

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1003 – CT 2150/2016 – Tender for the Provision of Chauffeur Driven Transportation Service in Malta to the Malta Tourism Authority for a Period of 36 Months**

The Publication Date of the Call for Tenders was 7 October 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 485,000.

On 27 October 2016, Zarb Coaches Limited filed a Pre-Contractual Objection against the Malta Tourism Authority and the Director of Contracts.

On 10 November 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Zarb Coaches Limited**

Mr Cedric Sciberras	Representative
Dr Massimo Vella	Legal Representative

#### **Contracting Authority – Malta Tourism Authority**

Mr Patrick Attard	Representative
Mr Arthur Grima	Representative
Dr Roseanne Sant Cortis	Legal Representative
Dr Frank Testa	Legal Representative

#### **Department of Contracts**

Dr Christopher Mizzi	Legal Representative
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Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Massimo Vella, the Legal Representative for Zarb Coaches Ltd opened his submissions by stating that this was a Tender issued by the Malta Tourism Authority which includes a number and types of vehicles which were chauffeur driven coaches, mini buses, executive cars, tail lift vans and taxis.

Dr Vella was concerned by the fact that whoever was bidding for this Tender can provide vehicles which were either owned by him or else vehicles which are leased to him and according to the Regulations, the Y plate vehicles and the Taxis cannot be leased.

Dr Vella continued by saying that when he was notified with the date of the Public Hearing, he wanted to summon a person from Transport Malta who would have confirmed under oath what he was saying but she informed the Public Contracts Review Board secretariat that she was not available today.

Dr Anthony Cassar, Chairman Public Contracts Review Board said that the Board has asked her to send a representative instead of her but no one from Transport Malta turned up for the Public Hearing.

Dr Massimo Vella continued by saying that he would find no objection if the Board would manage to interpret the Subsidiary Legislation 368.02 regarding the Registration and Licensing of Motor Vehicles. He continued by saying that even the Contracting Authority had their doubts whether the Tender was issued correctly or not as showed in point 11 of the Reasoned Letter of Reply dated 8 November 2016.

Dr Vella continued by saying that the Tender was asking for Chauffeur Driven coaches, mini buses, tail lift vans, which are all Y plates, executive cars which can either be Y plates or QZ or taxis which have the Taxi number plates. From all these, the Y plate vehicles and the Taxis cannot be hired. In order for a vehicle to be hired for long term according to the Subsidiary Regulation 368.02 must be QZ.

In the Reasoned Letter of Reply, argued Dr Vella the Contracting Authority had already shown that this is a valid argument but they are saying that from a procurement point of view, at the end of the day, the Bidder has to be conforming to the Regulations. This would not solve Zarb Coaches Limited's problem since they could bid with their own vehicles, which are entirely theirs while another Bidder who bids with leased vehicles can win the Tender but could not implement it because he has Y plated vehicles which could not be leased according to Law.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that therefore the issue was whether one can operate this Tender with leased vehicles.

Dr Massimo Vella, for Zarb Coaches Limited whilst agreeing with Dr Cassar's remark insisted that currently the Tender was a distorted one because the Contracting Authority was approving vehicles which cannot be proposed as they go against the Regulations.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether is it possible to include a clause in the Tender Document which says that if the leased vehicles are not authorised to operate they cannot be submitted for consideration.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts, said that from the Contracting Authority's point of view, this goes beyond the remit of both the Procurement and the Malta Tourism Authority to check what has been authorised from Transport Malta. The Contracting Authority has to leave the doors open for whoever wanted to bid for this Tender. Then it was up to the Bidder to come up with a system which conforms to Transport Malta.

Dr Mizzi suggested that the Public Contracts Review Board would impose an extra parameter in the Tender which would ask prospective bidders whether their vehicles were compliant with the Subsidiary Regulations 368.02.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, stated that the Contracting Authority had the right to open their options for more bidders possible as per directives issued by the European Union.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that there is a difference between something which goes against the Law and something which does not find comfort from the Authorities as one of their devices. What was being requested was not illegal.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board agreed with Dr Mizzi's argument but suggested that an extra clause would be added which would be in the parameters of the Legal Application of the Vehicle.

Dr Massimo Vella, the Legal Representative for Zarb Coaches Limited questioned what would happen currently if someone with leased mini vans would submit an offer since at the moment, the Tender allows them to do so.

