

PUBLIC CONTRACTS REVIEW BOARD

Case 1055 – TM 017/2017 – Concession for the Licensing and Operation of Malta Heritage Buses

The Publication Date of the Call for Tenders was 5 April 2017 whilst the Closing Date for Call of Tenders was 19 May 2017.

On 17 May 2017, Supreme Travel filed a Pre-Contractual Objection against Transport Malta.

On 20 June 2017, 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 Pre-Contractual Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Supreme Travel

Mr Nazzareno Abela	Representative
Dr Reuben Farrugia	Legal Representative

Contracting Authority – Transport Malta

Ms Sylvana Bartolo	Representative
Mr Ray Stafrace	Representative
Dr Chris Cilia	Legal Representative

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

Dr Reuben Farrugia, the Legal Representative for Supreme Travel, opened by explaining that this was a concession Tender on an exclusive rate for a period of 20 years so that one can operate those which today are called as the Malta Heritage Buses. This has to be regulated by the Public Procurement Regulations issued on 28 October 2016 under the Legal Notice 174.10 and not by the previous Legislation as Transport Malta was alleging.

He was saying this because there was a crucial difference between the two legislations in respect also of the directives issued by the European Union which say that the right of exclusivity goes against the spirit of competition.

Dr Farrugia then referred to Paragraph 3 of the Reasoned Letter of Reply which said,

“Illi fl-ewwel lok jiġi rilevat u sottolineat illi din is-sejha għall-offerti nħarġet skond id-dispożizzjonijiet tal-Avviż Legali 174.04 (Regolament għall-Akkwist Pubbliku) u jista' jipparteċipa fiha kull operatur illi huwa eligibbli mingħajr ebda limitazzjonijiet diment illi l-kriterji tas-sejha jiġu sodisfatti, kif inhija l-proċedura normali.”

At this stage, continued the Appellants, there was enough evidence for the Public Contracts Review Board to stop this Tender since the Contracting Authority should go with the new Public Procurement Regulations.

Dr Reuben Farrugia then continued by referring to Article 60 of the Legal Notice 353/2016 issued on 28 October 2016 which said,

“Contracting Authorities and Contracting Entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate matter”

The Appellant's Legal Representative also quoted Article 73 from the same Legal Notice which said,

“For concessions lasting more than five years, the maximum duration of the concession shall not exceed that time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives”.

This was being stated because the EU rules stated that in order for a derogation to be given for exclusive rights, this must be for a limited period and to recover the expenses needed to make the service. The Malta Heritage Buses, continued Dr Reuben Farrugia, were those buses who when the Public Transport Reform occurred, had the licence to operate on a scheduled service removed and either given € 110,000 and give the bus to the Authorities or else being paid € 90,000, keep the bus but could only use it for strictly private purposes.

Dr Reuben Farrugia was wondering where the capital investment in this situation was. Besides he was also asking how this Tender justifies Article 73 since the Law obliges one to consider capital expenditure and cost. The Appellants were sure that no study was made

regarding the matter and hence the Tender was invalid since these Obligations do not fall under the Public Procurement Regulations but under the Concession Contracts Regulations.

Dr Farrugia then quoted Article 79 of the Letter which *inter alia* said,

“Concessions shall be awarded on the basis of objective criteria which comply with the principles set out in Regulation 60 and which ensure that Tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the Contracting Authority or the Contracting entity.

The Award Criteria shall be linked to the subject matter of the concession and shall not confer an unrestricted freedom of choice on the Contracting Authority or the Contracting Entity. They may include inter alia, environmental, social or innovation-related criteria”

According to the Appellants, there was no advantage for Transport Malta to accommodate the bus owners. The request for concession, as admitted by the Contracting Authority in their Reasoned Letter of Reply was issued after a request from the Tourism Sector.

