

# **PUBLIC CONTRACTS REVIEW BOARD**

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## **Case 1151 – Lease of various Motor Vehicles by Burmarrad Commercials Ltd to the Public Broadcasting Services Ltd**

### **Cancellation of Contract**

There was no call for quotations on this contract with an estimated value still to be determined.

Burmarrad Commercials Ltd filed a notice of objection dated 1<sup>st</sup> March 2018 against the Director General of Contracts' decision to cancel the contract on the grounds that there were irregularities in the procedure preventing fair competition. A deposit of € 400 was paid.

On 3<sup>rd</sup> April 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

### **Appellant – Burmarrad Commercials Limited**

Dr Keith Borg	Legal Representative
Dr Laura Calleja	Legal Representative
Mr Mario Gauci Jr	Representative
Ms Sharon Camilleri	Representative

### **Department of Contracts**

Dr Franco Agius	Assistant Director
Dr Chris Mizzi	Procurement Manger
Dr Anthony Cachia	Director General
Mr Nicholas Aquilina	Assistant Director

### **Public Broadcasting Services Ltd**

Dr Mark Vassallo	Legal Representative
Ing Charles Dalli	Chief Executive Officer

After a brief welcome the Chairman of the Public Contracts Review Board, Dr Anthony Cassar, invited the Appellants to make their submission.

Dr Keith Borg, Legal Representative of Burmarrad Commercials Ltd, suggested that the Public Contracts review Board should hear the evidence of the various witnesses before parties made their submissions.

Mr Mario Gauci Jr (233284M) testified under oath that he was the Sales and Business Development Manager of Burmarrad Commercials Ltd (referred to as BCL). He stated that around 2014-2015 his firm had been approached by the Public Broadcasting Services Ltd (referred to as PBS) to provide quotations for the leasing of vehicles. Nothing came of it. In 2016 they were again approached by the PBS to quote for the leasing of a range of vehicles. After submitting quotations the PBS again contacted them to negotiate rates and was subsequently advised that their quotation was accepted. The package deal included the taking back of the current PBS fleet of cars and € 3,000 advertising by BCL.

Mr Gauci further stated that at a point in time they received a letter from the Director General of Contracts advising them that BCL was in breach of contract, of which they were not aware, since they had followed the usual procedure when a client signs a contract: i.e. they supplied the requested vehicles. He further stated that he and Ms Sharon Camilleri, a work colleague, had met with Mr Mario Micallef, Mr John Bundy, Mr Edmund Tabone and Mr Brian from Accounts, all executives of the PBS.

He also confirmed that he had supplied the Director General of Contracts with a sworn affidavit.

Dr Franco Agius, Assistant Director, Department of Contracts, asked Mr Gauci if he had seen any schedules indicating that their quotation to the PBS was the cheapest, to which he replied that he was only going on what the PBS had told him. He also confirmed that the purchase order from the PBS was not qualified in any way.

Dr Franco Agius then tabled an excel sheet taken from the Electronic Public Procurement System showing various calls for offers in which BCL had participated, and in the majority of which there had been calls for quotations. This contradicted the action pursued in the case of the PBS. Mr Gauci contented that it was not up to his entity to decide what procedure the PBS followed in their purchasing and he had no idea of the constitutional set-up of the PBS.

Various other documents were tabled dealing with communications between the PBS, BCL and the Director of Contracts.

The Chairman of the Board made the point to Mr Gauci that the word 'Public' in the PBS title was generally a clear indication that it was a public entity. Mr Gauci also confirmed that normally negotiation of prices happened with private firms not public bodies.

The next witness called was Mr Edmund Tabone (625957M) who testified on oath that he was the Manager Corporate Services of the PBS, and that he occupied this position for the last twelve years. He said that he had no dealings with BCL as this was being handled by Mr John Bundy and Mr Mario Micallef. As background information Mr Tabone said that in September 2016 the Chief Executive Officer of the PBS, Mr John Bundy, had called a meeting at which were present Mr Mario Micallef, Sales Manager, Mr Brian Galea, Financial Controller and himself. They were told by Mr Bundy that he wished to change the vehicle fleet. Mr Tabone stressed that this was a case for the issue of a tender and also required approval by the Board of the PBS. Mr Bundy said he would get clearance from the Ministry, through Ms Charmaine Portelli, and he instructed Mario Micallef to obtain quotations from the main car dealers in Malta. That was it – a five/ten minute meeting on such a serious matter. The same members of staff met again the following February when Mr Micallef presented the quotations. Mr Tabone stated that he did not see any of the quotations. Mr Bundy abruptly announced that the PBS would be leasing vehicles from BCL, and he had clearance from the Ministry to do this. Mr Tabone said that he had listed the mentioned facts in an affidavit which he had voluntarily prepared and handed to the PBS Chairman. He also mentioned that at the meeting Mr Bundy had signed the BCL quotation and made the other members of staff present to sign them, which, in his case, he did under duress.

