

PUBLIC CONTRACTS REVIEW BOARD

Case 1179 – 5/2018 – Request for Proposals for a Public Service Concession Contract for the Provision of Passenger and Vehicle Ferry Services in Malta and Gozo.

Call for Remedy on Request for a Proposal

The publication date of the call for concession was the 26th January 2018 whilst the closing date of the call for concessions was the 26th April 2018. The estimated value of the tender (exclusive of VAT) was € 20,000,000

Virtu' Ferries Ltd filed a call seeking a remedy on 20th April 2018 against the Ministry for Transport Infrastructure and Capital Projects in terms of the Concession Contracts Regulations.

On 15th June 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Virtu' Ferries Ltd

Dr Adrian Mallia	Legal Representative
Mr Adrian Attard	Representative
Mr Francis Portelli	Representative
Mr Matthew Portelli	Representative
Mr Henri Saliba	Representative

Contracting Authority – Ministry for Transport, Infrastructure and Capital Projects

Dr Steve Decesare	Legal Representative
Mr Marco Cassar	Representative
Mr Christopher Cutajar	Representative

Other Interested Parties

Dr Antoine Cremona	Legal Representative Gozo Channel
Dr Clement Mifsud Bonnici	Legal Representative Gozo Channel
Dr Simon Schembri	Legal Representative Gozo Channel
Mr Joe Cordina	Representative Gozo Channel
Mr Joseph Muscat	Representative Price Waterhouse Cooper

Note: Gozo Channel is an abbreviated reference to Gozo Channel (Operations) Ltd and Gozo Channel (Holding) Co Ltd

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, invited Appellants to make their submission.

Dr Adrian Mallia, Legal Representative for Virtu' Ferries Ltd, (herein referred to as Virtu') stated that this request for a remedy arose out of public concession tender issued by the Ministry for Transport, Infrastructure and Capital Projects (the Ministry) on the 26th January 2018 requiring submissions for three types of service - a mandatory conventional service between Mgarr, Gozo and Cirkewwa; similarly a fast ferry service between Valletta and Mgarr, Gozo and optional fast ferry services on other routes. The more services that were offered the more points were allotted. The Maritime Cabotage Regulations of 1992 opened the market for maritime transport services for passengers and vehicles in the same country. This was followed a few years later by the Directive on Service Concessions followed by a Legal Notice. This meant that if the Government wished to issue a call for services of this type it had to follow the Public Concessions Regulations.

Dr Mallia said that the first point he wanted to make was that the public services concessions regulations were intended to open up concessions to genuine open competition with the more bidders the better. The second point covered the situation where an incumbent has an advantage over a new entrant. Legislation lays down that the tender has to be open and to have a level playing field. The Contracting Authority (Authority) is obliged to neutralise the advantage of incumbency. His third point was that it was incontestable and on record that the Minister for Gozo had stated in Parliament that the current situation was that the construction of the vessels to provide the service had preceded the building of the port facilities, which had been built to match the vessels. This point was relevant since it meant that it was impossible for a bidder to use an 'off-the-shelf' vessel to use those facilities, and it was not possible to acquire a suitable vessel at short notice.

His first reason for seeking this remedy was that the tender demanded three months between the start and the finish of the process. This was too short to enter into such a complex service and it was not reasonable. The second ground was that the duration of the concession was limited to five years with no assurance of any extension. While this was not a problem for Gozo Ferries as the incumbent, a five year concession had a serious effect on the investment aspect to a new comer. The third ground was that a new bidder had to take on existing staff from Gozo Channel. This fell under the transfer of business regulations which his clients accepted. However, the information provided to outsiders was limited, not sufficient and qualified by a clause which stated that no responsibility was assumed on the submitted information. As an example no

information was given regarding future pay arrangements of staff. Finally Dr Mallia said that implementation plan which was essential was impossible to formulate due to lack of information.

