



## 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, 29 ta' Marzu, 2023.**

**Numru 8**

**Appell numru 413/2022/1**

***CareMalta Limited (C-28382)***

**v.**

- 1. *Active Ageing and Community Care* fi hdan il-Ministeru għall-Anzjani u l-Anzjanità Attiva (illum Ministeru għall-Anzjanità Attiva);**
- 2. *Golden Care Limited (C-89549)*;**
- 3. Direttur Ġenerali tal-Kuntratti f'isem id-Dipartiment tal-Kuntratti**

1. Dan huwa appell ta' *CareMalta Limited* [*"CareMalta"* jew *"l-appellanti"*] minn deċiżjoni tas-27 ta' Settembru 2022 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi [*"il-Bord ta' Reviżjoni"*], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [*"L.S. 601.03"*], li ċaħad oġġezzjoni mressqa minn *CareMalta* kontra l-għażla ta' *Golden Care Limited*

[“*Golden Care*”] bħala “offerent rakkomandat” għall-għoti ta’ kuntratt pubbliku wara sejħa għal offerti mill-Ministeru għall-Anzjanità Attiva [“il-ministeru”] u mid-Dipartiment tal-Kuntratti [“id-dipartiment”].

2. Il-ministeru d-dipartiment għamlu sejħa għal offerti “*for the management, operation and upkeep of Zammit Clapp Residential Home including environmentally friendly materials*”. Fost il-kondizzjonijiet tas-sejħa kien hemm dik taħt “(B) *exclusion and selection criteria*, (c) *technical and professional ability*” illi trid illi kull oblatur jagħti:

»Evidence that the tenderer has managed and maintained one (1) Old People’s Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers. (Note 2)<sup>1</sup>«

3. Wieħed mill-oblaturi għamel din it-talba għal kjarifika dwar din il-kondizzjoni:

»Given that the closing time for submission of tenders is currently set for 16 November 2021 and that tender adjudication may very well stretch to late 2021/early 2022, can you please confirm whether the requirement of providing evidence corroborating that a tenderer has managed and maintained at least one (1) Old People’s Home with a capacity of at least one hundred (100) residents during the past three (3) years is also satisfied if this evidence relates to the years 2019, 2020 and 2021 (as opposed to 2018, 2019 and 2020, as requested)?

»Furthermore, can you please confirm whether evidence corroborating that a tenderer has managed an Old People’s Home having a capacity in excess of two hundred thirty (230) residents since 1 January 2020 (*i.e.* during the very challenging COVID-19 pandemic period) will be sufficient?«

4. Id-dipartiment wieġeb hekk:

»The selection criteria in the tender document specifically requesting experience during the years 2018, 2019 and 2020 by the deadline for submission of offers shall remain unchanged. Therefore any quoted

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<sup>1</sup> Note 2 tgħid hekk: “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.”

experience which does not fall within those parameters shall be deemed as not compliant.«

5. Fost dawk li tefgħu offerti kien hemm *CareMalta* u *Golden Care*, u l-kumitat tal-għażla irrakkomanda illi l-kuntratt jingħata lil *Golden Care*.
6. B'ittra tas-7 ta' Mejju 2022 *CareMalta* ressqet oġġezzjoni kontra din id-deċiżjoni quddiem il-Bord ta' Revizjoni għar-raġuni, fost oħrajn, illi *Golden Care* twaqqfet fil-15 ta' Jannar 2019 u għalhekk ma setgħetx mexxiet dar tal-anzjani matul l-2018.
7. Il-Bord ta' Revizjoni ċaħad l-oġġezzjoni għal raġunijiet li fissirhom hekk:

»The board ... having noted the objection filed by *CareMalta Limited* (hereinafter referred to as the appellant) on 9<sup>th</sup> May 2022 ... whereby the appellant contends that:

- »a) Recommended bidder not compliant – The appellant company feels aggrieved by the decision of the evaluation committee, in particular since it failed to adhere to the mandatory requirement of the tender document, noticeably that the bidder shall provide: “Evidence that the tenderer has managed and maintained one (1) Old People's Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers, (Note 2)”.

»In accordance with article 38(5) of S.L. 601.03, the above was further substantiated through the issuance of a clarification, whereby the provision was confirmed in its entirety, and further clarified that:

»“Answer 5: The selection criteria in the tender document specifically requesting experience during the years 2018, 2019 and 2020 by the deadline for submission of offers shall remain unchanged. Therefore any quoted experience which does not fall within those parameters shall be deemed as not compliant,”

»The above indicated provisions are in accordance and fully respect S.L.601.03, wherein in article 232 it is held that:

»“Article 232. Evidence of the economic operators' technical abilities may be provided by one or more of the following means, in accordance with the nature, quantity or importance, and use of the works, supplies or services: (a) by means of the following lists: ... (i) a list of the principal deliveries effected or the main services provided over, at the most, the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting

authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account”.

»The appellant company claims that evaluating committee and /or the defendants failed to adhere to the mandatory requirements, and in the process not only breached article 61 of S.L. 601.03, but also acted in contravention of article 6 (“Criteria for Award”) of the tender document, by its failure to recommend for award *Golden Care Limited* and in the process illicitly sanctioned a breach. The wording of the requirement is clear and the recommended bidder failed the mandatory experience requirement, in view of the fact that:

»*Recommended Company incorporated in 2019*

»Notwithstanding that the company was incorporated in 2019, and thus is clearly and unequivocally in breach of the 2018 experience tender requirement, the evaluation committee and/or the defendants opted to recommend bidder *Golden Care Limited*;

»*Evidence provided is only relevant for the period 30.09.2019 - 29.09.2020*

»The recommended tenderer claimed that “*Golden care Limited* has managed and maintained an Old People’s Home with capacity in excess of the minimum required 100 residents over the last three years, as evidenced by the licences for 235 residents uploaded as part of this submission”.

»In addition to the aforesaid statement, it enclosed two licences issued by the Social Care Standards Authority (SCSA) covering the following period: i) 30.09.2019 - 29.09.2020; ii) 12.10.2020 - 30.20.2021 (partially admissible).

»In accordance with the clarification “quoted experience which does not fall within those parameters shall be deemed as not compliant” ... it is amply clear that the decision of the evaluation committee and/or the defendants is in breach of the tender specifications and *inter alia* article 61 of S.L. 601.03, by selecting a tenderer not in accordance with the relative tender requirements.