Dr Anthony Cachia (142658M) was next to give his evidence. Under oath he testified that he was the Director General of Contracts, a position he had held for four years. He stated that he had launched an investigation regarding the possibility that Public Procurement Regulations (PPR) had not been followed. He requested the files from the PBS containing e-mails, the auditors' report prepared by RSM, the affidavits of the employees of the PBS as well as asking BCL for their version of events. BCL sent him copies of all the signed contracts, nothing else. Dr Cachia continued by listing the various heads under which he felt the PPR had not been followed – namely:

- Regulation 28(1) regarding the Calculation of Estimated Cost which laid down that the global cost should not be broken down into parts;
- Regulation 100 which states that an estimated value of more than € 5,000 had to be published through the Electronic Public Procurement System giving everyone the chance to submit an offer;
- Regulation 101 which regulates tenders with a value in excess of € 135,00 which had to be published Europe wide

- Regulation 270 had not been observed since the procedure used by the PBS had prevented any chance of an appeal;
- Regulation 28(5) which lays down that tenders must not be sub-divided;
- Tenders are not meant to be negotiated unless they are classified as ‘negotiated procedures’.

Dr Cachia indicated that there was lack of transparency in this contract, and newspaper comments had led him to start the investigation as he was duty bound to do. In reply to a question from Dr Keith Borg, witness stated that the PPR bound both the Contracting Authority and the Economic Operator. You could not have a law that involved the economic operator without him being bound by it.

In reply to questions by Dr Franco Agius, witness stated that under Regulation 277 et seq. of the PPR a contract could be terminated.

Finally in reply to a question from Dr Keith Borg, witness confirmed that he had not divulged the existence of affidavits from various employees to BCL.

In his submissions Dr Keith Borg stated that he wanted to clarify two points – why was the economic operator bound by PPR and if PPR had been broken it was certainly not by BCL, - they are not accomplices to the action. There was also the principle of natural law to be considered in that the affidavits had not been divulged to BCL. In Malta we did not have the benefit of ‘implied term’ unfortunately and his clients could not rely on it. The PCRB were also bound by natural law principles and the Director General of Contracts should concentrate on who was the wrong-doer. If the Director’s grievance was against the PBS they should be the ones who suffer.

Dr Franco Agius stated that he wished to clarify the impression that BCL was not aware that the Contracting Authority could terminate a contract. The Director of Contracts had an obligation to ensure that regulations were followed. Both parties were responsible for breaking these regulations; in these particular circumstances public funds were involved. Article 1625 of the Civil Code applied in the present case in so far as the law did not allow compensation. PPR regulations bind the Director General to act on his findings and he had acted correctly both under natural law and regulations. BCL had an opportunity to present further evidence but they had decided to reply solely by means of a letter.

In winding up the hearing the Chairman said that the PPR are specific and the Board will determine this case on such regulations. He thanked both parties for their submissions and declared the hearing closed.

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**This Board,**

**Having noted this Objection filed by Burmarrad Commercials Limited (hereinafter referred to as the Appellants) on 1 March 2018, refers to the contention made by the same with regards to the cancellation of the contract by the Director of Contracts, (hereinafter referred to as the Director), between the Appellants and the Public Broadcasting Services, (hereinafter referred to as the Contracting Authority), such contract relating to the leasing of various motor vehicles to the Public Broadcasting Services.**