Dr Steve Decesare, Legal Representative of the Ministry, said that the tender document allows exchange of information regarding the employees, projected revenues, and passengers' throughput. The tender was issued on the 26th January, there were several clarification meetings but no points of query and no issues were raised by Virtu'. As regards the duration of the concession this has to follow legislation and the tender does not impose the use of new ferries – a bidder could rely on chartering vessels, and this was applicable to all tenderers. The Authority cannot eliminate the advantage of the incumbent but they try to even it out as much as possible; there was plenty of information given out regarding the facility including site visits. The period of the tender was extended from the normal 25 days for online offers to three months plus the period taken for the evaluation and a further three months to start the service. This gave a bidder enough time to formalise any negotiations. The information given out by the Authority gave the maximum facility to others – what one had to establish was if the tender was drawn to favour the incumbent not that the incumbent has an advantage.

Dr Antoine Cremona, Legal Representative for Gozo Channel, stated that the incumbent point should not be over-stressed as it was neither illegal nor necessarily advantageous. Article 98 of the Public Procurement Regulations regarding concessions restricts the right of appeal as to who qualifies as a prospective candidate. Appellant made an offer on the contract for a preliminary market consultation that declared that the applicant had to participate with Gozo Ferries – this was conditional on not participating with any other party; by virtue of this restriction the Appellant can never be a prospective bidder. Virtu' cannot have a foot in both camps – they cannot be prospective bidders under Article 98 as they have no *'locus standi'*. The extent of Virtu's appeal should be limited to the points made in the appeal letter, and no additional points should be brought in at this stage.

Mr Matthew Portelli (541684M) testifies on oath that he was involved in the setting up of the tender. He has been a Director of Virtu' since 2013 and holds an MBA in General and Strategic Management. He mentioned that Virtu' has been operating since 1945 as ship owners and cargo operator, originally clearing World War Two ordnance and operating oil tankers. In 1988 Virtu' Ferries was set up and they currently operate five high speed vessels on eight international routes carrying one million passengers in 4,100 voyages and with an annual turnover of € 36 million. Mgarr and Cirkewwa ports do not have standard facilities (ramps, roll-over, restrictions in length of vessels) as they were designed for the existing ferries. Existing facilities are difficult to use by different vessels and would incur additional costs of modifications and re-instatement at the end of the five year contract. Within three months it was impossible to obtain three vessels on the second-hand market that would fit the existing facilities. Witness quoted the case of a company in Denmark where the Government had given them 26 months from the signing of the contract to begin operation on a ten year concession, with a possible two year extension.

The next witness, Mr Joseph Muscat (282658M) stated on oath that he has been a partner at Price Waterhouse Cooper since 2003. Virtu' was his clients and he had set up a financial model showing the difference between a five year and a ten year concession and the related costs – this indicated an incremental capital charge on the shorter term concession. Financially a five year term was too short to make it viable to build a new vessel. He confirmed that assumptions made had been on data provided by his clients based on their long experience.

Dr Adrian Mallia said that having heard the points made there were many complicated factors to consider in this claim and it was not possible in a short hearing to examine all the details. He requested that the submissions be made in writing to be able to deal seriously with these complicated arguments.

After some discussion, the Chairman said that all submissions were already in the hands of the Board, and he proposed a short recess to enable the Board to consider this request.

On resumption the Chairman stated that all objections had already been tabled and the hearing was to proceed as Appellant will have every opportunity to deal with his submissions.

Dr Mallia, then said that he wished to have minuted the following – “to request permission to submit in writing points to rebut the Contracting Authority submissions as well as any interested party and undertakes to present same in writing within a short time as directed by the Board including if necessary by Monday 18th June”.

Dr Decesare replied that the Authority's view was that since the pre-contract remedy and the concession contract regulations provide that the process should be dealt with in an expedited manner and during one sitting it does not feel that further written submissions are required.

According to Dr Cremona Public Procurement Regulations, Section 276 (h) states that any interested party can make submissions. He therefore was indicating that his clients would submit to the decision of the Board.

The Chairman noted that the letter of reply sent to the Applicant gave them enough opportunity to deal with it.

Dr Mallia went on to say that the Authority's assertion that the timing of the claim was sufficient implied that this was not a genuine complaint. Legally there was no limit to submitting such a claim. The possibility of asking for clarifications was also mentioned – clarification only applies if the tender statements are unclear. How does one clarify a five-year term or a three-month start of service asked Dr Mallia. It was claimed that the onus to prove that the Authority was not following the law was on the Appellant.

