni abbażi tal-allegazzjoni li l-financial ratios kellhom jiġu sodisfatti minn kull membru tal-konsorzju.

»Tajjeb li wieħed jgħid li l-awtorità kontraenti (u flimkien magħha s-soċjetà appellanti) qed issostni li kienu l-general rules governing tenders li jitolbu li s-selection criteria fuq il-kapaċità finanzjara kellhom jiġu sodisfatti minn kull membru tal-konsorzju (bl-interpretazzjoni żbaljata tal-kliem “as a whole”), imma:

- »a. fl-ewwel lok l-awtorità kontraenti qatt ma sostniet li din hija restrizzjoni ai termini tar-regolament 58(2) tar-Regolamenti;
- »b. fit-tieni lok l-awtorità kontraenti qatt ma spjegat jew ġabet prova biex turi kif tali restrizzjoni hija “justified by objective reasons and is proportionate”.

»Għalhekk il-pern tat-tilwima hija biss fuq l-interpretazzjoni żbaljata tal-kliem “as a whole” li issa s-soċjetà appellanti qed tipprova tallacća miegħu sabiex teħles mill-konkorrenza tal-konsorzju appellat.

»Dan kollu qalitu l-PCRB bis-sñiħ fid-deċiżjoni appellatta meta stqarret li: “it is clear and evident that joint ventures need to satisfy criteria ‘as a whole’, [and] it is very much accepted and legally permissible to rely on the capacities of certain members making up the joint venture, always within certain requisites that must be reached and honoured”.

<sup>10</sup> »Case C-642/20 Caruter Srl v. S.R.R. Messina Provincia SCpA et [2022] ECR 308«

»Fuq nota aħħarija huwa wkoll fallaċi l-argument li jagħmlu l-appellati Ministeru u Direttur Ġenerali li teżisti xi distinzjoni bejn il-kunċett ta' *joint venture / consortium* u *reliance on the capacities of other entities* fil-paragrafi 14 *et seq.* tar-risposta tal-appell tagħhom.

»Dan l-argument huwa fallaċi għaliex jikkozza mal-ħsieb tal-leġislatur komunitarju u tal-QĠUE konsistenti fuq dan il-punt u kif inhu evidenti minn dak iċċitat hawn fuq.

»Ir-“*reliance*” hija għodda għad-dispożizzjoni tal-oblaturi sabiex ikunu jistgħu jipparteċipaw fit-*tenders* u dan sabiex il-konkorrenza ġenwina tiġi mħarsa.

»Naturalment, awtorità kontraenti tista' timponi restrizzjonijiet, li jridu jkunu ġustifikati u proporzjonati, fuq din l-għodda, però, il-prinċipju huwa li tista' ssir u tista' ssir bil-forma ta' konsorzju (fejn kulhadd ikun responsabbli *in solidum*) jew permezz ta' *subcontractors* (fejn l-oblatur li innomina s-*subcontractor* jibqa' responsabbli għall-prestazzjoni).

»Fil-każ odjern il-Ministeru u d-Direttur Ġenerali ma imponu l-ebda tali restrizzjoni fuq din l-għodda imma bil-wisq evidenti li l-interpretazzjoni li qed jinsistu fuqha tas-*selection criteria* timmilita kontra l-istess awtorità kontraenti għaliex qed tnaqqas il-konkorrenza fl-istadju li jmiss tal-evalwazzjoni (*i.e.* tal-*award criteria*).

»Għal dawn ir-raġunijiet, dan l-aggravju għandu jiġi miċħud.

»Dwar it-tielet aggravju

»It-tielet aggravju tas-soċjetà appellanti hija sempliċiment estensjoni tal-ewwel aggravju. Ladarba l-ewwel aggravju għandu jiġi miċħud, l-konsorzju appellat jissottometti li t-tielet aggravju lanqas ma jisthoqqlu jiġi milqugħ minn din il-qorti.

»Is-soċjetà appellanti tilmenta li l-*PCRB* għamel apprezzament żbaljat tal-fatti u li dan jidher ċar mill-użu tal-kliem segwenti fid-deċiżjoni tiegħu: “*it was clear from the start that for economic and financial standing requisites reliance was going to be placed on the financial 'robustness' of FM Core Limited*”.