- »b) Clarity of the tender document – In no uncertain terms, the tender documents firstly and through the clarification thereafter clearly crafted a requirement which was clear, unambiguous and directly applicable (without distinction) to all tenderers when the tender document referred to and requested “Evidence that the tenderer has managed and maintained one (1) Old People’s Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers” The main characteristics of the requirement are highlighted above, and no party may deviate from any of such mandatory requirement. This should not be limited to an opinion or an interpretation but a mere factual fact-finding exercise by the evaluation committee and/or the contracting authority, based on the submissions made by the individual parties, to confirm or otherwise whether the bidder satisfied all

requirements. The contracting authority and/or the evaluation contracting (*sic*) had one role in all this, to determine if any or all of the tenderers satisfied all the requirements. The use of word 'and' when drafting the years requirements ("during the past three (3) years being 2018, 2019 and 2020") and the use of words "during the past three [3] years" makes it crystal clear that the requirement was for the tenderers to have at least three (3) years experience in the specific years indicated. Tenderer *Golden Care Limited* does not satisfy the requirement of having the necessary experience, and this is based both on publicly available documents, as well as through the documents submitted by itself. Thus and thereby, it is amply clear that the decision of the evaluation committee and/or the defendants is in breach of the tender specifications and *inter alia* article 61 of S.L. 601.03, by selecting a tenderer not in accordance with the relative tender requirements.

- »c) Doctrine of self-limitation – The doctrine of self-limitation 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. The appellant company feels aggrieved by the decision of the evaluation committee, in particular since it failed to adhere to the mandatory requirement of the tender document, and in the process breaching this fundamental principle.
- »d) Technical score afforded to *CareMalta Limited* – The appellant company contends that the technical score afforded to it, in particular where and when it was not afforded full marks, are unjust and unfounded. *CareMalta Limited* has submitted equivalent standards, whenever it was asked to provide a specific standard, and as such, its point reduction should be reviewed and reconsidered by the evaluation committee. The acceptance of equivalent standards and their acceptance in exchange of particular requirements are hallmarks developed through the European Court of Justice, which should and must be considered as such by the defendants.

»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 hearing held on 19<sup>th</sup> September 2022, in that:

- »a) The objection revolves around Section 5 being Selection and Awards Requirements: (A) Eligibility Criteria specification, (c) Technical and Professional Ability, Performance of Services of the Specified Type, (i) Evidence that the tenderer has managed and maintained one (1) Old People's Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers. This condition does not establish a minimum amount of time (experience) but simply experience during the past three years. Therefore and without prejudice to the evaluation process, any amount of experience within the three (3) years is satisfactory. For the sake of clarity the tender does not require three (3)

whole and consecutive years experience, but for experience within the said years.

- »b) As already pointed out the section in question is part of the eligibility criteria. Therefore, the section of the tender document is mandatory in other words either eligible or not. Thus, points are either given a pass (ePPS<sup>2</sup> score 100%) or a fail (ePPS score 0%). If an economic operator/bidder fails the eligibility criteria, the evaluation committee will not be able to move to the next section and continue to evaluate the tender on technicality. Therefore if one fails the eligibility criteria the evaluation process will stop and the economic operator's offer will be deemed not to be administratively compliant. Active Ageing and Community Care also make reference to article 232 S.L 601.03 which stipulates:

»“Article 232. Evidence of the economic operators' technical abilities may be provided by one or more of the following means, in accordance with the nature, quality or importance, and use of the works, supplies or services: (a) by means of the following lists: (i) list of the principal deliveries effected or the main services provided over, at the most, the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account.”

»Therefore in line with the principle *ubi lex voluit dixit*, the quoted article is clear as it states 'at the most' and not throughout the whole three (3) year. Thus the decision of the contracting authority to consider the experience of *Golden Care Limited* as eligible was correct and within the parameters of the law and thus carried on to evaluate the said entity's tender.

»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 hearing held on 19<sup>th</sup> September 2022, in that:

- »a) Main grievance – the appellant's interpretation of “Evidence that the tenderer has managed and maintained one (1) Old People's Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers, (Note 2)” was “for the tenderers to have at least three years experience in the specific years indicated”. This interpretation is certainly not synonymous with the writings of the tender dossier and of the clarification note / answer as issued by the Director General of the Department of Contracts.
- »b) Self limitation – appellant implies that the DoC “failed to adhere to the mandatory requirements of the tender document”. It is hereby being submitted that, if the evaluation committee had to act on the lines as suggested by the appellant, the principle of self limitation would have been broken.

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<sup>2</sup> *electronic Public Procurement System*

»c) Technical score afforded to CareMalta Limited – the criteria for award was the ‘BPQR’<sup>3</sup>. Therefore, by just meeting the minimum requirements you are not ascertained to score the full available points. It is in fact the core principle of BPQR to aid in identifying the bid with best value for money

»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 witnesses duly summoned, will consider appellant’s grievances as follows:

»a) Main grievance – non compliance of recommended bidder –

»The main bone of contention in this appeal revolves around the interpretation of paragraph 5(C)(i) of Section 1 of the tender dossier, more specifically “Evidence that the tenderer has managed and maintained one (1) Old People’s Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020 by the deadline for submission of offers, (Note 2)”.

»This board opines that such a clause / requirement, could possibly have more than one interpretation. Therefore, it is deemed essentially important to analyse how the evaluation committee proceeded in its evaluation when allotting marks for this specific criterion.

»It was duly ascertained ... that, even though the evaluation committee had already interpreted such criterion, it still sought the advice of the Director General Department of Contracts (“DoC”). DoC duly replied and provided its interpretation which essentially was in line with that of the evaluation committee. Argumentation brought forward by appellant that the request of the evaluation committee to the DoC is a ‘half truth / story’ or was in any way mis-leading, is deemed by this board to be a nonstarter. This due to fact that clarification note 5 question 5 confirms that only the experience gathered and obtained during years 2018 – 2020 is to be deemed relevant for evaluation *i.e.* experience gathered by tenderers as from inception (of their company) till 31<sup>st</sup> December 2017 and as from 1<sup>st</sup> January 2021 onwards, will not be deemed relevant. Otherwise, it just repeats excerpts of the criteria subject to this appeal with no additional interpretations.

»It is also essential to note that public procurement is there to encourage competition amongst the business community. Therefore, is such procedure adopted by the evaluation committee to be deemed to go against the principles of self-limitation and proportionality?

»The evaluation committee sought advice from the Department of Contracts after they realised the possibility that such criteria could be interpreted differently. Such action is deemed completely in line with the role they have been given. Therefore, the decision made (by the evaluation committee) and eventual marks allotted is also deemed to be in favour of the principle of

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<sup>3</sup> *Best price/quality ratio*

proportionality. It is deemed, by this board that the evaluation committee acted in a transparent and diligent manner throughout.