Dr Reuben Farrugia then entered in the merits of how this Tender was published. The Contracting Authority was promoting a pooling of vehicles to be operated under one group. This was violating the European Law of Competition since the latter said that pooling had to be made only if the service was an essential one, which was not the case for this Tender since Transport Malta specified that the buses were going to be used for Tourism and Conference Services. When one talked about essential services, one meant National Services.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether Tourism was an essential service.

Dr Reuben Farrugia, the Legal Representative for Supreme Travel replied negatively and added that an essential service must be a scheduled one which did not depend from the industry. In order to pool, under the EU Regulations, the service must be a national one and this also had to be justified.

Dr Farrugia continued by saying that what Transport Malta was suggesting was that if the prospective Bidder had a problem with the € 50,000 onetime fee which had to be paid for this Tender, the Bidder can pool with others and this does not make sense since it does not promote an equal treatment between the economic operators and goes against article 60 of the Concession Contracts Regulations.

The Appellants were asking on what criteria these buses, for which were given € 90,000 not to be used again in the roads were now to enter in the Touristic and Conference Sectors. With regards the Tourism sector, these buses were going to compete with different operators which work differently since the latter spend millions to conform with the current Regulations. One cannot base a twenty year concession on the basis of these criteria.

Dr Farrugia warned that if the Tender pass as it is, it would be violating in a lamping way the EU Regulations. Besides, he was also wondering how one can judge a 20 year concession on the criteria offered. This was being used by Transport Malta to justify the alleged competition.

The Appellant's Legal Representative denied the allegation issued by Transport Malta in the Reasoned Letter of Reply that his clients wanted to exclude competitors. Not only this was not the case, but Supreme Travel was encouraging a level playing field in a just and fair competitive way.

Dr Chris Cilia, the Legal Representative for Transport Malta admitted that they have mistakenly mentioned the Subsidiary Legislation 174.04 in the Reasoned Letter of Reply instead of the current Subsidiary Legislation, the 174.10.

Transport Malta had a strong request from the Tourism Sector for the return of the old Malta Buses. Luckily this country had a phenomenon of repeat tourists who have been coming to Malta for these last 30-40 years and who requested these buses. Naturally the Tourism Sector had to address the Transport Regulator in Malta, hence MTA proactively answering for this demand.

Dr Cilia continued by saying that this was a Concession Tender and that the Contracting Authority could have defined the Malta Heritage Buses and gave those who had buses which qualified under this category the license to operate but instead chose to issue a Concession Tender.

Dr Chris Cilia then continued by saying that Supreme Travel was wrong in attacking his clients because there are no conditions and no investments. He understood that this attack was made since the Appellants were a company who operated on coaches who at the same time was interested in participating to have a licence. This was a fundamental point. Transport Malta has made a concession in order to regulate.

The licensed buses will have a different licence and a different number plate than the similar ones which will not be licensed. When an enforcement officer catches an old Malta Bus without a number plate qualifying them as a heritage bus, this means that these are not supposed to operate.

These buses are to have a specific license to work with tourists and in conferences and these will be obliged to install a data track system which will enable the Contracting Authority to keep check about how many vehicles there are on the roads at that particular time.

With Regards Article 79, Dr Chris Cilia continued by saying that if one had to see what advantages there are in issuing the Tenders, the Contracting Authority would not have issued any. As a regulator, the latter is obliged to answer the needs of society in order for the service to be available.

With regards to environmental concerns, the Tender insists that the vehicles must be restored and its engines had either to be LPG or else must have mechanisms installed which could decrease drastically the emissions. The vehicles must also be installed with an audio recording system which explains the History of Malta. With regards the pooling issue, Transport Malta does not oblige pooling, but it encouraged homogeneity. The Contracting Authority was not discriminating, concluded Dr Chris Cilia.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether there were going to be standards of upgrading.