»Fl-ewwel lok, din l-osservazzjoni tal-*PCRB* saret fil-kuntest tal-obbligu tal-awtorità kontraenti li titlob rettifiċi u / jew kjarifiċi mingħand l-oblaturi fuq l-offerta tagħhom.

»Fit-tieni lok, is-soċjetà appellanti qiegħda unilateralment tinterpreta l-kliem “*financial robustness*” bħala riferenza unikament għat-tielet parti ta' dawn is-*selection criteria* u *cioè* għal “*other economic or financial requirements*”. Fl-opinjoni tal-konsorzju appellat, il-*PCRB* ma kien qed jagħmel l-ebda esklużjoni tal-ewwel żewġ *selection criteria* u *cioè* tal-*financial ratios* u tal-*general yearly turnover* billi uża l-kliem “*financial robustness*”, imma sempliċiment kien qiegħed jirreferi għal *reliance* li l-konsorzju kien qiegħed jagħmel fuq is-sitwazzjoni ekonomika u finanzjarja ta' *FM Core Limited*. Din hija interpretazzjoni tas-soċjetà appellanti biss sabiex tavalla t-teżi tagħha.

»Infatti, il-konsorzju qiegħed jistrieħ fuq il-kapaċità finanzjarja ta' *FM Core Limited* biex jissodisfa is-*selection criteria* relatati ma' *economic and financial standing*.



»Il-konsorzju appellat jissottometti li s-soċjetà appellanti qiegħda tipprova tagħti spinta lil kliem bħal “*robustness*” li mhumiex frażijiet legali, mentri l-pern ta’ dawn il-proċeduri hija l-kwistjoni legali ta’ “*reliance*”.

»Fi kwalunkwe każ, il-premessa tas-soċjetà appellanti hija żbaljata (kif spjegat fir-risposta tal-konsorzju appellat għall-ewwel aggravju) għaliex tassumi, kuntrarjament għall-prinċipji bażilari tal-liġi dwar l-akkwist pubbliku, li l-konsorzju ma setax jistrieħ fuq il-kapaċità finanzjarja ta’ wieħed mill-membri tagħha.

»Minflok, is-soċjetà appellanti tinsisti u tallega li l-ħila finanzjarja ta’ *FM Core Limited* għandha tpatti u tikkumpensa għall-membri l-oħra tal-konsorzju, b’mod partikolari għall-*financial ratios* tagħha. Kif spjegat hawn fuq, din hija pożizzjoni li ma ssib l-ebda komfort la fil-liġi nostrana, la fid-Direttiva tal-Unjoni Ewropea, u wisq anqas fil-ġurisprudenza ta’ Malta u tal-Ewropa.

»Il-prinċipju li oblatur jista’ jistrieħ fuq il-ħila finanzjarja jew teknika ta’ terz huwa prinċipju assoċjat fil-liġi u l-ġurisprudenza tal-Unjoni Ewropea. Fis-sentenza C-176/98 fl-ismijiet *Holst Italia SpA v. Comune di Cagliari*<sup>11</sup> (“*Holst*”), il-qorti qalet hekk:

»“It is therefore permissible for a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a public service contract to rely, vis-à-vis the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract.

»“However, such recourse to external references is subject to certain conditions. As stated in article 23 of Directive 92/50, the contracting authority is required to verify the suitability of the service providers in accordance with the criteria laid down. That verification is intended, in particular, to enable the contracting authority to ensure that the successful tenderer will indeed be able to use whatever resources it relies on throughout the period covered by the contract.

»“Thus, where, in order to prove its financial, economic and technical standing with a view to being admitted to participate in a tendering procedure, a company relies on the resources of entities or undertakings with which it is directly or indirectly linked, whatever the legal nature of those links may be, it must establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (see, to the same effect, as regards Directives 71/304 and 71/305, *Ballast Nedam Groep I*, paragraph 17).