»This also when bearing in mind that a simple search in the *Cambridge Dictionary* for the word 'during' can have different meanings. 'During' can have the meaning and / or be used in the following instances: 'throughout the course of' and 'at a particular point in the course of'.

»Therefore, this board ascertains that it would be against the core principles of public procurement if it were to uphold such an appeal.

»This grievance of the appellant is therefore not being upheld.

»b) Technical score afforded to CareMalta Limited –

»The appellant did not provide any proof to substantiate this grievance. The 'Criteria for Award' as per paragraph 6.1 of the tender dossier (Section1) makes it clear that the tender will be awarded to the tenderer submitting the offer with the best price / quality ratio (BPQR). It is a well enshrined principle that meeting the minimum criteria will not automatically mean that a tenderer will be provided full marks. This due to the element of 'leeway' afforded to evaluation committee to determine whether another bidder would have provided a better technical and / or financial offer. This for the contracting authority to meet an objective whereby the best value for money is achieved. Due to no proof being presented, this grievance is not being considered any further.

»The board, having evaluated all the above and based on the above considerations, concludes and decides:

- »a) does not uphold appellant's letter of objection and contentions,
- »b) upholds the contracting authority's decisions in the recommendation for the award of the different lots as originally made,
- »c) directs that the deposit paid by appellant not be reimbursed.«

8. *CareMalta* appellat b'rikors tas-17 t'Ottubru 2022. Id-dipartiment wieġeb fil-14 ta' Novembru 2022; *Golden Care* wieġbet fil-21 ta' Novembru 2022; u l-ministeru wieġeb fit-2 ta' Diċembru 2022.

9. Fl-ewwel aggravju l-appellanti essenzjalment tgħid illi l-kondizzjoni tas-sejfa hija ċara u ma teħtieġ ebda interpretazzjoni. Tfisser l-aggravju hekk:

»Huwa ċar ħafna li l-elementi prinċipali tar-rekwiżit huma s-segweni:

- »i one (1) Old People's Home
- »ii capacity of at least 100 residents,



»iii during the past three (3) years

»iv 2018, 2019 and 2020

»Ma tantx kien hemm diżgwid dwar l-ewwel tnejn (i, ii), u minkejja li skont il-fehma tas-soċjetà appellanti ma tantx hemm x'wieħed jiddibatti, jidher li hemm diżgwid dwar it-tieni tnejn, partikolarment (iii) *during the past three (3) years*; u (iv) *2018, 2019 and 2020*.

»Fid-deċiżjoni tiegħu l-bord jidher li aċċetta dak li qal l-*evaluation committee*, senjatament, li kull esperjenza fis-snin indikati huwa biżżejjed u suffiċjenti sabiex jissodissfa r-rekwiżit.

»... ..

»Tassattivament, ir-rekwiżit talab esperjenza matul l-aħħar tliet snin u dana billi stqarr u uża l-kliem "*during the past three years*", u eventwalment bl-aktar mod ċar jispjega liema huma dawn is-snin, *cioè* fl-2018 u fis-sena 2019 u fis-sena 2020, u dana kif indikat bl-użu tal-kelma "*and*".

»Għalhekk huwa ċar u manifest li l-esperjenza kellha tkun f'kull wieħed mis-snin indikati, u mhux kif erronjament qiegħed jigi ssuġġerut mill-bord.

»Jekk kien hemm ħtieġa, dak indikat fir-rekwiżit gie rrinforzat permezz tal-kjarifika li jagħmilha ċara għat-tieni darba li huma t-tliet snin 2018, 2018 u 2020 li huma relevanti għaċ-ċirkostanzi *de quo* – kieku l-awtorità kontraenti riedet xi haġa differenti, kienet tintuża l-kelma "*or*" u mhux "*and*".

»... ..«

## 10. Id-dipartiment wieġeb hekk:

»Il-pern tal-appell kollu huwa proprju fuq l-interpretazzjoni tal-klawżola 5(B)(c) u *cioè* jekk din tirrikjedix li offerent ikollu esperjenza ta' ġestjoni ta' dar b'mitt resident f'kull waħda mis-snin 2018, 2019 u 2020, jew inkella tirrikjedix biss li offerent ikollu l-esperjenza rikjesta matul dawn l-aħħar tliet snin li għaddew (peress li s-sejħa għall-offerti ħarġet fl-2021).

»L-appellanti tinsisti fuq interpretazzjoni purament testwali u lingwistika tal-klawżola in kwistjoni. Dan biex tinsisti li l-klawżola kellha tiġi interpretata mill-kumitat tal-evalwazzjoni bħala li qiegħda tirrikjedi li offerent għandu jkollu esperjenza ta' ġestjoni ta' dar b'mitt resident f'kull waħda mis-snin 2018, 2019 u 2020 konsekuttivament.

»... ..

»Is-sentenza tikkunsidra ... li:

»"a simple search in the Cambridge Dictionary for the word 'during' can have different meanings. 'During' can have the meaning and / or be used in the following instances: 'throughout the course of' and 'at a particular point in the course of'"

»... .. "*throughout the course of*" u "*at a particular point in the course of*" kjarament ifissru li offerent għandu jkollu esperjenza ta' ġestjoni ta' dar b'mitt resident matul l-aħħar tliet snin li huma 2018, 2019 u 2020 u mhux matul kull waħda minn dawn is-snin.

»Anke jekk ma nħarsu xejn lejn dizzjunarji u esperti lingwistiċi, huwa manifestament ċar li l-frazi fis-sejha għall-offerti *“that the tenderer has managed and maintained one (1) Old People’s Home with a capacity of at least 100 residents, during the past three (3) years being 2018, 2019 and 2020”* tfisser xi haġa totalment differenti mill-frazi *“in each of the years 2018, 2019 and 2020”*. Huwa inekwivoku li dan il-Kriterju tal-Għażla qed jirrikjedi esperjenza ta’ ġestjoni ta’ residenza matul dawn l-aħħar tliet snin, dawn li huma s-sena 2018, is-sena 2019 u s-sena 2020.

»Terġa’ u tgħid, il-kjarifika nru 5 li jiċċita r-rikors tal-appell kompliet tagħmilha aktar ċara li:

»“Therefore any quoted experience which does not fall within those parameters shall be deemed as not compliant.”

»Jiġifieri jekk l-esperjenza ta’ xi offerent ma taqax fil-parametri ta’ dawn l-aħħar tliet snin, *cioè* tkun inkisbet f’snin qabel l-1 ta’ Jannar 2018 jew wara il-31 ta’ Diċembru 2020, mela din ma tgħoddx għall-fini tas-sejha għall-offerti.

»Mela allura anke mil-lat purament testwali u lingwistiku, dan l-aggravju tal-appellanti ma jistax jirnexxi.