At this stage Mr Christopher Cutajar, representative of the Ministry, intervened to say that it needed to be clarified if the document dated 24th May 2018 from Ganado Advocates referred to the market pre-consultation from Gozo Channel as an interested party as it does not give a full picture.

The Chairman proposed a short recess to enable the Board to study the document referred to.

After the recess Dr Mallia continued by saying that when it comes to the burden of proof the onus is on the party or person who makes the allegation. He cited PCRB Case 583/13 (paras 42 and 43) decided on the 12th March 2015 wherein it was held by the Court that normally the onus is on the one who alleges, but if the Contracting Authority infringes their obligations the onus of proof shifts. There was no proof that the four points raised by the Appellant had been challenged. On the point regarding the equal treatment of the incumbent it was accepted that the Authority did not have an absolute obligation to neutralise all advantages of the incumbent but it must give all reasonable assistance. On the point raised regarding the '*locus standi*' Virtu' had made it clear in a letter dated 27th April 2018 to Gozo Channel that if unsuccessful it would bid for the second tender on its own. The definition of a prospective candidate should not be restricted and the Authority has to prove that the tender is attractive to more bids since they are obliged to promote competition and decrease restrictions. The start of the service within three months creates no problems for Gozo Channel as everything is already in place – to participate an outsider has to modify vessels to meet the port facilities, and at least this should have been compensated for by a longer start period. It is up to the Authority to explain why such a short limit was imposed. As in the case of Denmark, quoted by a witness, other countries allow a long period of time before the concession starts operating.

As regards the deployment, Dr Mallia pointed out that this happens after the award of the tender, immaterial of what happened before, and therefore three month limit was not enough. The Authority had to prove that this period of time was sufficient to enable a participant to be on the same foot as the incumbent and the length of time allowed was reasonable. Regarding the concession the Authority had to create a balance between attracting new bids and the possibility of foreclosure of the market if the period of the concession was too long. Port facilities also have a bearing as in this case the vessels had to suit the port facilities. The European Commission accepts longer concession periods and the Authority has to take all factors into consideration to open the tender to wider participation. All Virtu' asked for was a longer period. The information supplied about the employees could have been more detailed. The collective agreement which was not supplied might contain onerous clauses and risks, while the redundancy argument was fallacious as it comes at a cost if pursued. The information supplied in the Implementation Plan is asymmetric due to the Authority's disclaimer that no representation, express or implied is made.

Dr Decesare in replying stated that with regard to the points raised on the employment and Implementation Plan, information had been supplied where possible – for example the details of the subcontracted personnel could be found in the annex; the collective agreement was not made available to the Authority and they are not entitled to seek confidential information from a private entity. These clarifications should have been sought at the time and not raised now. The disclaimer was issued to avoid doubt as the information was not in the hands of the Authority. Regarding the length of the concession it was pointed out that the Authority was not obliged to issue a contract for a period longer than it wants – this was a new service, it was not known if it would be viable, costs were unknown and it was only reasonable to have a limited period to see how it goes.

On this latter point the Chairman said that a period of concession needs a very extensive exercise regarding the length and viability and he asked the Authority if this had been done.

Dr Decesare said that there were two legal frameworks to consider. In 2003 after ten years experience of Cabotage regulations the European Commission said that concessions longer than six years would limit competition and foreclose the market. In 2014 a further communication said that a Contracting Authority could justify longer concessionary periods but there was no independent information supplied to offer longer concessions. In ECJ case 232/06 it was decided that the incumbent did not have an advantage due to their past working with the Contracting Authority and they had not been favoured by the latter.

Dr Cremona stated that one must be careful not to upturn legal assumptions – services at all stages were regulated by legislation. If a concession was outside the terms of the legislation it has to be justified. The Appellant has to prove that the analysis were faulty and give reasons therefore Virtu' did not ask for any clarifications, did not offer a reasoned presentation on their analysis of the financial return. They had not provided any proof on any of the points raised and they were confusing a distinctly fundamental point - the procurement with the implementation stage. The legal aspect on the onus of proof as quoted by Dr Mallia is fundamentally opposite to what the law states – namely that in transposing procurement rules a country may place the onus on the Contracting Authority otherwise procedural regulations apply.