**Appearing for the Appellants: Dr Keith Borg**

**Appearing for the Contracting Authority: Dr Mark Vassallo**

**Appearing for the Director of Contracts: Dr Franco Agius**

**Dr Christopher Mizzi**

**Whereby the Appellants contend that:**

- a) They should not be held responsible if the contract to which they were a party to, was not in conformity with the Public Procurement Regulations. At the same instance, the Appellants insist that it was not their responsibility to ensure that the Contracting Authority conformed with such regulations;**
- b) The Appellants strongly maintain that there was no collusion whatsoever with the Public Broadcasting Services Limited, to obtain the award of the call for quotation;**
- c) In accordance with Article 960 of the Civil Code, the Appellants maintain that a contract cannot be cancelled unless there is an agreement between the parties thereto. In this regard, Burmarrad Commercials Limited consider even more so, the fact that a third party has no legal right to cancel a contract between two other parties to the same contract;**
- d) The Appellants also contend that the Director of Contract's decision to cancel the contract was not legally correct, as such an action can only be taken through a court order and if any one party to the contract, does not honour his obligations thereto, so that the contract is still valid.**

**This Board also considered the Director of Contracts’ “*Letter of Reply*” dated 14 March 2018 and its verbal submissions during the Public Hearing held on 3 April 2018, in that:**

- a) The Director contends that the Appellants were obliged to be aware that such an award of the quotation was regulated by the Public Procurement Regulations and to this effect, they were also responsible and obliged to ensure that such regulations were adhered to by both parties to the contract;**
  
- b) The Director maintains that the fact that the Appellants entered into a legal obligations whilst knowing that the regulations of the “*Public Procurement*” were violated, does in fact, lead to an acceptance by the Appellants of this violation;**
  
- c) The Director of Contracts maintains that he had acted in accordance with the Contracting Authority and obligations bestowed upon him within the parameters of the “*Public Procurement Regulations*”;**

**d) The Director of Contracts insists that public procurement is regulated by the “*Public Procurement Regulations*” through which he has the authority to cancel such contracts due to specific circumstances.**

**This same Board also considered the testimony of the witnesses namely:**

- 1. Mr Mario Gauci Junior, Director, Burmarrad Commercials Limited, duly summoned by the Appellants;**
- 2. Mr Edmund Tabone, Public Broadcasting Services, duly summoned by the Department of Contracts;**
- 3. Mr Anthony Cachia, Director General, Department of Contracts, duly summoned by the same Department.**

**This Board also took notice of the following documents submitted by Burmarrad Commercials, which consisted of:**

- 1. Spreadsheet of Awards;**

- 2. Letter dated 6 December 2017 sent by the Director of Contracts to Burmarrad Commercials;**
- 3. Reply dated 7 December 2017 sent by Burmarrad Commercials to the Director of Contracts;**
- 4. Copies of e-mails between Burmarrad Commercials and the Public Broadcasting Services**

**This Board, after having examined in detail the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, would respectfully point out that the jurisdiction of this Board is regulated by the Public Procurement Regulations and the grievances presented by Burmarrad Commercials Limited will be considered in their merit, within the parameters of such regulations.**

- 1. With regards to the Appellants' First Grievance, this Board would establish, without any reasonable doubt, that Burmarrad Commercials Limited were aware that they are entering into a commercial agreement with a Public Entity, and that the latter entities, in so far as**

procurement is concerned, are regulated by the “*Public Procurement Regulations*”. In this regard, the Appellants’ were also obliged to be fully aware of the fact that Public Entities had specific procedures as to how and when such entities can issue quotations.

Quotations are issued so that the Public Entities, through an evaluation process conducted by competent members of the entity itself, will adjudicate as to the best and most advantageous offer received. Such a procedure is an established and mandatory norm and all economic operators are fully aware of it. In this particular case, this Board cannot credibly establish that the Appellants were not cognisant of this procedure and cannot justify a circumstance where Burmarrad Commercials Limited entered into a commercial agreement with a Public Entity, blindfold.

In this particular case, this Board opines that both parties to the agreement had the obligations to ensure that the agreement falls within the authorised parameters of the legal framework of both the Contracting Authority and the Appellants’ structure. In this respect, the onus falls on both parties to the contract and not solely on the Contracting Authority, to ensure that the latter entity had adhered to

**all the local regulations governing the same and that the proper procedure had been followed in the award of this contract.**

**In this case, this Board would point out that ignorance of the law excuses nobody and such ignorance does not help or assist the lawbreaker that he did not know the regulations binding such contract which, eventually was entered into by the Appellants. In this regard, this Board opines that Burmarrad Commercials Limited were obliged to be fully aware that the Public Broadcasting Services was a Public Entity and as such, was regulated by the Public Procurement Regulations and in this respect, both parties had the obligations for the proper execution of this agreement.**