»Però l-interpretazzjoni tal-kumitat tal-evalwazzjoni, tal-esponent direttur, kif ukoll tal-bord ta’ reviżjoni tistrieħ fuq ferm aktar minn sempliċiment it-test waħdu. Il-prinċipji ġenerali fil-qasam tal-akkwist pubbliku jiddettaw li l-kriterju tal-għażla 5(B)(c) jinqara bħala li jirrikjedi l-esperjenza rilevanti matul l-aħħar tliet u mhux matul kull waħda minn dawn it-tliet snin.

»Ir-regolament 39(3) tar-Regolamenti dwar l-Akkwist Pubbliku (L.S. 601.03) jiddetta li:

»“Id-disinn tal-akkwist pubbliku ma għandux isir bl-intenzjoni li jeskludi mill-kamp tiegħu ta’ applikazzjoni dawn ir-regolamenti jew li b’mod artifiċjali jnaqqas il-kompetizzjoni.”

»Jiġifieri l-kriterji tal-għażla għandhom jiġu interpretati strettament skond l-għan tagħhom u wieħed m’għandux irendihom aktar stretti milli hemm bżonn biex jintlaħaq dan l-għan.

»Ir-regolament 222(1) tal-istess Regolamenti jispjega li l-għan ta’ kwalunkwe rekwiżit ta’ esperjenza għandu jkun intiż biss biex jiżgura li l-offerent jista’ jwettaq il-kuntratt bi standard adegwat ta’ kwalità fl-ipoteżi li jirbħu:

»“Fir-rigward tal-abbiltà teknika u professjonali, l-awtoritajiet kontraenti jistgħu jimponu rekwiżiti li jiżguraw li l-operaturi ekonomiċi jkollhom ir-riżorsi umani u tekniċi u l-esperjenza meħtieġa sabiex iwettqu l-kuntratt bi standard adegwat ta’ kwalità.”

»Mela allura ma jagħmel l-ebda sens li biex tilhaq dan l-għan li l-awtorità kontraenti tirrikjedi li l-offerenti għandhom ikunu qiegħdin jiġġestixxu residenza tal-anzjani b’aktar minn mitt resident fis-sena 2018, fis-sena 2019 kif ukoll fis-sena 2020. Huwa biżżejjed biex jintlaħaq dan l-għan li offerent kellu esperjenza li jmxxi residenza tal-anzjani b’aktar minn mitt ruħ fiż-żmien riċenti.

»Imbagħad l-interpretazzjoni korretta tal-kriterju tal-għażla 5(B)(c) joħroġ l-aktar ċar mir-regolament 232(a)(ii) tal-istess Regolamenti.

Dan ir-regolament jistabbilixxi gwida ta' kif l-añjar l-awtoritajiet kontraenti għandhom jitolbu lill-offerenti juru li għandhom il-kapaċità teknika u professjonali neċessarja:

»“Evidenza tal-abbiltajiet tekniċi tal-operaturi ekonomiċi tista' tiġi pprovduta permezz ta' mezz wieħed jew aktar minn dawn li ġejjin, skont in-natura, il-kwantità jew l-importanza, u l-użu tax-xogħlijiet, provvisti jew servizzi:

»“... ..

»“(ii) lista tal-konsenji prinċipali effettwati jew is-servizzi ewlenin ipprovduti matul mhux aktar mill-añhar tliet snin, ... Fejn dan ikun meħtieġ sabiex jiġi żgurat livell adegwat ta' kompetizzjoni, l-awtoritajiet kontraenti jistgħu jindikaw li jistgħu jieħdu f'kunsiderazzjoni provi ta' provvisti jew servizz rilevanti mwassla jew imwettqa (saħansitra) aktar minn tliet snin qabel;”

»Għal dawn ir-raġunijiet l-esponent direttur huwa tal-fehma li l-bord għamel sew li kkunsidra li “*it would be against the core principles of public procurement if it were to uphold such an appeal*”. Għalhekk ukoll dan l-ewwel aggravju tal-appellanti għandu jiġi miċhud.«

#### 11. Golden Care wieġbet hekk:

»... .. l-ilment prinċipali tal-appellanti huwa msejjes kollu kemm hu fuq l-interpretazzjoni, *del resto* żbaljata, tagħha dwar dak li hi dehrilha kien qed jitlob id-Direttur Ġenerali (Kuntratti) fid-dokument tas-sejha relattivament għall-kriterju fuq imsemmi. Id-“diżgwid” li tagħmel riferenza għalih l-appellanti fir-rikors tal-appell tagħha ġie kreat biss għaliex l-istess appellanti ma tridx taċċetta li l-interpretazzjoni korretta li ngħatat konsistentement fil-proċess relattiv għal din is-sejha – kemm mill-*evaluation committee*, ukoll mid-Direttur Ġenerali (Kuntratti), u kif ukoll mill-bord revizorju – tas-*selection criteria* 5(B)(c)(i) mhijiex dik li trid li tkun l-appellanti.

»L-esponenti tissottometti ... illi din l-interpretazzjoni (żbaljata) tal-appellanti mhux talli ma hix sorretta mid-dokument tas-sejha iżda talli ġiet addirittura mxejna minn ħadd ħlief id-Direttur Ġenerali (Kuntratti) innifsu fir-risposta tiegħu – datata 28 ta' Ottubru 2021 – għall-mistoqsijiet/kjarifiċi speċifiċi li sarulu minn *Grant Thornton* dwar dan il-punt ... ..

»... ..

»Tassew, wara li saret din il-kjarifika – u kif *del resto* kien irid id-dokument tas-sejha, *ossia* li dak li kien meħtieġ kienet biss evidenza li l-offerent prospettiv mexxa u żamm dar tal-anzjani waħda ta' mhux inqas minn 100 resident tul 2018, 2019, 2020 – id-Direttur Ġenerali (Kuntratti) ġustament u korrettement qies lill-esponenti eliġibbli – billi l-esponenti “*fall[s] within those parameters*” għaliex “għandu esperjenza matul dawk it-tliet snin” – u saħansitra għadda sabiex jirrakkomanda lill-istess esponenti għall-*award* tas-sejha mertu ta' din ir-risposta, liema *award* reġa' ġie mbaġħad konfermat mill-bord revizorju.

»B'żieda mal-kjarifika, u fuq talba tal-kumitat ta' evalwazzjoni li saret għall-fini ta' ċertezza minkejja li l-istess kumitat unanimament qabel “li fit-*tender* ma kienx jitlob li jrid 3 snin esperjenza”, id-Dipartiment tal-

Kuntratti ta wkoll parir datat 29 ta' Novembru 2021 li permezz tiegħu reġa' kkjarifika:

»“Condition does not establish a minimum amount of time (experience) – but simply experience during the past three years.