Dr Reuben Farrugia, the Legal Representative for Supreme Travel referred to a statement in Page 19 of the Tender Document which said that “*Each Malta Heritage Bus must be well restored.*”

Dr Chris Cilia, the Legal Representative for Transport Malta added that if one had to see pages 18 and 19 of the Tender Document there were 22 conditions which had to be respected. His clients felt that there were to be 20 vehicles at any point in time on the roads.

Dr Reuben Farrugia, the Legal Representative for the Appellants countered that from what Dr Cilia was submitting there is no legal justification to issue a Concession Tender. There was no legal submission which can justify an exclusive 20 year concession licensing. The phenomenon of repeat tourism does not justify the derogation for competition neither.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked what the basis for a 20 year concession was for which Dr Chris Cilia, the Legal Representative for Transport Malta added that first and foremost the vehicles must be updated and pass the mandatory VRT tests.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that when the new Regulations were being set up, these were implemented from the EU Regulations.

Dr Chris Cilia, the Legal Representative for Transport Malta added that they were being limited in their use.

Dr Reuben Farrugia, the Legal Representative for Supreme Travel argued that the Contracting Authority should be fair and state that these vehicles were to be used exclusively for the Tourism Sector. He also added that the concession had to be justified. The five-year rule entered because the Contracting Authority had to justify why a concession was given and besides the European Commission had to be notified within a month that a concession was given.

At this stage, the Public Hearing was adjourned to Tuesday 4 July at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Pre-Contractual Objection filed by Supreme Travel (herein after referred to as the Appellant) on 17 May 2017, refers to the Contentions made by the latter with regards to the issuing of Tender of

Reference TM 017/2017 listed as Case No 1055 in the records of the Public Contracts Review Board, issued by Transport Malta (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Reuben Farrugia

Appearing for the Contracting Authority: Dr Chris Cilia

Whereby, the Appellant contends that:

- a) Certain Clauses in the Concession Agreement are in violation of the Subsidiary Legislation 174.10, the Laws of Malta and those of the European Union. In this regard, Supreme Travel refers to Clause 79 of the Concession Contracts Regulations;**

- b) The Appellant also maintains that the one-time fee of € 50,000 imposed by Transport Malta for all prospective Bidders does in fact create an unnecessary burden on Bidders owning small quantity of Buses, thus limiting the scope of competition, creating an uneven playing field and at the same instance eliminate the possibility of participation of small operators;**

c) Supreme Travel also refers to the lack of consideration taken by the Contracting Authority to the fact that the majority of the operators of these buses have already been compensated through a previous Government scheme which covered their capital investment, whilst others who operate a different mode of Transport, in conformation with the Local Transport Regulations, had to invest substantially in their operations. In this regard, the Appellant feels that the Concession Agreement does not take this important factor into consideration.

This Board also noted the Contracting Authority's "*Letter of Reply*" and its verbal submissions during the Public Hearing held on 20 June 2017, in that:

- a) Transport Malta, categorically denies that it has infringed any of the clauses contained in the Subsidiary Legislation 174.10. In this regard, the Contracting Authority had opted for a much wider parameter for small operators to participate in this Concession;**

- b) With regards to Supreme Travel's alleged Second Grievance, Transport Malta offered alternative possibilities for small operators**

through pooling, so that the onetime fee of € 50,000 will be substantially reduced through the sharing of the financial burden;

- c) The Contracting Authority also affirm that it did take into consideration the fact that some of the operators of these buses were handsomely compensated for their withdrawal of licence to operate as means of public transport. At the same time, Transport Malta imposed conditions so that these buses are restored and conditioned to present Local Regulations.

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

1. With regards to Supreme Travel's First Concern, this Board, after having examined the relative documentation and heard lengthy submissions, refers to Clause 79 of Regulation 174.10 which states that:

“Concessions shall be awarded on the basis of objectivity which complies with the principles set out in Clause 60 and which ensures that Tenders are assessed in conditions of effective competition so as to

identify an overall economic advantage for the Contracting Authority or the Contracting Entity”

In this regard, and in conjunction with the latter, this Board would like to now refer to Clause 60, which is referred to above and which states that:

“Contracting Authorities and Contracting Entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.”