»Din is-sentenza ġiet kwotata minn din il-qorti diversi drabi, inkluż fis-sentenza mogħtija fit-12 ta’ Lulju 2019 fl-ismijiet “*X Clean Ltd v. St Vincent de Paul Long-Term Care Facility u Dipartiment tal-Kuntratti*”<sup>12</sup> fejn din il-qorti diversament presjeduta tat rendikont dettaljat tal-ġurisprudenza dwar is-sistema ta’ *reliance* fuq il-kapaċitajiet ta’ terzi. Il-qorti saħansitra ikkonkludiet li din il-pożizzjoni minn żmien *Holst* sa

<sup>11</sup> »Case C-176/98 *Holst Italia SpA vs Comune di Cagliari* [1999] ECR 593«

<sup>12</sup> Każ Rif. Nru 98/19, *X Clean Ltd v. St Vincent de Paul Long-Term Care Facility u Dipartiment tal-Kuntratti* (Qorti tal-Appell, 12 ta’ Lulju 2019).

żmien sal-lum-il ġurnata “ma biddlitx din il-fehma tagħha anzi komplet tagħfas fuqha”.

»Infatti, l-konsorzju appellat dejjem aġixxa b’mod konsistenti *vis-à-vis* l-awtorità kontraenti u issottometta biss il-*financial ratios* ta’ *FM Core Limited* biex jittieġdu in kunsiderazzjoni mill-*evaluation committee*. Il-*financial ratios* ta’ *Operations Holdings Limited* ġew ikkalkulati mill-*evaluation committee* wara li l-istess talbet l-*accounts* ta’ *Operations Holdings Limited* mill-konsorzju appellat permezz ta’ *request for clarification* (u mhux permezz ta’ *request for rectification* peress li l-*accounts* ma kinux mitluba mal-offerta) u mingħajr ma stqarret li ser tikkalkula l-*financial ratios*.

»Is-soċjetà appellanti tallega li d-dikjarazzjoni ta’ *reliance* tal-konsorzju huwa formalistiku, intenzjonat biex biss “traqqa” l-pannu bil-qargħa ħamra”. B’kull rispett, din l-allegazzjoni għal darb’ oħra mhux mis-sewwa.

»Kif diġà rajna, regolament 235(1) tar-Regolamenti jipprovdi li oblatur li jixtieq jistrieħ fuq il-ħila ta’ ħaddieħor jeħtieġu: “jagħti prova lill-awtorità kontraenti li huwa ser ikollu r-rizorsi meħtieġa għad-dispożizzjoni tiegħu, pereżempju, billi jippreżenta impenn minn dawk l-entitajiet għal dan il-għan”.

»Prova tal-impenn teżisti u qiegħda fl-offerta tal-konsorzju appellat permezz tal-*ESPDs* rispettivi tal-membri tal-konsorzju u saħansitra mill-*joint venture agreement* li huwa ffirmat bejn il-membri (dan kien fl-offerta tal-konsorzju appellat u disponibbli fil-*procurement file* disponibbli lill-*PCRB* u lil din il-qorti).

»*Inoltre*, il-membri formanti parti tal-konsorzju huma marbuta taħt *joint and several liability* in ottemporanza ma’ klawżola numru 2.3 tal-*general rules governing tenders*:

»“The tender must include a preliminary agreement or letter of intent stating that all partners assume joint and several liability for the execution of the contract, that the lead partner is authorised to bind, and receive instructions for and on behalf of, all partners, individually and collectively.

»*In vista* tas-suespost, it-tielet aggravju tas-soċjetà appellanti huwa infondat fil-fatt u fid-dritt u għandu wkoll jiġi miċħud.«

12. Wiegħbu wkoll il-ministeru u d-dipartiment li qablu mal-aggravji tal-appell.
13. Essenzjalment l-argument ta’ *Gold Care* huwa illi r-regoli tal-akkwist pubbliku jippermettu illi “*operator* ekonomiku wieħed jista’ jistrieħ fuq il-kapaċità finanzjarja jew teknika ta’ ieħor”. Dan ma huwix kontestat u ċertament daqskemm il-konsorzju jista’ jinqeda bil-kapaċitajiet ta’ terzi jista’ jinqeda bil-kapaċitajiet ta’ membru ieħor tal-konsorzju. Il-kwistjoni iżda ma hijjex dik. L-argumenti dwar dritt ta’ *reliance* u kemm dan huwa

importanti għall-kompetizzjoni ħielsa huma ta' importanza marginali fil-kuntest tal-każ tallum, u ma jolqtux il-meritu ewlieni tal-appell.