»“Without prejudice to the evaluation process, ... any amount of experience within the three years is satisfactory. Tender does not ask for three years experience, but for experience within the mentioned three years.”

»Skont is-soċjetà appellanti, din l-interpretazzjoni (korretta) li ta d-Direttur Ġenerali (Kuntratti) hija “inspjegabbli”. Biżżejjed jingħad li, quddiem il-bord reviżorju, *CareMalta Limited* saħnsitra argumentat illi b'din l-interpretazzjoni tiegħu, id-Direttur Ġenerali (Kuntratti) ġie li aġixxa bi ksur tal-prinċipju bażilari tas-*self limitation*.

»... ..

»Timposta kif timposta l-argumenti tagħha l-appellanti, jibqa' illi dan l-appell mhu xejn għajr stedina lil din il-qorti sabiex tagħti interpretazzjoni diversa għal dak li jrid id-dokument tas-sejha relattiv, b'tali mod li telimina operatur legittimu – rakkomandat wara l-għarbiel ta' proċess validu u trasparenti – bil-konsegwenza li l-inabilità tal-appellanti li tagħmel offerta kompetittiva tkun ġiet sanata b'deċiżjoni tal-qorti. ... ..

»Bla ebda ħsara għal dak kollu ġà sottomess, anqas ma hi korretta s-soċjetà appellanti meta tilmenta illi “*l-evaluation committee* u sussegwentement il-Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi għamlu applikazzjoni skorretta tar-rekwiżit mandatorju 5(B)(c)(i)” biss għaliex qiesu lill-esponenti eliġibbli u li “*fall[s] within those parameters*” kif imfissra mid-Direttur Ġenerali (Kuntratti). Anzi, din is-sottomissjoni tagħha – ukoll dik mressqa quddiem il-bord reviżorju illi l-istess Direttur Ġenerali (Kuntratti) aġixxa bi ksur tal-prinċipju tas-*self limitation* – hija mill-aktar infondata. Dan għaliex hija proprju l-istedina li qiegħda tagħmel is-soċjetà appellanti lil din il-qorti u lill-bord teviżorju qabilha, biex tiġi żnaturata t-tifsira korretta tal-kriterju in kwistjoni, li jwassal għal “applikazzjoni skorretta tar-rekwiżit mandatorju 5(B)(c)(i)”. Hija sewwasew din l-istedina li qiegħda tagħmel l-appellanti lil din il-qorti li tiddipartixxi minn dak imfisser fid-dokument tas-sejha u mhux, kif tinsisti żbaljatament l-appellanti, id-deċiżjoni tal-*evaluation committee* u l-bord reviżorju li twassal għal deċiżjoni errata fil-liġi. Sew qal il-bord reviżorju meta kkonkluda illi “*it would be against the core principles of public procurement if it were to uphold such an appeal*”.

»Għalhekk, dan l-aggravju ma fih ebda siwi u għandu jiġi miċhud.«

## 12. Il-ministeru wieġeb hekk:

»Is-soċjetà appellanti tipprova tpenġi narrativa fejn kull deċiżjoni li ħadet l-awtorità lontraenti, li ħa d-dipartiment tal-luntratti, u li ħa l-PCRB, kienu kollha sforz ta' żball testwali fl-interpretazzjoni tat-tender u r-rekwiżiti tiegħu.

»... .. xejn ma jista' jkun aktar imbiegħed mir-realtà. Il-mod kif ġie ifformulat u aġġudikat it-tender odjern huwa riżultat ta' adempjenza

mal-prinċipji m'haddna fil-liġi dwar l-akkwist pubbliku, partikolarment il-prinċipju ta' *self-limitation*, proporzjonalità u l-ftuħ tal-kompetizzjoni.

»Il-PCRB fehem eżattament dan il-kuntest u stqarr li: "*it would be against the core principles of public procurement if it were to uphold such an appeal*". Din id-deċiżjoni jisthoqqilha tiġi ikkonfermata minn din il-Qorti tal-Appell għar-raġunijiet imsemmija hawn u għall-istess miġjuba quddiem il-PCRB.

»... ..

»Il-lanjanza tas-soċjetà appellanti hija li r-rekwiżit kien jirrikjedi li l-oblatatur in kwistjoni jkollu esperjenza fis-settur tal-ġestjoni ta' djar għall-anzjani mhux biss matul il-perjodu ta' tliet snin minn 2018 sa 2020, iżda li jkollu *oltre* esperjenza f'kull sena indikata, u *cioè*: (a) fis-sena 2018 (b) fis-sena 2019 u (c) fis-sena 2020. Is-soċjetà appellanti tkompli tgħid, u saħansitra tuża test fittizju tat-tender sabiex tagħmel dan il-punt, li l-appellati jkollhom raġun fl-interpretazzjoni tagħhom kieku intużat il-kelma "*or*" minflok il-kelma "*and*" fis-selection criterion in kwistjoni "*during the past three (3) years being 2018, 2019 and or 2020*".

»It-teżi tas-soċjetà appellanti li l-awtorità kontraenti kellha takkumpanja l-kelma "*during*" mal-kelma fl-alternattiv "*or*" ma ssibx konfort. Fi kwalunkwe każ, irid jingħad ukoll li l-użu tal-kelma "*or*" minflok "*and*" huwa sempliċement improponibbli minn perspettiva grammatika Ingliża.

»Is-soċjetà appellanti kien ikollha raġun fil-każ li minflok it-terminu "*during*" fit-tender intużaw il-kliem "*minimum three (3) years' experience*" jew "*at least for three (3) years*". Li kieku l-awtorità kontraenti xtaqet esperjenza da parti l-oblatatur f'kull waħda mis-snin indikati, kienet tutilizza l-kelma "*minimum*" jew "*at least for*" u mhux "*during*".

#### »Prinċipji Ġenerali tal-Akkwist Pubbliku

»Apparti mill-eżami testwali u kif qal tajjeb il-PCRB fid-deċiżjoni tiegħu, kieku kellu jilqa' l-oġġezzjoni tas-soċjetà appellanti, dan kien se jkun bi ksur tar-regoli u l-prinċipji tal-akkwist pubbliku.