This Board justifiably notes that this particular concern relates to whether the Contracting Authority has breached any of the principles mentioned in the above stated clauses. One has to bear in mind that this concession is directly related to the use/utilisation of the old buses, better known as the “*Malta Bus*”, for touristic purposes and that this concession is targeted at operators and owners of such vehicles. In this respect the possible participants in this concession are clearly identified.

With regards to the adherence to the principles as stated in Clauses 60 and 79, this Board notes that Transport Malta issued the

Concession with certain conditions so as to ensure that only reliable and fully restored buses are utilised by the successful operators.

The Concession Document on pages 11, 12 and 13 dictates conditions which are to be strictly adhered to by all operators tendering for this offer, so that, a Level Playing Field has been established in so far as technical qualifications are concerned. At the same instance, this Board did not find any evidence or proof that Transport Malta violated any of clauses 60 and 79 of the Subsidiary Legislation 174.10

- 2. With regards to Supreme Travel's Second Concern, this Board would like to justifiably acknowledge the fact that the majority of the prospective participants to this concession will be composed of individual owners or small entities that were previously operating the Transport Routes in Malta.**

It is a fact that the onetime fee of € 50,000 will create a financial burden on the small entities, especially for those who own one or two buses and wish to participate yet, at the same time, the same fee will not create any financial obstacle for those who are participating with a fleet of buses.

In this regard, this Board credibly opines that the onetime fixed fee of € 50,000 will create a financial obstacle for small entities. This situation may be a cause to limit the spirit of fair competition and may also be a detriment to small entities and at the same instance, debar same from participating in this concession.

In this regard, this Board would have expected to be aware of a fair scale of onetime fee which represents proportionately the size or the number of buses which the participants are offering for this concession. This will establish a onetime fee for each class of entity and which will reflect a fair, just and proportionate portion of the financial burden.

This Board would also like to consider the 20 year period of the concession by referring to Clause 73 (i) of Regulation 174.10 wherein it is stated that:

“For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take or recoup the investments made in operating the works or services together with a return on invested

capital taking into account the investments required to achieve the specific contractual objectives”.

The above mentioned regulations clearly denotes that for the concession to last more than five years, an exercise has to be formulated where the Contracting Authority would estimate an approximated amount for capital investment required on the part of the operator to carry out the objectives of the concession.

This Board notes that the period of 20 years was not clinically and financially assessed and at the same instance, this was the necessary tool by which a fair and just duration period of the concession could be established. In this regard, this Board finds that the established 20 year period is deficient of a justification.

3. With regards to Supreme Travel’s Third Concern, this Board again would like to point out that this concession relates to Heritage Buses only and that no comparison should be made between these type of buses and today’s modern coaches, where investments are concerned.

At the same time, this Board through the requisites laid out in the Concession Agreement, is comforted to note that Transport Malta

imposed conditions to ensure that the participating buses will conform fully to today's traffic regulations.

At the same instance, this Board does not see the relevance of the fact that the owners of these buses were compensated for the withdrawal of their licence to operate as this compensation represented loss of earning for surrendering their licence to act within the Public Transport services.

In view of the above, this Board concludes that Transport Malta did not violate any of the principles of Regulations 60 and 79 of Legislation 174.10. However, it recommends the following:

- i) With regards to the one-time fee of € 50,000, an equitable scale of fees is to be formulated to reflect a fair and proportionate scale where each class of onetime fee is representative of the size of the fleet through which operators will participate;**

- ii) With regards to the duration of the concession period, Transport Malta should first carry out an exercise whereby an approximation of the investment required by operators together with an expected return is determined and the recoupment of such costs is taken into**

account. It is only then that the duration of the Concession Period can be dictated and justified.

iii) The above mentioned recommendations should be carried out by means of a clarification where the necessity arises.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

30 June 2017