14. Il-kwistjonijiet essenzjalment huma dawn:

- i. il-kriterji finanzjarji huma maħsuba biss biex jistabilixxu jekk il-konsorzju, ukoll jekk bil-kontribut biss ta' wieħed mill-membri, għandux is-saħħa finanzjarja biex jiffinanzja l-proġett, jew huma maħsuba wkoll biex jistabilixxu jekk il-konsorzju għandux il-vitalità meħtieġa biex jibqa' fis-seħħ għaž-żmien kollu li hu maħsub li jdum il-kuntatt?
- ii. il-kriterji finanzjarji għandhom ikunu sodisfatti meta tqis il-figuri tal-membri kollha tal-konsorzju kumulativament – “*as a whole*” – jew huwa biżżejjed li wieħed biss mill-membri jissodisfa dawk il-kriterji?

15. Il-kriterji finanzjarji li kellhom jitqiesu huma tlieta: (1) *financial ratio*, (2) *general yearly turnover*, u (3) *other economic or financial requirements*<sup>13</sup>. Filwaqt li t-tielet kriterju huwa maħsub biex jistabilixxi jekk l-oblatur għandux is-saħħa finanzjarja biex jiffinanzja l-proġett sa tmiemu, il-kriterji l-oħra, partikolarment l-ewwel wieħed, huma maħsuba biex jistabilixxu l-vitalità tal-oblatur. Il-*financial statements* mitluba huma dawk relattivi għas-snin ta' qabel ma jinbeda l-proġett u huma maħsuba biex juru jekk l-attività ekonomika tal-operatur tiġġenerax qligħ biżżejjed biex jistgħu b'mod fattibbli u sostenibbli jifhallsu d-djun ta' dak l-operatur. Fil-każ ta' konsorzju, ukoll jekk membru wieħed waħdu għandu qagħda

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<sup>13</sup> Para. 4, *supra*

finanzjarja soda u jista' bis-saħħa ta' hekk jikseb finanzjament għall-proġett, madankollu, jekk it-twettiq tal-kuntratt jeħtieġ il-partecipazzjoni tal-membri kollha tal-konsorzju, il-kuntratt jista' jiġi frustrat jekk membru wieħed ma jkunx jista' jkompli l-attività tiegħu għax mgħobbi bi djun li ma jiflaħx għalihom. Dan jikseb urgenza akbar fil-każ tallum meta tqis illi l-kuntratt huwa maħsub li jseħħ għal seba' snin u nofs, li hu żmien x'aktarx twil. Għalhekk l-awtorità kontraenti tkun teħtieġ serħan il-moħħ illi l-konsorzju jibqa' sħiħ għal dak iż-żmien kollu, u mhux jisfaxxa għax membru minnhom ma jiflaħx il-piż finanzjarju, mhux biss tal-kuntratt iżda tal-attività ekonomika kollha tiegħu. Kif tgħid il-kittieba ċitata minn *CareMalta* fir-rikors tal-appell:

»“a measure relates to economic or financial standing when it seeks to ensure that the firm has adequate financial resources *to remain in business during the contract period*«