»Qabel xejn, hawnhekk qegħdin nitkellmu dwar *selection criterion* fuq il-kapaċità professjonali u teknika ta' oblatatur. Regolament 217 tar-Regolamenti dwar L-Akkwist Pubbliku (Legislażjoni Sussidjara 601.03 tal-Liġijiet ta' Malta) (ir-"Regolamenti") jgħid hekk dwar *selection criteria*:

»"Bħala rekwiżiti għall-partecipazzjoni, l-awtoritajiet kontraenti jistgħu jimponu biss il-kriterji msemmijin f'dan ir-regolament. Huma għandhom jillimitaw kwalunkwe rekwiżit għal dawk li huma addati biex jiġi żgurat li kandidat jew offerent għandu l-kapaċitajiet legali u finanzjarji u l-kapaċitajiet tekniċi u professjonali li jwettaq il-kuntratt li għandu jingħata. Ir-rekwiżiti kollha għandhom ikunu relatati u proporzjonati mas-suġġett tal-kuntratt.

»Għalhekk ir-rekwiżit tal-esperjenza surreferit ġie mhejji b'dan il-mod. In ottemperanza mal-obbligi legali tagħha, l-awtorità kontraenti kellha l-ħtieġa li dawk l-oblaturi li jimxu għat-tieni tellieqa fuq l-*award criteria* ikollhom livell ta' esperjenza suffiċjenti biex jesegwixxu l-kuntratt pubbliku jekk dan eventwalment jingħata lilhom.

»It-tieni nett, u kif jirrikjedi r-regolament 217, il-livell ta' esperjenza meħtieġa mill-oblaturi kellha bilfors tkun: (a) relatata u (b) proporzjonali mas-suġġett tal-kuntratt.

»Tajjeb li wieħed jgħid li regolament 217 huwa traspożizzjoni *verbatim* tal-artikolu 58 tad-Direttiva 2014/24/UE tal-Parlament Ewropew u tal-Kunsill tas-26 ta' Frar 2014 dwar l-akkwist pubbliku u li tħassar id-Direttiva 2004/18/KE (id-“Direttiva”) li jesponi r-rekwiżit ta' relazzjoni u proporzjonalità.

»Ma hemm l-ebda kuntestazzjoni li r-rekwiżit tal-esperjenza huwa relatat mas-suġġett tal-kuntratt ladarba dan jirrikjedi esperjenza fil-ġestjoni u l-immaniġjar ta' dar residenzjali tal-anzjani. L-eżami li kellha tagħmel l-awtorità kontraenti, u li ... għandha tistharreġ din il-qorti, huwa jekk ir-rekwiżit tal-esperjenza kienx proporzjonali jew le.

»It-*tender* huwa għall-ġestjoni tad-dar *Zammit Clapp* għad-durata ta' erba' (4) snin mill-eżekuzzjoni tal-kuntratt pubbliku. Għalhekk, l-awtorità kontraenti ifformulat ir-rekwiżit tal-esperjenza b'mod proporzjonali li jirrikjedi esperjenza matul perjodu fiss ta' tliet snin, u *cioè* minn 2018 sa 2020.

»L-awtorità kontraenti tissottometti li t-tali rekwiżit ma kienx ikun proporzjonali kieku ġie ifformulat bil-mod li qiegħda tippretendi s-soċjetà appellanti, u *cioè* li jirrikjedi tliet snin esperjenza infila għal kuntratt ta' erba' (4) snin.

»L-esperjenza rekwiżita għandha tkun proporzjonali għall-mertu tal-kuntratt eventwali u ma tistax teċċedi dak li huwa neċessarju biex tissodisfa lill-awtorità kontraenti li l-oblatur għandu l-abbiltà li jwettaq il-kuntratt.<sup>4</sup>

»L-awtorità kontraenti tħoss li d-deċiżjoni tagħha kienet kemm *in linea* mal-obbligi tagħha *ai termini* r-regolament 217 kif ukoll raġjonevoli.

»*Inoltre*, l-awtorità kontraenti fittxet li tkun leali mhux biss mal-proċedura legali kif elenkata fir-Regolamenti (inkluż regolament 217) iżda ukoll li tkun leali lejn il-prinċipji mħaddna mill-akkwist pubbliku.

»Partikolarment, l-awtorità kontraenti ħarset lejn id-dmir li tiftaħ it-*tender* għall-konkorrenza fis-suq kemm jista' jkun possibbli, u mhux li tiffavurixxi b'xi mod jew ieħor lil dawg l-operaturi ekonomiċi li ilhom stabbiliti għal tul ta' żmien konsiderevoli.

»Il-konkorrenza wiesgħa u l-proporzjonalità imorru id f'id. Skont l-artikolu 18 tad-Direttiva, li huwa rifless *verbatim* f'regolament 39 tar-Regolamenti Maltin:

»“Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

»“The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.”

<sup>4</sup> »Gomez-Farinas Beatriz, *The Principle of Proportionality on Public Procurement (Ius Publicum)* (2021) p. 29«

»Skont studju li sar mill-Kummissjoni Ewropea, instabet tendenza fost awtoritajiet kontraenti li jfasslu *selection criteria* bl-intenzjoni li jiggarrantixxu l-eżekuzzjoni tal-kuntratt mill-oblatur rebbieħ. Din it-tendenza ġiet magħrufa bħala waħda mill-ikbar impedimenti lil *SMEs* mill-partecipazzjoni fl-akkwist pubbliku.<sup>5</sup>

»“Keeping selection criteria proportionate is of core importance for *SMEs*, since contracting authorities that fix too high capacity and ability levels exclude de facto a high proportion of *SMEs* from participating in tender procedures.»

»F’dan il-każ, l-awtorità kontraenti għarfet il-ħtieġa li tiftaħ il-kompetizzjoni għas-suq kemm jista’ jkun possibbli in ottemperanza mal-obbligi tagħha kemm taħt id-Direttiva Ewropea kif ukoll taħt ir-Regolamenti Maltin.

»Jekk jonqos xi kwistjoni ta’ interpretazzjoni, l-awtorità kontraenti umilment tissottometti li din l-interpretazzjoni għandha tkun skont ir-regolamenti dwar l-akkwist pubbliku.

»F’dan ir-rigward, Regolament 232 jistabilixxi mezzi ta’ kif oblatur jista’ jissodisfa rekwiżiti dwar *technical and professional ability*. Regolament 232(a)(ii) jgħid li wieħed minn dawn il-mezzi huwa lista ta’ servizzi ewlenin ipprovduti “matul mhux aktar mill-aħħar tliet snin”.

»In ottemperanza mal-kliem tal-liġi stess, l-awtorità kontraenti għażlet li tieħu mis-sena 2018 sas-sena 2020 bħala l-parametri tagħha.