**Burmarrad Commercials Limited's claim that they were not responsible for the Public Broadcasting Services' non-adherence to the latter's internal regulations is not to be considered as a credible excuse as the Appellants, being a party to the commercial agreement were also obliged to ensure that the other party to the contract has fulfilled his obligations in accordance within the parameters of his legal authoritative framework. In this regard, this Board does not uphold the Appellants' First Contention.**

**2. With regards to the Appellants' Second Grievance, this Board would point out that whoever makes an accusation must provide concrete evidence to justify that a violation of law or regulation has, in actual fact, been committed and in this regard, this Board will consider occurrences where it opines that regulations of the Public Procurement have been breached, as follows:**

**i) As mandatorily dictated in the “*Public Procurement Regulations*”, the particular call for quotations was not published using the Governments' e-tendering system;**

**ii) In accordance with Article 28 (i) of the Public Procurement Regulations, the estimated value of a procurement must be established by including all ancillary components of a particular procurement. In this particular case, the Contracting Authority, for some unknown yet unjustifiable reason, divided the same procurement into thirteen separate contracts as follows:**

***“Hence, if taken individually, the value of each contract is as follows:***

- a. *Contract Agreement – BRL 732 (€ 230 monthly for 96 Months) -  
€ 22,080*
- b. *Contract Agreement – BRL 739 (€ 235 monthly for 96 Months) -  
€ 32,160*
- c. *Contract Agreement – BRL 745 (€ 600 monthly for 96 Months) -  
€ 57,600*
- d. *Contract Agreement – BRL 734 (€ 230 monthly for 96 Months) -  
€ 22,080*
- e. *Contract Agreement – BRL 735 (€ 230 monthly for 96 Months) -  
€ 22,080*
- f. *Contract Agreement – BRL 733 (€ 230 monthly for 96 Months) -  
€ 22,080*
- g. *Contract Agreement – BRL 737 (€ 270 monthly for 96 Months) -  
€ 25,920*
- h. *Contract Agreement – BRL 740 (€ 335 monthly for 96 Months) -  
€ 32,160*
- i. *Contract Agreement – BRL 742 (€ 315 monthly for 96 Months) -  
€ 30,240*
- j. *Contract Agreement – BRL 741 (€ 335 monthly for 96 Months) -  
€ 32,160*

- k. Contract Agreement – BRL 738 (€ 315 monthly for 96 Months) -  
€ 30,240*
- l. Contract Agreement – BRL 743 (€ 490 monthly for 96 Months) –  
€ 47,040*
- m. Contract Agreement – BRL 726 (€ 230 monthly for 96 Months) -  
€ 22,080”*

**From the above schedule of contracts, this Board notes that some of the contracts entered into by Burmarrad Commercials Limited refer to the same model of vehicle for the same period of the lease. At the same instance, this same Board cannot comprehend as to why all the contracts were dated 12 June 2017 except for one dated 10 March 2017. From the above schedule, it can be easily deduced that the total value of this contract amounts to € 375,840, so that a proper call for tenders should have been issued and in this regard, this Board would refer to an extract from the testimony made by Mr Edmund Tabone wherein he stated that:**

*“Jiena mill-ewwel stressjajt il-punt li dan huwa element ta’ Tender u li anke jrid jitla’ Bord anke ghax il-prassi taghna qabel kienet hekk.”*

**In this regard, this Board would respectfully refer to regulations 100 and 101 of the Public Procurement Regulations, wherein the procedure and values of Public Procurement are regulated. Such regulations form the basic principles as to how and when the calls for quotations and tenders are to be issued. In this particular case, the above regulations have all been breached and both parties to the agreement were obliged to be knowledgeable enough that such violations are illegal. This Board has established that this procurement was split in an illogical and irregular manner, and yet with the knowledge and endorsement of both the Appellants and the Contracting Authority.**

**iii) From the documentation presented, this Board notes that the Appellants were given the opportunity to revise their quotation, which is highly irregular, as this procurement is not subject to a negotiated procedure. In this regard, this Board would refer to an e-mail dated 1 December 2016 by Mr Mario Gauci Junior addressed to a number of PBS employees, stating:**

*“It was a great pleasure meeting you this morning. As discussed please find attached the revised quotations for the leasing of a fleet of vehicles for PBS”*

**From the above e-mail, it is evidently clear that there was no commercial sense in splitting the Lease contract for the fleet into separate contracts and it was evident that the Appellants were asked by the Contracting Authority to change their original quotation. At the same instance, this Board was not presented with a schedule of quotations received for this procurement. In this regard, this Board is convinced that the Appellants were fully aware of how this quotation was handled and at the same time, they were aware that they were given preferential treatment in revising their offer, which is highly irregular and breaches the Public Procurement Regulations.**