In conclusion Dr Mallia said that he invited the Board to refer to the cases quoted by him and to the fact that the point of a tender is to open it to competition. No proof and no legal argument were put forward against widening of competition.

Dr Decesare drew the Board's attention to the Commission Staff document COM (2014) – 231 Final which gives an extensive list of the length of concessions granted to ferry operators since 2014.

The Chairman thanked the parties for their submissions and declared the hearing closed.

This Board,

having noted this Call for Remedies filed by Virtu' Ferries Limited, (herein after referred to as the Appellants), prior to the Closing Date of Competition on 20 April 2018 refers to the contentions made by the same Appellants with regards to the Request for Proposals for a Public Service Concession of reference 5/2018 issued by the Ministry for Transport and Infrastructure and listed as Case No 1179 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Adrian Mallia

Appearing for the Contracting Authority: Dr Steve Decesare

Appearing for Gozo Channel: Dr Antoine Cremona

Whereby, the Appellants contend that:

- a) The period stipulated in the “*Call for Proposals*” for the commencement of services, is three months from the date of award of the contract. In**

this regard, the Appellants maintain that taking into account the nature of the service being requested, this period is too short and will limit the scope for competition;

b) The Request for Proposals stipulates that Bidders had to submit an implementation plan which depicts how the services will be taken over from the incumbent operator. The Appellants insist that the details requested in such a plan consist of information which could only be in possession of the current operator, so that prospective Bidders were being handicapped. In this regard, Virtu' Ferries Limited maintain that adequate information should be available for new Bidders to compile a proper implementation plan;

c) The Request for Proposals stipulates that the successful Bidder will be awarded a contract for five years. The Appellants insist that this short period of time will not allow any new operator to recoup his investment outlay, so that the present operator has an advantage over incoming new Bidders;

d) Since one of the conditions laid out in the RFP is that the successful new Bidder will be required to employ all the employees of the current operator, the Appellants maintain that they have not been given all the necessary information, in this regard, to establish the real costs involved of such a requirement.

This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 8 May 2018 and also its verbal submissions during the Public Hearing held on 15 June 2018, in that:

a) The Ministry for Transport and Infrastructure maintains that the period dictated for the commencement of services of three months is not too short, as the time frame refers to the time lag between the award of the contract and the commencement of operations. In this regard, the Contracting Authority contends that, in order to submit their offer, the Appellants would have undertaken all the preparatory arrangements and entered into agreements to commence work, once they are awarded the concession;

- b) The Ministry insists that it had provided all the opportunities for Bidders to be provided with considerable information regarding the conventional service being provided at present. In addition, each Bidder had the right and opportunity available to attend site visits, attend Clarification meetings and submit requests for Clarifications. In this regard, the Appellants did not avail themselves of such opportunities to request clarifications;
- c) Although the Appellants did not provide evidence that the concession period of five years does not allow new Bidders to recover their investment layout, the Contracting Authority refers to the regulations issued by the European Union which stipulates that Contracts exceeding six years in duration do not normally meet the proportionality requirement.
- d) The Ministry for Transport and Infrastructure insist that the information provided with regards to employees was considerably detailed enough to allow the prospective Bidder to establish the labour costs involved, however, no request, for further information in this respect, was made by the Appellants.

This same Board also noted the testimony of the witnesses summoned by Virtu' Ferries Limited namely,

- 1) Mr Matthew Portelli;**
- 2) Mr Joseph Muscat**

This Board would make reference to the Preliminary Plea raised by Gozo Channel, (an interested party,) whereby the latter is contesting the validity of the Appeal submitted by the Appellants, in that, it is being claimed that Virtu' Ferries are not to be regarded as “*prospective candidates*” and thus are not eligible to file such an Appeal. In this regard, this Board, after having considered all the facts and circumstances of this appeal, opines that Virtu' Ferries Limited are being considered as “*prospective candidates*” for this Request for Proposal (RFP) and as such Appellants have all the rights at law to file such an appeal and same be considered, on its merits, by this Board.