»Din il-pożizzjoni ġiet rafferмата permezz ta’ *Clarification Note 5* maħruġa fit-28 t’Ottubru 2021 fejn b’risposta għall-mistoqsija dwar jekk hux permessibbli li tissottometti esperjenza ottjenuta fis-sena 2021, l-awtorità kontraenti wieġbet hekk:

»“The selection criteria in the tender document specifically requesting experience during the years 2018, 2019 and 2020 by the deadline for submission of offers shall remain unchanged. Therefore, any quoted experience which does not fall within those parameters shall be deemed as not compliant.”

»B’hekk, din il-kjarifika ikkonfermat li l-intendiment tal-frazi “*during the past three (3) years being 2018, 2019 and 2020*” kien li tistabilixxi l-parametri għar-rekwiżit tal-esperjenza fis-sens li esperjenza fis-sena 2017 u qabel jew fis-sena 2021 u wara ma tistax tiġi ċċitata.

»Apparti l-esperjenza sodisfaċenti li kellu f’idu r-*ecommended bidder*, dan għandu wkoll esperjenza u liċenzja biex jopera mitejn u ħamsa u tletin (235) sodda ġewwa dar residenzjali għall-anzjani. Min-naħa l-oħra, ir-rekwiżit tal-esperjenza kif dedott fi klawżola 5(B)(c)(i) tat-*tender* kien jirrikjedi biss esperjenza fil-ġestjoni ta’ mitt (100) sodda.

»... ..

»Mingħajr preġudizzju għas-suespost u fi kwalunkwe każ, ir-rekwiżit tal-esperjenza fi klawżola 5(B)(c)(i) huwa immarkat bħala *Note 2*. Dan ifisser li anke li kieku stess is-soċjetà appellanti kellha raġun u li l-oblatur kien rikjest ikollu tliet snin esperjenza mandatorji, l-awtorità kontraenti setgħet tagħti l-opportunità lir-*recommended bidder* biex

<sup>5</sup> » *Commission Staff Working Document, ‘European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts’ (Commission of the European Communities) (2008) p. 14*

jirrettifika l-offerta tiegħu u jinnomina *sub-contractor* ġdid li għandu tliet snin ta' esperjenza.

»*SIAC Construction*

»L-awtorità kontraenti tixtieq tagħlaq permezz ta' riferenza għal sentenza mogħtija mill-Qrati tal-Ġustizzja tal-Unjoni Ewropea fl-ismijiet *SIAC Construction Ltd and County Council of the County of Mayo*. Din is-sentenza ġiet mogħtija fit-18 t'Ottubru 2001 u l-portata tagħha għadu rilevanti sal-lum il-ġurnata.

»F'dan il-każ, il-kwistjoni quddiem il-Qrati tal-Ġustizzja tal-Unjoni Ewropea kienet tikkonċerna *award criteria* però l-prinċipji stabbiliti huma ukoll applikabbli għal *selection criteria*:

»“42. More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

»“43. This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure (see, along these lines, *Commission v Belgium*, cited above, paragraphs 88 and 89).

»“44. Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition.<sup>6</sup>

»Kif diġà rilevat, l-*evaluation committee* kienet unanimu fil-kunsens tagħha dwar l-interpretazzjoni waħdiena li toħroġ mir-reqwizit tal-esperjenza:

»“Waqf l-*evaluation* rajna li kien hemm lok ta' interpretazzjoni f'dik il-fażi. Għalkemm aħna qbilna bejnietna li fit-*tender* ma kienx jitlob li jrid tliet snin esperjenza però tliet snin esperjenza matul dawk it-tliet snin imsemmija u għalhekk tlabna l-parir tad-*DoC*.<sup>7</sup>

»Għalhekk l-*evaluation committee* kienet oġġettiva u uniformi fl-applikazzjoni tagħha tas-*selection criteria* għal kull oblatur li tefa' offerta għal din is-sejha.

»*Inoltre*, sija *Clarification Note 5* surreferita sija l-gwida mogħtija mid-Dipartiment tal-Kuntratti mogħtija permezz ta' korrispondenza elettronika lill-awtorità kontraenti fid-29 ta' Novembru 2021 ikkonfermaw li l-interpretazzjoni tal-*evaluation committee* kienet korretta. B'hekk, l-*evaluation committee* serraħ rasu li kien qiegħed jimxi kompletament mal-liġi bl-applikazzjoni oġġettiva u uniformi tas-*selection criteria*, inkluż b'mod partikolari r-reqwizit tal-esperjenza.

»*In vista* tas-suespost, l-ewwel aggravju tas-soċjetà appellanti għandu jiġi miċhud.«

<sup>6</sup> »C-19/00 *SIAC Construction Ltd and County Council of the County of Mayo* (18 October 2001) para. 42 – para. 44«

<sup>7</sup> »Ara t-traskrizzjoni tax-xhieda tas-Sinjura Nadia Cauchi *qua chairperson* tal-*evaluation committee*.«



13. Il-kwistjoni hija jekk il-frazi “*during the past three (3) years being 2018, 2019 and 2020*” fil-kondizzjonijiet tas-sejha tfissirx li l-oblatur irid ikun mexxa dar tal-anzjani għaż-żmien kollu bejn l-1 ta’ Jannar 2018 sal-31 ta’ Diċembru 2020 jew tfissirx li jkun biżżejjed li jkun mexxa dar tal-anzjani għal xi żmien, hu kemm hu twil jew qasir, f’xi waħda jew aktar minn dawk it-tliet snin.
14. Fil-fehma ta’ din il-qorti, jekk hemm ambigwià fit-tifsira tal-kelma “*during*” – jekk tfissirx “*throughout the course of*” jew “*at a particular point in the course of*” – din l-ambigwià titneħha bl-użu tal-kelma “*and*” flok “*or*” u għalhekk it-tifsira hija ċara: l-esperjenza meħtieġa hija ta’ matul it-tliet snin 2018, 2019 u 2020, it-tlieta li huma, u mhux f’xi żmien waqt xi waħda jew oħra minn dawk it-tliet snin. Bl-interpretazzjoni li jridu l-ministeru, id-dipartiment u *Golden Care*, ikollok tasal għall-konklużjoni li esperjenza ta’ ftit ġimgħat, jew anke ta’ ftit jiem, f’xi waħda minn dawk it-tliet snin tkun biżżejjed, għax, jekk fil-kondizzjoni ma hemm ebda indikazzjoni tal-minimu ta’ żmien meħtieġ, tkun deċiżjoni arbitrarja u imprevedibbli li tgħid *tot* jiem biżżejjed iżda *tot* nieqes wieħed le. Inevitabilment tifold biss il-konklużjoni li ż-żmien kollu hu meħtieġ.
15. L-argument ewlieni mressaq fit-tweġibiet kontra din l-interpretazzjoni huwa msejjes fuq żewġ prinċipji: il-proporzjonalità u l-ftuħ għall-konkorr- enza.
16. Dwar proporzjonalità, fit-tweġibiet jingħad illi li “ma kienx ikun proporz- jionali kieku ġie ifformulat bil-mod li ... jirrikjedi tliet snin esperjenza infila għal kuntratt ta’ erba’ (4) snin”.