16. Dan iwassalna għat-tieni mistoqsija: jekk, meta membru tal-konsorzju jinqeda bis-saħħa finanzjarja ta' membru l-ieħor, għandhomx ikunu sodisfatti l-kriterji finanzjarji tal-membri kollha kumulativament.
17. Għandu jingħad qabel xejn illi meta membru tal-konsorzju sejjer jinqeda bl-impenn tal-ħila finanzjarja ta' membru ieħor, dak l-impenn – peress illi, kif rajna, il-ħila finanzjarja għandha tkun biżżejjed biex tiggarrantixxi mhux biss it-twettiq tal-kuntratt iżda wkoll il-vitalità finanzjarja tal-membri kollha – għandu jkopri kemm it-twettiq tal-kuntratt u kemm il-qagħda finanzjarja generali tal-membri kollha. U għa hawnhekk il-konsorzju jfalli, għax waqt illi *FM Core Ltd* intrabtet illi tagħmel tajjeb għall-obbligazzjonijiet ta' *Operations Holdings Ltd* marbuta mat-twettiq tal-kuntratt, id-difensur tal-konsorzju meta mistoqsi mill-qorti jekk *FM Core Ltd* intrabtitx ukoll illi, jekk

meħtieġ, tħallsilha d-djun li ma humiex imnissla mill-kuntratt, biex tevita li *Operations Holdings Ltd* tkun insolventi, wieġeb li le. Verament il-mistoqsija kienet waħda retorika, għax it-tweġiba kienet ovvja.

18. Irrispettivament mela minn jekk il-figuri finanzjarji kellhomx jittieħdu kumulativament jew indipendentement minn xulxin, il-konsorzju jfalli għax ma hemmx l-impenn sħiħ ta' *FM Core Ltd* li fuqu tista' tistrieħ *Operations Holdings Ltd*.

19. Iżda wkoll li kieku ngħata dak l-impenn, ladarba membru tal-konsorzju jitgħabba bil-piż finanzjarju ta' membru ieħor, biex jista' jerfa' dak il-piż ikollu jqis mhux biss il-kapaċità tiegħu li jħallas id-djun tiegħu iżda wkoll il-kapaċità li jħallas id-djun tal-membri l-ieħor, u għalhekk loġikament il-posizzjonijiet finanzjarji jkollhom jitqiesu kollha flimkien.

20. Dan jirriżulta wkoll mill-awtoritajiet ċitati minn *Gold Care* stess fit-tweġiba tagħha għall-appell, kif jidher mis-siltiet hawn taħt miġjuba:

»“Fil-każ *Swm Costruzioni*, il-qorti sabet illi l-liġi dwar l-akkwist pubbliku tippermetti l-*akkumulazzjoni* tal-kapaċitajiet ta' diversi operaturi ekonomiċi.”

»“Taking advantage of the possibility for economic operators to group together and rely on their *combined* economic and financial standing and technical ability”

»“Taking advantage of the possibility for economic operators and groups of economic operators to prove their *combined* economic and financial standing and technical ability”

21. Barra minn hekk, il-kliem tal-para. 2.4 tal-kondizzjonijiet tas-sejha huma ċari: “*the ... consortium ... as a whole must satisfy the criteria established in the instructions to tenderers*”.

22. Kemm għax il-figuri finanzjarji ma jagħtux serġan il-moħħ dwar il-vitalità ta' membru tal-konsorzju *Gold Care* għaż-żmien kollu tal-kuntratt, kemm għax l-impenn mogħti minn membru li fuqu jistreh il-membru l-ieħor ma huwiex sħiħ u ma jkoprix il-piżijiet finanzjarji kollha, u kemm għax f'kull każ is-saħħa finanzjarja kumulativa tal-membri kollha tal-konsorzju ma tissodisfax il-kriterji finanzjarji, kellha raġun l-awtorità kontraenti li twarrab l-offerta ta' *Gold Care*.
23. Dan huwa biżżejjed biex jintlaqa' l-appell, u ma hux meħtieġ li nqisu l-aggravji l-oħra tal-appellanti.
24. Il-qorti għalhekk tilqa' l-appell, tħassar id-deċiżjoni tal-Bord ta' Reviżjoni tal-10 ta' Awissu 2022 u tikkonferma d-deċiżjoni tal-awtorità kontraenti tad-29 ta' April 2022 illi titwarrab l-offerta ta' *Gold Care*.
25. L-ispejjeż ta' dan l-appell tħallashom *Gold Care*.

Mark Chetcuti  
President

Giannino Caruana Demajo  
Imħallef

Anthony Ellul  
Imħallef

Deputat Reġistratur  
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