Dr Christopher Mizzi for the Department of Contracts replied that with the Public Contracts' Review Board's permission with the leased contracts, the prospective successful Bidder had to submit also the arrangements and approvals which he has from the competent Authorities. This clearance for a QZ vehicle would show that the vehicle in question can be available for leasing.

Dr Massimo Vella for Zarb Coaches continued by saying that if Transport Malta had bothered to send a representative for this Public Hearing, there would be a confirmation of what was being discussed during the Public Hearing.

Dr Anthony Cassar, the Public Contracts Review Board chairman said that this Board would not like to change any clauses from the Tender but that it was suggested that a clause would be added wherein the onus was on the Tenderer to be compliant with the Subsidiary Regulations 368.02 regarding the utilisation of the vehicles.

Dr Frank Testa, the Legal Representative for the Malta Tourism Authority concluded by saying that a clause in this sense would save the Tender, the clause in the same regarding the leasing of the vehicles and as his colleague Dr Massimo Vella was saying, a Legal Filter was being created to prevent any irregularities.

At this stage, the Public Hearing was closed.

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**This Board,**

**Having noted this Pre-Contractual Objection filed by Zarb Coaches Limited (herein after referred to as the Appellant) on 27 October 2016, refers to the Contentions made by the latter with regards the Tender of Reference CT 2150/2016 listed as Case No 1003 in the records of the Public Contracts Review Board, issued by the Malta Tourism Authority in collaboration with the Director of Contracts (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Massimo Vella**

**Appearing for the Contracting Authority: Dr Christopher Mizzi (DoC)**

**Dr Roseanne Sant Cortis & Dr**

**Frank Testa (MTA)**

**Whereby, the Appellant contends that:**

- a) With regards to Clause 4.2.1 (c) of the Tender document, wherein prospective bidders are allowed to have leased vehicles used for this Tender, the Appellant is contending that the Tender is requesting the**

utilisation of “*Chauffeur Driven Coaches*”, “*Mini Buses*”, “*Tail Lift Vans*” and “*Taxis*”. All these vehicles require and carry a Y Registration.

In this regard, the Appellant maintains that all Y vehicles and taxis cannot be leased and this limitation is in accordance with the local transport regulations. The Appellant’s concern is that there might arise the instance whereby a Recommended Bidder operating with such leased vehicles could not execute the Tender within the parameters of the Local Regulations and in this regard, the Appellant insists that Clause 4.2.1 (c) should be amplified to avoid any such situation.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 9 November 2016 and its verbal submissions during the Public Hearing held on 10 November 2016, in that:

- a) The Contracting Authority maintains that the objective behind Clause 4.2.1 (c) was to allow and encourage more prospective Bidders to participate, in order to create a healthier and wider competition.

**In this regard, the Contracting Authority contends that it will be the Recommended Bidder's responsibility to operate within the Local Regulations regarding "*Leased Vehicles*".**

**This Board, after having treated the merits of this case, arrived at the following conclusions:**

- 1. After having examined the Tender Document with particular reference to Clause 4.2.1 (c), justifiably opines that, in the first place, the Contracting Authority acted correctly in granting the possibility of the leasing of the vehicles.**

**In this regard, this Board would like to refer to the General Principle within the European Union, in that a Tender should be construed in such a way so as not to hamper a particular Bidder from participating. Clause 4.2.1 (c) includes such a faculty.**

**However, at the same instance, the Tender Document should not dictate or encourage conditions which are not in conformity within Local Regulations. In this particular case, from submissions made, it became evidently clear that all vehicles carrying a Y plate and taxis cannot be hired.**

**In this regard, this Board would credibly endeavour to avoid any misunderstanding or unnecessary litigation on clause 4.2.1 (c). A particular instance wherein, a particular Recommended Bidder would commence the execution of the Tendered works with leased vehicles and later on would not be in a position to finish the works, due to non conformity, is a possible occurrence.**

**To this effect, this Board, to avoid and eliminate any possible future litigations to the detriment of the Tendered works, is hereby recommending that Clause 4.2.1 (c) should be amplified to include a condition whereby those bidders who are using leased vehicles must produce certification from the relevant Authority that such vehicles can be utilised by the Bidder within the parameters of the Local Regulation.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*15 November 2016*