17. Iżda r-reg. 232 tal-L.S. 601.03 espressament iġhid illi “evidenza tal-abbiltajiet tekniċi tal-operaturi ekonomiċi tista’ tiġi pprovduta permezz ta’ ... lista tax-xogħlijiet imwettqa matul massimu ta’ ħames snin”. Naturalment, il-livell ta’ esperjenza meħtieġa jkun marbut man-natura tal-kuntratt. F’każ bħal dak tallum, fejn il-kuntratt huwa dwar servizz li għandu jingħata lil persuni vulnerabbli, huwa raġonevoli li tistenna esperjenza x’aktarx twila biex ikun hemm żmien biżżejjed biex tkun analizzata l-abilità teknika tal-oblatur fuq medda ta’ snin ta’ ħidma normali. Iġhid hażin id-dipartiment, fit-tweġiba tiegħu għal ieħor mill-aggravji tal-appell, illi “huwa pjuttost raġunament monk li wieħed jgħid li għax l-oġġett ta’ sejha għall-offerti huwa servizzi mediċinali, bħallikieku jekk il-gvern ikun qed jakkwista xi riżma karti jew *paper clips* jista’ jkun aktar laxk fl-applikazzjoni tad-dritt tal-akkwist pubbliku”. Mhux għalhejn illi r-reg. 232 jafda fl-għaqqal tal-awtorità kontraenti biex tistabilixi ż-żmien ta’ esperjenza meħtieġ, soġġett biss għall-massimu ta’ ħames snin; li kieku l-kuntratti kienu kollha l-istess, li kieku l-konsegwenzi li tixtri *paper clips* difettużi kienu serji daqs li tħalli l-kura tal-anzjani f’idejn inkompetenti, kieku r-regolament kien jesigi l-istess żmien f’kull każ u mhux iħalli f’idejn l-awtorità kontraenti biex tagħżel bejn il-livell ta’ esperjenza meħtieġa f’każ u f’ieħor.

18. L-argument imsejjes fuq nuqqas ta’ proporzjonalità huwa għalhekk hażin.

19. L-argument l-ieħor hu msejjes fuq xkiel għall-konkorrenza.

20. Huwa minnu illi, jekk tesigi żmien twil ta’ esperjenza, tkun qiegħed tagħlaq il-bieb għal dawk l-operaturi ekonomiċi li għadhom ġodda fis-suq. Iżda trid tqis żewġ fatturi oħra: i. kif rajna fil-paragrafi ta’ qabel dan, mhux irraġon-

evoli jew sproporzjonat li biex jaghti servizz f'qasam delikat trid lil xi ħadd li juri kredenzjali ta' kompetenza f'dak il-qasam li tkun sostnuta fiż-żmien; u ii. dan ma huwiex qasam li l-esperjenza fih tista' tiksibha biss fis-settur pubbliku. Li kieku kien hekk tista' forsi tgħid li biex tikseb esperjenza trid titħalla taħdem fis-settur pubbliku, iżda biex titħalla taħdem fis-settur pubbliku trid tkun għa' ksibt esperjenza fis-settur pubbliku: dik li jsejnhulha *catch-22 situation*. Dan iżda ma huwiex il-każ, u fil-fatt jidher li *Golden Care* għa' bdiet tikseb esperjenza f'dan il-qasam, u tkun tista' tikkonkorri fis-sejha li tergħa' ssir meta jasal biex jagħlaq iż-żmien tal-kuntratt li dwaru saret din il-kawża tallum.

21. Il-kondizzjoni tas-sejha, mela, ma tistax titqies anti-kompetitiva talli jista' jikkonkorri biss min juri kredenzjali ta' kompetenza fil-qasam tal-kuntratt partikolari, aktar u aktar meta tqis illi l-L.S. 601.03 stess jippermetti li s-sejha tkun ristretta b'dan il-mod.
22. Argument sekondarju mressaq mill-ministeru huwa dak tar-rettifika, meta fit-tweġiba jgħid illi "r-rekwiżit tal-esperjenza fi klawżola 5(B)(c)(i) huwa immarkat b'hal *Note 2*. Dan ifisser li kieku stess ... l-oblatur kien rikjest ikollu tliet snin esperjenza mandatorji, l-awtorità kontraenti setgħet tagħti l-opportunità lir-*recommended bidder* biex jirrettifika l-offerta tiegħu u jin-nomina *sub-contractor* għdid li għandu tliet snin ta' esperjenza".
23. Bla ma nidhlu fil-kwistjoni jekk *note 2*<sup>8</sup> tippermettix li jiddaħhal sub-appaltatur jew tippermettix biss lill-oblatur "*to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing*

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<sup>8</sup> Ara fn 1, *supra*.

*documents*”, il-fatt jibqa’ illi *Golden Care* ma indikat ebda sub-appaltatur li għandu l-esperjenza meħtieġa.

24. Dan l-argument ukoll għalhekk huwa f’hażin.

25. Il-qorti għalhekk tilqa’ dan l-ewwel aggravju tal-appellanti u, billi dan hu biżżejjed biex jintlaqa’ l-appell, ma jibqax meħtieġ li nqisu l-aggravji l-oħra.

26. Il-qorti għalhekk tilqa’ l-appell, tħassar ir-rakkomandazzjoni li l-kuntratt jingħata lil *Golden Care*, tħassar ukoll id-deċiżjoni tal-Bord ta’ Reviżjoni, u tilqa’ l-oġġezzjoni ta’ *CareMalta* kontra l-għażla ta’ *Golden Care*. Tordna għalhekk illi l-evalwazzjoni ssir mill-ġdid b’dan illi ma jitqisux oblaturi li ma jħarsux il-kondizzjoni tas-sejha kif interpretata f’din is-sentenza. Tordna wkoll illi d-depożitu mħallas minn *CareMalta* biex setgħet tressaq l-oġġezzjoni tagħha quddiem il-Bord ta’ Reviżjoni jintradd lilha.

27. L-ispejjeż ta’ dan l-appell jitħallsu mid-Dipartiment tal-Kuntratti u mill-Ministeru għall-Anzjanità Attiva flimkien.

Mark Chetcuti  
President

Giannino Caruana Demajo  
Imħallef

Anthony Ellul  
Imħallef

Deputat Reġistratur  
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