**This Board justifiably established that the whole procedure of the award of this procurement was handled solely by the Chief Executive Officer of the Public Broadcasting Services and not through an evaluation committee and in this respect this Board cannot ignore the testimony given by Mr Edmund Tabone, who stated that:**

*“Is-Sur Bundy, fl-ahħar meeting hareġ il-quotation ta’ Burmarrad  
Commercials iffirmata minnu u ġieghlna niffirmawha.  
Ninizzjalizzawha. Jien iffirmajt under duress”*

**In this regard, this Board does not uphold Burmarrad Commercials Limited’s Second Contention.**

**3. With regards to the Appellant’s Third and Fourth Contentions, this Board, as stated previously in these adjudications, will only consider the merits of these grievances within the parameters of the Public Procurement Regulations.**

**With all due respect, Burmarrad Commercials Limited’s claim that a contract can only be cancelled either by mutual agreement of both parties or by a court order, does not feature credibly in this particular case for the following reasons:**

- The commercial agreement is between an economic operator, (Burmarrad Commercials Limited) and a public entity, (Public Broadcasting Services Limited), the latter of which is governed by**

**the Public Procurement Regulations. The latter regulations are regarded as special regulations pertaining to Public Procurement and same regulations provide the necessary authorisation of the Director of Contracts to cancel a contract under certain circumstances. At the same instance, it is established that the agreement entered into by the Appellants constitute a Public Procurement agreement so that the procedures to be adopted in the process of attaining the procurement must conform with the regulations related to Public Procurement.**

**One has to acknowledge and appreciate that public funds represent taxpayers' contributions and the Government is in duty bound to safeguard and control such spending and at the same time, ensure that procurement is properly allocated and processed in a fair and transparent manner, hence the Public Procurement legislation provides the tools and guidelines through which such procurements are processed. At the same instance, the Director of Contracts may also implement corrective measures to regulate the Contracting Authorities who default from adhering to the procurement regulations. In fact, one of the duties is to report violations of the**

**regulations in procurement procedures and take the necessary action and regulations 261 (7) specifically states that:**

*“The Director has the right to issue a decision terminating any contract or agreement that could have been reached or signed with a contractor, if it transpires that the award of the contract has been made in breach of these regulations or else by discriminating between economic operators”*

**From the above regulations, it is an undisputable fact that the Director of Contracts has the right to cancel any contract if there appears to have occurred irregularities which in fact breach the Public Procurement Regulations and which, in the opinion of this Board, such an occurrence did in fact materialise for the following reasons:**

- **No proper call for a Tender was issued;**
- **The value of the procurement was irregularly and illogically split into parts which misinterpreted the actual value of the contract and**

**which, in the opinion of this Board, was done for no beneficial gain to the Contracting Authority;**

- **No proper evaluation procedure was carried out and in fact no Evaluation Board was appointed to assess all the quotations received;**
- **The Contracting Authority could not even present a schedule of offers;**
- **The Appellants were given the opportunity to revise their offer;**
- **The Tendering and evaluation procedure was carried out by one and the same person;**
- **The final endorsement for the award was enforced by the same person, who handled this call for quotation on members of the Authority without giving valid reasons as to why the Appellants' offer was chosen for award;**

**In this respect, this Board establishes that the award process of this Procurement breached various regulations and such a process swayed completely away from such procurement regulations, in fact, this Board opines that this particular procurement provides the perfect example of a strict non-adherence to all the principles of transparent public procurement. In this respect, this Board does not uphold Appellants' third and fourth contentions.**

**In view of the above, this Board,**

- i) Upholds the Director of Contracts' decision to cancel the contract/agreement entered into between Burmarrad Commercials Limited and the Public Broadcasting Services for the leasing of vehicles;**
- ii) Does not uphold the contentions made by Burmarrad Commercials Limited;**
- iii) Recommends that the deposit paid by the Appellants should not be refunded;**

**iv) In view of the fact, that this Board is convinced that there were irregularities in this Procurement Procedure, this same Board orders the Contracting Authority to carry out any necessary investigation into this award and take all the necessary legal action that would be deemed appropriate after such investigation.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Lawrence Ancilleri  
Member

*17 April 2018*