This Board would also refer to the “*Preliminary Plea*” duly raised by Virtu' Ferries Limited whereby the Appellants requested that additional written submissions be made by same, to make good for the limited time available

during the Public Hearing. In this regard, this Board decided that, since all the information regarding the issues raised by the Appellants in their objection, is in the possession of this Board, all the points mentioned therein will be duly considered so that there is no justifiable need for further written submissions relating to this call for remedy.

This Board, after having examined the relevant documentation and heard submissions made by all interested parties, including the testimony of the witnesses, opines that the issues which are to be considered are:

- Commencement Period of Services;**

- Implementation Plan;**

- Concession Period;**

- Establishment of Labour Costs**

1) Commencement Period of Services

This Board is cognizant of the fact that this Request for Proposals is not to be treated as a “*run of the mill tender*” and one must take into consideration the type of service being requested which consist of a national service to the public at large, so that such a service must be performed in a smooth and professional manner. On the other hand, the Contracting Authority must ensure that such a service be uninterrupted, (except due to inclement weather) and operated by competent candidates, so that, it is the duty of the Authority to stipulate reasonable conditions in the running of operations to the benefit of the public. In doing so, the Authority stipulated that upon the award of the contract, the successful candidate must commence operations within three months from date of contract and in this respect; the Appellants are claiming that such a period is too short.

It is a norm and accepted practice that any prospective Bidder prior to the submission of his offer, especially in this type of service, would have carried out the necessary field work consisting of memorandum of agreements, projections etc, so that once the successful bid is awarded,

the Bidder can finalise all the arrangements to commence operations. This Board also acknowledges the fact that although prior arrangements for the start-up of operations would have been considered and calculated by the prospective Bidder, the actual conclusion of agreements and other preparatory work will necessitate adequate time to actually implement the requested operational procedures.

At the same instance, this Board is highly aware of the fact that the present operator of the conventional service, who will be the only other competing Bidder, has an advantage which, due to prevailing circumstances exist and which cannot be avoided. In this regard, this Board opines that such an advantage can only be suppressed by stipulating conditions that will offer the disadvantaged Bidder more accommodating remedies, such as a longer period for the start-up of operations.

This Board also considers the fact that the two possible Bidders are both, at present, operating one of the two services being requested in the proposal, so that both Bidders require the availability of an additional service to be able to submit their offer. In this regard, both Bidders will

have a level playing field if a more practical date for the start-up of operations is established for the benefit of all the bidders and in this respect, this Board opines that a more convenient date would be five months from the award of the contract. At the same instance, this Board is convinced that such an extension of start-up period will not have any negative effect on the concession itself.

2) Implementation Plan

With regards to the Appellants' Second Contention, this Board notes that, through the Request for Proposals, the Ministry for Transport and Infrastructure, quite appropriately, stipulated that an "*implementation plan*" be submitted with the offer, such a plan would represent the procedures to be adopted by the successful candidate, in providing the required services to include also the transition period of handover. It is also an established procedure that the plan will address such issues as labour force, time tables, trips, locations, fares, etc. Virtu' Ferries Limited's claim in this regard, is that they are not in possession of adequate information to enable same to submit such a reliable plan.

This Board would respectfully point out that the implementation plan is meant to illustrate the “*modus operandi*” of the operational services which the successful candidate will adopt for providing the service and the information contained therein should be based and established by the prospective Bidder himself. It is acknowledged that since there exist an already established conventional service in operation, relative information from such an activity is vital to assess and establish costs for the same type of service being requested and in this regard, this Board opines that it is the responsibility and obligation of the Authority to provide such information to enable the Appellants to formulate the basis of their calculations. At the same instance, this Board would also point out that such vital information which is requested by the Appellants has not been identified or itemised.

It is a fact that, in this Request for Proposals, there are only two prospective competing Bidders and one has an advantage over the other in the running of conventional service between Malta and Gozo whilst the other competing Bidder is well proficient in the operation of “*fast ferry service*”. The Request for Proposals is requesting the service for the operation of both activities so that each prospective Bidder requires

data and knowledge on the activity which he is not presently operating and in this respect, a form of level playing field is present. At the same instance, this Board opines that the Ministry should provide adequate information to the Bidders to enable the latter to submit plans on reliable information. Although this Board is justifiably convinced that any lacking information being claimed by the Appellants should have been obtained through a request for clarifications, this same Board suggests that Virtu' Ferries Limited should seek clarifications from the Ministry for Transport and Infrastructure so that the latter will provide the requested information which is pertinent enough and which can be prudently divulged.

3) Concession Period

With regards to Virtu' Ferries claim that the concession period, as stipulated in the proposal, is too short to recoup the investment involved, this Board would refer to the objectives of the Directive relating to concessions in that, it is specifically emphasised that if the period of concession exceeds five years, then *“the maximum duration of the concession shall not exceed the time that a concessionaire could*

reasonably be expected to take to recoup the investments made together with a return on invested capital taking into account the investment required to achieve the specific contractual objectives.”

This Board would also point out that concession periods exceeding five years must be justified by the concessionaire in that, it has to be proved that the recoupment of investment can only be achieved through such period in excess of five years. In this respect, this Board notes that the Appellants did not put forward their justification for such a request.

At the same instance, it should be pointed out that throughout the Directive, it is emphasized that the duration of a concession exceeding five years must comfort the Contracting Authority that such an extension is indispensable for the concessionaire to recoup the latter’s investment outlay, as well as to obtain a return on his investment. In this regard, this Board would have expected to be presented with a financial report justifying the number of years, the Appellants require to recoup their outlay together with a return thereon and such a statement was not presented with the Objection.

This Board also considers the fact that the proposal is not imposing the purchase of vessels and chartering is also allowed so that an option of reducing the investment cost is also present. In this particular case, from the documentation made available to this Board and submissions made by the parties concerned, this Board cannot find any justifiable reason as to why the concession period of five years should be extended and at the same instance, this same Board opines that the stipulated period reduces the risk of market foreclosure so that competition and open market are safeguarded. In this regard, this Board does not uphold Virtu' Ferries Limited's third contention.

4) Establishment of Labour Force Costs

With regards to the Appellants' fourth contention, this Board would, first and foremost, point out that the Request for Proposals is not imposing upon the prospective concessionaire to take over all the labour force currently employed with the incumbent operator presently running the conventional service. The Request for Proposal is inviting prospective concessionaries to compile and establish the level of

manpower which is estimated to be required for the proper running of a conventional and fast ferry service between Malta and Gozo.

In this regard, this Board notes that the Ministry for Transport and Infrastructure published a schedule showing the level and costs of the labour force currently employed with the incumbent service provider of the conventional service, so that the information of the level and costs of the labour force for the latter, has been provided by the Contracting Authority.

At face value, it would seem that the published information is adequate for the prospective Bidder to calculate the labour costs involved, however, this Board opines that, it is a known fact that such a labour force enjoys a collective agreement and through the latter document, there are denoted benefits, increments, etc, which are most important to include and assess in compiling future costs along the concession period of five years. This Board is aware of the fact that such an information has to be obtained from third parties, however, the Contracting Authority is under an obligation to give the necessary information and guidance to prospective concessionaires for the latter to be able to

submit a viable proposal and at the same instance, create a level playing field for the two possible prospective Bidders. In this regard, this Board opines that the details of the collective agreement presently enjoyed by the employees of the incumbent operator of the conventional service, be made available to the Appellants and in this respect, this Board upholds the latter's fourth contention.

In view of the above, this Board,

- i) Upholds Virtu' Ferries Limited's first contention and instructs the Ministry for Transport and Infrastructure to extend the start-up period to be "*within five months from the award of the concession*";**

- ii) Confirms that the Contracting Authority gave sufficient information for the Appellants to compile an "*implementation plan*", however, due to the prevailing circumstances and for the sake of safeguarding the principle of equal treatment, this same Board instructs the Appellants to identify the issues which they should have done at a much earlier stage and provided the information requested is prudent and can be divulged, obtain the same from the Ministry;**

iii) Does not uphold the Appellants' third grievance and confirms that the stipulated concession period of five years is considered to be appropriate and equitable;

iv) Upholds Virtu' Ferries Limited's fourth contention and instructs the Ministry for Transport and Infrastructure to provide the frame-work of any collective agreements presently in force;

v) Instructs the Ministry to issue a new closing date for the submission of offers, after taking into consideration the conclusions arrived at, by this Board;

Dr Anthony J Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

23rd August 2018